ORIGINAL

In the

Supreme Court of the United States

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

APPELLANT,

V.

PUBLIC SERVICE COMMISSION OF NEW YROK,

APPELLEE.

No. 79-565

Washington, D. C.
March 17, 1980

Pages 1 thru 45

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, Appellant,	:	
v.	:	No. 79-565
PUBLIC SERVICE COMMISSION OF NEW YORK, Appellee.	:	

Washington, D. C.,

Monday, March 17, 1980.

The above-entitled matter came on for oral argument at 11:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

TELFORD TAYLOR, ESQ., Taylor, Ferencz & Simon, 60 E. 42nd Street, New York, New York 10017; on behalf of the Appellant

PETER H. SCHIFF, ESQ., General Counsel, Public Service Commission of the State of New York, Empire State Plaza, Albany, New York 12223; on behalf of the Appellee

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Central Hudson Gas & Electric v. Public Service Commission of New York.

Mr. Taylor, I think you may proceed whenever you are ready now.

ORAL ARGUMENT OF TELFORD TAYLOR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. TAYLOR: Mr. Chief Justice, and may it please the Court:

This case also involves an order of the Public Service Commission, it is in our brief on page 3, and is mercifully short: "All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising..."

I think the Court will readily see that the constitutional questions raised here are distinct from those in the case that has just been heard. The bill insert ban closes a particular channel to speech on public issues; this is a complete ban on speech described as promotional advertising. That, of course, falls within the general category of speech. That in the decisions of this Court has been called commercial speech, but I think it will appear in the course of the discussion that the line here between commercial speech and other speech is

not as clear as it has been in some of the other cases in this Court.

Now, I think I should say a word about the genesis of this order because it is different from the chronology of the bill insert case. The ban there in the same language as on page 3 was enunciated by the commission in a summary emergency fashion in December of 1973 at the time of the Arab oil boycott following the Arab-Israeli war, at a time when there was a genuine and acknowledged belief of a shortage of oil which might not enable the utilities to continue service, and it was put in on that basis at that time, together with an order for voltage reduction. Months passed, the shortage eased and the voltage restriction was restored, but the promotional ban was retained in effect.

In 1976, the commission inaugurated a proceeding to review whether the promotional ban should be continued. Central Hudson and other companies urged that it should be lifted. We urged that unsuccessfully, and after losing before the commission and rehearing denied, this litigation was commenced in the New York state courts and, of course, therefore is here on appeal on federal constitutional grounds.

I might also just mention to the Court that a brief has been filed here in amicus on behalf of the Long

Island Lighting Company. That was a litigation started in the federal courts, in the Eastern District of New York, in which Judge Pratt ruled that this promotional ban was indeed unconstitutional under the First Amendment but upheld the bill insert ban. That case is pending and has been argued in the Second Circuit but has not been decided.

Now, before I come to the two matters that I think are very basic here, I would like to mention three things which either are or should be uncontroverted and which I think may clear up a couple of things and avoid the necessity for colloquy.

In the first place, in this case there is no question about who pays for promotional advertising. There is federal legislation declaring federal standards which require that promotional advertising be paid for by the shareholders and not the rate payers. The commission's own view is to the same effect and therefore we do not have here any question about the source of funds for promotional advertising. The owners of the company bear it.

QUESTION: Would this bar, Mr. Taylor, ads in the form of essays, as is sometimes done, promoting the more efficient use of electrical energy?

MR. TAYLOR: Yes. The ban is phrased in terms not of consumption of oil or energy resource but the

amount of electricity and therefore if we urge by the use of an appliance or in any other way something which will increase the use of electricity, even though it might be a net saving of energy, it comes within the ban. I will be coming in more detail to that point in a few moments.

QUESTION: But it wouldn't ban advertising in promoting the non-use of electricity --

MR. TAYLOR: No.

QUESTION: -- if the advertising said turn out your lights when there is nobody in the room.

MR. TAYLOR: You're quite right. If the use reduces the amount of electricity used, it is not within the ban. The promotional ban is defined as anything which might be expected to increase the use of electricity.

In the second place, neither the commission nor any other authority, state or federal, has done anything which prohibits the underlying activity here, that is there is no restriction on the distribution, sale and use of electricity. It is perfectly lawful, and the commission's brief said that they haven't even tried to discourage the use of electricity for heating and therefore it is beyond argument I think that the effect of this ban is to withhold from the public information about an activity which is perfectly lawful.

In the third place, although this ban in its

origin in December of 1973 was based on an actual shortage of oil, that is not the case with the commission's decision in 1977 which continues the ban. There is nothing in the record, there is nothing in my opponent's brief, there is nothing which indicates any present or approximate shortage of oil. The conservation theory which has been invoked in support of the order is rather that there is a continued dependence on foreign oil. That is the conservation factor which is primarily relied on in the commission's decision in the Court of Appeals and therefore, of course, I will be addressing that value which is invoked to support the ban I hope before I sit down.

QUESTION: Mr. Taylor, supposing that a drug manufacturer sent out a letter saying ask your doctor to prescribe morphine for your pain you have, now the prescription of morphine is perfectly legal in most states, but you do have to get it by prescription. Would you say that that was a violation of the First Amendment?

MR. TAYLOR: Well, if it was encouraging him to get it without a prescription, it would, of course, be advocating unlawful conduct and I suppose it would fall within the traditional category of speech which can be limited. But the point of my making my so-called point two there was precisely that: There is nothing unlawful about the use of the electricity, the sale or the

distribution and indeed --

QUESTION: But my hypothesis simply says the drug company sends to the occupant of every house "ask your doctor to prescribe morphine" --

MR. TAYLOR: Well, that --

QUESTION: -- so it would be in compliance with state law --

MR. TAYLOR: That is encouraging the use of what are called controlled substances, well known to be dangerous. It is very much like, Mr. Justice Rehnquist, I take it the tobacco ban on advertising tobacco which is lawful to smoke, which Your Honors did uphold in the tobacco case. Of course, the nature of using morphine and the nature of using electric heating is different as night from day in terms of general opinion about whether this is good or bad.

May I come to the two points which seem to me of the greatest importance here and which I think go further than anything else to show why the court below and the commission have fallen into constitutional error here.

In the Court of Appeals, these two things I am about to mention led the court to say that Central Hudson's First Amendment rights are in this case at the "nadir" and having them put them in that low a state, of course,

it was unnecessary to scrutinize very carefully the value factor invoked to support the ban because so low a category is placed on the speech itself.

Now, the most important point here I believe is in our brief on page 15. We have quoted the governing paragraph in the Court of Appeals decision which, as Your Honors would see, treats this case as simply one where, since we have a monopoly in the distribution of electric energy and since the price is controlled by the -- the rates are controlled by the commission, that there can be no value in discussion about the use of electricity. Consumers have no choice regarding the source of their electric power, the price of electricity simply may not be reduced by competitive shopping.

Well, Your Honors, we say that that demonstrates a very fundamental misconception about what the speech involved in this case is. Of course, it is true that the price of electric energy to the rate payer is regulated. Of course, it is true that, as a substantial matter, our company is the only source of it. But it wholly overlooks the fact that people don't take electric energy for its own sake because it can be turned into heat and light and power and to goods of that kind, and that in terms especially of temperature control, of heating and cooling, the company's share of this is not only not a monopoly,

it is very much a minority share. There is --

QUESTION: I suppose if the state said we want to cut down the use of energy in this state so we are going to put a quota on what the utilities may sell, we are going to somehow say you can't sell to any one customer more than a certain amount or you can't sell any more than you sold him last month or something like that. I suppose you would accept that as a --

MR. TAYLOR: Well, that question can't be answered fully without taking account both of statutory matters which I don't think are relevant here and constitutional matters. There would be statutory problems about the commission's authority to do that. What you suggest has been specifically authorized by statute in the case of gas, but not in the case of electricity. Now, if that --

QUESTION: Let's get past the statutory question. How about the constitution --

MR. TAYLOR: Yes, I was going to go past it right away. If the statutory question is resolved, why, then, of course, there would be no First Amendment problem. There would still be --

QUESTION: Or any other problem?

MR. TAYLOR: Well, there would be a matter of showing if there was a reasonable basis for the restriction

and, of course, ordinarily the standards of review on that are very relaxed. If this were a prohibition which began to impinge on existing service to customers and reduced them to a bad circumstance in terms of heat, why, then, you might well have a stricter standard of review to show the necessity.

QUESTION: But there wouldn't be any constitutional problem, would there, assuming that the state statute clearly authorized it, if the utilities commission could say no electric utility in this state shall take on any new customers for the next twelve months.

MR. TAYLOR: If a satisfactory substance showing could be made in support of that regulation, the answer of course is they could do that, assuming the statutory questions were cleared up, there would be no First Amendment problem.

QUESTION: Or no constitutional problem of any kind, would there?

MR. TAYLOR: If a satisfactory factual basis, there are none.

QUESTION: Right.

MR. TAYLOR: That's right.

QUESTION: Well, let's narrow that a little bit, Mr. Taylor. Suppose the notice was no utility shall hereafter take on any new customers for heating, space heating

by electricity, any problem about that?

MR. TAYLOR: No different problem, Your Honor, no.

QUESTION: You think it is no different from the other?

MR. TAYLOR: No, this would still be a restriction on the activity itself, it would not raise a First Amendment problem.

QUESTION: But you nevertheless say that the state may not achieve an equivalent or roughly the same end by telling the company not to advertise the use of electricity.

MR. TAYLOR: Yes indeed because the situation we have now is that the public or the consumer is entirely free to use electric energy, the company is entirely free to make it available, there are many alternative ways of using it, some of which are more effective than others, and --

QUESTION: Yes, but the state has decided that they have a very good reason for limiting the use of electricity. They considered very heavily putting a quota on or a limit or a ban of new customers, but they just thought they would limit the promotional activities of the company if for no other reason to save the new customers money, the company money and it would have an

equivalent effect. But you think --

MR. TAYLOR: I don't believe they can do that, Mr. Justice White, it seems to me because that rests on achieving this consequence by keeping the public in ignorance to matters they are entitled to know. The option of electric energy is not an offensive one or an unlawful one, it is one which the commission has deliberately left open, it has not found a basis for doing the rationing restriction that you suppose and under those circumstances I think they can't say to speak put a slow brake on it by the device of holding this information from the public.

In all the other commercial speech cases of recent vintage, there have been arguments made to show that a policy might be furthered but in those cases the balances had to be weighed and the policy has been found insufficient, and it seems to me that is the case here, too.

QUESTION: Are you going to get to Ohralik?

MR. TAYLOR: Yes, I will. Yes, Mr. Justice Rehnquist.

Well, to complete my point there, since the commission -- the court, in other words, in this passage on page 15, wholly mistook the nature of the market which is involved here. The monopoly and the supply of electric energy does not mean at all that the company is not in sharp competition with other energy sources. Now, the

facts and circumstances about the relative merits of these energy sources are matters of public interest. It is precisely for that reason that I said that in this case the line between the commercial speech and the so-called controversial speech is a thin one because advertising which would tell the consumer what the benefit of heat pumps are, what the benefits and detriments of electric space heating are is information of public interest and of great interest to the consumer, and therefore the whole approach to the advertising taken by the Court of Appeals was mistaken.

Now, the other --

QUESTION: Do you see any analogy, Mr. Taylor, in a rationing program, rationing gasoline, for example, with coupons? Is this not an effort to equalize on the part of the commission, to hold down consumption so there will be enough to reach everybody? Is there any analogy there?

MR. TAYLOR: It would seem to me not, Mr. Chief Justice. In the first place, this would bring me to the fourth point in my brief, that if this were regarded as an equalizing measure, it is a strange one indeed because 75 percent or more of the heating is by home oil furnaces and there is no restriction on the advertising and promotion of heat derived from that source. It is limited to the distribution of electric energy and therefore far from

it being an equalizing thing, it is a discriminatory thing because only this one relatively small side of the energy picture is covered.

The other matter on which it seems to us the Court of Appeals and the commission have been led astray is because, in addition to the point I have just discussed, they have relied here heavily on the thought that because Central Hudson is a regulated public utility, that by that fact in and of itself our First Amendment rights are less.

I would have thought that the Belotti case had laid at rest that point of view. Of course, I am aware that that case was decided by a closely decided Court, but I don't think that the area of disagreement in the Belotti case has much to do with what is before the Court now. In the Belotti case, the state value invoked to limit the corporate speech was itself in the nature of a First Amendment value, the idea of a prophylactic rule that would prevent public discussion from being dominated by corporate resources, and the Court had to strike a balance between those and they disagreed on how to strike the balance.

But we don't have that situation here. What is being invoked on the other side here is not of the same character or stripe at all and therefore the considerations in the Belotti case that led to the division in the Court

don't seem to be of bearing here. Certainly I think it is clear in the Belotti case that both the majority and minority thought that corporate entities do have the rights of commercial speech and in the majority opinion the standard to be used was exacting scrutiny, both of the dissents recognized the same thing, and indeed Mr. Justice White's dissent strongly suggested that corporate rights in the commercial area might well be greater than the political area because of the closer nexus with the corporation's own business.

In that connection, can I remark in conclusion here on this aspect of the case that we have here none of the factors which the Court has referred to in some of these cases, the common sense differences between commercial speech and other speech. We have none of the factors which the Court has mentioned as reasons for giving commercial speech a lesser degree of protection. This order has nothing to do with whether speech is deceptive or misleading or anything of that kind. It has nothing to do with overreching solicitation, as in Ohralik. There are several cases, including Friedman v. Rogers, in which the Court has tabulated these distinctive features of commercial speech and none of them are present here and therefore for all those reasons that I have now covered, we strongly urge that the speech in this case is highly

akin to public issue discussion, that there is no reason in this case why the same standard should not be applied to speech that was applied in the Belotti case.

QUESTION: Do you agree, Mr. Taylor, that if you thought the state was giving a compelling interest, was using a compelling interest to justify this restriction, that it would be all right? Or do you just say that you just can't do it?

MR. TAYLOR: Of course not, Your Honor -- excuse me for putting it that way. But I would suppose that in any case if you come forward with a sufficiently compelling reason, that the amendment gives way.

QUESTION: Then suppose the state just out and out says, well, we offer you a compelling interest, we don't know of any more compelling interest than to save energy and we think this is an effective way of saving energy, is that -- of course, you disagree that that would be a compelling interest, I suppose, or would you?

MR. TAYLOR: We do not at all dispute the idea that the conservation of energy is a great value. Whether the means you used here display a means calculated to serve the compelling interest is another matter. The point I have been endeavoring to make so far, Mr. Justice White, is --

QUESTION: Well, if you didn't think your

advertising was effective, you wouldn't really be worrying very much, would you?

MR. TAYLOR: Of course, the advertising must be effective --

QUESTION: You would it is effective or you wouldn't be spending your money on it.

MR. TAYLOR: Right. The advertising which, as our brief indicates, we desire to do, the advertising of heat pumps, is not the kind of advertising which will increase the net consumption of energy. And of course, one of our complaints against the order is that in that sense it is over-broad and it is indeed the over-broad portion which most directly affects us because there are electrical devices, including the heat pump, now available which very greatly diminishes the use of electrical energy and would not increase the use of foreign oil.

QUESTION: I take it you would be unsatisfied if just the over-broad portions were clipped off of the order?

MR. TAYLOR: We would be dissatisfied.

QUESTION: Dissatisfied.

MR. TAYLOR: We would be dissatisfied, yes.

QUESTION: Although over-breadth you think -- do you think over-breadth applies right across the board in --

MR. TAYLOR: Well, we believe the over-breadth doctrine is available in this case because it is not a situation where we would come within the legitimate scope of the statute in a complaint that it might apply to someone else. Indeed, here the over-breadth part is the part that especially and immediately affects us. But frankly, in answer to your question, no, we would not be satisfied because we believe that the order is invalid insofar as it applies to resistance heating or other uses and for the same --

QUESTION: Well, what would be our rationale if we said, well, we think the state's justification is saving energy, we think that is a compelling interest, then what do we say? We say, well, even so, this is invalid because it isn't effective? The state thinks it is.

MR. TAYLOR: No other state does, and neither does the federal government. This is not based on shorage of --

QUESTION: But this state does, though.

MR. TAYLOR: Yes, but I take it that --

QUESTION: Must we disagree with them to side with you?

MR. TAYLOR: I think you must find that the assertion that this would measurably further conservation is not so here. This is not --

QUESTION: If we disagree with you on that, you lose?

MR. TAYLOR: No.

QUESTION: No?

MR. TAYLOR: Because we still have the overbreadth argument and we still have another argument which in point three of our brief, which we think is equally compelling. The statute here is the orthodox kind of public utility statute with only the standard of public interest, public welfare in it. It can be not seriously contended that the legislature has ever intended to convey on the commission the powers to regulate speech. Of course, the construction of the statute is not under review here, but the fact that the Court has given that construction that the commission is vested with powers to limit speech does inevitably raise the question of whether the standard for it is adequate, and we suggest that it is not, that the standard for regulating speech must be a good deal more precise than that and that there is nothing in the context or general application of the statute which gives any guide here sufficient for First Amendment purposes. So that is another reason why on which basis you would not have --

QUESTION: Even though within that broad authorization the commission perhaps comes up with a much narrower

justification and says what we are really talking about is saving energy?

MR. TAYLOR: Under the question of the standard though, what they have done here is only one thing that they might do for lack of the standard, and also the conservation is not the only point the commission is making, of course. They are also asserting the right to control promotional advertising because of its effect on the rate structure, an area in which they have full powers under their right powers to deal with it in other ways. So that the assertion of power here by the commission is pretty open-ended, Mr. Justice White, and it seems to us that the lack of the standard is fatal.

May I come back, if I may, in conclusion, to the matter of conservation because I think this is crucial. Since the matter is not one of shortage of oil but of continued dependence on foreign oil, we have a problem which is primarily a national problem. The federal decision is a considered one, the matter of prohibiting promotional advertising was raised, the committee report quite specifically says it is not intended to accomplish that.

No other state except Oklahoma has attempted this, and there the state court immediately held it unconstitutional. So we think that that is highly relevant

in determining the substantiality of invoking conservation. Of course, conservation itself is a compelling interest but I don't think it all follows from that -- and look at the Linmark case, where the state objective was desegregated housing, admittedly an important one --

QUESTION: Has the state suggested any other reason for doing this?

MR. TAYLOR: Yes, they have, even more inadequate than the first, Mr. Justice White.

If I may, I will save my remaining time for reply.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schiff.

ORAL ARGUMENT OF PETER H. SCHIFF, ESQ.,

ON BEHALF OF THE APPELLEE

MR. SCHIFF: Mr. Chief Justice, and may it please the Court:

As mentioned before, this case arises from the same order as the previous one, although with a somewhat different history. Certainly Mr. Taylor has explained one of the reasons why we imposed the ban on the promotion of electricity by utilities.

I want to say that our ban has been on all promotion of electricity by the electric utilities. Our order did consider in some detail the requests by some of

the utilities that they should be allowed to promote off-peak uses for particularly space heating which is in the form of -- in two forms, one is electric resistance heating and the other is in terms of the heat pumps.

Now, the primary reason for this ban is that New York is terribly oil dependent and any time an additional kilowatt hour of electricity is generated in New York, at just about any time, day or night, winter or summer, additional oil is burned. Oil is what is burned at the margin in New York state. Ninety percent --

QUESTION: Do you suppose the state legislature of New York would pass a law saying that no company engaged in the oil business shall engage in promotional advertising that would tend to increase the consumption of oil or of any kind of petroleum product?

MR. SCHIFF: I will tell you, we have not -- that is a more difficult question, in light of this Court's First Amendment cases.

QUESTION: What is really involved in that question I think is how much does your argument depend upon the fact that these are regulated monopolies.

MR. SCHIFF: It depends very substantially on the fact that these are regulated monopolies.

QUESTION: The case posited by my brother Stevens would be the same if --

MR. SCHIFF: Well, let me, if I may, say why I think this is different and --

QUESTION: I will tell you why it is different, becasue the difference is rather obvious. I would be interested in your answer to the question.

MR. SCHIFF: Well, in this case the basic information in commercial speech cases that the Court has protected is really saying that there is a need to provide price information to customers. That was true in the prescription drug case, it was true in the routine legal services case. In terms of the oil jobbers advertising as to what the costs are for the individual jobbers, you will have again price information of that type being provided.

Actually the oil jobbers in this case told the commission they would be glad to have their speech restricted, but in that sense, Mr. Justice Stevens, it is different and I am not --

QUESTION: I understand that it is different. I am just curious about your answer to my question.

MR. SCHIFF: Well, I don't have to -- I guess I have to argue this case and I think there are compelling reasons here. I don't think I have to know what this Court would decide on that case in order for you to affirm us here, so I am not --

QUESTION: So you don't want to answer the question.

MR. SCHIFF: Yes, I think it is too iffy because I don't think you have to reach it here. I think the interests -- the Court has looked at what --

QUESTION: Is there competition for items such as heat pumps?

MR. SCHIFF: Yes, there is competition --

QUESTION: And are their suppliers of those competing items that are not regulated by your commission?

MR. SCHIFF: Absolutely, there are suppliers who are free to advertise, the appliance dealers, there are the manufacturers --

QUESTION: People can advertise oil furnaces?

MR. SCHIFF: Yes. I mean --

QUESTION: They can advertise the relative advantages over electric heating?

MR. SCHIFF: They can advertise their relative advantages --

QUESTION: And that advertising may promote the consumption of oil, I assume?

MR. SCHIFF: Yes, and there are appliance dealers who can promote and say why electric heat is better than oil heat. The reason for banning the promotion by the electric utilities --

QUESTION: Let me just be sure. I take it the reason you decline to answer my question is you rest exclusively on the regulated monopoly character of this industry?

MR. SCHIFF: That fact -- well, primarily. I mean I think the facts of this case have to be judged in the context that this is a regulated monopoly, that even though there is competition on a small portion of the regulated company's business, and my understanding is that Central Hudson, perhaps 8 percent of its sales are involved in electric heating, although that figure is not too easy to come by, a much smaller amount involves how much is added at any one time since these are not thing that are added very quickly.

QUESTION: Well, there is nothing in the Constitution that prevents New York from making every single enterprise conducted in the state a regulated monopoly, is there?

MR. SCHIFF: Well, we can't very well make something a regulated monopoly if the business is not essentially monopolistic. Electric utilities --

QUESTION: Now, wait a minute.

MR. SCHIFF: Oh, we could regulate them but not as monopolies.

QUESTION: Well, couldn't New York simply have

a system of state socialism where the state owns all the means of production and so forth? There is nothing in the Constitution that prevents that.

MR. SCHIFF: Well, if you are talking about state ownership, I suppose we could have that. I think, yes, I suppose we could have that but that is not what is involved here. In the case of the utilities, as I indicated before, the state has imposed an obligation --

QUESTION: Utilities is just a descriptive term for those types of businesses that the state has chosen to heavily regulate and franchise, isn't it, and there is no magic boundary between a utility and a kind of semi-free enterprise type of business.

MR. SCHIFF: I think there is, Your Honor. Historically, the electric utilities became regulated because it is a matter of economics and as a matter of esthetics, it made sense only to have one company serving one area. And there was no competition for most of its services and there is no competition for most people getting electric service. If you want electric service, you have one place to go. That is not --

QUESTION: That is because of the state.

MR. SCHIFF: No, no, it is not because of the state. It is -- well, it may be because of the state, but as a practical matter you can't really function, you can't

have two sets of distribution lines, two sets of --

QUESTION: You mean you can't economically? You can't economically, but you could constitutionally, couldn't you?

MR. SCHIFF: Oh, constitutionally, sure. But what I am saying is that utilities, monopoly utilities, the reason the state has regulated them is a matter of historically because utilities really requested the regulation in order to be protected from having public power, which is true in so many other countries, but they are different in terms of how they operate and the competition that we have here is very limited.

The Court of Appeals was perfectly correct in at least recognizing that the dominant aspect of electric utilities was serving as a monopoly. Now, in terms of the conservation here, the reason that this is important, we think that having utilities promote -- now, by promoting it is not giving price information, it is essentially saying to the public, go out and use electricity and at the same time they are supposed to be telling the public to save electricity. And the more oil that we use, the more expensive it gets. The oil in New York is the most expensive in the country, I suppose because it is the lowest sulfur oil.

Ninety percent or more than 90 percent of our

oil comes from foreign sources because that is the kind of oil, residual oil that is burned in our generators. In addition to that, we have a rate problem, at least in New York, where the rates unfortunately are probably the highest in the country. I looked this up. I say with regret that the average price used at the time of highest consumption, which is basically in the summer time in the areas served by Central Hudson as well as LILCO, is priced below what the real cost to the society is or what the consumer is, but we have not yet been able to develop the marginal costs. We haven't had all the information or the equipment that is necessary to do that.

In the meantime, to have people add these services on the basis of the prices that are now being charged, encouraging to do that, promoting it, which is not just plain advertising, it is asking them to add that service, is really inherently misleading as we explain in our brief.

Now, we realize, of course, that in banning we are intruding on the commercial speech rights, the First Amendment considerations that were considered by the commission, but this case is different from the other case in that there was the problem that consumers could only get the price information of prescription drugs practically through advertising. Here the price information, there is

one price for electricity, it is public knowledge, Anybody can get it. You can call the utility or the appliance dealers who can advertise this electricity, can provide it --

QUESTION: Well, the point is you don't have any choice.

MR. SCHIFF: You don't have any choice, there is one price.

QUESTION: And that is all there is to know about it.

MR. SCHIFF: This isn't the routine legal services that we are involved with, this is talking qualitative kind of --

QUESTION: Why do you say this is just in the terms of commercial speech? It seems to me that your ban would prevent the company from communicating about anything that is controversial, whether it has anything to do with their business or not -- please vote for George Jones for governor.

MR. SCHIFF: No, this is on the promotion of electricity, this isn't on whether they are promoting -- this ban, the only thing that is involved here is the promotion by advertising of electric usage. That is all that is involved here. It doesn't have anything to do with political advertising, which apparently George Jones

perhaps can't be promoted in any event, but --

QUESTION: If he is an oil man or an electricity man, it might be?

MR. SCHIFF: Well, thid particular oder goes to the question of whether you can promote the usage --

QUESTION: Of electricity.

MR. SCHIFF: -- of electiricity, right.

QUESTION: On your point that the information is generally available about prices and the like and there is no choice, as Mr. Justice Stewart points out, as contrasted with other commercial speech cases, suppose a big company was concerned about the relative advantages and disadvantages of using heat pumps and using electric space heating rather than other kinds of space heating, isn't that information equally inaccessible except from the company itself --

MR. SCHIFF: No, because that was my next point, that the utilities are really not uniquely qualified to speak on that. They don't sell this equipment, they are just selling the electricity. The entities that are uniquely qualified, the ones that are comparable to the pharmacies are the appliance dealers or the manufacturers. It is not the utilities.

QUESTION: I take it that by refusing to answer earlier, you would agree that you could not prohibit them

from advertising the advantages of using their equipment?

MR. SCHIFF: Well, we certainly couldn't. Your question relates to --

QUESTION: No, but my question of could the legislature put some kind of an oil conservation board into effect that would censor advertising generally that tended to promote the usage of oil.

MR. SCHIFF: I think that would be -- I would really doubt that we could do it except in cases of extreme emergency, but we certainly haven't attempted to do that. The problem here -- one of the things the commission did point out is that there were other alternatives --

QUESTION: But it seems to me that you might have two different cases, one in which you say you can't advertise where the consumer has no alternative choice such as providing electricity for burning lighting or something like that, but why do you have to extend the ban all the way into areas in which there is a legitimate difference of opinion as to whether electricity is the most efficient energy source?

MR. SCHIFF: Your Honor, the reason that the monopoly aspect of this is very important is that, for example, it might be beneficial for a customer, an individual customer to take on an electric heat pump, the electric heat pump is normally -- Central Hudson says

there are some without air conditioning, but at least they have never advised us of that -- normally carry with it air conditioning in the summer, and the commission found that this would result in air conditioning that would not otherwise happen. The commission found that the consequence of this would be to increase the rates of all the other customers. What we have is a problem that perhaps the individual customer who can get information elsewhere might be benefited by taking a particular appliance, but the rest of the customers are hurt and this is very different, as we point out in our brief, from the area of free competition of the pharmacist or others who aren't going to engage in the promotion unless they think it is going to be overall good for them. The company may think it is overall good for them, but you have to remember that most of the cost of this, the tab will be picked up through their monopoly rates. There is no way of really separating the consequences of the kind of promotion they do. This is why the fact that this is a monopoly makes this case very different from any other case that you have previously considered in this free speech area.

QUESTION: Well, I understand heat pumps, of course, but I don't know why the competition for, say, a new subdivision is being developed by a huge builder or a new 100-story office building, they have a choice as to

what kind of heating, space heating it shall employ, electric, coal, and so forth. Isn't that just old-fashioned competition in that area?

MR. SCHIFF: Well, you see, the resistance heating problem is that it uses substantially more oil and there really is not much argument and the situation in New York may be different --

QUESTION: It clearly is not a monopoly then.

MR. SCHIFF: -- when we have conversions to coal, but we don't have that now. It is competition at that level, Mr. Justice Stevens, but in this case the utility --

QUESTION: Isn't that the place they need the advertising the most, is where there is competition? They wouldn't spend a lot of money to tell people about rates they have to pay anyway.

MR. SCHIFF: The problem is when the utility does this advertising, the extra costs from using additionl oil and from the rate structure problems which the utilities can equally work on with the commission, that problem is one that is going to be to the detriment of the rest of the consumers, so you really have to say, well, we can let them advertise to a fare-thee-well and the other consumers be damned, we can't control that even if you can't control it by putting in a -- suppose we

said, well, you can promote but put in a label that this is dangerous to the general rates, that wouldn't help the other consumers because it is encouraging that use which in itself --

QUESTION: Why don't you justify it on grounds of protecting other consumers rather than saving oil?

MR. SCHIFF: Well, that is part of it because -- no, we want to save oil. We are also troubled that any promotion, the commission found that any promotion that is done, including for heat pumps -- and this is mass media advertising that we are talking about, because we are not talking about one-to-one promotion, this sort of doesn't go to that -- is going to give them mixed signals that electric heating is going to be advertised primarily in the summertime when it would be installed or frequently in the summertime, and the consumers say how do the utilities tell us it is okay, how can we accept the fact that we shouldn't be using electricity for other purposes. This is one ball of wax. The utility is one entity and it is very difficult to disaggregate that and I -- now, there is an argument here on over-breadth --

QUESTION: Shouldn't we assume that the consumer is intelligent? Here you don't assume --

MR. SCHIFF: I think that the consumer is intelligent and we think that an intelligent consumer is going

to accept the fact that if a utility is promoting generally, that it doesn't really mean what it says about conservation. I mean I think that is what I would think an intelligent consumer would be doing.

QUESTION: You reject then Mr. P. T. Barnum's oft-quoted maxim that no one ever lost a dime underestimating the intelligence of the American public?

MR. SCHIFF: I think the consumer is reasonably intelligent. I think that we point out that it is very difficult to really compartmentalize this, but that is why the fact that the ban is being -- it does not apply to other dealers, to appliance dealers where you do not have mixed signals. We think that it does provide consumers with a great deal of information and that they are not really being deprived of essential information.

I would like to get to an important point I think and that is the position that Central Hudson has taken that, regardless of how good the reasons are that we have for banning it, we can't ban promotional advertising because we haven't banned the use of electricity and we haven't banned electric heat pumps or resistance heating. I think that the First Amendment does not require that kind of a conclusion. This Court in the Virginia Pharmacy case said we are confident that people will not -- that doctors will not over-prescribe, but you did also

say in the Texas Optometry case that the fact that the state wanted to limit the commercial optometrist or had not cut out commercial optometrists did not mean that you couldn't put reasonable restrictions on that in terms of the trade name. And I think there is a vast difference in discouraging or not encouraging the use of electricity. It may be one way of permitting people to use that electricity without excessively pushing up the rates or without putting an undue pressure on the oil requirements, and that you don't have to go to the draconian means of saying, well, some people can't be attached. Now, I would be terribly troubled with saying that new customers couldn't attach or new people couldn't move, and I think it is just plain absurd to say that you can't put some limits on promotion simply because you have not banned the use of electricity or restricted the use of electricity.

I think this Court has certainly used a common sense approach in these cases of commercial speech and frankly I am appalled to say that we have to be so draconian that the utilities can't be prevented from encouraging their usage.

QUESTION: Well, are you arguing that because you could be so draconian you can have this much narrower but effective ban?

MR. SCHIFF: Well, I think certainly -- I don't think the facts would warrant trying to be that draconian at this time.

QUESTION: N , but you could, you might say, and therefore we can certainly do this.

MR. SCHIFF: Well, we certainly did that back i '73, when the oil was practically running out in the Con Ed territory and some other places, we recognized that there were alternative means of doing it and that restricting promotion was a better means of doing that than saying you simply couldn't -- that you close down the electric system alternately throughout the system.

There are common sense differences in the commercial speech area and -- well, regardless of commercial speech, I think -- but especially in the commercial area, where you may have to take other alternative means, if this is a sensible means, more sensible than saying absolute ban, I would think that this makes very good sense in First Amendment terms, but especially because of the minimal --

QUESTION: This shift by its terms applies to "all electric corporations."

MR. SCHIFF: Yes.

QUESTION: How many of those are there in the state of New York?

MR. SCHIFF: Well, there are seven -- there are basically seven privately owned utilities and -- well, this applies to the seven electric privately owned utility companies in the state.

QUESTION: Well, this applies by its terms to all electric corporation --

MR. SCHIFF: They are all the ones that we regulate.

QUESTION: -- and my question was how many are there.

MR. SCHIFF: Well, there are some municipally owned which provide a very small service in New York state. There are seven that serve virtually the whole state, Your Honor.

QUESTION: There are only seven over which the commission has jurisdiction?

MR. SCHIFF: Well, there may be a couple of very small ones, but basically this applies to the seven. There are seven basic companies that serve New York state.

QUESTION: Throughout the state.

MR. SCHIFF: Throughout the state, yes.

QUESTION: How many municipal or public owned, roughly? Two or three or twenty?

MR. SCHIFF: Well, I think there are probably more in the nature of twenty. It is a peculiar setup.

They are not subject to our jurisdiction because they get their power from the power authority of the state of New York and by statute we do not regulate them. But unlike some other places, there is very little electric power sold by the municipals in New York.

I do want to say that in the past we had restrictions on the promotion of telephone, we still have some restriction on the promotion of gas service. We imposed restrictions on telephone promotion in the early seventies when service in down-state New York was just incredibly poor. As that service improved, the restrictions got lifted and the commission has been flexible and has adjusted to the exigencies of the situation. And if a showing can be made that promotion in fact is going to conserve energy, which it has never been made to us, the commission's order says we are ready to relax our ban, we're not interested in banning for the sake of banning it. We think that is basically a bad idea, if we can avoid it. In gas, we have been relaxing it as more gas has become available. And I think in viewing the commission's experience in this, I think that is something also to keep in mind.

But what the utilities say, let us go ahead and do what we ever want to do, and it doesn't really make any difference what effect it has on the rate payers,

the mere fact that there is competition on a small part of this business does not protect the consumers generally, it is an important reason to approve the ban on promotion here. The utility status is vital.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: You yielded your time, Mr. Schiff?

MR. SCHIFF: I am finished unless there are further questions, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Taylor.

ORAL ARGUMENT OF TELFORD TAYLOR, ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. TAYLOR: Mr. Chief Justice, and may it please the Court:

I would just like to make an additional comment with respect to the question that Mr. Justice Stevens addressed to Mr. Schiff, suggesting a newly developed housing area, should it be resistance heating or some other form, and Mr. Schiff's reply was that resistance heating would take more oil.

That of course may be true if the energy is electrically fired, but may I call your attention to Mr. Schiff's brief which says on page 18 that the commission has never taken the position that electric space heating should be discouraged, and also says that there is no sufficient basis for any action banning electric heating.

That is certainly true, there is no shortage of oil, there is no shortage of electric capacity, there is no need for rationing. These circumstances which might

call those powers into play are not here. There are advantages in electric space heating --

QUESTION: Are you saying that is the commission's position, Mr. Taylor, that the commission has not found any of these things? Is that it?

MR. TAYLOR: That is what it says, yes, sir. The advantages, of course, of electric heating are that it is clear, its use in the home is pollution free, you don't have gas trucks running over the place and polluting and burning up gas, and we say that under these circumstances that --

QUESTION: Are you urging that the justification they submit or they tender is insufficient?

MR. TAYLOR: It is concededly so. It is concededly so, Mr. Justice White.

QUESTION: Well, I didn't hear him concede.

MR. TAYLOR: Well, I read it though at page 18 of his brief that there is no basis for the restrictions on electric heating, and we say if that is so that you cannot put a sort of slow brake on it by forbidding the public to be informed about the advantages that are there.

Now, one other thing which I would like to mention, the notion that if we promote electric energy we are giving the public misleading signals about conservation. You will find in our reply brief an example of

what has been done here. We have save energy programs in which various ways of saving energy are indicated to the public and by display, and so forth, accompanied however by information about the heat pump. The commission has questioned our doing that under this ban. There is in fact a vagueness problem with this ban, too, though I have not stressed it becsuse I think there are more fundamental arguments, but there is that vagueness argument and the fact is that, despite his adverse comments on the heat pump, the New York Legislature has recently required us to finance their installation under some circumstances and have specified the heat pump as an energy saving device.

So I think the gist of my very brief reply is that with all respect, Mr. Justice White, I think it is over-simplified to say that any promotion is going to be energy costly. It is not. Some of it is going to be energy economical and the order ignores that.

QUESTION: I know, but your point is that even if it is costly, this restriction is invalid.

MR. TAYLOR: My point is that the additional costliness is very incorrect and difficult to quantify and neither federal nor state-wise has any other authority found any necessity for this sort of limitation.

QUESTION: So we are to disagree with the

commission then.

MR. TAYLOR: We urge you to find the invocation of the value insufficient because it will not accomplish measurably its purpose.

QUESTION: Or, alternatively, the commission is without authority, even assuming the accuracy of those claims --

MR. TAYLOR: Yes, Mr. Chief Justice, for the other arguments I have advanced.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. the case is submitted.

(Whereupon, at 1:06 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -