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NOTES

REGULATION OF ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES UNDER THE FIRST AMENDMENT

The rising public controversy over the depletion of conventional energy resources and the viability of alternative energy sources has focused increased attention upon corporate and governmental activities related to these concerns. The energy crisis has prompted some governmental authorities responsible for the regulation of public utility corporations to restrict the means by which the utilities disseminate corporate opinion on energy policies; specifically, by banning the use of inserts in utility bills. In addition, in at least one jurisdiction, all promotional advertising by utility companies has been prohibited.

This Note will examine the status of the first amendment rights of utility corporations in light of recent legal challenges by several New York utilities to state imposed restraints on their communications with utility subscribers and the public in general. This exami-

1. That this nation's energy problems have reached crisis proportions has been amply reported by the news media over the past several years. See, e.g., The Energy Mess, TIME, July 2, 1979, at 14-27. The New York Court of Appeals has gone so far as to take judicial notice of the energy crisis, which it deemed a compelling justification for banning promotional advertising by public utility corporations. Consolidated Edison Co. v. New York Pub. Serv. Comm'n, 47 N.Y.2d 94, 110, 390 N.E.2d 749, 758, 417 N.Y.S.2d 30, 39 (1979).
4. See, e.g. cases cited in note 10 infra.
nation will focus on the regulations promulgated by the New York Public Service Commission which prohibited the use of bill inserts on controversial matters of public policy and banned all promotional advertising by public utility corporations.  

I. Background and Nature of the Controversy

The New York Public Service Commission (PSC) is a public authority with general powers of supervision and regulation over the activities of gas and electric utilities. Long Island Lighting Company (LILCO), Central Hudson Gas and Electric Corporation (Central Hudson) and Consolidated Edison Company (Con Edison) are public utility companies subject to regulation by the PSC. The PSC, as a result of a comprehensive review of its policy concerning advertising by regulated utilities, issued an order precluding promotional advertising by public utilities. Additionally, the PSC announced a ban on the use of bill inserts by utilities as a means of communicating their views on "controversial matters of public policy." Several utilities regulated by the PSC filed lawsuits challenging the order. Con Edison claimed the ban on bill inserts infringed...
upon its constitutional right of free speech insofar as it restricted a utility's ability to communicate freely with its customers. Central Hudson attacked the ban on promotional advertising as an impermissible restriction of commercial free speech. LILCO challenged the order on both grounds.

In Con Edison and Central Hudson, the Supreme Court of New York ruled that the ban on bill inserts was permissible while the prohibition of promotional advertising was unconstitutional. The appellate division reversed the decision on promotional advertising, declaring the PSC order constitutional. The New York Court of Appeals affirmed the appellate division. The court distinguished between governmental regulations directed at the content of speech and regulations which, while not directed at speech itself, affect the free flow of information. Governmental regulations directed at suppressing communication on the basis of content must be subjected to strict judicial scrutiny; absent a compelling justification, a content-oriented restriction may not stand. On the other hand, the validity of a regulation which is not aimed at the content of communication, but merely at the time, place, or manner of communication, is determined by balancing the various competing interests involved, with due regard for the special status of first amendment rights. The court of appeals held that the prohibition of bill in-

14. 93 Misc. 2d at 316-17, 402 N.Y.S.2d at 553.
15. 63 A.D.2d at 370, 407 N.Y.S.2d at 738.
16. 47 N.Y.2d at 110, 390 N.E.2d at 758, 417 N.Y.S. at 39.
17. Id. at 105-07, 390 N.E.2d at 754-56, 417 N.Y.S.2d at 35-37.
18. Id. at 105, 390 N.E.2d at 754, 417 N.Y.S.2d at 35-36. See, e.g., Hess v. Indiana, 414 U.S. 105 (1973). The Court reversed disorderly conduct conviction of individual who had shouted "We'll take the fucking street" at a college antiwar demonstration. The Court found this statement to be protected speech and ruled that there was no showing that substantial privacy interests were being invaded in an intolerable manner or that the words were intended to and likely to produce imminent lawless action. See also Brandenburg v. Ohio, 395 U.S. 444 (1969) (state statute proscribing advocacy of the use of force held to be an unconstitutional restriction on the subject matter of speech).
19. 47 N.Y. 2d at 105-06, 390 N.E.2d at 754-55, 417 N.Y.S.2d at 36. The Supreme Court
serts was not directed at the content of speech and thus fell within the second category of free speech regulations. The court then found that the ban on inserts was a valid regulation of communication since it was not content-oriented, served significant governmental interests and left open ample alternative channels of communication.

The New York Court of Appeals also upheld the ban on promotional advertising. The court held that commercial speech was not to be afforded the same degree of protection as other types of speech. The court decided that the degree of first amendment protection to be afforded to commercial advertising is dependent upon a societal interest in receiving the particular information under consideration for informed and reliable economic decision-making. The ban on advertising was upheld because the court could find no significant public interest in receiving promotional advertising from utility corporations which operated in a noncompetitive market.

In LILCO, the United States District Court for the Eastern District of New York rendered its judgment on the very same issues. Contrary to the New York Court of Appeals, the district court ruled that the ban on bill inserts was clearly content-oriented. Neverthe-

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has stated often that the state may reasonably regulate the time, place, or manner of speech. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (statute upheld which forbid the use on public streets of sound trucks or any instrument which emitted a loud and raucous noise); Cox v. New Hampshire, 312 U.S. 569 (1941) (state statute requiring license for parades on public streets held constitutional). See also Virginia State Bd. Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

20. 47 N.Y.2d at 105, 390 N.E.2d at 754, 417 N.Y.S.2d at 36.
21. Id. at 105-07, 390 N.E.2d at 755-56, 417 N.Y.S.2d at 36-37.
22. Id. at 107-10, 390 N.E.2d at 756-58, 417 N.Y.S.2d at 37-39.
23. Id. at 107, 390 N.E.2d at 758, 417 N.Y.S.2d at 37. The doctrine that traditional free speech analysis did not apply to commercial speech and that such communication was more susceptible to governmental regulation originated in Valentine v. Chrestensen, 316 U.S. 52 (1942). The Supreme Court repudiated this doctrine in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court did note, however, that some regulations, intolerable where normal free speech was involved, might be acceptable in relation to commercial speech. Id. at 770-73. See pt. III infra.

26. 5 MED. L. REP. (BNA) 1241 (E.D.N.Y. March 30, 1979). The decision was rendered as a result of a summary judgement motion by LILCO. Id.
27. Id. at 1253.
less, the ban was upheld.\textsuperscript{28} The district court did not apply traditional free speech analysis of content-oriented restrictions, which would have required a compelling justification for the ban. The court held that such analysis is required only if a public forum is involved.\textsuperscript{29} Where no public forum is implicated, reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious.\textsuperscript{30} The court found that the billing mechanism was not a public forum where traditional free speech analysis is to be applied.\textsuperscript{31} The court further recognized several significant governmental interests served by banning bill inserts.\textsuperscript{32} Since the regulation was not found to be arbitrary, capricious, or inviduous, the ban on bill inserts was upheld.\textsuperscript{33}

The ban on promotional advertising, however, was held invalid.\textsuperscript{34} The district court acknowledged that commercial speech was entitled to first amendment protection.\textsuperscript{35} In determining that the ban on advertising was constitutionally infirm, the court applied a balancing of interests test.\textsuperscript{36} LILCO had an obvious interest in continuing its communication of commercial information.\textsuperscript{37} Furthermore, the court ruled that the public had a substantial interest in receiving truthful advertising from the utility.\textsuperscript{38} The court found no gov-

\textsuperscript{28} Id. at 1255.
\textsuperscript{29} Id. at 1254.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 1255. The court listed several reasonable justifications for the ban: the risk of imposing on a captive audience, the appearance of favoritism toward the utilities' point of view on controversial issues and the difficulties inherent in counteracting that appearance by permitting other points of view, the inevitable charges of improper conduct when the PSC is placed in the position of arbitrating fair access for opposing views, preserving the billing mechanism as a means of disseminating useful information, and avoiding the risk of creating a public forum out of the billing process. Id.
\textsuperscript{33} Id. at 1254-55.
\textsuperscript{34} Id. at 1255.
\textsuperscript{35} Id. at 1233-34. For a summary of the growth of first amendment protection of commercial speech, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 758-73 (1976).
\textsuperscript{36} 5 MED. L. REP. (BNA) at 1245.
\textsuperscript{37} Id.
\textsuperscript{38} Id. The district court found that there was a general public interest in the free flow of commercial information on the use of electrical energy for home heating, in assisting the consumer's decision in selecting from among the types of heating sources available, in making economic decisions concerning the benefits and detriments of electrical heat and in providing society with information necessary for ecologically sound, efficient utilization of energy resources. Id.
ernmental interest which outweighed the corporation’s first amend-
ment right to conduct promotional advertising and, therefore, inval-
idated the ban on promotional advertising.39

II. The Ban on Bill Inserts and the First Amendment

As a general rule, the first amendment guarantee of free speech
precludes governmental regulation of the content of speech absent
a compelling justification.40 To be distinguished are regulations pro-
mulgated to further legitimate, significant governmental interests
which do not restrict unduly the exercise of protected rights.41 Rea-
sonable regulations may be imposed on the time, place, or manner
of the exercise of first amendment rights.42 Such restrictions have
been deemed acceptable provided they leave open ample alternative
channels of communication, serve a significant governmental inter-
est, and are justified without reference to the content of the regu-
lated speech.43

The Con Edison and LILCO courts utilized the criteria for a rea-
sonable time, place, or manner regulation in examining the PSC
order.44 The New York Court of Appeals found that the prohibition

39. Id. at 1245-47. The asserted governmental interest was to curb the growth of energy
consumption in New York. Id. at 1246-47.

challenged a statute which prohibited them from making contributions or expenditures de-
signed to influence the outcome of political referendums. The Supreme Court noted that the
state could prevail only by demonstrating a compelling state interest. Id. at 786-87. The Court
found that no such interest was shown and invalidated the statute. Id. at 795.

Assuming the state demonstrates a compelling interest, the means chosen to meet that
interest must be “closely drawn to avoid unnecessary abridgment.” Buckley v. Valeo, 424
U.S. 1, 25 (1976).

demonstrated on a nonpublic county jail driveway upheld because statute represented rea-
sonable regulation on place of speech); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (nondis-
criminatory statute against obstructing public passages upheld as reasonable restriction on
place of speech).

42. See note 41 supra. See also Virginia State Bd. of Pharmacy v. Virginia Citizens

43. 425 U.S. at 771.

44. 5 Med. L. Rep. (BNA) at 1252; 47 N.Y.2d at 105-07, 390 N.E.2d at 754-56, 417
N.Y.S.2d at 36-37. Both courts apparently accepted the proposition that corporations enjoy
first amendment protection as do other persons. In First Nat’l Bank of Boston v. Bellotti,
435 U.S. 765 (1978), the Supreme Court invalidated a state statute which prohibited busi-
on the use of bill inserts was not aimed at the content of speech and thus did not require a compelling justification.\(^4\) In the court's analysis the PSC order did not extend to

all speech of a prescribed content, but only to one manner of communication. No one viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums affected. In short, the PSC is concerned with but one particular means of expression, and then only to a limited extent.\(^5\)

In direct contrast, the district court in \textit{LILCO} felt that the PSC order did not fit "the classic mold of a time, place or manner restriction" and was clearly content-oriented.\(^6\)

A. Ample Alternative Channels of Communication

The government may reasonably regulate the time, place, or manner of speech provided the regulation leaves open ample alternative channels of communication, serves a substantial governmental interest, and is justified without reference to the content of the regulated speech.\(^7\) The express purpose of the PSC order was to ban the utilization of one means of disseminating corporate opinion on controversial issues, the billing process.\(^8\) The order did not purport to absolutely preclude utilities from advocating nuclear power or other policies.\(^9\) The utilities argued that other available means, particularly television, radio, and separate mailings, were either prohibitively expensive or less effective.\(^10\) Both the New York and district courts remained unimpressed. The New York court in \textit{Con Edison} felt that numerous alternative channels remained open and accessible to the utilities.\(^11\) The district court in \textit{LILCO} agreed and concluded "[o]ne test that is clearly met here is the requirement of

\[\text{ness corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to the voters other than questions materially affecting the property, business or assets of the corporation. The opinion indicates that the identity of the speaker is an immaterial consideration in determining the scope of first amendment rights.}\]

45. 47 N.Y.2d at 106, 390 N.E.2d at 754-55, 417 N.Y.S.2d at 36.
46. Id.
47. 5 MED. L. REP. (BNA) at 1253.
49. 5 MED. L. REP. (BNA) at 1252.
50. Id.
51. Id.; 47 N.Y.2d at 106, 390 N.E.2d at 755, 417 N.Y.S.2d at 36.
52. 47 N.Y.2d at 106, 390 N.E.2d at 755, 417 N.Y.S.2d at 36.
ample alternative channels for communication." In large measure, this was because the very same channels of communication routinely available to anyone, including the use of the mails other than through bill inserts, remained open for corporate use.

In *Kovacs v. Cooper* the Supreme Court addressed the issue of ample alternative channels of communication in the context of a time, place, or manner restriction of speech. The Court upheld a New Jersey ordinance banning sound trucks from broadcasting in a "loud and raucous" manner on public streets. The amplification of the human voice, like the bill insert, was prohibited as a means of conveying ideas. Notwithstanding the fact that loudspeakers were more effective than public speaking or private interpersonal communication in reaching a wider audience or that loudspeakers may have provided a less costly means of communication the ordinance was upheld. The critical factor was the existence of effective alternative channels of communication. Complete and unfettered discussion of issues and the promotion of opinions remained feasible since such options as newspapers, pamphlets, and private conversation remained available.

Where effective alternatives for communication are available to the speaker, a governmental regulation restricting the time, place, or manner of speech will be upheld, assuming the two other elements of the test are also met. The PSC order did not restrict the utilities' ability to continue to communicate corporate opinion by means of the electronic media, newspapers, and even by a direct mailing to their subscribers; alternatives which the courts in *Con Edison* and *LILCO* deemed adequate.

54. *Id.*
56. *Id.* at 87.
57. *Id.* at 88-89.
58. *Id.*
59. *Id.* at 89. More recently, in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court emphasized that the alternative channels of communication must be more than theoretically available; they must be ones which the speaker might realistically be expected to employ. *Id.* at 93. In that case, a town ordinance which prohibited "For Sale" signs on residential property was invalidated. The Court found that such alternatives as sound trucks and leaflets were unrealistic in marketing realty, while relevant alternatives such as newspapers and listing with real estate agents were more costly and provided less autonomy. *Id.* The Court concluded that the alternatives were "far from satisfactory." *Id.*
60. See pt. II B *infra.*
B. Substantial Government Interest

The second criterion for a permissible time, place, or manner regulation is that it serve a substantial governmental interest. The interest advanced by the PSC and accepted by the court in *Con Edison* was the protection of the privacy rights of the "captive audience" of utility subscribers to be free from receiving unwanted, offensive communications. Since the ratepayer would have to open his bill, he almost surely would be confronted with the message in the separate insert. Similarly, the court in *LILCO* maintained that this would be an appropriate consideration to be weighed in regulating utilities.

The Supreme Court has accepted the concept that an unwilling audience, in certain situations, should be protected against unwarranted communications. To justify protection, however, the utility subscribers must be found to be truly a "captive audience." The Supreme Court has addressed the concept of a captive audience in several specific situations. In *Lehman v. City of Shaker Heights*, the city had refused to allow political campaign advertisements within public rapid transit vehicles. In upholding the governmental regulation, the Court recognized that the necessity of using mass transit in modern urban society makes it impossible for the passenger to avoid the message on placards posted throughout the car. Thus, the passengers constituted a captive audience.

The protection of the privacy rights of unwilling listeners was a significant factor in the Supreme Court decision in *Federal Communications Commission v. Pacifica Foundation*. In this case the Court upheld a governmental regulation which precluded the broad-

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63. 5 MED. L. REP. (BNA) at 1253.
67. 418 U.S. at 304.
casting over public airwaves of a monologue which included indecent language, stating that it was impossible to protect unwilling listeners from the unexpected program content. Lehman and Pacifica illustrate circumstances in which the Supreme Court has applied the concept of protecting a captive audience. The concept itself, however, requires closer analysis. The Supreme Court has noted frequently that the state may not suppress the dissemination of ideas merely because they are unpopular, annoying or distasteful. The hostility of the recipient to the message, therefore, is not sufficient to justify governmental regulation of communication. Furthermore, a person is often "captive" and subject to objectionable communications outside his home, but this does not provide a basis for regulating the first amendment rights of the speaker. Thus, the critical factor is not whether the individual is an unwilling recipient of a particular communication, but whether, as an unwilling recipient, he is forced to confront the message in an unwarranted location. In Erznoznik v. City of Jacksonville, the Court invalidated a city ordinance which prohibited drive-in movie theaters from exhibiting films containing nudity where the screen was visible from a public street. The Court rejected the city's argument that the ordinance protected the unwilling audience driving past the theater because a passerby simply could avoid looking at

69. Id. at 748-49. The Court was careful in pointing out that of all forms of communication, it is broadcasting that receives the most limited first amendment protection. Id. In large measure, this is due to the unique nature of the medium involved and the fact that there is only a limited number of available broadcast frequencies. See, e.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (F.C.C. fairness doctrine upheld to extent it required broadcasters to provide response time for views contrary to their political editorials and for victims of their criticism). See also 47 U.S.C. §§ 309(a), 312(a)(2) (1976) (broadcaster may be deprived of his license if F.C.C. determines that such an action serves the public interest, convenience, and necessity); F.C.C. v. WOKO, Inc., 329 U.S. 223 (1946).

70. Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943). See also Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (in holding that a city could not deny a permit for the Jehovah's Witnesses to use a public park for a meeting where the city had previously granted permits for similar purposes, the Court noted that the city had denied the permit because of its evident "disagreement . . . with their views.").

71. Cohen v. California, 403 U.S. 15, 21 (1971) (conviction of individual for disturbing the peace by wearing a jacket bearing the words "Fuck the draft" in the corridor of the Los Angeles Courthouse reversed despite argument that the distasteful mode of expression was thrust upon unwilling viewers).

72. 422 U.S. 205 (1975).
the screen. The individual was not forced to listen to or look at the message with which he was confronted.

The captive recipient at home, however, enjoys a greater right to privacy, one which plainly outweighs the first amendment rights of an intruder. But that right resides in the individual, not the government. The Supreme Court has generally declined to uphold regulations which seek to prohibit the dissemination of information by soliciting persons in their homes. Furthermore, several governmental attempts to regulate or prohibit mailings which contained otherwise protected speech have been rejected. On the other hand, in *Rowan v. United States Post Office Department,* the Court upheld a regulation which allowed an unwilling recipient to demand the removal of his name from a particular mailing list and preclude all future mailings from the specified sender. Thus, while a govern-

73. *Id.* at 210-11.
75. *See, e.g.*, Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (municipal ordinance requiring advance written notice be given to the police department by any person desiring to solicit door-to-door for a "recognized" charitable cause or political cause held unconstitutionally vague and not drawn with the narrow specificity required of a governmental regulation of first amendment activities); Martin v. City of Struthers, 319 U.S. 141 (1943) (municipal ordinance forbidding any person to knock on doors for the purpose of distributing handbills or circulars held invalid as a denial of freedom of speech); Cantwell v. Connecticut, 310 U.S. 296 (1940) (conviction of individuals for solicitation for religious cause from door-to-door and in public street invalidated as impermissible restraint on speech). But see *Breard v. Alexandria,* 341 U.S. 622 (1951) (under old commercial free speech doctrine, Supreme Court upheld conviction of individual who sold magazine subscriptions door-to-door in violation of an ordinance declaring solicitation on private premises without invitation to be a nuisance).
76. Blount v. Rizzi, 400 U.S. 410 (1971). In this case the Court considered a federal statute which allowed the Postmaster General to return to sender letters addressed to any person and to prohibit the payment of postal money orders to that person if he found, on evidence satisfactory to him, that the person was seeking money through the mails for an obscene matter. The Court invalidated the statute as an infringement on the first amendment guarantee of free speech. In large measure, the decision was based upon the lack of prompt judicial review of the alleged obscenity of the material. In *Lamont v. Postmaster General,* 381 U.S. 728 (1970), a federal statute requiring the Postmaster General to detain and deliver only upon the addressee's request unsealed foreign mailings of "communist political propaganda" was held unconstitutional. The Court reasoned that the statute imposed an affirmative obligation on the addressee which amounted to an unconstitutional limitation of his rights under the first amendment.
78. *Id.* at 737. The Court noted that the mailer's right to communicate is circumscribed only by an affirmative act of the addressee. The Court felt that Congress provided this power in the individual to avoid constitutional problems that might arise from vesting discretionary authority in a governmental official. *Id.* See note 76 supra and accompanying text.
ment regulation which allows an individual to request voluntarily that certain mail not be sent may be permissible, one which attempts to impose an outright prohibition on mailings may not survive judicial scrutiny.

The New York court in *Con Edison*, and the district court in *LILCO*, found the utility subscribers constituted a captive audience. The courts reasoned that the practical requirement of opening the billing envelope forced the subscriber to confront the inserted communication in an unwarranted location. The necessity of paying one's utility bill, however, does not require that the recipient read the accompanying inserts. Just as an unwilling listener confronted with an offensive but protected solicitation in his home or elsewhere may terminate the message once he determines the contents, the ratepayer may avoid reading inserts he finds distasteful. Additionally, direct mailings by the utilities to their subscribers are presumably a feasible and unobjectionable means of communicating corporate opinion on controversial issues. Although an insert may be somewhat less easily identifiable as objectionable material by an unwilling recipient, it is incongruous to conclude the utilization of an insert rather than a separate mailing

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79. 5 MED. L. REP. (BNA) at 1253. 47 N.Y.2d at 106, 390 N.E.2d at 755, 417 N.Y.S.2d at 36-37.
80.  See note 79 supra.
81.  Martin v. City of Struthers, 319 U.S. 141, 146-48 (1943). It is interesting to note that while the New York Public Service Commission argued that the ban on bill inserts was to protect state citizens from unwarranted, offensive communications, the State of New York, through its Motor Vehicle Commissioner, is in the business of selling lists of names to direct mail advertisers.  See Lamont v. Commissioner of Motor Vehicles, 269 F.Supp. 880 (S.D.N.Y.), aff'd, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968). In Lamont, the suit was brought to enjoin the sale to advertisers of the lists taken from registration records. The plaintiffs claimed that their privacy rights were invaded as a result of the sale of the lists. The court, in dismissing the action, noted: "The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."  Id. at 883.
converts a class of utility subscribers into a "captive audience" warranting governmentally imposed protection. As Justice John M. Harlan once noted:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.⁸³

In LILCO, the district court acknowledged that a second significant governmental interest existed if corporate use of inserts could be construed as creating a public forum.⁸⁴ If the billing process is so controlled by the state that its very use constitutes state action, then allowing a utility to voice its opinion in a bill insert would obligate the PSC to provide equal opportunity for both opponents and proponents of the utility viewpoint to employ the bill insert medium.⁸⁵ Furthermore, open access might result in such a substantial increase in inserted messages that desirable, noncontroversial information might be excluded.⁸⁶ This argument rests on the premise that state sanctioned use of a facility by one party converts the facility to a public forum which may be used by all. Nevertheless, the process by which a utility corporation bills its customers should not be considered a public forum merely because the utility employs an insert to disseminate corporate opinion. State regulation of utilities does not convert the acts of an essentially private corporation into state action.⁸⁷ The PSC's argument that it might be creating a public forum if it failed to prohibit the use of inserts is unpersuasive in light of the Supreme Court decision in Jackson v. Metropolitan Edison Co.⁸⁸ In that case, the Court held that the process by which the utility terminated service to a subscriber upon reasonable notice

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⁸⁴. 5 Med. L. Rep. (BNA) at 1255. This problem was actually viewed by the court as encompassing several potential governmental interests: the avoidance of creating a public forum, id.; the problems inherent in placing the PSC in the position of arbitrating fair access to the billing mechanism, id.; and the preservation of the bill insert medium for important and useful information, id.
⁸⁵. Id.
⁸⁶. Id.
⁸⁸. Id.
of nonpayment of bills was not state action. In so holding, the Court noted:

The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

The PSC did not order Con Edison or LILCO to utilize bill inserts. In a time where governmental regulation pervades the economy, regulated corporate activities ought not be viewed as state action or potential public forums.

The district court in LILCO mentioned two related concerns in conjunction with the asserted governmental interests concerning the

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89. Id. The Court determined that monopoly status, provision of essential services, and the fact that the provision for termination practice had routinely been included in a general tariff approved by the Public Utility Commission were insufficient reasons for concluding that the actions of the utility were state action. Id. at 350-57. See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (Chief Justice Burger, writing for the court, but joined in this part by only two associate justices, held that licensing and regulation of broadcasters by the F.C.C. did not constitute state action nor mandate that broadcasters be compelled to accomodate the first amendment rights of others by accepting paid political and editorial advertising).

90. 419 U.S. at 357.

91. Id. at 354. The question of whether some sort of fairness doctrine ought to be imposed upon the billing process if the utilities employ bill inserts was not at issue in either LILCO or Con Edison. The PSC did not attempt to impose a requirement similar to the F.C.C. fairness doctrine which requires public broadcasters to accurately reflect opposing views on public issues and to provide response time where a political editorial or personal attack is presented. See generally Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 375 (1969), where the Court upheld the F.C.C. fairness doctrine to the extent it required broadcasters to afford opponents of political editorials an opportunity to respond. Id. at 400-01. In large measure, this was due to the unique nature of the medium, id. at 387-88, and the fact that there are only a limited number of available frequencies. Id. at 390.

Furthermore, while such a doctrine has been upheld by the Supreme Court in the extensively regulated broadcast media (See note 69 supra) a similar governmental requirement in regard to newspaper publishers was invalidated in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) as violating the first amendment guarantee of a free press. See also Boushey v. Pacific Gas and Elec. Co., 10 PUR4th 23, 43 (Cal. Pub. Utils. Comm'n 1975) (the utilities commission, in ruling that utilities had a right to utilize bill inserts to disseminate corporate opinion, held that the use of inserts did not give rise to a right of enforced access on the part of any other party).
creation of a public forum; the appearance of favoritism toward the utility's point of view and the difficulties inherent in counteracting that appearance by permitting other points of view in bill inserts.\textsuperscript{92} These arguments appear to be grounded upon an assumption that the public, ignorant of the true state of affairs, will assume the government has either sanctioned or encouraged the opinion expressed by the utility corporation to the exclusion of other viewpoints. While it is unclear how much reliance the district court placed upon these asserted interests, neither the inserts nor the billing process are state activities.\textsuperscript{93} If the PSC perceives a need to dissociate itself from the utilities' messages, and this is found to be a substantial governmental interest, a more narrowly drawn regulation, of less severity than an absolute ban on inserts, would adequately serve such an interest.\textsuperscript{94}

Thus, neither of the asserted governmental interests, protection of a "captive audience" and fear of creating a public forum, are sufficient to provide the substantial governmental interest required to support a restriction of first amendment rights.

C. Content Oriented Regulations

The third criterion of a permissible restriction of speech is that it must be justified without reference to the content of the regulated speech.\textsuperscript{95} In Con Edison, the New York court applied the test premised on the court's theory that a content-oriented regulation is a restriction which impedes the dissemination of one side or point of view on a given issue, not one which seeks to block all discussion of an issue.\textsuperscript{96} The PSC order did not ban all use of bill inserts; the regulation permitted the use of bill inserts to impart any information or opinion, unless it is a "controversial matter of public policy."\textsuperscript{97} Nor did the ban expressly discriminate against any particular view on a public issue. Rather, entire issues were denied discussion

\textsuperscript{92} 5 Med. L. Rep. (BNA) at 1255.
\textsuperscript{93} See notes 87-90 supra and accompanying text.
\textsuperscript{94} For example, if it is found that the public is in fact confused as to the extent of governmental influence over the contents of bill inserts, an appropriately worded disclaimer should clarify the situation.
\textsuperscript{96} 47 N.Y.2d at 107, 390 N.E.2d at 755-56, 417 N.Y.S.2d at 37.
\textsuperscript{97} Id.
in bill inserts. The fact that, as a practical matter, it would always be the utility’s point of view that was prohibited did not affect the analysis in *Con Edison*. In the limited sense that the regulation selected topics and not opinions for exclusion, the PSC order might seem content-neutral. The district court in *LILCO* implicitly rejected the logic of the New York Court of Appeals, stating “it cannot be said that [the] PSC’s ban on use of bill inserts to express views on ‘controversial issues of public policy’ is unrelated to the content of the regulated speech. Indeed, it is precisely because of the content—controversial issues—that LILCO has been denied access to bill inserts.”98 The New York court in *Con Edison*, in denying that the PSC order was content-oriented, acknowledged that a regulation directed at the content of speech required a compelling justification.99 The district court in *LILCO* also recognized that a regulation directed at the content of speech required a compelling justification, with the additional qualification that the forum must be one appropriate for traditional analysis of regulations affecting first amendment rights.100

The Supreme Court has frequently discussed the concept of content-oriented regulations. In *Linmark Associates, Inc. v. Township of Willingboro*,101 a town ordinance which prohibited the posting of “For Sale” signs on real property was declared invalid. The township argued that the ordinance was a reasonable restriction on the time, place, or manner of speech.102 The Supreme Court, however, found that the ordinance was “not genuinely concerned with the place of speech—front lawns—or the manner of the speech—signs.”103 The township had not prohibited all lawn signs; rather, it precluded only those dealing with the issue of sales.104 The Court found that the ordinance proscribed particular types of speech based on the content.105 The fact that the proscription applied only to one mode of communication did not transform it into

98. 5 Med. L. Rep. (BNA) at 1253.
100. 5 Med. L. Rep. (BNA) at 1254.
102. Id. at 93.
103. Id.
104. Id. at 93-94.
105. Id. at 94.
a time, place, or manner regulation.\textsuperscript{106} Similarly, it may be argued that the PSC ban was not truly concerned with the place or manner of speech, the bill insert, but with the content of speech—controversial matters of public policy.

In \textit{Police Department of the City of Chicago v. Mosley},\textsuperscript{107} the Court considered the constitutionality of a Chicago ordinance which precluded all picketing on a public way within 150 feet of any school building while school was in session except peaceful picketing during a labor dispute. The ordinance excluded any and all opinions, regardless of the view advocated, unless the expression was in relation to the permissible topic, labor disputes.\textsuperscript{108} The Court found the statute constitutionally defective precisely because it defined permissible picketing in terms of its subject matter.\textsuperscript{109} The opinion reaffirmed the preeminent position of the first amendment right of free speech; the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.\textsuperscript{110} Although the ordinance did not discriminate against particular viewpoints, it nevertheless was found to be an impermissible content-oriented restriction because it was selective as to the overall subject matter of speech.\textsuperscript{111}

The PSC order also discriminates on the basis of the subject matter of the speech in question, completely banning certain broad topics. That it avoids prohibiting the expression of any one position does not in any sense lead to the inexorable conclusion that the order is not content-oriented. On the contrary, the ban discriminates on the basis of content,\textsuperscript{112} as directly as did the ordinance set aside in \textit{Mosley}. The ban in \textit{Mosley} precluded all picketing unless the topic was a labor dispute. Similarly, the PSC order precluded all use of inserts unless the topic was noncontroversial.

As a content-oriented regulation, the PSC order may be sustained only if the state proves a compelling state interest in restricting the
communication. The Supreme Court has held that speech advocating the use of force or violation of law, where it is directed to inciting or producing imminent lawless action and likely to incite or produce such action, meets the test of a compelling justification. Neither the New York court in Con Edison nor the district court in LILCO found any such compelling justification for banning bill inserts concerning controversial matters of public policy.

The Supreme Court has been willing to tolerate governmental restrictions on the content of speech in certain specific situations where a measure of conflict arises between one party’s first amendment right and another’s right of privacy. Such a conflict exists in a situation where a utility corporation attempts to communicate with its subscribers in the privacy of their homes. The very basic right of a person to be secure in the privacy of his home, even to the exclusion of otherwise protected communications, may justify appropriate regulation of another’s right to communicate.

Rowan v. United States Post Office Department presented a challenge to a federal statute which permitted an individual to request the removal of his name from a mailer’s correspondence list and preclude all future mailings. Settling the controversy required a balancing of the first amendment right of the mailer to freely distribute information against the individual’s right to privacy in his home. The Court held that a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee. The holding was a narrow one based upon competing constitutional interests and no general or absolute governmental ban against mailings was considered. As Chief Justice Warren Burger noted, the mailer’s right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailing from that particular

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114. 395 U.S. at 447.
118. Id. at 736.
119. Id. at 736-37.
120. Id. at 737. In contrast, the ban imposed by the PSC is a governmentally imposed, absolute ban on the use of bill inserts relating to controversial matters of public policy.
mailers, not by a general state ban on communication. The Court felt that Congress provided this sweeping power in the individual not only to protect an individual's privacy right but also to avoid potential constitutional problems that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official. The Court has consistently invalidated state, as opposed to individual, efforts to prohibit communications with persons at home on the basis of content. Unlike the situation in Rowan, the PSC order sought to eliminate certain communications because of their content without regard for the desires of the individual subscriber.

In F.C.C. v. Pacifica Foundation, the Court considered the radio broadcasting of a twelve minute "indecent" monologue entitled "Filthy Words." The nature of the medium is such that broadcast messages reach individuals, even unwilling listeners, in the privacy of their homes, often without warning as to the content. The opinion acknowledged that the F.C.C. order declaring the language indecent and subject to regulation was directed at the content of speech. Because the audience is constantly tuning in, rendering prior warnings almost useless, and because broadcasting is uniquely accessible to even small children, it was considered appropriate to regulate the indecent speech. The Court noted, however, that if the offensiveness of the message to the unwilling listener could be traced to its political content, first amendment protection might be required. In Con Edison and LILCO, the utility corporations' use of bill inserts did not involve the use of the broadcast media in reaching individuals in their homes. Additionally, because the PSC ban was directed only at inserts dealing with controversial matters of public policy, the offensiveness of the message to the unwilling reader must lie in the political content of the message. Although the Supreme Court upheld a content-oriented regulation of indecent speech in a medium entitled to only limited first amendment pro-

121. Id.
122. Id.
123. See notes 75-76 supra.
125. Id. at 748-49.
126. Id. at 744.
127. Id. at 748-49.
128. Id. at 746.
tection,\textsuperscript{129} \textit{Pacifica} does not support the imposition of a governmental regulation of the content of political speech in a mailed insert.

Another factor considered influential in balancing the right of free speech against the individual right of privacy exists where the recipients comprise a captive audience. In \textit{Public Utilities Commission v. Pollak},\textsuperscript{130} the Supreme Court upheld a governmental ruling that broadcasting radio programs in public streetcars was not a cognizable infringement of the privacy rights of the passengers, despite their captive status. More recently, however, the Court in \textit{Lehman v. City of Shaker Heights}\textsuperscript{131} upheld a municipal policy of excluding political advertising in public transit vehicles while allowing other forms of commercial advertising. Lehman, a candidate for public office, had argued that the advertising placards in public transit cars constituted a public forum entitled to first amendment protection.\textsuperscript{132} Four members of the Court were of the opinion that the city operated transit system did not constitute a public forum and that the managerial decision to limit placard space to commercial advertising did not rise to the level of a first amendment violation.\textsuperscript{133} Justice William O. Douglas, concurring in the judgment,\textsuperscript{134} echoed the sentiment of his dissent in \textit{Public Utilities Commission v. Pollak}\textsuperscript{135} that the privacy rights of the captive audience justified regulation of otherwise protected speech. The crux of the \textit{Lehman} decision, however, was not that the state had the right, in its discretion, to protect an unwilling audience if they could be deemed "captive", but that the place, government operated transit cars, was not an appropriate public forum in which traditional first amendment considerations would apply.\textsuperscript{136} The four dissenting justices found that the city had opened up the transit system as a public forum by accepting commercial advertising and as such, protection of a captive audience was not sufficiently compelling to allow for content-oriented regulation of communication.\textsuperscript{137} While it

\begin{enumerate}
\item\textsuperscript{129} \textit{See note 69 supra.}
\item\textsuperscript{130} 343 U.S. 451 (1952).
\item\textsuperscript{131} 418 U.S. 298 (1974).
\item\textsuperscript{132} \textit{Id.} at 299.
\item\textsuperscript{133} \textit{Id.} at 301-02, 304.
\item\textsuperscript{134} \textit{Id.} at 305 (Douglas, J., concurring).
\item\textsuperscript{135} 343 U.S. 451, 458-69 (1952) (Douglas, J., dissenting).
\item\textsuperscript{136} 418 U.S. at 302-03.
\item\textsuperscript{137} \textit{Id.} at 310 (Brennan, J., dissenting).
\end{enumerate}
can be argued that the existence of the captive audience was one of the factors that made the forum inappropriate, it is more reasonable to interpret the decision as a determination that the transit system was simply not the type of public property where first amendment rights would prevail over all but compelling interests.138

In LILCO, the district court drew an analogy between the circumstances of Lehman and the bill insert controversy.139 This evaluation was premised upon the notion that a bill insert, or the billing process, was a forum.140 As a consequence, the court attempted to follow the analysis of the Lehman Court in determining whether the insert was a "public" forum and what degree of first amendment protection was warranted.141 The district court felt that such analysis was crucial because, in its view, the general rule that content-oriented regulations required a compelling justification was inapplicable where a public forum did not exist.142 The LILCO court relied upon the Lehman decision for the proposition that where an activity was not already a forum for the discussion of public issues, the state may regulate the content of speech as long as the regulation is not arbitrary, capricious, or invidious.143

There is a fundamental difference between the situation presented in Lehman and that presented in Con Edison and LILCO. Lehman dealt with a state-controlled activity, the transit system, which had the potential for becoming a public forum if the state allowed it to be utilized for the dissemination of public opinion. Unlike some state-controlled facilities such as public streets and parks which are natural forums for the expression of opinion, other state-operated activities may generally be inappropriate as a forum for the public expression of ideas.144 In a situation where the forum is normally inappropriate, unless the state creates a public forum by allowing some use for the dissemination of ideas or opinion,145 the

139. 5 M.E.D. L. REP. (BNA) at 1254-55.
140. Id.
141. Id.
142. Id. at 1254.
143. Id.
145. See, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). In Mosley,
Lehman decision indicates that the state may impose a content-oriented regulation without demonstrating a compelling justification.

The issue in the utility cases, however, is not whether the insert is or has become a public forum. The power of a city government to regulate the use of public property or facilities under its control was not at issue in Con Edison or LILCO as it was in Lehman. The billing mechanism is not a public facility for which the state is responsible in the sense that it may, in its discretion, decide to make it available as a public forum.\textsuperscript{146} It is inappropriate to categorize speech as a forum merely because it is printed communication mailed by a corporate person to an individual consumer. The situation presented in Con Edison and LILCO deals with essentially private communications between persons, not with public places such as streetcorners, parks or even transit cars, that have the potential of becoming public forums.\textsuperscript{147} Although it is true that the billing process, like most of the utilities' activities, is regulated by the state, this does not convert it into a state activity or public property.\textsuperscript{146} Thus, discussion of whether the bill insert is a sufficiently "public" forum to warrant strict judicial scrutiny of content-oriented regulations of communication is misdirected.

Neither of the courts in Con Edison or LILCO held that a compelling justification existed which would have justified a content-oriented regulation of communication. Analysis of Supreme Court rulings on governmental regulation of first amendment activities

the Court invalidated a city ordinance which precluded all picketing near schools except peaceful labor picketing. The Court found that under the equal protection clause, as well as the first amendment itself, government may not open up a forum for public use and then selectively exclude opinions on the basis of content. \textit{Id.} at 96.

\textsuperscript{146.} The district court in LILCO acknowledged that the billing envelopes are owned by the utility company and that, historically, the insert messages have been generated either by the PSC or LILCO. \textit{5 MED. L. REP. (BNA)} at 1254. However, because the PSC regulates the utilities, and hence the billing mechanism, and because the district court was attempting to determine whether a public forum existed, the fact that inserts were not available for use by the general public became a significant factor in the court's analysis. \textit{Id.}

\textsuperscript{147.} Despite the fact that utilities are regulated by the state, the utilization of the U.S. mails by inserting messages in the envelopes by which the corporation bills its customers is, essentially, a private act of communication. See Boushey v. Pacific Gas and Electric Co., 10 PUR4th 23, 38-41 (Cal. Pub. Utils. Comm’n 1975) (bill inserts found to be private communication).

leads to the conclusion that the PSC ban on the use of bill inserts to convey corporate opinion on controversial matters of public policy unconstitutionally infringes upon the utilities' right to communicate with their subscribers.

III. Commercial Free Speech and the Ban on Advertising

The second major issue faced by the courts in both LILCO and Con Edison was the utilities' claim that the PSC ban on advertising violated their first amendment rights. Unlike the ban on bill inserts, this order precluded all speech of a particular nature. No promotional advertising of electric service was permitted. Until recent years, such governmental action would have been acceptable under the old commercial free speech doctrine. The concept that commercial speech was amenable to governmental regulations which would not be tolerated where more traditional forms of speech were involved was articulated by the Supreme Court in Valentine v. Chrestensen. In upholding an ordinance which banned the distribution of commercial advertising in public thoroughfares, the Court observed, "the Constitution imposes no such restraint on regulation by government as respects purely commercial advertising." More recently, however, the decision of the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. greatly expanded the first amendment protection afforded to commercial speech. The Court in Virginia State Board invalidated a state statute which prohibited the advertising of prescription drug prices. The Court ruled that advertising was a matter of public interest and that the free flow of commercial information was indispensable to reliable and informed economic decision-making. Nevertheless, the Supreme Court has left some room for distinguishing between commercial speech and other varieties of speech and the degree of first amendment protection to be afforded

152. Id.
153. Id. at 54.
155. Id. at 749-50.
156. Id. at 765.
respectively.\textsuperscript{157} In \textit{Virginia State Board}, the Court tested the validity of the governmental regulation prohibiting advertising by balancing the conflicting interests involved.\textsuperscript{158} As a consequence, proper resolution of any controversy involving commercial speech requires a balancing of the first amendment interest of the speaker, the interests of the potential recipients and society as a whole in the free flow of commercial information, and the governmental interest allegedly served by the regulation.

In employing the balancing of interests approach to promotional advertising by utilities, the \textit{Con Edison} and \textit{LILCO} courts reached entirely different conclusions. The New York Court of Appeals in \textit{Con Edison} felt that promotional advertising by a utility did not contribute to society's interest in view of the noncompetitive market in which the corporation operated.\textsuperscript{159} In \textit{LILCO}, the district court's view of the balance of the interests was at variance with this evaluation. The district court recognized the obvious economic interest of the utility in promoting the use of electricity.\textsuperscript{160} Furthermore, the court felt that truthful advertising on such topics as electric space heating represented a substantial public interest.\textsuperscript{161} Arrayed against these factors was the state's interest in curbing growth of electrical usage.\textsuperscript{162} The PSC sought to limit the use of electricity indirectly by "suppressing accurate promotional information."\textsuperscript{163} The court went on to note that the

\begin{itemize}
\item PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. . . . But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating.\textsuperscript{164}
\end{itemize}

The starting point for a proper understanding of the dichotomy existing between the \textit{Con Edison} and \textit{LILCO} decisions lies in analyzing the language by which the Supreme Court in \textit{Virginia State

\begin{enumerate}
\item\textsuperscript{157} \textit{Id.} at 770-73. See notes \textsuperscript{165-69} infra and accompanying text.
\item\textsuperscript{158} \textit{Id.} at 762-70.
\item\textsuperscript{159} 47 N.Y.2d at 109-10, 390 N.E.2d at 757-58, 417 N.Y.S.2d at 38-39.
\item\textsuperscript{160} 5 Med. L. Rep. (BNA) at 1245.
\item\textsuperscript{161} \textit{Id.}
\item\textsuperscript{162} \textit{Id.} at 1245-46.
\item\textsuperscript{163} \textit{Id.} at 1246.
\item\textsuperscript{164} \textit{Id.}
\end{enumerate}
Board qualified the first amendment protection to the afforded to commercial speech. Some forms of governmental regulation perhaps inconsistent with traditional notions of free speech may be tolerated where commercial speech is involved.\textsuperscript{165} Although neither exhaustive nor all inclusive, the examples of permissible restriction provide some insight into the potential limits of proper regulation contemplated by the Court. As with all varieties of protected speech, mere time, place, or manner restrictions may be made provided they meet the standard criteria for such actions.\textsuperscript{166} Similarly, untruthful, deceptive and misleading advertisements are proper subjects of state regulation, as are advertisements involving transactions which are themselves illegal.\textsuperscript{167} Two other areas of special interest also received mention in \textit{Virginia State Board}. Broadcasting, due to the very nature of the medium, is particularly vulnerable to additional restriction.\textsuperscript{168} Professionals, specifically physicians and attorneys, are also more amenable to additional control because of the unique nature of their services.\textsuperscript{169}

Since \textit{Virginia State Board} was decided, the Court has declared unconstitutional a number of regulations which imposed complete bans on commercial advertising.\textsuperscript{170} An examination of the Supreme Court's position in these decisions regarding the viability of governmental regulation of commercial speech illustrates the high degree of first amendment protection afforded to commercial advertising. For example, in \textit{Bates v. State Bar of Arizona}\textsuperscript{171} a state bar association disciplinary rule which prohibited advertising of the prices of routine legal services was held unconstitutional. The Court stated that commercial advertising was entitled to first amendment protection.\textsuperscript{172} The Court held that the interest of society in the free flow of commercial information relating to the cost of legal services out-
weighed all asserted state interests. Although the Court was willing to concede in *Virginia State Board* that advertising by professionals might be subject to a higher degree of governmental scrutiny, it would not countenance an absolute prohibition on commercial advertising by attorneys.

In *Carey v. Population Services International*, the Supreme Court invalidated a state ban on the advertising of contraceptives. The Court reiterated the position it took in *Virginia State Board* that the state may not completely suppress the dissemination of concededly truthful information concerning a lawful activity even if the information was of a commercial nature. In noting that the advertisements could not be characterized as presenting a clear and present danger, the Court indicated that commercial advertising, at least where it implicated a fundamental right, would receive a full measure of first amendment protection and a governmental restriction of speech itself would require a compelling justification.

Finally, in *Linmark Associates, Inc. v. Township of Willingboro*, the Court held that a governmental ban on the posting of “For Sale” signs on residential property was unconstitutional. In reemphasizing that it might be permissible to regulate deceptive commercial speech, the Court concluded that the ordinance, which impaired “the flow of truthful and legitimate commercial information” was constitutionally infirm.

To be contrasted with the above cases are several recent Supreme Court decisions upholding less restrictive governmental regulations of commercial speech. The Court had indicated earlier that it

173. *Id.* The Arizona State Bar attempted to justify the ban on advertising by asserting that advertising would have an adverse effect on professionalism, on the administration of justice and on the quality of legal services. The Bar also argued the standards would be difficult to enforce and that any advertising would be inherently misleading and have undesirable economic effects. *Id.* at 368-79.


175. *Id.* at 700.

176. *Id.* at 701-02. The state attempted to justify the ban on advertising by asserting that such advertising would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. *Id.* at 701.


178. *Id.* at 98. The town attempted to justify the ban on advertising on the basis that it was designed to promote stable, racially integrated housing by reducing a perceived apprehension among and flight by white homeowners. *Id.* at 86-88, 94.

would reserve judgment on the degree of first amendment protection certain professional groups would enjoy. In *Ohralik v. Ohio State Bar Association*, the Court faced a challenge to a state bar association disciplinary rule banning in-person solicitation of clients by attorneys. Though Ohralik argued that his free speech was implicated and, under *Bates*, advertising by lawyers was to be accorded protection, the Court found that in-person solicitation of professional employment does not stand on a par with truthful advertising about the availability and terms of routine legal services. The Court held that because of the special status of attorneys, the significant risk of deception and of client pressure inherent in the immediacy of in-person solicitation, and the state’s responsibility in maintaining standards among members of the licensed professions, the state’s substantial interests outweighed any first amendment interest of the individual attorney. A lawyer’s procurement of remunerative employment was characterized as a mode of advertising only marginally affected with first amendment concerns.

Seizing upon the language of the *Ohralik* decision, but not the carefully constructed rationale, and taking judicial notice of the energy crisis, the New York court in *Con Edison* concluded that not only the mode, but all advertising could be banned to protect society. The court noted that “a particular mode of advertising which would not well serve the societal interest in informed decisionmaking . . . may constitutionally be banned,” and ruled that advertising by utilities did not serve society’s interests and that a complete ban on promotional advertising, regardless of the mode, was permissible. This interpretation, however, is not consistent with the holdings of *Ohralik* and *Bates*. In *Ohralik*, the Supreme Court had ruled that, given the inherent dangers of in-person solicitation by attorneys, the government might regulate this mode of

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182. *Id.* at 455.
183. *Id.* at 457, 464.
184. *Id.* at 459.
186. *Id.* at 109, 390 N.E.2d at 757, 417 N.Y.S.2d at 39.
187. *Id.* at 110, 390 N.E.2d at 757-58, 417 N.Y.S.2d at 39.
commercial speech.\textsuperscript{188} In \textit{Bates}, the Court expressly held that an outright prohibition on commercial advertising by attorneys was unconstitutional.\textsuperscript{189}

In addressing the idea that advertising should be banned to shelter society from its effects, the Supreme Court noted:

The argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.\textsuperscript{190}

The motivating factor behind the PSC order and the New York court's approval was a concern about the growth of energy consumption and the effect advertising might have on it.\textsuperscript{191} However, the ban does not directly affect energy usage one way or the other. It affects it only through the reactions it is assumed people will have to the free flow of information.\textsuperscript{192} The PSC order does not seek to regulate reasonably the mode or place of advertising, rather, it seeks to abolish utility advertising.

In a more recent case involving the regulation of professional groups, the Court, in \textit{Friedman v. Rogers},\textsuperscript{193} upheld a state statute prohibiting optometrists from practicing under trade names. The Court found that trade names were not on the same footing as advertisements such as were approved in \textit{Virginia State Board and Bates}, even if it was considered a form of "commercial speech."\textsuperscript{194} The name itself has no intrinsic commercial value or meaning until it acquires a secondary meaning after a long period of association in the minds of the consuming public.\textsuperscript{195} The state's interests in regulation were considerable. The possibility of deception was significant,\textsuperscript{196} a factor specifically mentioned in \textit{Virginia State Board Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748 (1976) for the same reason. \textit{Id.} at 769.

\begin{tabular}{l}
\textsuperscript{188} 436 U.S. at 457-58. \\
\textsuperscript{189} 433 U.S. at 379. \\
\textsuperscript{190} \textit{Id.} at 374-75. \\
\textsuperscript{191} 47 N.Y.2d at 110, 390 N.E.2d at 757-58, 417 N.Y.S.2d at 39 (1979). \\
\textsuperscript{192} The Supreme Court criticized the ban on advertising prices of prescription drugs in \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748 (1976) for the same reason. \textit{Id.} at 769. \\
\textsuperscript{193} 99 S. Ct. 887 (1979). \\
\textsuperscript{194} \textit{Id.} at 895. \\
\textsuperscript{195} \textit{Id.} \\
\textsuperscript{196} \textit{Id.} at 896. \\
\end{tabular}
as a justification for control.\textsuperscript{197} Past practices in the trade prior to the statute lent credence to this concern.\textsuperscript{198} The individual professional’s interest was minimal. The restriction was characterized as only the most incidental of infringements upon the content of commercial speech.\textsuperscript{199} Optometrists could still advertise prices, types of services available and the fact that they belonged to a partnership or association.\textsuperscript{200} The law did no more than require that commercial information appear in a form less likely to deceive.\textsuperscript{201}

The PSC order banning promotional advertising does not fall within any of the categories mentioned in \textit{Virginia State Board} where more stringent regulation might be desirable. The PSC order was a total ban, not a reasonable time, place, or manner restriction. The advertisements were not considered to be deceptive, misleading or false nor did they propose any illegal transaction. The corporate persons involved were not professionals rendering unique services of an “almost infinite variety and nature, with consequent enhanced possibilities of confusion or deception.”\textsuperscript{202} The New York Court of Appeal’s analogy to the cases of regulated professional groups was inappropriate. Furthermore, the Supreme Court has consistently struck down absolute bans on professional advertising.\textsuperscript{203} As the court observed in \textit{LILCO}, “[a]lthough the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends . . . . PSC’s ban on promotional advertising of electricity by public utilities is unconstitutional.”\textsuperscript{204}

Beyond the fact that the PSC ban did not directly serve the asserted governmental interest, the district court in \textit{LILCO} found that the alleged interest was outweighed by the interests of the utility and the public in continuing the dissemination of commercial advertising.\textsuperscript{205} LILCO’s economic interest in promoting the use

\textsuperscript{197} 425 U.S. at 771.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{204} 5 \textit{MED. L. REP. (BNA)} at 1247.
\textsuperscript{205} \textit{Id.} at 1245-47.
of electrical energy and in advertising the availability of its services was entitled to first amendment protection. The district court also found that the public interest in the free flow of information on the use of electrical energy for home heating was significant. Advertising concerning electrical energy also assists the individual consumer in making economic decisions concerning the benefits and detriments of electric heat and in choosing among oil, gas or electric residential heating. Finally, advertising by utility corporations serves a general public interest in ecologically sound, efficient utilization of energy resources.

V. Conclusion

With environmental concerns and a steadily worsening energy crisis provoking a clarion call for positive governmental action, emotions easily run in favor of regulations of the nature promulgated by the New York Public Service Commission. It is in such times that first amendment rights must be guarded most carefully. The course of our nation's energy policy is a matter of increasing concern to the public, the utilities and the government. The merits of each particular alternative may, and should be, the subject of sharp disagreement.

The imposition of a reasonable time, place, or manner restriction of speech is justifiable provided it leaves open ample alternative channels of communication, serves a substantial governmental interest and is not content-oriented. The PSC directed its ban on bill inserts at utility corporation attempts to communicate their opinion on controversial public policy issues. In doing so, the PSC imposed an impermissible restraint on the content of protected speech. Similarly, the prohibition against promotional advertising by utility corporations constitutes an intolerable restriction on commercial speech.

The reduction of energy consumption and the development of environmentally sound alternative sources of energy appear to be both necessary and desirable and may even necessitate the imposi-

206. Id. at 15.
207. Id. at 15-16.
208. Id. at 16.
209. Id.
tion of some form of governmental regulation. Unfortunately, if the PSC order as presently formulated actually serves any such function, it does so only at the expense of imposing an impermissible burden on the first amendment rights of public utility corporations.

Thomas G. Carulli