

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

APPELLANT

v.

PUBLIC SERVICE COMMISSION OF
NEW YORK,

APPELLEE

No. 79-134

Washington, D. C.
March 17, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

-----:
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Appellant

v.

No. 79-134

PUBLIC SERVICE COMMISSION OF
NEW YORK,

Appellee
-----:

Washington, D. C.

Monday, March 17, 1980

The above-entitled matter came on for oral argument
at 10:05 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, 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:

- JOSEPH D. BLOCK, ESQ., 4 Irving Place, New
York, New York 10003; 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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 79-134, Consolidated Edison Company v. the Public Service Commission of New York.

Mr. Block, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOSEPH D. BLOCK, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is an appeal from the New York State Court of Appeals which upheld that an order of the State Public Service Commission prohibiting utilities in New York State from communicating with their customers on controversial matters of public policy by means of messages enclosed with the utility bills. We call these messages bill inserts.

The order prevented Consolidated Edison Company and the other utilities from communicating with their customers in the most effective way available on issues that are directly related to the company's business providing energy in New York City and Westchester County. And these issues also are -- have a direct impact on our consumer public.

QUESTION: The order didn't prevent a separate mailing with the same information?

MR. BLOCK: It did not.

QUESTION: Yes.

MR. BLOCK: Because we felt that the order prevented us from speaking out through the medium of bill inserts we challenged the order below before the Commission and also before the State court on the ground that it violated Consolidated Edison Company's freedom of speech and freedom of press under the First and Fourteenth Amendments and also that the reference in the order to controversial matters of public policy were so vague that it brought into play this rule under the due process clause of the Amendment.

QUESTION: Mr. Block, does Con Ed have a franchise and a monopoly in its territory?

MR. BLOCK: It is the only utility authorized to serve that area.

QUESTION: Could a private utility simply come in and start soliciting Con Ed's customers?

MR. BLOCK: It would have to have the permission of the State Public Service Commission to enter our service area. Private building owners are free without permission to install their own generating building.

QUESTION: Con Ed does get certain benefits from the State than an ordinary private citizen doesn't get?

MR. BLOCK: Con Edison is protected from competition in exchange for which it is subject to very strict regulation, not only as to its rates but as to its service and practically

every aspect of its business. And the reason of course is it is economically unsound to permit two utilities to come into the same area and install the same facilities and to compete. Because of the great amount of capital involved in this business it would be disadvantageous to the consumer. This is a matter of social policy and it is accepted and we do get the benefit but we have the obligation. We have the statutory obligation to render adequate and reliable service at reasonable cost. And it is in pursuance of that business that we feel it is necessary for us to communicate with our customers on issues that are current and which affect our ability to serve them and which affect their well-being.

QUESTION: Along with your monopoly you are not free to charge any rates you want either, are you?

MR. BLOCK: We are not. Our rates are fixed by the Commission after extensive public hearings and it is not only our rates but, as I say, every aspect of our business is closely regulated.

We think the court below paid a great deal of attention to the fact that we were a franchised monopoly and although they didn't say this in their opinion there are things in their opinion that can only be explained by the fact that we have a monopoly status. And I want to turn to the court's opinion because they started off by treating this order of the Commission as a valid time, place and manner

restriction.

Now, the Virginia Pharmacy case that this Court decided in 1976 specified exactly what the elements of a proper, time and place and manner restriction are. And there are three -- three requirements, all of which must be present.

The first requirement is that the restriction of speech must not be based on the contents of the speech, it must be content neutral.

The second requirement is that the restriction must serve a significant governmental interest.

And the third requirement is that in imposing such a restriction there must be ample alternative channels of communication left to the facility or left to the speaker to communicate his views.

We say if the Court please that this -- that the court in saying that this was not a content-based regulation committed a fundamental error. The restriction applied to controversial matters of public policy and, in particular, the utilities' viewpoints on those matters.

QUESTION: How did they define "controversial matters"?

MR. BLOCK: They did not; they did not define it. When we challenged this order by a petition for rehearing they said that they would give us advisory rulings if we would

come to them and ask them whether something was controversial or not.

QUESTION: But at least it didn't purport to prevent you from putting in a bill an advertisement that you had a new toaster for sale?

MR. BLOCK: That is correct. They did not -- I assume that they would not regard that as controversial.

QUESTION: You are saying that there is a terrific television program on on Saturday night that we are financing.

MR. BLOCK: Well, it is -- it is very difficult for us to know just exactly what they did mean by this. And we have had problems with it since the ban has been in effect.

QUESTION: The concern of the court seemed to be, and the concern of the Commission, promoting greater use of energy during an energy shortage and that they were advertising appliances that might be inconsistent with --

MR. BLOCK: Well, Your Honor, that is the issue in the second case that is on the call for this morning, the Central Hudson case. And this order that I speak of in addition to banning inserts banned promotional advertising by electric utilities.

Now, we did not appeal from that part of the order. Other utilities did, including Central Hudson which is before the Court in the second case.

The promotional advertising involves this matter of

encouraging people to use more electricity at a time when conservation should be the keynote. That is something that is involved in the bill insert order as such although it may be a controversial matter within the scope of the bill insert prohibition. But there is a separate prohibition that is subject to a separate appeal that we do not regard that issue as being involved, particularly in the bill insert case. The Commission does not want us to speak out on controversial matters and that, as I say, may well include promotion. But we have no -- as far as Con Edison is concerned our desire is to speak out on such issues as whether some of our plants should be permitted to burn coal instead of high-cost imported oil so that we can not only save our customers some money but can reduce this Nation's dependence on foreign oil, which is a risky supply and one that we do not feel comfortable living with, because it can be cut off at any time.

Another issue that we think is important to our customers and to our business is what is the future of nuclear power now that there has been an accident at Three Mile Island and a lot of investigation.

We would like to communicate with our customers telling them what measures were taken to improve the safety of our nuclear plant operation. We would like to tell them about the economics of nuclear power versus oil.

QUESTION: Mr. Block, do you contend you would have

a First Amendment right to tell your customers to vote for a particular candidate in the Presidential election?

MR. BLOCK: No, I would say that we are forbidden from doing that.

QUESTION: Why? Suppose a particular candidate is hostile to atomic energy and you are in favor of atomic energy or something like that?

MR. BLOCK: We interpret the Federal Election Campaign Act as prohibiting us from seeking to -- from spending money to influence, to communicate with our customers -- communicate with our customers on political candidate endorsements.

QUESTION: I see. That is because of the Federal Election Campaign Act.

MR. BLOCK: Yes. We think we are forbidden, we have no particular desire to do that and we don't think that is -- that is something that we don't think our company should get into. We want to talk about issues and information. And the ban is so broad it doesn't -- it doesn't tell us that we can't support candidates or vote against candidates, it doesn't say that we shouldn't foster or try to promote legislation or oppose legislation. It tells us we cannot communicate at all on controversial matters of public policy by means of these bill inserts.

And I say --

QUESTION: I suppose your company has thousands of shareholders, doesn't it?

MR. BLOCK: We have -- we have thousands of shareholders. We have I would say 300,000 shareholders.

QUESTION: And if we are talking about controversial subjects, however that may be defined, at least sort of by definition some of your shareholders will disagree with the position that the company takes, won't they?

MR. BLOCK: That -- that could be, Your Honor, that --

QUESTION: Controversial --

MR. BLOCK: Your Honor, that is an issue that was handled and dealt with in the Bellotti case and we are aware of that issue. The Commission has not purported to act to protect an unwilling stockholder from supporting these bill inserts. They have acted solely to protect the customer from receiving these inserts if the customer is unwilling to receive it.

QUESTION: But if you should prevail here, then that problem suggested by our colloquy would be around the next corner, wouldn't it?

MR. BLOCK: Well, we have had no -- we have had no registering of opposition by our shareholders whatsoever.

QUESTION: But you have been forbidden to do this.

MR. BLOCK: I beg your pardon?

QUESTION: You haven't been doing this, have you?

MR. BLOCK: Well, before the ban was imposed we were at liberty to use bill inserts to communicate with whoever we wanted to, our customers, our shareholders.

QUESTION: Yes.

MR. BLOCK: And we never -- during all this time before the ban, for many years we could do this, before it was foreclosed in 1977. We never had any problems with our shareholders, not a single shareholder at an annual meeting ever objected to our public statements on this subject, on these energy subjects. And we just haven't had any shareholder opposition whatsoever.

QUESTION: Does the Commission restraint here apply to inserts with the dividend checks, if Consolidated Edison pays dividends?

MR. BLOCK: No, Your Honor, it does not. It only applies to inserts sent out to customers.

QUESTION: They are just as much a captive audience, are they not, as --

MR. BLOCK: The shareholders?

QUESTION: Yes.

MR. BLOCK: Well, we don't -- we don't regard them as being --

QUESTION: Well --

MR. BLOCK: -- a captive audience, because --

QUESTION: Well, you don't regard either of them as being captive?

MR. BLOCK: We don't regard either of them as being captive but --

QUESTION: The customers are a captive audience in the --

MR. BLOCK: Well, I would say --

QUESTION: -- the same sense the stockholders are?

MR. BLOCK: I would say Your Honor that --

QUESTION: Where would he get his gas if he doesn't get it from Consolidated Edison -- I mean his electricity? Can he get it from any place else?

MR. BLOCK: No, Your Honor, he does not get electricity --

QUESTION: Well, then, couldn't he be by some stretch of the imagination a captive?

MR. BLOCK: Well, I --

QUESTION: I suppose he is free to move out, move some place else.

MR. BLOCK: Well, I would say that a customer applies to us for service and he is entitled to service.

QUESTION: I don't think you need the captive, do you?

MR. BLOCK: Pardon me?

QUESTION: You don't need to argue the captive point.

do you? Because it is the captive that pays for the mailing then, too, doesn't he?

MR. BLOCK: Well, the customer pays for the mail, that is right.

QUESTION: That is right.

QUESTION: A stockholder can always sell his stock but unless if somebody wants to freeze to death -- he can't do it without electricity.

MR. BLOCK: Now, I would say, Your Honor, that if the Commission had issued an order that was tailored to meet the problem of unwilling customers getting these communications, that would be one thing. But they issued a ban that applied to the -- we have 3 million customers and the majority of those are probably very desirous of getting these messages. The Commission whose burden it was to justify this regulation by showing a compelling and subordinating interest, a governmental interest that was important, the Commission made no showing whatsoever as to how many unwilling recipients there were likely to be. It just assumed --

QUESTION: Mr. Block, when you say a governmental interest, it is the Commission that is the government, not Con Ed.

MR. BLOCK: That is correct, the Commission is the government -- is the State agency, I think, under authority of State law. And when it issues a prohibition on speech it must

justify that prohibition by some -- by some State interest that is seeking to protect and that it has a right to protect. That is the way I read the cases of this Court and there doesn't seem to be any disharmony on that principle.

QUESTION: Well, when you say that you made a showing of a compelling governmental interest, you mean a fortiorari the Commission didn't --

MR. BLOCK: I mean -- I meant to say, Your Honor, that it was the Commission's burden, when it imposes a restriction on speech such as this one, it is their burden to justify that restriction by making a showing that will withstand scrutiny before a court, including this Court, withstand exacting scrutiny in the language of this Court decision. And as a result of that scrutiny the Court must be satisfied that there is a very important governmental interest that this restriction will serve.

QUESTION: Mr. Block, I understood you to say that the customer pays for these mailings.

MR. BLOCK: The question here --

QUESTION: What do you mean by that?

MR. BLOCK: I mean by that, Your Honor, that the Commission who fixes the rates that we are charged --

QUESTION: Yes.

MR. BLOCK: -- when it fixes the rates it allows us to recover through our rates the costs of mailing out these

bills.

QUESTION: The cost of mailing the bills undoubtedly is an expense. Is that expense augmented or increased by including these inserts?

MR. BLOCK: It is not, Your Honor. The insertion of an insert on a controversial matter of public policy in the same billing envelope would not increase the postage, would not increase any of the customers' costs, any costs that --

QUESTION: Do volunteers put them in there?

MR. BLOCK: No, any labor costs --

QUESTION: Who pays the labor costs?

QUESTION: Paid by the stockholders.

MR. BLOCK: -- will be paid by the stockholders. We have conceded that and we do not argue about that. We will pay any additional costs that might be involved. But the customer gets full value in services out of paying his rates and after all it is the Commission that fixes the rates and the Commission has control over that.

QUESTION: Let us suppose that -- and this is a straight supposition -- let us just suppose that you could also collect the cost from somebody, like the customer, for a separate mailing of the same material. Would you be here then?

MR. BLOCK: Well, I --

QUESTION: Or is there some special reason you want

to include the materials in the bill?

MR. BLOCK: Well, the Commission -- I will answer it this way, Your Honor: The Commission has said itself in issuing this prohibition that the bill insert is a unique method which enables utilities to communicate with the stockholders.

QUESTION: Well, in a sense it enables them without further expense to communicate with the stockholders.

MR. BLOCK: It is true that they -- they do open the billing envelope to get the bill. Whether they would open a separate mailing envelope is --

QUESTION: So what is the answer to my question? Is it just money that that is involved or --

MR. BLOCK: It is not only the cost we save by using bill inserts, it is a proven fact that the bill inserts do get into the hands of the customers and those who want to read them will read them; and those who don't want to bother with them can throw them away. But the bill insert coming in a billing envelope has more effective potential to reach the consumer than a separate mailing.

And of course the Commission does not permit us to make a separate mailing at rate-payers' expense.

QUESTION: I take it if you put in a bill a review of the Commission's last decision in your case and said, "This is a terrible decision and the Commissioners really don't

know what they are doing, I suppose you would be breaking this rule?

MR. BLOCK: Well, I think we would be running into the problem of --

QUESTION: What is a controversial --

MR. BLOCK: -- a controversial matter and we would be in the position --

QUESTION: I can think of some people who would controvert you.

MR. BLOCK: Well, we're --

QUESTION: If you put something in an envelope like that.

MR. BLOCK: There are --

QUESTION: At least the Commission wouldn't agree with you.

MR. BLOCK: I think this rule -- this order puts us in a position where we are not free to criticize the Commission that governs us, which is not an acceptable state of affairs under the First Amendment.

Now, I --

QUESTION: Suppose that you put a staffer in the bills just informing the consumers of the fact that Con Ed had opened a nuclear power plant; nothing more, just pure informational material.

In your view would that be banned by the Commission's

order?

MR. BLOCK: I do not believe that was considered to be a controversial matter of public policy.

QUESTION: And on the other hand suppose it were directed to the opening of a new coal-powered plant; same thing, same answer?

MR. BLOCK: Well, I would -- I am really at a loss to interpret this matter of controversial public policy. It is so vague, I don't know standards the Commission has applied to or will apply to determine it. It seems to me a totally subjective matter that the Commission has reserved to itself. They say for example that energy conservation is something we can tell our customers about by means of bill inserts. But there are a lot of aspects of energy conservation that are controversial, for example keeping the thermostats at 65 degrees and 78 degrees has provoked a lot of controversy on the part of building owners, restaurant owners, theater owners, but I really can't speak in all candor as to what the Commission means by its prohibition.

I would say if we were just opening up a new plant it would seem to me that we ought to be able to tell our customers that without running into a problem with this order. But I --

QUESTION: Could you enclose a small pamphlet reproducing an essay or an article by some scientist on the

advantages of developing oil shale as a source?

MR. BLOCK: Well, the order reads that we are forbidden from expressing our position on controversial matters. It doesn't say that we are not able to publish somebody else's opinion.

But that would be a question of whether when we publish somebody else's opinion we are in fact taking it as our own and making it our own and violating the order.

So --

QUESTION: A good many environmental organizations are opposing the development of oil shale. Now, does that make it controversial?

MR. BLOCK: Well, I think it probably does. Again, I am at a loss to know what the Commission would say but I would say that if it is a matter of public debate then it probably is a controversial subject, even though it is at the core of the First Amendment and the First Amendment has been held by this Court repeatedly to promote debate and to have a robust, uninhibited debate on matters that are controversial.

Now, what the Commission said here -- what the Court of Appeals said here is that we should -- we are limited by the Commission's order to publishing the innocuous and non-controversial. And the court thought that was all right. But I think that is a sad state of affairs when we have to

operate under a restriction that limits us to publishing something that is innocuous.

I wanted to answer one question about the shareholders. Since what we have to talk about with our customers in these bill inserts is related to the company's business I feel that these communications are in the stockholders' interest. We are acting for our stockholders when we are communicating with our customers on issues that are corporate in nature, that are intimately related to our business and are not like the situation in Bellotti where there was a State income tax and the question was, well, is this something that is a part of the bank's business so they should have full First Amendment protection.

We feel we are talking here about issues that are related to the company's business and are being communicated in behalf of our shareholders.

QUESTION: Do you think the State is claiming a right to -- generally to keep sellers from putting inserts in their bills? Let us suppose that the Banking Commission said that credit card companies shall not stuff their bills to their card holders with controversial matters. Does this decision rest on a ground broad enough to sustain that kind of a --

MR. BLOCK: I believe it is -- I believe those two situations are the same. I believe -- I believe the fact we

are regulated I think is not -- is not something that places us in the position where we have lesser First Amendment rights.

QUESTION: You don't think the Commission purported to rest on the ground that it could do this because you were regulated?

MR. BLOCK: I think the Commission did rest on that ground and I think they are wrong, because I don't think the fact that we are a regulated monopoly should cause this Court to say that we don't have First Amendment rights on issues related to the company's business where the Commission has not shown a single governmental interest that will be protected by this ban.

QUESTION: How about the State courts, they rested on that too, didn't they?

MR. BLOCK: The Court of Appeals did not expressly say that because we are a monopoly we can be subject -- subjected to this restriction. They thought we were invading the privacy of customers. But the ban does not prohibit us from direct mailing, so the privacy could still be invaded by -- with this ban in effect, the ban will not accomplish its purpose, it doesn't prohibit us from going door to door as this Court allowed recently in the --

QUESTION: Or advertising.

MR. BLOCK: Or advertising. But it did take away from us an effective means and we think that the court below

erred, and I will have to rely on our brief for the arguments we make to show that the various governmental interests which the State here is reaching out in attempting to rest on as a justification for this order are totally without merit.

QUESTION: 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:

This case was initiated before the Commission by a complaint of consumers of Consolidated Edison who were members of the Natural Resources Defense Council and other groups and some individually who complained of basically an infringement of their First Amendment rights when Consolidated Edison had published their views on the merits of nuclear power; and request was made that the persons who had opposing views be given an opportunity to present their views in a subsequent bill insert of Consolidated Edison.

QUESTION: Suppose they include in the mailing not the views of Consolidated Edison as such but the views of Admiral Rickover or some other scientist or some energy expert, would that be barred too?

MR. SCHIFF: Well, I think, Your Honor, that

if -- yes, I think the Commission has barred the use of the billing envelope from dissemination of controversial subject matter views. One of the reasons for this is that the Commission is very much concerned that the bill inserts be used for messages specifically related to the needs of the customers who are paying for these bill inserts and that there is limited space involved. So that as I will discuss a little bit more later, one of the alternatives that the Commission had before it, which Mr. Block has not addressed himself to at all, is the possibility of opening up the billing packet as a general forum for controversial views. That posed some additional problems, there were still some captive audience questions there, it would use up the billing space even more so and would detract from the possibility of the utility providing messages to the utility customers on matters such as what are your new rates going to be, what are your rights as a consumer in case there is a cutoff of service. We require the utilities at least once a year to tell the customers about their rights as consumers and that is supposed to be done in the billing insert.

The legislature has indicated that we should require them to tell customers about new rate proposals.

We signed a State law the utilities have an obligation to tell the consumers about the possibility of conserving energy in the process of using utility service,

both gas and electricity.

There is a need for safety information as to how to not use your equipment to prevent gas explosions and the like.

This is a kind of information that the Commission believes the bill inserts should be restricted for, should be -- or should be used for. Perhaps it is not even restricted but that is what we believe is the proper use for this. They can of course include general informational information relevant to utility service.

QUESTION: And that kind of information that you just described, your Commission has power to compel the petitioner to send in its billing envelopes, does it?

MR. SCHIFF: Yes, Your Honor; it does so, and has done so.

QUESTION: Does your Commission have power generally to limit the advertising expenditures of the petitioner?

MR. SCHIFF: Well, the Commission certainly classifies advertising expenses as those which can be collected from rate-payers so-called above-the-line expenses and those which may not be collected.

QUESTION: Is there a dollar figure on that above-the-line or below-the line, or does it depend upon the content of the advertising or the nature of the advertising?

MR. SCHIFF: Well, in the order reviewed upon here

the Commission adopted in 1977 it established a policy that it would allow utilities a certain percentage of their revenues as what they could include -- what they would be allowed in advertising for -- we want to get out of the business of trying to determine, looking backwards when we are setting rates for the future. But we include an allowance.

Now, the Commission has never --

QUESTION: A percentage of their receipts --

MR. SCHIFF: Right.

QUESTION: -- they can spend on advertising to your client at the cost of the rate-payers?

MR. SCHIFF: That is correct, Your Honor.

QUESTION: And if it exceeds that percentage, then it is a cost to the stockholders.

MR. SCHIFF: That is right.

QUESTION: Regardless of the nature or the content of the advertising --

MR. SCHIFF: A --

QUESTION: -- within --

MR. SCHIFF: Within limits. Well, the Commission has divided the advertising into several different categories, as the order shows. The percentage applies to institutional and informational advertising. There is a category which doesn't apply right now to the electric utilities that would be promotion and we might allow something separate if it appears

that promotion is desirable from a rate-payer's point of view. The political advertising has never been allowed to be collected from the rate-payers. And that division has been made in the uniform system of accounts both of our Commission and those of the Federal Commissions and most of the State Commissions and drawing the distinction between political and non-political. And political has included the matters of -- controversial matters of public policy. Obviously it is not entirely easy to always separate them but --

QUESTION: The political --

MR. SCHIFF: -- it is a classification --

QUESTION: -- is broader than partisan political.

MR. SCHIFF: Yes, yes, is broader than that. One of the matters that it is plainly related to, for example, is the question of whether there should be public take-overs or public power should be established. And, indeed, Consolidated Edison last fall spent something in the nature of a million dollars in opposing the referendum in Westchester County that might have led to public power in Westchester County.

QUESTION: Those expenditures were taxable to the stockholders, as I understand it.

MR. SCHIFF: Absolutely.

QUESTION: If I understand what you are saying.

MR. SCHIFF: Yes. Right. They are not rate-payer

expenses.

QUESTION: Right.

MR. SCHIFF: I mention those because it does demonstrate that the ban which we have made on bill inserts is a fairly limited ban. It does not attempt to prevent utilities from expressing their views. This is not the Bellotti case.

QUESTION: It is kind of broad, isn't it?

MR. SCHIFF: Yes --

QUESTION: For example, you would normally say that to urge people to have 65 degrees in the winter and 78 in the summer was within any Consolidated Edison business; is that right? But you wouldn't say it was controversial, would you?

MR. SCHIFF: Well, I think that may --

QUESTION: Or if you can't get a better word than "controversial," what is it?

MR. SCHIFF: Well, it is difficult to get a better word but if it is a matter of law that these are the limitations on what people should be limiting their thermostats to it may not be controversial once Congress has adopted but I wouldn't want to go that far.

I don't think as a matter of fact that is what -- in terms of urging them to encourage conservation, I think we would tell them that -- should tell the consumers the benefits

or how you can conserve and not be basically that much less uncomfortable. There are lots of ways. You can install installation and in New York as well under the Federal law the utilities are providing lending money so that their customers can conserve through installation of insulation, through furnace improvements, storm windows and the like. That is the kind of conservation of --

QUESTION: A large number of Con Edison's customers live in apartments --

MR. SCHIEFF: Well, yes, some of it would --

QUESTION: -- with broken windows.

MR. SCHIFF: -- apply to apartments.

QUESTION: With broken windows.

MR. SCHIFF: No, I assume it probably would not.

The standard that we have here is, as we said in our brief, not materially different from that which has been used in terms of uniform system of accounts for years.

It is also very similar to the standard that this Court approved in the Red Lion case, FCC matters. So that I would be a fool to tell you that this is a standard that can be defined very easily. But we -- also I think the fact that we have told the utilities that they can come to us and get ready rulings is an important consideration when you recognize that we are dealing with a small number of utility -- monopoly utilities where bill inserts are not done on the

spur of the moment.

QUESTION: Let me ask you: Do you think this prohibition would ever cover a communication which if it were sent separately could be charged to the customer?

MR. SCHIFF: No. I am not -- if it was sent separately and could be charged to the customer, our restriction would not apply when it is being sent separately.

QUESTION: It doesn't quite follow, does it, that just because it can be charged to the customer it isn't controversial?

MR. SCHIFF: No, no, but we are --

QUESTION: I would suppose that some of the above-the-line advertising is about controversial sayings but it is still chargeable to the customer.

MR. SCHIFF: Well, under the uniform system of accounts the controversial advertising would be charged below the line. I mean that sort of -- one follows the other.

QUESTION: So your answer to me is that nothing -- no advertising or no communication about a controversial element is ever chargeable to the customer?

MR. SCHIFF: It has not been for years, Mr. Justice White. I mean it is not supposed to have been. Now, there may be some issues at times as to what is controversial and what is not. But if it is concluded that it is controversial, the utility --

QUESTION: It is just a matter of information about a controversial matter --

MR. SCHIFF: Well, you asked --

QUESTION: -- being covered by the prohibition. Suppose they just tell the customers, well, here is what is happening up in Albany about a matter that protects our company?

MR. SCHIFF: I think a lot of information --

QUESTION: And it is very, very controversial in Albany.

MR. SCHIFF: I think a lot of informational advertising -- if they are saying --

QUESTION: Advertising -- this is just information.

MR. SCHIFF: Information. If they tell their customers that we are challenging an order of the Public Service Commission in court, I would not think that that would be controversial. I mean this is information. The informational part of our order which appears at -- or if they say --

QUESTION: If they say we have -- we have just opened a new nuclear energy facility and it was sacked by a mob?

MR. SCHIFF: I think that would be informational advertising.

QUESTION: It is not --

MR. SCHIFF: Information, not advertising. That would not be controversial. We are stating the fact as to

what the status of the utility is and the Commission's order said so.

QUESTION: Well, you are really saying that "controversial" means that the company is transmitting its opinion.

MR. SCHIFF: That is right and we --

QUESTION: So if you gave both sides of an argument but included the company's opinion, it would be banned, it would be under this --

MR. SCHIFF: Yes, because this is a problem of the bill insert. I mean we regard this, the courts below did, as a matter of fact the United States District Court in the companion case all viewed this as being essentially --

QUESTION: So in effect what you are saying is you can't avoid the above- and the below-line accounting by sticking this stuff in a bill?

MR. SCHIFF: No, you can just avoid the --

QUESTION: Well, you are saying then --

MR. SCHIFF: You can disseminate your views by sending it separately or by having a newspaper advertisement.

QUESTION: But if you send it separately it is at your expense, not the customers'.

MR. SCHIFF: The company's expense, that is right.

QUESTION: What about a pamphlet that gives -- purports to give the pro's and con's of developing a nuclear

source of energy?

MR. SCHIFF: Well, this was an alternative proposal which, as I say, the petitioners who started this case and who are represented by Miss Glen over at the counsel table urged, the Commission concluded that on balance because of the limited space of these bill inserts if you start putting too much in there, then you are going to have additional postage, you are going to have additional work putting it in.

QUESTION: Let us stay with it.

No additional postage, the pamphlet folded over, pro's and con's --

MR. SCHIFF: Well, all right --

QUESTION: -- equal number of lines.

MR. SCHIFF: The Commission concluded that neither the utilities nor the Commission could really administer in view of the kind of role that we have, could practically administer this kind of a public forum.

We do think -- the Commission said that we had considered this and some of the Commissioners had thought that this might be a better way rather than preventing the utilities from using the bill insert was to open it up to both views in the manner that you have described. And we concluded that that was a less desirable provision because --

QUESTION: But, Mr. Schiff, that is not to say in answer to the Chief Justice's question that if

the utility should choose to do this it would be covered by this order. It wouldn't be, would it?

MR. SCHIFF: Yes, I think it would be. I think the Commission's order --

QUESTION: This order covers the utility's position on controversial matters of public policy.

MR. SCHIFF: Yes. If you look at the ordering clause itself --

QUESTION: The order does not prevent the utility from doing what the Commission decided not to require them to do.

MR. SCHIFF: Well, I suppose that is correct but --

QUESTION: Yes.

MR. SCHIFF: -- the Commission's order in fact was rested -- one of the basically 4 or 5 grounds, depending on how you want to divide them, was that the opening up of a public forum in this matter would --

QUESTION: Well, that was considered by the Commission as something that they considered as requiring the utility to do. They decided not to do that.

MR. SCHIFF: They decided not to do that --

QUESTION: That doesn't mean that the utility is not free to do it so far as this order goes, does it?

MR. SCHIFF: Well, if you read it very narrowly --

QUESTION: Read it any way you want to.

MR. SCHIFF: Well, the Commission's opinion, which I think has to be read into the Commission's order, made it quite clear that that alternative had been rejected --

QUESTION: As a requirement.

MR. SCHIFF: -- as really being permissive, because it would -- it goes to the same problem. It still imposes on a captive audience. It uses up the space that is needed to provide the proper message.

QUESTION: You told me a while ago that this ban was restricted to matters that contained the company's opinion.

MR. SCHIFF: No, I said it related to matters --

QUESTION: That is what I thought you said.

MR. SCHIFF: -- matters of public controversy. And I believe --

QUESTION: Well, I asked you expressly and you indicated that it was limited to things giving the company's opinion; and now you say it isn't.

MR. SCHIFF: Well --

QUESTION: The order by its terms is confined to dissemination of the utility's position.

MR. SCHIFF: I agree. The order by its terms, and the --

QUESTION: If you wanted to prevent a utility from doing what was suggested in the Chief Justice's question, you

have to issue a new order or amend this order.

MR. SCHIFF: Well, as I say, if you read the context of the Commission's order very narrowly, I would agree that that is correct.

I guess I am saying that the Court should in making the decision reach the question of whether this would be a forum, because that was one of the reasons that the Commission used for objecting -- for making its decision. But I cannot disagree that if you didn't reach that that we probably would have to issue a new order. But I think it is very much part of this case.

QUESTION: Well, now, you have said though in response to Mr. Justice Stewart's question that the Commission has given an opinion which would be quite different from his reading of the order by its own terms.

MR. SCHIFF: Well, I think that Mr. Justice Stewart and I are really not in disagreement. I think that we agree that we certainly considered it as an integral part of the reasoning for reaching our decision. But that the ordering clause as such did not impose that requirement.

QUESTION: Well, what if after listening to this argument the utility would like to send out a two-sided pamphlet, just giving the Chief Justice's example, both sides of a question. And it said, "I hear that we can get an early ruling on whether this is covered by your ban."

What would be the answer of the Commission? I take it you would say the Commission would say, "You may not send it out."

MR. SCHIFF: I would say that that would be -- it might be a new order but I would assume that that is what the Commission would say, it is consistent with --

QUESTION: But here, your content here we should take the order that we are ruling on as not banning the public forum?

MR. SCHIFF: I would agree that in terms it doesn't ban the public forum. I would say --

QUESTION: We should judge this case on the basis that the Commission has not banned the public forum, then?

MR. SCHIFF: Well, the Commission concluded that there should be a time space manner restriction here because of a number of reasons, one of which was a limited space in general. One of them, which the Court of Appeals discussed, primarily is that the problems of imposing on a captive audience of views that the customers may not agree with. Another reason is that essentially on the company's views is that the customers would be required essentially to pay for the views of somebody else and this matter, the fact this is a utility which is a monopoly is crucial just as in the next case on promotion. Monopolies are very different from other credit -- other companies that may send out billing inserts.

You don't have any choice, you get your heat cut off if you don't look at the bill.

QUESTION: Well, what is your answer to my question? Do we judge this case on the basis that the order does not ban the public forum mailing or not?

MR. SCHIFF: I think that you probably have to view it that the order per se does not but that the public forum issue is one of the reasons that the Commission reached that conclusion, because the Commission expressly concluded --

QUESTION: But the public forum issue is not here then, I take it?

MR. SCHIFF: No, -- well, I disagree but Your Honors will have to decide how you do it. It is here in the sense that one of the reasons -- one of the important reasons that the Commission used for not permitting this is that the alternative of having a public forum was even less desirable. It is still -- what we have done here, the Commission has basically imposed the least First Amendment restriction, because this case is a matter of balancing competing First Amendment interest of the company on the one hand and the consumers on the other hand. And --

QUESTION: What is the consumers' First Amendment --

MR. SCHIFF: Well, it --

QUESTION: -- the right not to have this privacy invaded, as you put it earlier?

MR. SCHIFF: That is right, Your Honor.

QUESTION: Then what if the companies put a little card in with return postage and say, "If you do not want inserts with your bill all you have to do is return this card and we won't put any inserts in your bill"?

MR. SCHIFF: Well, the problem with that suggestion, which has been made by Long Island Lighting Company, is that there are matters that should be in these bill inserts that the customers -- the State has concluded they should be receiving and that are important to them, like what happens if you have the complaint about utility service. What are your general rights in dealing with utilities. This is not like some other --

QUESTION: Let us change the return card. Let it specify just in terms of the Commission order any controversial

MR. SCHIFF: Well, there is no practical way of having different inserts sent to some customers than other customers.

One suggestion has been made, perhaps jokingly, that let the customer send it back and then if he got any more he wouldn't have to pay his bill. But even that would be undesirable.

QUESTION: You are familiar with the talk about over-breadth in some First Amendment cases, I take it?

MR. SCHIFF: Yes, yes.

QUESTION: What if we thought that this order covered public forum mailings and that that restriction was invalid. Would the entire order be invalid then, as it being over-broad? Or do you think over-breadth applies in this context at all?

MR. SCHIFF: Well, I don't think --

QUESTION: Suppose we said in our minds the public forum mailing is bad, the mailing of the company's opinion about a controversial matter could be banned without violating the First Amendment. Would --

MR. SCHIFF: But on the other hand --

QUESTION: My question is would that order be bad in its entirety?

MR. SCHIFF: No, I don't think so. I don't think it should be banned. I take it you could say open it up as a public forum and that technically it isn't reached here. But I don't think that over-breadth strictly should apply here.

I think one thing I would like to say in my limited time -- remaining time is that as we say in our brief and the courts below have held, that this case is in our view not strictly speaking content related. It is subject matter content neutral, very much like the case of *Lehman v. Shaker Heights*, the one involving the placards on the buses. So I think it is --

QUESTION: Well, how can that possibly be true when

this is not a general ban against stuffing, it is a ban against stuffing only materials that have a certain content?

MR. SCHIFF: Well, but it is even-handed. Its subject --

QUESTION: Oh, yes, it is even-handed in the sense that it makes a category and applies the same rule to everything within the category.

MR. SCHIFF: Well, that is what this Court also affirmed in the -- recognized in the Shaker Heights case. At the same time in that case the dissenters took the view that the forum really couldn't have been open at all, I think. And here we -- at least we don't, we are not opening up a forum, so that there are a considerable line of cases supporting that view.

QUESTION: You have drawn an analogy to the Federal Communication regulation and the fairness doctrine. And that I understand is critical to your argument.

Would you say that the First Amendment would not be violated if the FCC said there shall be no use of radio or television for discussion of controversial subjects?

MR. SCHIFF: No, I imagine that in terms of -- the answer would be clearly "no" I think it would be violated.

QUESTION: How do you --

MR. SCHIFF: Well, because public utilities don't have the communication function. In this case it is clear

that we --

QUESTION: They are asserting it in this case, they are asserting the right to censor.

MR. SCHIFF: Well, we are not -- yes, only in the bill insert, Your Honor. We are letting them speak freely in this case --

QUESTION: You are saying because you have the captive audience we are going to tell you what you can say.

MR. SCHIFF: Well, the captive audience and the free ride. I think basically what the record shows is that if the utilities are paying an allocated share of the postage that other means of communication would be cheaper. Their objective here is simply to get something cheaper. And even under State law there is no right to have a --

QUESTION: Your rationale for doing it is totally non-economic, as I understand it. You are not going to allow them to make a one-sided use of the captive audience.

MR. SCHIFF: Well, that is one of the bases. There are a series of grounds here.

QUESTION: That is the only one you have argued.

MR. SCHIFF: Well, I have tried to argue all of them. We have argued all of them in the brief and --

QUESTION: You have not explained why your least restrictive alternative isn't -- why shouldn't that have applied; if you had just said if you want to mail these things,

pay your share of the postage. You say you felt they wouldn't have done it then so that would have achieved that end.

MR. SCHIFF: Well, the reason for that is that you still have the problem -- that is an alternative but it still poses a --

QUESTION: But you --

MR. SCHIFF: -- captive audience problem. It is still a captive audience problem.

QUESTION: You still haven't answered the question about the cards, the return cards, except to say that it wasn't feasible. You surely have not persuaded me that it is not feasible.

MR. SCHIFF: Well, its --

QUESTION: It was found feasible in the Rowan case.

MR. SCHIFF: It is not feasible, Your Honor, in the sense that the bill inserts do have a role under State law -- I think a proper role under State law to have the utility in this provide information on the kind of information drec directly related to consumers. The consumers, if they say don't send us bill inserts, won't get any information. And And --

QUESTION: I specified that the card would say: I don't want any information from you about oil shale, nuclear energy or any other alternative sources of energy or any

controversial --

MR. SCHIFF: Well, I understand that is a proposal that the utilities who did make the first alternative that you suggest it made, did not make that proposal. And it is so expensive to administer that it would be of no avail, I think, Your Honor.

I see that my time is up.

I ask the Court to affirm the order of the Court of Appeals and in turn of the Commission.

Thank you.

QUESTION: Mr. Schiff, I am afraid we have not given you much of an opportunity to make your argument but you have filed your brief and we will consider that of course.

Having said that, I want to ask you one more question:

Would the Commission's ban prevent Con Ed from including a bill insert that recommended that all thermostats be set at 60 degrees? Your brief urges that conservation is a subject as to which information should be supplied consumers. Would the ban --

MR. SCHIFF: Well, it is unlikely.

QUESTION: Suppose it said 62 degrees or 64.

MR. SCHIFF: Well, I like the 60 because it is so "iffy" and I think in the circumstances -- I don't think -- if they did that I assume it would create a controversy.

QUESTION: It sure would.

MR. SCHIFF: It would create a controversy --

QUESTION: I agree.

MR. SCHIFF: -- at the inception so that perhaps I would like to ask the -- have them ask the Commission as to what they would do if they were ever so foolish as to make that recommendation.

QUESTION: Well but suppose to just change the example they said energy will be saved by turning off your lights at night but don't forget there is a lot of risk of burglarly and so forth and balancing between one or the other it is the utility's position that we favor leaving the lights on. That would be controversial I suppose.

MR. SCHIFF: Well, I don't think -- I think it probably is not. It may be informational. I really don't think that would -- my own view. And I would not regard it as controversial as such.

QUESTION: Some of your responses would indicate that the Commission may have not thought this problem through entirely.

MR. SCHIFF: Well, I think it did in the context I do believe that it is not possible to set down a standard that will deal with each and every topic. The Commission's order does talk about the informational matters that can be discussed and I can think, like you can, of matters in the gray area dealing with the utility. And I recognize that

when in First Amendment terms this poses a problem I do think that it poses much less of a problem when dealing with the monopoly -- wanting to perhaps put things in bill inserts where there is a lot of thought given to it before you put something in there. I don't think this really goes to the core of the speech restriction and that there is -- there are important problems in how we can deal with regulated monopolies, entities that you have not previously considered in these speech cases.

QUESTION: Did the Commission consider the possibility of making the utilities file each time they wanted to put something in the bill?

MR. SCHIFF: Well, not in the record. My recollection is that we did not think that they should come in each time; no.

QUESTION: Not with respect to things you have ordered in the mail but in other --

MR. SCHIFF: Well, I think the content of your question I mean I don't think we would say: Well, tell us anything.

But I mean of course asking for advice is not necessarily dissimilar to that.

Sometimes on the kind of information they do give consumers we ask to look at that information beforehand, like the consumer rights. We want to make sure that it does properly convey what their rights are and we have looked at that

kind of information. The Commission is very much involved in this billing packet which is very much the consumers.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Block, do you have anything further?

MR. BLOCK: Nothing further, Your Honor.

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

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