CONSUMER ACCESS TO UTILITY MAILINGS: FIRST AMENDMENT AND OTHER ISSUES

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INTRODUCTION

Intervenor participation in utility applications before state regulatory agencies has been a topic of increasing interest over the past few years.[1] As public concern over utility rates and new plant costs has grown, so has interest in promoting intervenor participation in utility cases. State public service commissions and legislatures have sought to encourage intervenor participation in a variety of ways.[2] Several states have created Consumer Utility Boards.[3] Intervenors in utility rate cases can now collect attorneys' fees under the Public Utilities Regulatory Policies Act of 1978 (PURPA).[4] States also have begun allowing attorney fees awards on non-PURPA issues.[5] Most recently, a few state regulatory agencies have decided to let select intervenor groups use the utilities' billing envelopes to solicit contributions from ratepayers.

Two state commissions have given intervenors access to utility billing envelopes: The California Public Utilities Commission (CPUC) and the New York Public Service Commssion (NYPSC). In California, the CPUC first ordered San Diego Gas and Electric Company (SDGandE) to permit a new group, "Utility Consumers Action Network" (UCAN) to send UCAN's solicitations in SDGandE's billing envelope four times a year for two years.[6] UCAN has already begun mailing material in SDGandE's billing envelope. After the UCAN decision became final, another residential consumer organization, "Toward Utility Rate Normalization" (TURN), petitioned the CPUC for access to Pacific Gas and Electric Company's

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[1]See Comment, *Access To Public Utility Communications: Limits Under The Fifth and First Amendments*, 21 San Diego L. Rev. 391 (1984); Harrison, *Public Utilities In The Marketplace For A Competitive Imbalance*, 43 Wis. L. Rev. 43 (1982); Comment, *Billing Inserts: A Unique Forum For Free Speech* - Consolidated Edison Company v. Public Service Commission, 30 De Paul L. Rev. 705 (1981).

[2]Pub. Util. Code § 1801 (amended by Statutes 1984, Chapter 297); Wis. Stat. Ann. §§ 199.01-18 (west Supp. 1983); See also N.Y. Times, June 6, 1982, § IV, at 8, Col. 3; Center for Pub. Interest Law v. San Diego Gas & Electric Co., Dec. No. 83-04-020, ___ Cal. P.U.C. 2d ___ (1983).

[3]Wisconsin has enacted consumer utility board (CUB) legislation. Wis. Stat. Ann. § 199.10 (West Supp. 1983). Also Illinois has enacted such a statute. Several other states have considered similar legislation, but have not enacted it.

[4]16 U.S.C. § 2632(a)(2) (1978).

[5]The California Public Utilities Commission greatly expanded the basis for awarding attorneys' fees and expert witness fees. In the Matter of the Application of Environmental Defense Fund, Dec. No. 83-04-017, ___ Cal. P.U.C. 2d ___ (1983); See also Re Pacific Gas and Electric Co., 53 P.U.R. 4th 667 (1983). The CPUC's authority to issue such regulations is presently being considered by the California Supreme Court. S.F. No. 24734. Legislation which would expand the CPUC's authority in this area also is pending.

[6]Center for Public Interest Law v. San Diego Gas & Elec. Co., Dec. No. 83-04-020, ___ Cal. P.U.C. 2d ___ (1983), [1981-83 Transfer Binder] Util. L. Rep. ___ State (CCH) ¶ 23,983.

(PGandE) billing envelope.[7] The CPUC issued Decision No. 83-12-047 (as modified by Decision No. 84-05-039) in the TURN-PGandE case ordering PGandE to send TURN's material in the billing envelope four times a year for two years.

If the CPUC's decision is not overruled,PGandE's own newsletter, which has been sent to ratepayers in the billing envelope for the last sixty years, will be displaced from the envelope to make room for TURN's materials. PGandE has appealed the decision to the California Supreme Court.[8] A third consumer organization, "California Public Interest Research Group" (CalPIRG), and TURN have requested access to Pacific Bell's (Pac Bell) envelope.[9] That case is still pending decision before the CPUC. Meanwhile, on the east coast, the New York Public Service Commission has announced its intention to require utilities under its jurisdiction to give consumer groups access to billing envelopes.[10]

State action forcing a utility to grant consumer organizations access to the billing envelope raises constitutional issues. Although encouraging intervenor participation in utility proceedings may be a worthy goal,[11] the states' actions in pursuit of that goal must be consistent with the United States Contitution and applicable state constitutions and laws. Many state legislatures and utility regulatory commissions are considering ways to encourage intervenor participation in utility rate proceedings. This article focuses on the TURN-PGandE proceeding and the legal issues encountered when the CPUC ordered PGandE to disseminate TURN's material in the billing envelope.

I. Status of Consumer Access to Utility Mailings

At present, consumer group access to utility mailings is permitted in four states. Wisconsin was the first state where public access to utility billing envelopes was legislated. In 1979, Wisconsin established a Citizen Utility Board (CUB) to represent utility ratepayers. The CUB has access to the utility billing envelope four times per year to solicit funds for CUB activities.[12] In 1983, the Illinois Legislature enacted a CUB statute. The Wisconsin CUB represents residential and farm utility consumers, while the Illinois CUB is limited to residential consumers. Both statutes provide for statewide CUBs with democratically elected board of directors and access to the utilities billing envelope four times a year. Still in its embryonic stage, the Illinois CUB has an interim board and its first elected board is to be selected by December 1984. More experienced, the Wisconsin CUB has enlisted approximately

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[7]Toward Utility Rate Normalization v. Pacific Gas & Electric Co., Dec. No. 83-12-048, ___ Cal. P.U.C. 2d ___, (1983) (as modified by Dec. No. 84-05-039 (1984)).

[8]See Brief of Pacific Gas and Electric Co. v. Public Utilities Commission, SF No. 24734 (filed Aug. 3, 1984). [Ed. note: As this article went to press the California Supreme Court denied PGandE's petition for a writ of review, although two justices voted to hear the case. PGandE is appealing its case to the U.S. Supreme Court.]

[9]California Public Interest Research Group v. Pacific Telephone & Telegraph, Cal. P.U.C. Case No. 83-08-04 (filed August 1, 1983).

[10]*See* State of New York Public Service Commission, *State Writ Of Policy Governing The Access To Intervenor Organizations To The Extra Space In The Utilities Billing Envelopes,* Case No. 28655, mimeo, (May 14, 1984).

[11]*Id.*

[12]Wis. Stat. Ann. § 199.10 (West Supp. 1983).

90,000 members out of 4 million members, each of whom pays a $3.00 membership fee.

The Wisconsin law grants access to the envelopes of utilities with annual revenues in excess of $2.5 million for gas, electric and water, and $1.6 million for telephone companies. On the other hand, Illinois law grants access to the envelopes of all utilities except those municipally owned. Both Wisconsin and Illinois allow access four times a year.

Recently, the New York Public Service Commission (NYPSC) decided to allow access to the extra space in the billing envelope.[13] Extensive hearings were held before the NYPSC rendered its decision creating a statewide CUB with an elected board of directors.[14] Unlike in Wisconsin and Illinois, which prohibits people associated with utilities for serving on the board, the NYPSC refrained from excluding such people from board membership, but required financial disclosure statements from candidates, and conflict of interest guidelines.[15] The NYPSC limited its access order to utilities with annual revenues in excess of $100 million, and access to every third bill mailing of the bi-monthly biling process.[16]

After extensive hearings, the NYPSC stated:

> We have conducted a thorough review of the record and based on our analysis, have concluded that provided ratepayer access to the bill envelope to facilitate increased utility consumer representation is in the public interest. Further, we find that the Commission has the legal authority to require utilities to open their billing envelopes for this purpose. Thus, we will direct the appropriate utilities to open their billing envelopes to enable a qualifying organization to communicate with consumers and solicit membership and funds.[17]

In California, in the TURN-PGandE case, the parties are litigating the questions of whether forced access to PGandE's envelope for TURN's materials violates: (1) PGandE's right of free speech under the First Amendment; (2) PGandE's right of free association under the First Amendment; (3) the Fifth Amendment prohibition against the taking of property without just compensation; (4) the Equal Protection Clause of the Fourteenth Amendment; and (5) the inherent limits on regulatory power over determining property rights and the management of the utility. These issues are discussed herein.

II. Ownership of the Envelope Extra Space

Underlying the resolution of the constitutional issues is the question of who owns the billing envelope and the extra space therein. Until recently, no one disputed the fact that the billing envelope and the space in it belonged to the utility.[18] However, in PGandE's 1982 test year general rate case, the CPUC,

[13] *See supra* note 10.

[14] *Id.*

[15] *Id.* at 30.

[16] *Id.* at 37.

[17] *Id.* at 42.

[18] Justice Blackmun, in his dissent in Consolidated Edison Company v. Public Service Commission 447 U.S. 530, 556 (1980), first raised the issue suggesting that state laws might make the billing envelopes ratepayer property. No other member of the Court joined Justice Blackmun on this issue. Rather, the other Justices in *Consolidated Edison* assumed that the billing envelope belonged to the utility.

addressing the contention that PGandE had indulged in political advertising in violation of PURPA,[19] stated that because the ratepayers had paid the estimated cost of mailing the monthly bill, any "extra space" remaining in the envelope was to be considered ratepayer property.[20] The Commission later elaborated upon its novel theory in the UCAN decision[21] where it stated that its treatment of the envelope space as ratepayer property was premised on an "equity right" rather than traditional property rights.[22] The CPUC provided no further elaboration of the new right. It failed to explain how the extra space in the envelope differed from the envelope itself. The CPUC also failed to address the ramifications which might follow from giving the ratepayer an "equity right" in property used to provide utility service, simply because such property is included in rates paid by the customers.

The decision in the TURN-PGandE case[23] further addressed the CPUC's view of the ratepayer's interest in the extra space in the billing envelope. The CPUC specifically recognized that the envelope itself is PGandE's property, but it still treated the extra space in the envelope as an "artifact" generated with ratepayer funds. To prevent the utility from benefitting from the value of the space, the CPUC decided that the extra space, as a matter of equity, "is properly considered as ratepayer property."[24] Based on its past practice of requiring utilities to send legal notices, conservation notices, tax and lifeline notices in these envelopes,[25] the CPUC reasoned that it had jurisdiction over the use of the extra space.

The CPUC's characterization of the envelope space as ratepayer property is contrary to existing law. In *Board of Public Utility Commissioners v. New York Telephone Co.*,[26] the United States Supreme Court specifically found:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or to other operating expenses, or to the capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company.

This fundamental legal principle was completely ignored by the CPUC in the

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[19]16 U.S.C. § 2625(h).

[20]The "extra space" in the billing envelope exists because under postal regulations a bill must be sent by first class mail. This entitles the utility to send up to one ounce of material. The mailing envelope, the bill, and the return envelope weigh less than one ounce. Thus, there is "extra space" in the billing envelope.

[21]*Center for Public Interest Law, supra,* note 6.

[22]*Id.* mimeo at 14.

[23]Dec. No. 83-12-047 mimeo, - Cal. P.U.C. 2d ___, (1983).

[24]*Id.* at 5.

[25]See generally Dec. No. 93887, ___ Cal. P.U.C. 2d ___ (1982); Dec. No. 92653, 5 Cal. P.U.C. 2d 398 (1981); Dec. No. 89316, 84 Cal. P.U.C. 248 (1978).

[26]271 U.S. 23, 32 (1926).

TURN-PGandE case.[27] Revenues collected from customers do not represent payment for anything but electric or gas utility service. From this perspective, a utility is similar to any other supplier of goods or services. For instance, a nonutility business also must cover the cost of doing business, including billing costs, through revenues from sales. Yet, using revenues from the business to cover these charges does not give nonutility customers a property interest in anything used to conduct the business. No basis has been offered for treating a utility differently simply because the rates it charges for gas and electricity are regulated.

Indeed, the U.S. Supreme Court consistently has recognized that utility property remains the utility's private property. In 1930, the Court noted: "The property of a public utility, although devoted to the public service and impressed with a public interest is still private property."[28] In *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, the Court, reviewing a decision by the Missouri Public Service Commission, stated:

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership.[29]

If paying a bill for gas and electricity gives the ratepayer a property interest in the extra envelope space, that same logic would give the ratepayers property interests in other property or facilities used to provide utility service such as extra office space and extra computer space. PGandE's property, like that of other business entities, is not transferred to customers who pay for the service. For instance, manufacturers own property that is used to produce a product. Manufacturers also have customers that pay to buy their products. No one has ever suggested that by paying for the product, the customers acquire some form of ownership interest in the manufacturer's property used to produce the product. One of the dissenting commissioners in the PGandE-TURN decision properly asserted that the majority's decision was contrary to basic principles of property

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[27]Compare Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission, 427 A.2d 1244 (1981). There, the Pennsylvania state court cited *Board of Public Utility Commissioners v. New York Telephone Co.* for the principle that payments for utility service do not create a ratepayer interest in property. The Federal Energy Regulatory Commisson (FERC) has also cited *Public Utilities Commissioners v. New York Telephone Co.* for the same principle. In Duke Power Co. Opinion No. 641, 48 F.P.C. 1384 (1972), the commisison stated:

> The real question presented appears to be whether the customers, intervenors in this case, have any rights in property or revenues derived from property owned by the utility. The law is well settled on this issue and the argument presented by the intervenors is without substance. Where an analogous argument was made in Board of Public Utility Commissioenrs v. New York Telephone Company, 271 U.S. 23, 31 (1926), the Supreme Court held: "[t]he customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and financial, or trustee and beneficiary. . . ." *Property paid for out of monies received for service belongs to the company just as that purchased out of proceeds of its bonds and stocks.*

Id. at 394-95. (emphasis added).

[28]United Railways and Electric Company of Baltimore v. West, 280 U.S. 234, 249 (1930).

[29]262 U.S. 276, 289 (1923).

rights: "[T]here is absolutely no precedent for, or constitutional basis [for] a dilution and transfer of a person's property right."[30] The majority's opinion, on the other hand, ignored the precedents respecting a utility's rights in its property, and, if applied to other items for which costs are reflected in rates, would lead to the disintegration of virtually all the utility's private property rights.

Proponents of access to utility envelopes further contend that the ratepayer is entitled to the beneficial use or economic value of the envelope space. They argue that ratepayers receive the economic value from other utility property. Specifically, proponents claim ratepayers receive the benefit of revenues from cable television companies' use of pole space, office space rentals, gas transportation charges, and recreational fees. Accordingly, reason the proponents, the CPUC's action in Decision No. 83-12-047 simply captures the economic benefit of the extra envelope space in a comparable manner.

This argument, however, fails to consider the critical fact that the poles, office space, gas lines and recreation facilities remain the utility's property. Even though estimated rental fees and miscellaneous charges potentially generated by such facilities may be allocated to the ratepayers for purposes of ratemaking, the CPUC does *not* decide to whom the pole, office, or recreation facility shall be rented. That discretion is left to the utility. If the envelope space were to be treated on a comparable basis, then estimated revenues from envelope space rental could be allocated to the ratepayers, but the decision as to whether the space should be rented, and to whom, would remain the utility's.

The shifts in the CPUC's position on the ownership issue from the one taken in PGandE's 1982 general rate case decision[31] to that taken in the UCAN decision[32] and then to the PGandE-TURN decision suggest that the CPUC is wary of this issue.[33] As mentioned previously, the CPUC specifically stated that it does "not adopt the idea that the envelope itself is ratepayer property."[34] Instead, the CPUC tried to distinguish the envelope from the space therein in order to give the ratepayers a property interest in the latter, but not the former. The CPUC's decision, however, provided no basis for making this distinction or for transferring ownership from the utility to the ratepayer. The envelope and the so-called "extra space" logically are indivisible. Without the envelope there is no space. The CPUC created a legal fiction by distinguishing between the envelope and the space within

[30]Dec. No. 84-05-039, mimeo at 1 (Bagley, dissenting), ___ Cal. P.U.C. 2d ___ (1984).

[31]See Dec. No. 93887, ___ Cal. P.U.C. 2d ___ (1982).

[32]See Center For Public Interest Law, *supra,* note 6.

[33]See *TURN, supra,* note 8.

[34]*Id.* at 4.

it. In doing so, it deprived the utility of the economic value of its property.[35]

III. First Amendment Issues

It is undisputed that utilities are entitled to First Amendment protection and may not be deprived of that protection merely because they are regulated monopolies.[36]

The CPUC order opening up PGandE's billing envelope to third parties violates a utility's First Amendment rights in at least three different ways. First, the CPUC's decision compels the utility to publish the message of a third party against its will. Such compulsion violates the utility's protected right to remain silent. Second, the CPUC's decision forces the utility to associate with others' messages. This forced association with the messages of others reduces the impact of the utility's own messages and adds the weight of the utility's name to parties with whom the utility may disagree. Third, the decision interferes with the utility's First Amendment right to use its own billing envelope to carry its communications to its customers.

A. The Utility's Right To Refrain From Publishing Another's Message

The Supreme Court's holdings in *Miami Herald Publishing Co. v. Tornillo*[37] and *Wooley v. Maynard*[38] have a direct bearing on the CPUC's requirement that PGandE

[35]Recent law review commentaries have addressed the fallacy of the CPUC's logic. One commentator has noted:

> The Commission's decision achieves desirable results, but uses questionable reasoning. The fact that ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing mechanism merely because they pay for the mechanism. Property rights are acquired through the creation, purchase or possession of a thing. Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. The Commssion's decision is more simply understood as based on the premise that the utility has no rights to extra envelope space.
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> The premise is in error. States may regulate public utilities, but they may not act as owners of public utility property. A public utility is a private property owner able to use and sell its property, subject to state regulation. Items purchased by the utility to provide service to the public are utility property. For example, if a utility has a franchise to install a power pole, then loses the franchise it nonetheless owns the pole and may not be denied its property without just compensation. Like a corporation's loss of charter, a utility's franchise loss has no effect on property rights. Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights, a regulated utility's billing envelopes still belong to the utility.
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> Language in a recent Supreme Court decision assumes that billing envelopes are utility property. The Court continually refers to utility billing envelopes as belonging to the utility instead of belonging to the ratepayers. Clearly, billing envelopes are utility property and a transfer of property rights is required to make them ratepayer property.

Comment, *Access To Public Utility Communications: Limits Under the Fifth and First Amendments*, 21 San Diego Law Review 391, 397-99 (1984) (citations omitted).

[36]See *Consolidated Edison Company, supra*, note 18, at 534.

[37]418 U.S. 241 (1974).

[38]430 U.S. 705 (1977).

disseminate TURN's message. In *Tornillo,* the Court rejected the idea that the state may compel a private person to publish the message of a third party. In that case, a Florida statute required newspapers to grant a right of reply to press criticism of a candidate for nomination or election. The Supreme Court found the statute unconstitutional and specifically rejected the argument that the government has an interest in enforcing a right of access in order to enhance a variety of viewpoints. Chief Justice Burger, writing for the Court, stated:

> The implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.[39]

The Court went on to hold:

> Compelling editors or publishers to publish that which "reason" tells them should not be published is what is at issue in this case. *The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specific matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.*[40]

Proponents of access to utility billing envelopes, such as CalPIRG, argue that *Tornillo* is distinguishable because *Tornillo* contains language that suggests the statute exacted a penalty on the basis of the newspaper's content. Therefore, proponents conclude the newspaper in *Tornillo* was forced to incur the costs of printing and composing the reply — costs that it would not otherwise incur.[41] Moreover, as argued by CalPIRG, "in contrast to *Tornillo,* no cost at all would be incurred by PGandE as a result of the Commission's order."[42] This distinction is without merit. The *Tornillo* Court specifically recognized that "[e]ven if . . . no additional costs [are required] to comply with a compulsory access law"[43] such a "statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."[44] The Court left no doubt that it is the interference with First Amendment rights, not the cost, that is critical when access is forced.

Three years after *Tornillo,* the Court decided *Wooley v. Maynard.*[45] In *Wooley,* the appellant was forced by the State of New Hampshire to display the State's message, "Live Free or Die," on his car's license plate. The appellant objected to carrying the message of a third party. The Court held for the appellant stating:

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[39]*Miami Herald Publishing Co., supra,* note 37, at 241.

[40]*Id.* at 256 (emphasis added) (citations omitted).

[41]See Brief For Intervenor California Public Interest Researcher Group et. al., Cal. Supreme Ct. S.F. No. 24735 (filed July 9, 1984).

[42]*Id.* at 39.

[43]418 U.S. at 258.

[44]*Id.*

[45]430 U.S. 705 (1977).

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complimentary components of the broader concept of "individual freedom of mind."*[46]

Rather than dealing with the First Amendment problems created by its order, the CPUC simply ignored the Court's holdings in these two cases by saying it was not requiring PGandE to publish anything, but was only requiring PGandE to make room in the billing envelope for TURN. Carrying someone else's message, however, does amount to publishing that message.[47] The prohibition against forcing one to publish a message against his or her will is not limited to the publishing activities of newspapers. Unlike *Tornillo*, *Wooley* did not involve a newspaper-type publication. The appellant in *Wooley*, like other motorists licensed in New Hampshire, was forced to display the state's slogan on his automobile license plate. The crux of the case as identified by the Supreme Court was that the state's interest, no matter how acceptable to some, "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[48]

Proponents of access to utility envelopes dismiss the applicability of *Wooley*. They assert that in *Wooley* the state sought to promote a specific message, but that in the TURN-PGandE case, the CPUC does not seek to promote a particular ideology. *Wooley*, however, stands for the general proportion that the right not to speak is an integral part of the freedoms protected by the First Amendment.[49] Based on that principle, *Wooley* teaches that the state may not require one person to carry another's message. *Wooley* does not limit that prohibition to situations where the state is promoting a specific message of its own. By ordering TURN's messages to be carried in the billing envelope, the CPUC has chosen to promote TURN's ideas and messages. And by favoring TURN, the CPUC has decided to promote TURN's ideology. Thus, as the state of New Hampshire in *Wooley*, the CPUC is promoting a particular ideology or message.

B. The Utility's Right To Refrain From Associating With Third Parties

The right to disassociate from the message of others is protected by the First Amendment.[50] Associational freedom is essential "whether the beliefs sought to be advanced by association pertain to political, economics, religious or cultural

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[46]*Id.* at 714.

[47]The CPUC's view of what constitutes "publishing" is inconsistent with law. Black's Law Dictionary, Fourth Edition, defines "publish" as: "to make public; to circulate; to make known to people in general." And, in Western States Newspapers, Inc. v. Gehringer, 203 Cal.App.2d 793, 797-98 (1962), publish was held to mean to disclose, reveal, proclaim, circulate or make public. Moreover, under the CPUC's concept of "publication" one could argue that New Hampshire merely required Wooley to provide space on his car for the state's message. Similarly, the CPUC's definition of publishing would allow the state to say that the Miami Herald was merely required to provide room on its page for political candidates' rebuttal.

[48]430 U.S. at 717.

[49]*Id.* at 715.

[50]*See* Abood v. District Board of Education, 431 U.S. 209 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

matters."[51] In *Abood v. District Board of Education*,[52] the Court allowed Michigan school teachers to disassociate themselves from views they opposed. The Court stated that the First Amendment "prohibit[s] the [school district] from requiring any of the [teachers] to contribute to the support of an ideological cause he may oppose."

Similarly, a utility should be entitled to constitutional protection of its right to freedom of association. By requiring a utility to send its bill and others' messages together, a public utilities commission forces the utility to associate with the third party's message. This compelled association gives the outsiders' message a status it may not achieve on its own. Sent by itself, another's solicitation probably could be easily identified as such from its envelope and quickly discarded or kept based on its own identity. The recipient of the utility's billing envelope, however, will open the envelope and peruse its contents precisely because the utility is sending the bill in it. Thus, the other person's message receives exposure and consideration it may not garner on its own. Furthermore, third party solicitations can detract from the utility's own communications.

A recent U.S. Supreme Court case from California is relevant to the First Amendment issues involving the utility's rights (1) to refrain from carrying another's message and (2) to refrain from associating with another's communications. In *Robins v. Pruneyard Shopping Center*,[53] the California Supreme Court held that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[54] *Robins* was affirmed by the United States Supreme Court in *Pruneyard Shopping Center v. Robins*,[55] which found that permitting third parties to distribute pamphlets and seek petition signatures did not violate the shopping center owner's right of free speech or right of association. Proponents of access to utility billing envelopes contend that *Robins* supports the proposition that the CPUC may require a utility to participate in disseminating another's message. This argument equates the characteristics of a one ounce billing envelope with a shopping center where the public has been invited to utilize the facilities. It ignores the limited space of a utility billing envelope and concludes that *Pruneyard* is controlling.

Pruneyard, however, is significant not for the principle argued by proponents, but because the U.S. Supreme Court upheld a state court's decision that relied on the state constitution to require a private shopping mall to allow members of the public to communicate their non-commercial messages in the mall. Under federal law, members of the public may not force mall owners to allow the public to exercise free speech rights in private shopping centers.[56] But the Court in *Pruneyard* relied on the nature and activities at the shopping mall to affirm the California Supreme Court's decision holding that the Pruneyard mall owner had to permit the exercise of free speech rights in the mall. In this regard, the Court was careful to note that a large shopping center, unlike other private property, is

[51]NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[52]431 U.S. 209, 235 (1977).

[53]23 Cal.2d 899 (1979).

[54]*Id.* at 910.

[55]447 U.S. 74 (1980).

[56]Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

an appropriate place for people to communicate their messages because of its size, the nature of the activities carried on there, and its invitation to people to congregate there. Quoting from the California Supreme Court, the U.S. Supreme Court observed:

> It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. *As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]*. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations would not markedly dilute defendant's property rights.[57]

In addition, the Court emphasized in *Pruneyard* that:

> Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. *It is instead a business establishment that is open to the public to come and go as they please.* The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.[58]

As noted by Justice Powell, concurring in *Pruneyard*, "this case involves only a state-created right of limited access to a specialized type of property" which "occupies several city blocks" and "contains 65 shops, 10 restaurants, and a theater," and which has "common walkways and plazas designed to attract the public."[59] Thus the Pruneyard shopping center was like a public mall where the public comes and goes, and individuals are free to speak and congregate. The fact that the shopping center had these characteristics was cited as an important factor in the U.S. Supreme Court's decision that the owners' First Amendment rights were not violated by the pamphleteers.[60]

In contrast, a utility's billing envelope is a private means of communication unavailable to third parties. The primary purpose of the billing envelope is to deliver to the customer a bill for services. It is not similar to a shopping center. It weighs less than one ounce and has never been opened to the public, in contrast to Pruneyard which contains acres of land where the public is specifically invited to utilize. A shopping center is quite different from a mailing envelope because it has space for many separate messages whereas access to a one-ounce envelope is quite

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[57] *Id.* at 78 (emphasis added) (citation omitted).
[58] *Id.* at 87 (emphasis added).
[59] *Id.* at 98, 101 (Powell, J. concurring).
[60] *Id.*

limited.[61]

Finally, the CPUC and the proponents rely on *Red Lions Broadcasting Co. v. Federal Communications Commission*[62] and *California Broadcasting System v. Federal Communications Commission*[63] as precedents for granting third parties rights of access to another's private property for dissemination of the third parties' messages. In those two cases, the U.S. Supreme Court upheld federally imposed rights of access to the broadcasting medium. That medium, however, is a scarce, licensed, and limited communications resource. In contrast, billing envelopes are not a limited resource as specifically recognized by the U.S. Supreme Court in

[61]Once the billing envelope is opened to one outside party, other similarly situated persons would be entitled to similar access. For instance, California courts have held that, under the California Constitution, if one party is granted access, all other parties similarly situated also must be granted that same right of access. In Laguna Publishing Co. v. Golden Rain Foundation, 131 Cal.App.3d 816 (1982), the court, citing *Robins v. Pruneyard Shopping Center, supra,* answered the precise question whether third parties similarly situated must be treated equally if one party, such as TURN, is granted access to private property.

The specific issue in *Golden Rain* was whether the private residential community of Leisure World could allow one newspaper in and keep out all other similar papers. In holding such discrimination to be impermissible, the court stated:

> In other words, Golden Rain, *in the proper exercise of its private property rights, may certainly choose to exclude all* give-away, unsolicited newspapers from Leisure World, *but once it chooses to admit one . . . then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspaper secured under our state Constitution.*

Id. at 843 (emphasis added).

Differential treatment of different groups once one group is allowed onto private property was highlighted by the *Golden Rain* court which explained the problem as it relates to California law:

> In short, for purposes of avoiding discrimination against the state constitutional guarantees of free speech and free press, *the right of any and all to enter this private, gated community to exercise this state constitutional right must be exactly measured by the right accorded to one,* both as to the nature of the activity of that one as well as to the conditions of his admission.

Id. at 845 (emphasis added).

Under this analysis, once an organization like TURN is allowed in the envelope, the CPUC is obligated to provide equal access to all other groups similarly situated. This problem was recognized by one of the dissenting Commissioners in the PGandE-TURN case who warned the majority of the dilemma created by granting TURN access:

> As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. *Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope.*

Decision No. 84-05-039, mimeo at 2, ___ Cal. P.U.C. 2d ___ (1984) (Calvo dissenting) (emphasis added).

[62]395 U.S. 367 (1969).

[63]453 U.S. 367 (1981).

Consolidated Edison.[64] Therefore, *Red Lion* and *CBS* cannot provide justification for compelling access to the billing envelope.[65]

C. *The Utility's Right To Send Its Own Messages*

Besides unconstitutionally requiring PGandE to carry TURN's message, the CPUC also has interfered with PGandE's freedom to send its own messages in the billing envelope. In effect, the CPUC has issued an order regulating PGandE's speech. The CPUC decision interfered with PGandE's right to send information to its customers by requiring PGandE to carry TURN's messages four times a year. PGandE may use any space left after TURN's message is placed in the envelope, but that concession is illusory. Whether or not PGandE will be able to communicate with its customers during these four months will hinge upon TURN and its decision as to the length of its message, or the weight of paper it uses. One of the dissenting commissioners in the PGandE-TURN decision stated this point succinctly and correctly:

> And now under the revised order TURN can determine, *solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder*. . . . Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.[66]

As recognized by this dissent, Decision No. 83-12-047 requires PGandE to curtail its own communications in order to carry the message of a third party. This governmentally ordered restriction violates the First Amendment's guarantee of free speech.

D. *Character Of Utilty Speech: Commercial v. Noncommercial*

Under the First Amendment, the state can regulate speech only if certain

[64] In *Consolidated Edison*, the Court rejected the application of the fairness doctrine to utility billing envelopes:

> The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon the Red Lion Broadcasting Co. v. FCC, *supra*, in which the Court held that the regulation of radio and television broadcast frequencies permits the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum.

Consolidated Edison Co. v. Public Service Commission, 447 U.S. at 542-43.

[65] *But see* Harrison, *Public Utilities In The Marketplace of Ideas: A 'Fairness' Solution For A Competitive Imbalance*, 43 Wis. L. Rev. 43, 49-53 (1982); Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 Cal. L. Rev. 1221, 1231-35 (1982) (access to limited forums is the logical extension of free speech doctrine).

stringent tests are met. However, the protections afforded noncommercial and commercial speech are different. For commercial speech, the tests the state must meet are less stringent than for noncommercial speech. Where noncommercial speech is involved, state regulation is permissible if it is (1) a reasonable time, place or manner restriction; (2) a permissible subject matter regulation; or (3) a narrowly tailored means of serving a compelling state interest.[67] For commercial speech, constitutional protection is afforded only if the speech concerns lawful activity and is not misleading. Even then, a state may regulate commercial speech only if (1) a substantial governmental interest is shown, (2) the regulation directly advances that interest and (3) the regulation is not more extensive than necessary to serve the interest.[68]

Since the constraints on the state's power to regulate speech do vary with the type of speech involved, it is important to establish the noncommercial nature of the utility's speech, if possible.[69] In *Consolidated Edison,* the Supreme Court recognized that the speech in question was noncommercial speech. Similarly, the PGandE communications affected by the CPUC order include many noncommercial messages. The state's interference with a utility's First Amendment right to communicate with its customers must withstand the *Consolidated Edison* tests.[70]

1. Regulation Of Speech Based On Content Is Unconstitutional

Public service commissions run afoul of the First Amendment's protection of free speech when they decide, as the CPUC did, that allowing third parties to use envelope space would be a more efficient use of that extra space. To reach that conclusion, a commission must necessarily weigh the utilility's messages against the third party's and decide which is more valuable to send. Such a comparison of the merits of sending the utility's message versus an outsider's materials amounts to content based regulations of speech. With very few exceptions, such as obscenity, content based regulation is unconstitutional.[71] The types of messages included in utility billing envelopes are not of the very limited type warranting content based regulation.

2. Regulation Of Speech Can Be Sustained Only If A Compelling State Interest Is Demonstrated

First Amendment freedoms occupy a "preferred position" and cannot be infringed unless the government demonstrates a compelling interest.[72]

According to the CPUC, the state interest to be served by limiting PGandE's

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[66]Dec. No. 84-05-039, *supra,* note 30 at 3.

[67]*Consolidated Edison Co.,* 447 U.S. at 535.

[68]*See* Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

[69]*See generally* Harrison, *supra,* note 65 at 64-67.

[70]*Consolidated Edison Co.,* 447 U.S. at 530.

[71]*Id.*

[72]Louisiana ex rel. Gremillion v. NAACP 366 U.S. 293 (1961); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

speech was the assurance of "the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues."[73] This goal, however, is not compelling. It falls far short of the test required for government regulation of speech. In *Buckley v. Valeo,*[74] the government sought to promote a more balanced market place of ideas by limiting the amounts that could be spent on certain political campaigns, therefore curtailing the speech of those who had the means of communicating. The government's goal was analogous to the CPUC's pursuit of fuller consumer participation and understanding of commission proceedings by forcing access to the billing envelope. The Court, however, found that the government's stated goal in *Buckley* could not support governmentally imposed infringement of speech. The Court stated: "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[75]

In the TURN-PGandE case, the state's interest in improving the flow of ideas is being pursued by restricting PGandE's communication and even by appropriating some of PGandE's resources to enhance the voice of TURN.[76] Under *Buckley,* however, that goal is not sufficient to support infringement of a utility's First Amendment rights.

3. The State Must Meet The Heavy Burden Of Demonstrating In The Record That The Regulation Meets Constitutional Requirements

When First Amendment freedoms are at issue normal presumptions of constitutionality do not apply.[77] "[W]here a government restricts the speech of a private person, the state action may be sustained only if the regulation is a precisely drawn means of serving a compelling state interest."[78]

This heavy burden was not met in the PGandE-TURN case. Though the record is devoid of evidence demonstrating a compelling state interest for regulating the contents of the billing envelope, the CPUC, nevertheless, concluded that: "In the present matter a compelling state interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way."[79] But, the CPUC did not cite any evidence in the record to support its conclusion.

In *Citizens Against Rent Control v. Berkeley,*[80] the Court noted that the City of Berkeley's limitation on campaign contributions could not survive a constitutional

[73]Dec. No. 83-12-047, *supra,* at 29 (quoting Dec. No. 83-04-020, at 17) ___ Cal. P.U.C. 2d ___ (1983).

[74]424 U.S. 1 (1976).

[75]*Id.* at 48-49.

[76]Decision No. 83-12-047 requires PGandE to use its bill processing equipment, employee time and customer list to send TURN's messages in PGandE's billing envelope. The only compensation TURN must pay for this use of PGandE's resources is any incremental cost incurred. The Commission has appropriated PGandE resources to help TURN communicate its message.

[77]Thomas v. Collins, 323 U.S. 516 (1945); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State (Town of Irvington), 308 U.S. 147 (1939).

[78]*Consolidated Edison, supra,* note 18. See also First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); *Buckley,* 424 U.S. at 25; Bailey v. Loggins, 32 Cal.3d 907 (1982).

[79]Dec. No. 83-12-047, *supra,* note 23 at 29.

[80]454 U.S. 290 (1981) (Blackmun, J. and O'Connor, J., concurring).

challenge unless it withstood "exacting scrutiny."[81] To withstand that scrutiny, the city had to demonstrate on the record that its regulations met the requisite tests.[82] In the TURN-PGandE case, there was no such evidentiary support in the record.

4. State Action Regulating Speech Can Only Be Sustained If It Is Narrowly Drawn

Government regulation of speech, when permitted, must be narrowly tailored to serve the identified compelling governmental interest. In other words, if a less drastic means is available, or if other means are available which would not infringe First Amendment rights, more drastic means interfering with First Amendment rights may not be employed. In *Shelton v. Tucker*,[83] the Court emphasized that even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[84] Moreover, even in non-First Amendment cases, the Court adheres to the doctrine that when the government has available a variety of equally effective means of achieving a given end, it must choose the method which least interferes with individual liberties.[85]

As stated previously, it is extremely doubtful whether the governmental interest identified by the CPUC satisfies the requirement of a compelling state interest. However, even if a compelling state interest were involved, forced access to the utility billing envelope still would not pass constitutional muster because the state interest in promoting participation in commission proceedings could be served just as well or even better by a number of other means which do not violate the utility's First Amendment rights. For instance, awarding attorney or intervenor fees to successful intervenors provides a direct incentive and reward for participation in commission cases.[86] Another possible means of satisfying the stated state interest identified by the CPUC would be to fund mailings by intervenor groups. This would not abridge fundamental liberties. None of these

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[81]*Id.* at 302.

[82]Justices Blackmun and O'Connor correctly stated the standard of review that the Berkeley ordinance had to survive: "To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means closely drawn to avoid unnecessary abridgement of First Amendment freedoms." *Id.* at 302 (citation omitted).. As Justice Marshall, also concurring in the *Berkeley* case, pointed out, the evidence of the significant governmental interest must be in the record. *Id.* at 302.

[83]Shelton v. Tucker, 364 U.S. 479 (1960).

[84]*Id.* at 488.

[85]*E.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 507-08 (1964); Dean Milk Company v. City of Madison, 340 U.S. 349, 354 (1951); see also Comment, *Less Drastic Means and the First Amendment,* 78 Yale L. Rev. 464 (1968).

[86]PURPA provided a basis for the CPUC to adopt rules for awarding reasonable fees and costs to intervenors making contributions in specified areas in proceedings involving electric utilities. The CPUC has adopted rules to implement this legislation. (See Rule 76.01 et seq. of the commission's Rules of Practice and Procedure). The CPUC expanded the circumstances under which it would award attorney fees and costs in Decision No. 83-04-017, ___ Cal. P.U.C. 2d ___ (1983). The California Supreme Court has issued a writ of review to determine the lawfulness of this decision. (S.F. No. 24606). Oral argument was held on June 6, 1984.

alternatives was explored by the CPUC.[87]

One of the dissenting commissioners in the TURN-PGandE decision pointed out that the intervenor organization had numerous alternatives for communicating its views and that the majority's decision unnecessarily abridged PGandE's First Amendment rights:

> TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding.I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings.[88]

In other words, the intervenor group had ample other means of reaching its "natural audience." No compelling governmental interest is served by placing its messages in the utility's billing envelope.

5. *Time, Place, Manner Restrictions Do Not Provide A Basis For State Action Opening The Billing Envelope To Third Parties*

The CPUC in the TURN-PGandE case did not address any of these constitutional obstacles. Instead the CPUC concluded that granting third party access to the billing envelope was a permissible time, place and manner restriction. In reaching this conclusion, the CPUC quoted *Consolidated Edison Co. v. New York Public Service Commission,*[89] and relied on the Court's recognition of "'the validity of reasonable time, place, or manner regulations that serve a significnt governmental interest and leave ample alternative channels for communication.'"[90] From this language, the CPUC reasoned:

> Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be 'a reasonable time, place, or manner' restriction in that *it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers.*[91]

The CPUC, however, made a basic mistake in applying the time, place, or manner restriction to *create* a right of access. A time, place, or manner restriction does not create a third party right of access to exercise First Amendment rights. Rather, the doctrine applies only to regulating an already existing, independent right of access

[87]Moreover, these alternatives allow an unlimited number of groups, not just one or two, to be eligible to receive funds for participating in commission proceedings. By such suggested narrowly drawn methods, groups representing all the different consumer interests would have a fair opportunity for funding, and the utility's First Amendment Rights would not be unnecessarily abridged.

[88]Decision No. 84-05-039, *supra* note 30, mimeo at 2 (Calvo dissenting) (emphasis in original). Furthermore, there was no evidence in the TURN-PGandE record that the contributions received by TURN would increase its effectiveness. Instead the intervenor might simply re-direct its present funds into other matters. As a result, the utility ratepayer may not realize any additional representation.

[89]447 U.S. at 535.

[90]Dec. No. 83-12-047, *supra,* note 23.

[91]*Id.* at 28 (emphasis added).

to exercise those rights. For example, a person who already has a right to exercise First Amendment privileges on a privately owned sidewalk can be limited to exercising those privileges in such a manner so as not to obstruct or unreasonably interfere with the premises or at a time that will not materially affect the normal business conducted there.[92]

The CPUC misapplied this doctrine by using it to give a previously nonexistent right of access to TURN. Time, place and manner restrictions are precisely that — restrictions. They do not create new rights where none previously existed.

6. *Overall Regulatory Authority Does Not Support Granting Third Party Access To The Billing Envelope*

The CPUC also concluded that it could constitutionally regulate the billing envelope based on its "overall regulatory authority." Overall regulatory authority, however, grants no such broad power. The use of "overall regulatory authority" to stifle First Amendment rights was addressed by the Court in *Consolidated Edison:*

> The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*).[93]

The Court, however, expressly rejected the New York Commission's "overall regulatory authority" as a basis for restricting Consolidated Edison's speech:

> But the commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.[94]

Thus, the Supreme Court has rejected the concept that "overall regulatory authority" empowers state commissions to regulate utility speech.

IV. The Fifth Amendment Issue

Public service commission orders granting third parties access to a utility's billing envelope may violate the Fifth Amendment's prohibition against the taking of property without just compensation. In the TURN-PGandE case, the CPUC ordered PGandE to use its envelope, machinery, labor and customer list to disseminate TURN's message. PGandE has contended that these items cannot be appropriated by the state for TURN's benefit without just compensation. Moreover, the California PUC does not have the eminent domain power needed to

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[92]*In re* Lane, 71 Cal.2d 872 (1969).

[93]*Consolidated Edison Co.*, 447 U.S. at 540.

[94]*Id.*

take a utility's property.[95]

Current concepts of property under the Fifth Amendment adopt a "bundle of rights" analysis which includes, among other things, the right to possess, use, and dispose of property, and the right to exclude others from using property.[96] Court cases continuously have held that when government physically invades private property, a taking exists. When the state restricts a utility's use of its property and allows a third party to enter the envelope to disseminate a message, there is a physical taking. In 1982, the Supreme Court stated:

> To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of rights.[97]

A third party's forced occupation and use of billing envelope space for its messages permanently takes the space in that month's envelope. The utility has no power to exclude the third party and forever loses that envelope space. In this way, a state order sanctioning a physical invasion of the utility's property without just compensation is a violation of the Fifth Amendment.

Even if just compensation were given, however, a state commission may not have the power to take the utility's property. For instance, in California the CPUC has only those powers assigned to it by the California Constitution or delegated to it by the legislature. The CPUC has no authority beyond those limits.[98] Article XII, Section 5 of the California Constitution permits the legislature to delegate to the CPUC the power to determine just compensation where a utility's property is condemned. That specific limited grant of authority is the only power relative to condemnation which the California Constitution gives the CPUC. The CPUC is not authorized to wield the broader power to condemn and take utility property itself.

V. Equal Protection Issue

It can be argued that a state commission decision granting access to the envelope to one class of ratepayers creates significant equal protection problems.

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[95]*See infra* notes 104-13 & accompanying text. As part of its power to supervise and regulate public utilities in the state, the commission possesses certain quasi-judicial authority. However, nothing in the Constitution or statutes vests the commission with jurisdiction to decide ownership rights in property. To the limited extent the commission has authority to adjudicate controversies regarding property-related interests, such authority has been specifically delegated by the legislature. *See* California Public Utilities Code §§ 1401, *et seq.* The explicit grant to the commission of these specific powers to decide certain property questions indicates that the commission has not been delegated plenary power to adjudicate utility property rights in general. *Cf.* East Bay Municipal District v. Railroad Commission, 194 Cal. 603, 614-16 (1924).

[96]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

[97]*Id.* at 435. In *Loretto,* the Supreme Court stated: "To require, as well, that the owner permit another to exercise complete domain literally adds insult to injury." *Id.* at 436. In the instant case, TURN has been given the power to exercise complete dominion over the extra space four times a year.

[98]California Water and Telephone Co. v. Public Utilities Commission, 51 Cal.2d 478 (1959).

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides for equal protection under law. While the Equal Protection Clause of the Fourteenth Amendment does not require everyone to be treated exactly the same, there is a basic requirement of rationality in making classifications.[99] Moreover, when fundamental, constitutional rights such as free speech are involved, as in the instant case, the governmental classifications are strictly scrutinized and will be held unconstitutional absent a showing of a compelling governmental justification.[100]

In the PGandE-TURN case, the CPUC has created governmental classifications favoring residential ratepayers which involve the fundamental constitutional right of free speech. Consequently, a compelling governmental justification is required if the CPUC order is to survive. As discussed previously, however, the Supreme Court in *Buckley v. Valeo*,[101] found that the government had no legitimate interest in promoting one party's speech at the expense of another's. Under the disguise of promoting ratepayer understanding and encouraging rate case participation, the CPUC's decision does precisely what *Buckley v. Valeo*,[102] forbids: promoting TURN's speech at the expense of PGandE's. Consequently, the governmental classification favoring residential ratepayers is not supported by the requisite compelling state interest and is suspect.

Moreover, in PGandE's case, the utility is being relegated to an inferior position. Its ability to utilize its envelope is made secondary to all others who can convince the CPUC that their proposals are meritorious. The CPUC decision allows TURN and others to present their programs and have them evaluated to determine if they are, in the CPUC's opinion, a more efficient use of the extra space. The CPUC, however, refused to consider PGandE's testimony demonstrating the value of its messages. Thus, PGandE has been denied the right to make a showing while third parties are permitted to present their case. Such treatment discriminates against PGandE in preference for others without justification.[103] On this basis, the CPUC's decision denies PGandE equal protection.

VI. State Commission Powers to Affect Property Rights and to Interfere with Utility Management

In addition to the First Amendment, Fifth Amendment, and Fourteenth Amendment issues already discussed, a public service commission may exceed its power under state law when ordering a utility to include a third party's messages in the utility billing envelope. In California the CPUC derives its authority from the

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[99]*See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972).

[100]Shapiro v. Thompson, 394 U.S. 618 (1969) See also Reynolds v. Sims, 377 U.S. 533 (1964); Sherbert v. Verner, 374 U.S. 398 (1963).

[101]424 U.S. 1 (1976).

[102]*Id.*

[103]*See* Polic Department of Chicago v. Mosley, 408 U.S. 92 (1972). In *Mosley* the Court made clear that: "There is an equality of status in the field of ideas; and government must afford all points of view an equal opportunity to be heard. . . ." *Id.* at 96.

California Constitution[104] and from the powers delegated to it by the legislature pursuant to that Article. This grant of power is limited by the Constitution and the legislature. Acts by the CPUC beyond those limits are void.[105]

As part of its power to supervise and regulate public utilities in the state, the CPUC possesses certain quasi-judicial authority. However, nothing in the California Constitution or statutes vests the CPUC with jurisdiction to decide ownership rights in property. To the limited extent the CPUC has authority to adjudicate controversies regarding property-related interersts, such authority has been specifically delegated by the legislature. For instance, the Public Utilities Code[106] explicitly empowers the CPUC to award reparations in the event the utility violates its tariffs or CPUC orders or injures a complainant. Similarly, the legislature has specifically directed that the CPUC may determine just compensation when a political subdivision seeks to acquire a public utility's property under eminent domain proceedings.[107] The explicit grant to the CPUC of these specific powers to decide certain property questions suggests that the CPUC has not been delegated plenary power to adjudicate utility property rights in general.

Similarly, the enabling statutes for the CPUC do not empower the CPUC to dedicate PGandE's property to new uses. The Code limits the CPUC's role to supervising, regulating and doing other things necessary or convenient to that authority. It has been specifically held that "an order directing a utility to devote its property to some other use than the public use to which the utility has dedicated the property cannot be justified as an exercise of the public power."[108]

For instance, if a public utility's property has been dedicated to providing one type of service, the California Commission is not empowered to order the utility to dedicate the property to another, different service. In *Pacific Tel. & Tel. Co. v. Eshleman,*[109] the CPUC was not allowed to order a telephone company to devote its utility property to third parties' use when the utility's property had been dedicated to telephone service conducted by itself. By analogy PGandE's envelope is dedicated to mailing bills and to communicating PGandE's messages to its customers and *not* to communicating third party solicitation messages. Consistent with judicial determinations, PGandE has maintained that it cannot be compelled to devote the use of its envelope, its labor, its customer lists, or its billing machinery to sending out the message of a private party like TURN.[110]

Public service commission orders that mandate access to the billing envelope also transgress the boundary between permissible regulation by the state and

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[104]See Cal. Const. Art. XII, §§ 1-9 (as amended 1974).

[105]*California Water and Telephone Co., supra,* 51 Cal. 2d at 489.

[106]*See* Cal. Pub. Util. Code § 734 (West 1975).

[107]Cal. Pub. Util. Code §§ 1401 *et seq.* (West 1975).

[108]Cal. Pub. Util. Code § 701 (West 1975).

[109]166 Cal. 640 (1913).

[110]Even if the extra space is considered ratepayer property, the California Supreme Court has suggested that the CPUC may not give ratepayer property to others. In Cory v. Public Utilities Commission, 33 Cal.3d 522, 528 (1983), the Court said: "There is nothing . . . indicating that the commission . . . is authorized to subsequently repudiate the property rights of unlocated former customers." If the envelope space is to be treated as ratepayer property, the same principle should apply here to prevent the commission from giving ratepayers' envelope space to a third party.

managerial control of the utility that is reserved for its management. By ordering PGandE to include TURN's messages in PGandE's envelope, the CPUC has intruded on PGandE's management prerogatives. As a general proposition, the CPUC has the power to regulate the utility to ensure that it is providing adequate service at reasonable rates without discrimination.[111] In discharging this responsibility, the CPUC can ensure that the property used to provide this service is being used efficiently.[112] Absent mismanagement or imprudence, however, the CPUC is not empowered to substitute its judgment for that of the directors of the corporation. As stated in *Missouri ex rel Southwestern Bell Telephone Company v. Public Service Commission of Missouri:*

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general powers of management incident to ownership.[113]

In the PGandE-TURN case, the CPUC stepped over the bounds of regulation into the area of management. It did do so without finding that PGandE has used the envelope space inefficiently or has acted imprudently. The CPUC did not find anything wrong with PGandE's activities, yet it assumed the management decision about how the envelope space should be used and has directed that the space be given to a specific group under specific terms and conditions. The CPUC effectively usurped management control of this property and establishes the terms and conditions for its use by TURN. That action violated PGandE's management prerogatives.

Conclusion

As indicated herein, a state commission's order requiring a utility to send third party messages in the utility's billing envelope raises numerous First, Fifth and Fourteenth Amendment issues. Furthermore, there are serious questions concerning the power of the state agency to decide property rights and to interfere with the management of the utility. All of these issues were litigated in the PGandE-TURN case and are currently on appeal to the California Supreme Court. Ultimately, however, it can be expected that the constitutional issues will require resolution by the United States Supreme Court.

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[111]Pacific Tel. and Tel. Co. v. Public Utils. Comm'n, 34 Cal.2d 822 (1950).

[112]To the extent that a utility could receive income from third parties for the use of utility property, the commission could take that income into account for ratemaking purposes. Thus, for example, if the commission determined that an unused portion of a utility office building which was in ratebase could be rented to third parties, the commission could take the potential reasonable rental value into account for the ratepayers' benefit when establishing rates. However, the commission could not take the further step of actually ordering the office space to be rented to third parties. It certainly could not draft the terms of the lease, or designate the specific part to whom the office is to be rented. Nor could the commission order the extra office space to be given to third parties free of charge. *See supra* notes 30-35 & accompanying text.

[113]262 U.S. at 289.