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RECENT DEVELOPMENTS

BAN ON ADVERTISING PROMOTING ENERGY USAGE VIOLATES FIRST AMENDMENT

CONSTITUTIONAL LAW: A complete ban on advertising intended to promote the purchase of utility services violates the First Amendment despite the ban's substantial advancement of national and state interests in energy conservation. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 100 S.Ct. 2343 (1980).

On February 25, 1977, the Public Service Commission of New York issued an order continuing a ban on advertisements which promote utility service purchases.¹ The order contained a policy statement in which the commission distinguished permissible and impermissible advertising. Informational advertising was ruled permissible because it did not seek to increase sales or aggregate consumption. Promotional advertising, on the other hand, was ruled impermissible as it clearly intended to encourage the purchase of utility services. The commission found this advertising contrary to national and state policies of energy conservation.

The commission noted that although the ban would not be totally effective in reducing energy consumption, it would at least dampen unnecessary energy growth. The commission reasoned that promotional advertising could result in higher utility rates to all customers because of the commission's present ratemaking policy regarding the pricing of electric services. This ratemaking policy is based upon the historical rather than the marginal cost of utility services. Thus under the commission's pricing policy, consumers are not being charged for the service in accordance with true cost principles. Since pricing of the commodity directly affects demand, the commission was concerned that, because of its uneconomic pricing policy, the utility would be forced to build additional expensive generating plants. This would result in generally higher utility prices for all customers. The commission also reasoned that promotional advertising sends the wrong signals to the public by encouraging energy consumption when it is state and national policy to encourage energy conservation.

1. The commission order originally issued in December 1973 after findings by the commission that the utility system in New York did not have sufficient fuel reserves or sources of supply to meet customer demands for the winter of 1973-74. For a more detailed history of the commission order, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 100 S. Ct. 2343, 2347-48 (1980).

Central Hudson Gas and Electric Corporation appealed the commission's ban on promotional advertising in state court, seeking relief from a restraint on its constitutionally protected rights to free commercial speech. The commission's order was upheld by the trial court and at the intermediate appellate level.² The New York Court of Appeals affirmed.³ The utility appealed to the United States Supreme Court.

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,⁴ the Supreme Court considered whether the commission's complete ban on promotional advertising by a state-created monopoly in pursuance of the state and national interest in energy conservation violated the utility's First Amendment commercial right of speech. The Court found that the commission's order restricted expression aimed entirely at advancing the speaker's economic interests. Further, it recognized that the Constitution accords a lesser protection to this type of speech than to other expressions.⁵ Nonetheless, the Court enunciated a stringent four part analysis for state action limiting commercial speech: (1) the expression must be protected by the First Amendment, i.e., the speech cannot be misleading or related to an illegal activity; (2) the asserted governmental interest must be substantial; (3) the governmental interest must be directly advanced by the regulation; and (4) the regulation must not be more extensive than necessary to serve that interest.⁶

Addressing the first part of the test, the Court held that the utility's speech concerned a lawful activity which was not misleading, and therefore was protected under the First Amendment.⁷ It rejected the claim that the status of a utility as a highly regulated monopoly removed its speech from First Amendment protection. The Court reasoned that "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment."⁸

Taking the second step of the analysis, the Court conceded that the state's interest in energy conservation was substantial, as was the state's concern that utility rates be fair and efficient.⁹ The Court

2. *Consol. Edison v. Public Serv. Comm'n of N.Y.*, 63 A.D.2d 364, 407 N.Y.S. 2d 735 (1978).

3. *Consol. Edison v. Public Serv. Comm'n of N.Y.*, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S. 2d 30 (1979).

4. 100 S. Ct. 2343 (1980).

5. *Id.* at 2350, *citing* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978).

6. *Id.* at 2350-51.

7. *Id.* at 2352.

8. *Id.*

9. *Id.* at 2353.

then examined the issue of whether the regulation directly advanced the state interest asserted. While it found that the link between fair and efficient rates and the advertising ban was highly tenuous and speculative, the Court did recognize a direct link between the commission's ban on promotional advertising and the state's interest in energy conservation.¹⁰

The Court then reached what it termed the critical inquiry of whether the regulation was more extensive than necessary to serve the state's interest in energy conservation.¹¹ The Court struck down the regulation because the commission had failed to demonstrate that its interest in conservation could not be protected by a more limited regulation, such as restricting the content and format of promotional advertising. Moreover, the Court found that the commission's order suppressed speech which did not impair the state goal of energy conservation.¹²

The concurring opinions of Justice Brennan and Justice Blackmun attacked the Court's four part test. In their view, as long as the speech is truthful and non-deceptive or non-coercive, there is no legitimate state interest to justify suppressing the speech. They reasoned that the state should not be allowed to indirectly influence public conduct by preventing the availability of information. If the state finds regulation of economic activities necessary, it should do so by direct action.

In his concurrence, Justice Stevens stated that he would not have analyzed this as a commercial speech case. In his view, the case dealt with an infringement of political speech which deserved the maximum protection afforded by the First Amendment. Because energy consumption and production are controversial in the political arena, a complete ban on promotional advertising would present an informed and interested group from participating in the discussion.

Mr. Justice Rehnquist, in his dissent, severely criticized the majority and concurring opinions. He asserted that a public utility, being a state-created monopoly and subject to a comprehensive regulatory scheme, was not entitled to First Amendment protection. He viewed the commission's action not as regulation of speech but as a legitimate economic regulation, which the Court has traditionally upheld. If the utility's promotional advertising is to be protected under the First Amendment at all, it would be entitled to a significantly lesser degree of protection than other forms of speech because of the sub-

10. *Id.*

11. *Id.*

12. *Id.* The Court noted that the ban included advertising of products and services which actually conserve energy, such as heat pumps.

ordinate position of commercial speech in the hierarchy of First Amendment values. He concluded that the ruling of the Court would impede the state's ability to protect and promote the interests of its citizens.

CONCLUSION

In reversing the New York Court of Appeals in this case, the United States Supreme Court expanded the protection afforded commercial speech. Adoption of the four-prong analysis with its critical "no more extensive than necessary" element severely restrains the promulgation of any rule or law which will directly prohibit speech regardless of the governmental interest involved or the status of the enterprise to be regulated. This result could have a major impact on means used to achieve policy objectives of national and state energy conservation. Public utility commissions attempting to limit the growth of energy usage may have to devise stringent economic regulations which directly affect the marketplace and consumer alternatives. This might require an expansion of the statutory powers of public utility commissions. At the very least, the Court's decision will require public utility commissions to either adopt regulations which restrict the content and format of utility speech or allocate costs to utility shareholders of impermissible advertising. Otherwise, a utility's unbridled ability to speak, given the economic power of such enterprises and their economic interest, could totally undermine the credibility of national and state energy conservation policy.

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