State Regulation of Advertising by Investor-Owned Electric Utilities: The Development of Current Standards and Their Constitutional Limits

I. Introduction

Since 1970 many states have revised their regulatory policies toward electric utility advertising. The general approach of the revisions has been to categorize advertising expenses by ad content and to allow only certain categories of expenses to be passed on to consumers through electricity rates.[1] Typically, state regulatory agencies adopting this approach will no longer allow any expenses for promotional or institutional advertising to be charged to ratepayers.[2] Only advertising which gives consumers information on utility services or on methods of energy conservation can now be included in the rates as an operating expense.[3] This relatively new regulatory attitude is a significant departure from the traditional policy that promotional and institutional advertising are legitimate operating expenses, consistent with the discharge of a public utility's duty to the public.[4]

The new, tougher state regulations are products of the radically changed economic and political climate after the late 1960's. State-of-the-art limitations on affordable improvements in generating technology, heavy inflation, environmental legislation, the energy crisis, and a general acceptance of ecological and consumer protection ethics all combined to put electric utilities and the regulatory agencies under great pressure.[5] Congress responded by enacting Title I of the Public Utility Regulatory Policies Act of 1978 (PURPA).[6]

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[1]See note 64 and accompanying text *infra* for rate cases using this approach.

[2]The categories of utility advertising expenditures in general use by state regulatory agencies are defined at 91 Pub. Util. Fort. 47 (Mar. 1, 1973):

> Utility advertising expenditures fall, generally, into four different categories. First, there is institutional advertising which is designed to enhance the corporate image of the utility. Second, there is promotional advertising which is designed to obtain new customers, increase usage by present customers, or to encourage [customers] to select and install appliances using one form of energy in preference to another. Third, there is consumer advertising which is designed to inform the customer of rates, changes in service, benefits available, emergency procedures, and safety precautions. Fourth, there is conservation advertising which is designed to inform the consumer of the means whereby he could conserve energy and reduce his usage.

See note 129 *infra* for the FTC's definition of corporate "image" advertising.

[3]See note 30 *infra* for a brief discussion of the components of operating expense and its use in rate-making.

[4]*See* notes 44-55 *infra* and accompanying text.

[5]*See* notes 55-63 *infra* and accompanying text.

[6]Pub. L. No. 95-617, §§ 101-43, 92 Stat. 3117 (1978) (to be codified in 16 U.S.C. §§ 2611-44 and 42 U.S.C. §§ 6801-08) [hereinafter cited as PURPA]. Title I is headed

One of PURPA's provisions requires state regulatory agencies to exclude the costs of political and promotional advertising from electric utility rates unless the agencies find that such exclusion would not tend to further the purpose of the Act or would not be consistent with applicable state law.[7] PURPA will probably result in judicial review of the traditional standard for electric utility advertising regulation in states which have not already substantially adopted PURPA's approach. The federal due process issue in *West Ohio Gas Co. v. Public Utilities Commission*[8] upon which the traditional standard of advertising regulation was largely based, may be an essential element in a state's decision regarding whether to adopt PURPA's advertising terms.

Neither PURPA nor most of the state policies taking the new, strict approach to advertising regulation prevent electric utilities from using institutional, promotional, or "controversial subject" advertising if utility stockholders bear the costs.[9] The strong public concern about energy policy and the serious problems of the electric power industry indicates, however, that the prohibition of all advertising in some categories may be adopted in states which now have more lenient policies.[10] Because the Supreme Court has ruled that corporate political and commercial speech has some degree of first amendment protection,[11] the constitutional validity of a prohibitory mode of utility advertising control may become a prominent issue if the trend for stricter regulation does not abate.

This Note will assess the constitutional foundation of electric utility advertising regulation, the extent to which the traditional *West Ohio Gas* standard remains valid constitutional law, and the decision's consequent significance for state implementation of

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"Retail Regulatory Policies for Electric Utilities." The Act's other titles are: Title II—"Certain Federal Energy Regulatory Commission and Department of Energy Authorities," Title III—"Retail Policies for Natural Gas Utilities," Title IV—"Small Hydroelectric Power Projects," Title V—"Crude Oil Transportation Systems," and Title VI—"Miscellaneous Provisions."

[7]See notes 70-78 *infra* and accompanying text for the PURPA sections pertinent to this provision.

[8]294 U.S. 63 (1935).

[9]There is evidence that electric utilities will continue promotional, institutional, or political advertising even if stockholders must pay for it. *E.g.*, *Ad Campaigns by State Power Producers Little Hard to Swallow for Citizens Groups*, Indianapolis Star, Jan. 7, 1979, § 3, at 8, col. 3 [hereinafter cited as *Ad Campaigns*] (regarding controversy about major, stockholder-financed advertising campaigns by Indiana utilities).

[10]New York, for example, has recently upheld a prohibition of all electric utility promotional advertising. Consolidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978).

[11]Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial speech); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (political speech).

PURPA's advertising provision. This Note will also probe the limits to which electric utility advertising may be constitutionally controlled.[12]

II. Traditional Basis for Regulation of Electric Utility Advertising

A. Legal Foundations and Scope of Regulatory Power

In *Munn v. Illinois*,[13] the Supreme Court held that the Constitution's fourteenth amendment due process clause[14] permits state regulation of private property which is profit-oriented and "affected with a public interest."[15] The Court in *Munn* ruled that a state law setting the prices that grain elevator operators could charge did not constitute a taking of private property without due process of law, unless the prices allowed were not reasonable compensation to the owners.[16] The Court noted that the fourteenth amendment was based on the common law conception of sovereign police power which permitted government control over the prices charged by ferrymen, common carriers, and others who offered their services to the

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[12]This Note will consider only regulations pertaining to investor-owned public electric utilities. Publicly owned electric utility advertising regulation does not raise constitutional issues under the first and fourteenth amendments. The bulk of the nation's electricity is produced and distributed by the investor-owned firms; according to the FPC, in 1970 the 200 largest investor-owned firms owned and operated more than 75% of the national generating capacity and served about 80% of the nation's electric customers. FPC, The 1970 National Power Survey, pt. 1, ch. 2, at 4 (1971). This Note, therefore, concerns the advertising regulation of the states as it affects the greater part of the nation's consumers.

The direct regulatory authority of the federal government over power supply is beyond the scope of the Note, although it does discuss the implications of PURPA, *supra* note 6, as applied to state regulation. The primary regulatory responsibility under PURPA is assigned to the states. *See* notes 70-77 *infra*. The constitutional issues which are discussed, however, are equally applicable to any federal regulation of privately owned electric company advertising.

This Note does not discuss natural gas utility advertising due to the different nature of the problems besetting the gas industry. Gas is a primary energy form in limited supply, while electricity is a secondary energy form which can be generated from several primary energy sources. Operating efficiencies of the gas and electric industries are also different. However, the state laws governing gas and electricity advertising are similar, so, apart from the policy issues arising from the differences between the two industries, much of the analysis in this Note is applicable to natural gas advertising.

[13]94 U.S. 113 (1876).

[14]"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 3.

[15]94 U.S. at 126 (quoting Lord Chief Justice Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78).

[16]*Id.* at 134.

general public.[17] Chief Justice Waite explained the common law rationale by stating:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created.[18]

Whether a business is "affected with a public interest" was subsequently held to be a matter for legislative determination, subject to judicial review.[19] The impossibility of an exact definition of the phrase resulted in much litigation and varying judicial formulations.[20] Ultimately, the state legislatures uniformly regarded electric power producers as "affected with a public interest" and created commissions to exercise the legislative police power by regulating electric utilities in a manner consistent with the public's interest.[21]

The process of regulation and its review by judicial authority have elaborated upon the scope of a utility's duty to the public, a duty implicit in *Munn's* formulation of the common law basis of private property control by government.[22] The formulations of the duty vary,[23] but the basic standard of the formulations may be stated as follows:

> The distinguishing characteristic of a public utility is the devotion of private property by the owner to such a use that the public generally, or at least that part of the public which has been served and has accepted the service, has the right to demand that such service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges.[24]

The "reasonable efficiency" element of utility duty allows regulatory

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[17]*Id.* at 123-25.

[18]*Id.* at 126.

[19]Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 431 (1927).

[20]16 AM. JUR. 2d *Constitutional Law* §§ 315-17 (1964).

[21]A thorough appraisal of the growth and structure of state regulatory agencies is beyond the scope of this Note. For a brief history of the creation of the state public service commissions and an overview of their modern structure and function, see A. FINDER, THE STATES AND ELECTRIC UTILITY REGULATION 16-23 (1977).

[22]94 U.S. 113 (1876).

[23]*See* 64 AM. JUR. 2d *Public Utilities* § 1 (1972).

[24]City of Phoenix v. Kasun, 54 Ariz. 470, 475, 97 P.2d 210, 212 (1939).

authority to reach beyond the control of price to the utility's methods of providing adequate service.[25]

To avoid unconstitutional confiscation, the rates set by government regulation must provide "a fair return upon the value" of the property used by a utility to provide its service. Such rates must not require the public to pay more for the services than they are "reasonably worth."[26] The fair return concept was explained by the Supreme Court as a matter "depend[ing] greatly upon circumstances and locality . . . the amount of risk . . . and the rate expected and usually realized there upon investments of a somewhat similar nature . . . ."[27] A later formula for proper rate-setting included a concern for the utility's fiscal health and its ability to attract capital: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."[28]

This concern was given pragmatic effect in the Court's definition of a proper rate calculation by the Federal Power Commission in *FPC v. Hope Nautral Gas Co.*[29] In that case, the Court held that a proper rate must balance the interests of ratepayers and investors, a balance obtained by allowing rates sufficient to cover operating costs, interest on debt, preferred stock dividends, and dividends on common equity equal to those paid by enterprises having similar risks.[30]

B. The Economies of Expansion: Electric Utility Operations Until the Late 1960's

From 1935 to 1967, the cost to produce a kilowatt-hour of electricity declined in the United States.[31] Several factors caused this sustained reduction in cost.

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[25]*See* Louisville & N. R.R. v. Kentucky, 161 U.S. 677, 696 (1896).

[26]Smyth v. Ames, 169 U.S. 466, 547 (1897).

[27]Willcox v. Consolidated Gas Co., 212 U.S. 19, 48 (1909).

[28]Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 693 (1923).

[29]320 U.S. 591 (1944).

[30]*Id.* at 603. State regulatory commissions today generally adhere to this formula. *See* A. FINDER, *supra* note 21, at 25. The revenues required to be generated through a utility's rate structure are equal to the utility's operating expenses (plant, fuel, labor, and management costs, plus taxes) plus its capital costs (interest on debt, retained earnings, dividends on preferred stock, and fair return on common equity). *Id.*

[31]FEDERAL POWER COMMISSION, THE 1970 NATIONAL POWER SURVEY, pt. 1, ch. 1, at 33-34 (1971):

> This long-term trend was in sharp contrast with almost every other price pattern in the American economy. For example, over the period 1940 to 1962,

Electric generating technology was improved by the successful use of ever-larger power plants, which burned fuel at increasingly higher temperatures with consequently greater efficiency.[32] Accordingly, the amount of fuel required to generate a kilowatt-hour was reduced. Improvements in transmission and distribution technology were also made, enabling utilities to deliver power at a lower cost.[33]

The demand for and consumption of electric power greatly increased[34] because of population growth, economic expansion, higher standards of living, and a great proliferation of the varieties of electrically powered devices.[35] The burgeoning demand and consumption enabled the utilities to build technological improvements in power generation into new facilities. Capital to finance the additions was generally available at reasonable cost.[36] As a result, the increases in revenue, required for "reasonable return,"[37] were offset by the lower operating cost per kilowatt-hour resulting from production improvements and by increased revenues from greater sales. This situation possessed all the elements of classic economy of scale.[38]

The utilities were also able to improve their load factor, the ratio of average power demand to peak demand.[39] Because electric power cannot economically be stored for later use, the generating capacity of an electric utility system must be sized to meet the power demand as it occurs. The daily demand on generating capacity will vary with the activities of the region it serves, but the general pattern of electric load will peak during daylight hours, when industrial, commercial, and residential use of electrical equipment is

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during which the average price of electricity—again on a current dollar basis—was reduced by nearly 25%, the average price of consumer goods (consumer price index) rose more than 200%.

[32]*Id.* at 34.

[33]*Id.*

[34]The load doubled approximately every 10 years from the 1880's to 1970. *Id.* ch. 3, at 3. Demand or load is the rate, at any moment, at which power is required. Consumption is the quantity of energy used over time.

[35]*Id.*

[36]*Financial Problems of the Electric Utilities: Hearings Pursuant to S. Res. 45 Before the Sen. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 429 (1974) [hereinafter cited as *Financial Problems*].

[37]*See* note 30 *supra* and accompanying text.

[38]FEDERAL POWER COMMISSION, THE 1970 NATIONAL POWER SURVEY, pt. 1, ch. 1, at 34 (1971).

[39]*National Energy Act: Hearings on H.R. 6831, H.R. 687, H.R. 1562, H.R. 2088, H.R. 2818, H.R. 3317, H.R. 3664, H.R. 6660 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., pt. 3, vol. 1, at 143 (1977) [hereinafter cited as *Energy Act Hearings*]. (These bills were later substantially incorporated into PURPA, *supra* note 6. *Compare* PURPA § 113(b)(5) *with* H.R. 6660 § 312(a)) 95th Cong., 1st Sess. (1977).

greatest, and will be lowest in the early morning.[40] Increases in the use of equipment during the periods of lower demand provided the utilities with better utilization of their power plants, so that the ratio of kilowatt-hours sold to total kilowatts of generating capacity increased and more revenue was available to pay the "fair return" on the debt and equity represented by the utility plants.[41] Demand levels historically varied with seasons as well as with the time of day.[42] Until the early 1950's, the highest demand on utility systems occurred during the winter. With the advent of commercial and residential air-conditioning equipment, however, the disparity between winter and summer demands began to diminish, so that by the early 1960's the composite national load factor was at its highest.[43]

C. The Regulatory Response to the Economies of Expansion: Advertising and the West Ohio Gas Standard

The favorable conditions for the growth of the electric power industry were inextricably bound to the expansion of the national economy. During this period the regulatory commissions adopted the policy that demand for power should be met in order to encourage economic growth. Accordingly, they approved rate designs which favored greater electric consumption. These rate designs, submitted by the utilities, took the form of "declining blocks" rewarding higher levels of consumption with a lower unit cost.[44]

Because the expansion of demand led to the reduction of energy costs by providing a market for new, technologically superior utility plants and because the demand growth itself was seen as an integral aspect of economic progress, the regulatory commissions accepted active promotion of increased consumption as a proper operating expense of an electric utility.[45] Promotional advertising was integral to the utility load growth effort.[46] While advertising's effect upon actual growth was not generally capable of factual demonstration before a commission, the benefits of promotional advertising were,

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[40]FEDERAL POWER COMMISSION, THE 1970 NATIONAL POWER SURVEY, pt. 1, ch. 3, at 1-2 (1971).

[41]An example of the type of equipment-improving load factor is street lighting.

[42]*Energy Act Hearings, supra* note 39, pt. 3, vol. 1, at 143.

[43]*Id.*

[44]A. FINDER, *supra* note 21, at 47.

[45]*See Promotional Practices By Public Utilities and Their Impact Upon Small Business: Hearings Pursuant to H. Res. 53 Before the Subcomm. on Activities of Regulatory Agencies of the House Select Comm. on Small Business*, 90th Cong., 2d Sess. A195-217 (1968) [hereinafter cited as *Promotional Practices*].

[46]*Id.* at 710-25 (exhibits of advertisements for appliances and appliance-related services).

in principle, justifiable as part of the active policy to promote growth of capacity and supply.[47] Institutional advertising was also an acceptable operating expense because it was considered to improve the utility's image as a good investment and, hence, to help provide the capital required to build new facilities.[48]

The regulatory attitude toward electric utility advertising during the expansion-oriented era was heavily reliant upon Justice Cardozo's majority opinion in *West Ohio Gas*.[49] The portion of the case concerning advertising involved unconstitutional confiscation by the Ohio Public Utilities Commission in its arbitrary disallowance of promotional expenses submitted by a gas company as an operating expense. Cardozo emphasized that a public utility is a private business venture whose managers must have reasonable flexibility in the discharge of the business' duty to the public:

> Good faith is to be presumed on the part of the managers of a business. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay. The suggestion is made that there is no evidence of competition. We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays.[50]

The presumption that growth is an integral aspect of the health of a business, notwithstanding that it is regulated, makes advertising to promote business expansion in the face of competition a legitimate operating expense: "Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others."[51]

The competitive aspects of an energy business and advertising's effectiveness in maintaining the fiscal health of a public utility were key principles to the holding that promotional expense was

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[47]*See, e.g.*, Letter from Lee C. White, Chairman of FPC, to Rep. John D. Dingell (Oct. 18, 1968), *reprinted in Promotional Practices, supra* note 45, at 743-44 (discussing acceptability of promotional rates to encourage off-peak load growth).

[48]*E.g.*, Consolidated Edison, 41 PUB. U. REP. 3d (PUR) 305, 364 (1961):

> What is of concern here are advertisements which are obviously designed to project a favorable image of the company to its customers, its existing stockholders or potential investors. To the extent that such advertising fosters sound consumer relations or encourages people to invest in the company, it seems clear that the consumers, as well as the stockholders, are ultimately benefited through the lessening of the expense of doing business.

[49]294 U.S. at 72.

[50]*Id.* (citations omitted).

[51]*Id.*

legitimately chargeable to the ratepayers.[52] To disallow advertising expenses without evidence that the advertising was unnecessary for the utility to provide its service would be to pass beyond regulation to usurpation of business management and to confiscation of private property without due process. Regulatory commissions had the duty to oversee, not to plan or administer.

As the cost of electricity continued to decrease while demand grew and the economy flourished, promotional and institutional advertising were routinely approved and included in rate structures by regulatory commissions.[53] If the need to pass the cost of such advertising on to consumers was questioned, state judicial review adhered to Cardozo's standard in *West Ohio Gas.*[54]

III. The New Climate and Changing Perceptions of the Role of Regulation: Current Advertising Policies

A. The Rapid Demise of the Expansion Policy

Since the late 1960's, the economies to be obtained from the expansion of electric demand have largely vanished. Growth has become a dilemma rather than a desirable goal. The reasons for this

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[52]*Id.* In his remarks on the legitimacy of advertising as operating expense, note 51 *supra* and accompanying text, Cardozo cited Consolidated Gas Co. v. Newton, 267 F. 231 (S.D.N.Y. 1920), which concerned in part the propriety of advertising undertaken in response to the plaintiff gas company's market share:

> The truth appears to be that the constantly increasing use of electricity for illumination has driven out gas more and more, until to hold its sales the plaintiff must promote the use of gas for heating and cooking. It has succeeded in a slight increase of sales, and its officers attribute their ability to do even so well to these departments. I have no doubt that they are right; but, whether right or wrong, their decision is not now open to question. They were under a duty to keep up their sales so far as they could, and to push the use of gas in any new ways which the public would use it. Even under municipal management, advertisement, when not pushed to the useless extreme which competition too often engenders, is a necessary function. In its proper sense it means, not the creation of a factitious demand by the familiar processes of repeated suggestion, but genuine information in such form as to reach the public.

Id. at 253.

[53]*E.g.*, Arkansas La. Gas Co., 40 Pub. U. Rep. 3d (PUR) 209 (Ark. Pub. Serv. Comm'n 1961); Southern Cal. Gas Co., 35 Pub. U. Rep. 3d (PUR) 300 (Cal. Pub. Util. Comm'n 1960); Promotional Activities by Gas & Elec. Corps., 68 Pub. U. Rep. 3d (PUR) 162 (N.Y. Pub. Serv. Comm'n 1967).

[54]City of El Dorado v. Public Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Gifford v. Central Me. Power Co., 160 Me. 136, 217 A.2d 200 (1966); Public Serv. Co. v. State, 102 N.H. 150, 153 A.2d 801 (1959). *But see* Southwestern Elec. Power Co. v. FPC, 304 F.2d 29 (5th Cir.), *cert. denied*, 371 U.S. 924 (1962) (holding FPC had power to transfer advertising expenses on benefits of private versus public power from expense accounts charged to ratepayers to accounts charged to stockholders).

change are beyond the scope of this Note, but a brief assessment is essential to an understanding of the current regulation of electric utility advertising and of the pressures for its strict control.

It is no longer true that expanded generating and transmission capacity reduce the cost to produce electricity. The efficiencies to be gained from economies of scale in generating capacity are not sufficient[55] to offset the increased costs of both the construction of new power plants and the fuel they use.[56]

Demand for power continues to increase rapidly, though estimates of future growth indicate it will no longer double every ten years.[57] The summer peak demand has outstripped the winter peak nationally, due to air-conditioning load growth, so that the national load factor is declining.[58] This problem is exacerbated by the failure of the declining block rate design to relate the actual cost of higher levels of power consumption during peak demand to the price charged. The social and the environmental costs of additional power plants, needed to meet increased demand, are too high.[59]

These changes have caused declining stock prices[60] and have forced the utilities to obtain new construction financing at inflated interest rates.[61] To offset these problems, the utilities have had to increase their rates rapidly,[62] despite intense opposition from outraged consumer groups.[63]

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[55]A. FINDER, *supra* note 21, at 1. One writer suggested that some efficiencies are still to be obtained from larger plants but that the size of the utility's operating territory itself functions as a limit upon the size of the generating unit which can be built, so that mergers among existing utilities or joint construction of super plants by consortiums of utilities are necessary to obtain the cost benefits of bigger plants. Hughes, *Scale Frontiers in Electric Power*, in TECHNOLOGICAL CHANGE IN REGULATED INDUSTRIES (W. Capron ed. 1971).

[56]*Energy Act Hearings*, *supra* note 39, pt. 3, vol. 1, at 78-79 (written testimony of D. Bardin, Deputy Adminstrator of the Federal Energy Agency).

[57]*Id.* at 79.

[58]*Id.* at 143.

[59]The undesirability of unrestrained increases in environmental pollution has been recognized and addressed in much legislation at both state and federal levels. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976).

[60]*Electric Utility Rate Reform and Regulatory Improvement, Hearings on H.R. 12461, H.R. 2633 and H.R. 2650 (Titles VII and VIII), H.R. 6696, H.R. 10869, H.R. 11449, H.R. 11475, H.R. 12848, H.R. 12872 (and all identical, similar, and related bills) Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess., pt. 1, 227 (1976) (statement of W.D. Crawford).

[61]A. FINDER, *supra* note 21, at 8.

[62]*Energy Act Hearings*, *supra* note 39, pt. 3, vol. 1, at 68-75 (statement of D. Bardin).

[63]For an example of the increasing sophistication of consumer groups hostile to electric utilities and of the breadth of their opposition to utility practices, see R. MORGAN & S. JERABEK, HOW TO CHALLENGE YOUR LOCAL ELECTRIC UTILITY (1974) (publication of the Environmental Action Foundation).

B. A Reassessment of the Proper Scope of Advertising Regulation

In response to the exigencies of the power situation and to public criticism, the regulatory agencies in many states have reacted by categorizing utility advertising content and by refusing to allow the costs of promotional and institutional advertising as operating expenses.[64] This policy has been adopted to remove incentives for increased consumption and to remove an unpopular cost from the rates. A few state agencies have adopted a prohibitory mode of regulation. New York has banned promotional advertising.[65] The Oklahoma Corporation Commission announced in 1975 that it would prohibit promotional and institutional ads, but subsequent state judicial review overruled the Commission order.[66] As yet no states have prohibited any controversial subject, conservation, or consumer information advertising.

One state has refused to adopt the categorical classification system because the definitional categories are viewed as obscuring the actual content of the advertising concerned. Advertising expenses under this non-categorical approach, however, are allowed as operating expenses only if they provide consumer service or conservation information.[67]

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[64]Arkansas Power & Light Co., 15 PUB. U. REP. 4th (PUR) 153, 176-77 (Ark. Pub. Serv. Comm'n 1976); Southern Cal. Edison Co., 100 PUB. U. REP. 3d (PUR) 257, 278-81 (Cal. Pub. Util. Comm'n 1973); Public Serv. Co., 13 PUB. U. REP. 4th (PUR) 40, 58 (Colo. Pub. Util. Comm'n 1975) (but promotional ads increasing off-peak use allowed); Promotional Practices of Elec. Utils., 8 PUB. U. REP. 4th (PUR) 268, 275-76 (Fla. Pub. Serv. Comm'n 1975); Tampa Elec. Co., 9 PUB. U. REP. 4th (PUR) 402, 414 (Fla. Pub. Serv. Comm'n 1975); Kansas Gas & Elec. Co., 11 PUB. U. REP. 4th (PUR) 504 (Kan. Corp. Comm'n 1975) (abstract of order disallowing institutional ads but allowing promotional ads tending to improve load factor); Potomac Elec. Power Co., 10 PUB. U. REP. 4th (PUR) 13, 19-20 (Md. Pub. Serv. Comm'n 1975); Northern States Power Co., 11 PUB. U. REP. 4th (PUR) 385, 402 (Minn. Pub. Serv. Comm'n 1975); Montana Power Co., 96 PUB. U. REP. 3d (PUR) 265, 277 (Mont. Pub. Serv. Comm'n 1972); Duke Power Co., 88 PUB. U. REP. 3d (PUR) 230, 239-40 (N.C. Utils. Comm'n 1971); Northern States Power Co., 10 PUB. U. REP. 4th (PUR) 489 (N.D. Pub. Serv. Comm'n 1975) (abstract of rate case); Northern States Power Co., 6 PUB. U. REP. 4th (PUR) 38, 42 (N.D. Pub. Serv. Comm'n 1974) (institutional ads not allowed, but promotional ads considered proper advertising expense); Utility Advertising Expenditures, 14 PUB. U. REP. 4th (PUR) 578 (Ore. Pub. Util. Comm'n 1976) (abstract of order); Pacific Power & Light Co., 14 PUB. U. REP. 4th (PUR) 578 (Ore. Pub. Util. Comm'n 1976) (abstract of case); Narragansett Elec. Co., 1 PUB. U. REP. 4th (PUR) 60, 67 (R.I. Pub. Utils. Comm'n 1973); Northwestern Pub. Serv. Co., 22 PUB. U. REP. 4th (PUR) 60, 83-84 (S.D. Pub. Util. Comm'n 1977); Wisconsin Power & Light Co., 4 PUB. U. REP. 4th (PUR) 305, 308-09 (Wis. Pub. Serv. Comm'n 1974).

[65]Consolidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978).

[66]State v. Oklahoma Gas & Elec. Co., 536 P.2d 887, 897 (Okla. 1975).

[67]Consumers Power Co., 3 PUB. U. REP. 4th (PUR) 321, 332-34 (Mich. Pub. Serv. Comm'n 1974).

Advertising regarding the benefits of nuclear power has received varying regulatory treatment. Maine and Wisconsin have concluded that such advertising conveys valuable information to both consumers and investors on the superior reliability and economy of nuclear power to both consumers and investors and that this advertising, therefore, is properly included in electric rates, even though nuclear generation is a controversial subject and opposed by significant segments of the public.[68] New York has ruled that advertising costs promoting nuclear power should not be passed on to consumers because nuclear generation is a controversial public policy matter upon which a utility should not be allowed to take a position at consumer expense.[69]

The impact of PURPA upon these state policies is difficult to predict. Title I of the Act[70] is intended to cause the states to reassess and strengthen their regulation of electric utility rates. The title's stated purpose is to encourage conservation of electricity, efficient use of utility facilities, and equitable consumer rates.[71] State regulatory agencies are required to consider whether Title I's purpose would be furthered by state implementation of specified federal standards,[72] one of which is the exclusion of promotional and

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[68]Central Me. Power Co., 15 PUB. U. REP. 4th (PUR) 455, 475 (Me. Pub. Util. Comm'n 1976) (nuclear power a subject upon which management may take and advertise a public position); Wisconsin Elec. Power Co., 9 PUB. U. REP. 4th (PUR) 204, 219 (Wis. Pub. Serv. Comm'n 1975) (substantial benefits of on-line nuclear plant a proper institutional ad operating expense to attract investors).

[69]Consolidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978).

[70]Note 6 *supra*.

[71]PURPA, *supra* note 6, § 101 (to be codified at 16 U.S.C. § 2611) provides: "The purposes of this title are to encourage—(1) conservation of energy supplied by electric utilities; (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and (3) equitable rates to electric consumers." The Act, however, applies only to larger utilities. Section 102(a) (to be codified at 16 U.S.C. § 2612) provides:

> This Title applies to each electric utility in any calendar year, and to each proceeding relating to each electric utility in such year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

[72]*Id.* Section 111 (to be codified at 16 U.S.C. § 2621) requires state regulatory agencies to consider whether the Act's purposes would be furthered by implementing federal standards for rate reform, including time-of-day rates relating price to time of daily use, seasonal rates providing for seasonal price differentials related to seasonal generation cost variations, and other rate changes. Section 112 (to be codified at 16 U.S.C. § 2622) requires the state agencies to make their considerations of the § 111 standards in formal hearings held no later than two years after the Act's passage. Section 113 (to be codified at 16 U.S.C. § 2623), aside from the advertising standard, note 73 *infra*, provides for state regulatory consideration of federal standards for "automatic adjustment clauses" (commonly known as fuel adjustment clauses), con-

"political" advertising[73] costs from consumer rates.[74] The states are not required to adopt the federal advertising standard if the state

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sumer information, procedures for disconnecting electric service for nonpayment of bills, and metering for multiple-occupancy buildings. Section 114 (to be codified at 16 U.S.C. § 2624) allows exceptions for "lifeline rates" which give subsistence levels of electricity to low-income consumers at prices lower than cost and which hence do not conform with the rate reform provisions of § 111. For a brief survey of PURPA's Title I, see Partridge, *A Road Map to Title I of the Public Utility Regulatory Policies Act of 1978*, 101 PUB. UTIL. FORT. 16 (Jan. 18, 1979).

[73]PURPA, *supra* note 6, § 115(h) (to be codified at 16 U.S.C. § 2625) defines promotional and "political" advertising and distinguishes them from other types of advertising:

> (1) For purposes of this section and section 113(b)(5)—
>
> (A) The term "advertising" means the commercial use, by an electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.
>
> (B) The term "political advertising" means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.
>
> (C) The term "promotional advertising" means any advertising for the purpose of encouraging any person to select or use the service or additional service of an electric utility or or the selection or installation of any appliance or equipment designed to use such utility's service.
>
> (2) For purposes of this subsection and section 113(b)(5), the terms "political advertising" and "promotional advertising" do not include—
>
> (A) advertising which informs electric consumers how they can conserve energy or can reduce peak demand for electric energy,
>
> (B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,
>
> (C) advertising regarding service interruptions, safety measures, or emergency conditions,
>
> (D) advertising concerning employment opportunities with such utility,
>
> (E) advertising which promotes the use of energy efficient appliances, equipment or services, or
>
> (F) any explanation or justification of existing or proposed rate schedules, or notifications of hearings thereon.

Note that § 115(h) does not refer to institutional advertising as defined in note 2 *supra*. This suggests that the courts may be faced with the question whether institutional advertising falls into either the "promotional" definition of § 115(h)(B) or the "political" definition of § 115(h)(C). Nuclear power advertising has been held to be institutional in nature by some regulatory commissions which have also recognized that the nuclear power issue is controversial. *See* note 68 *supra* and accompanying text. New York has ruled that nuclear power ads concern a controversial public policy issue. *See* note 69 *supra* and accompanying text.

[74]*Id.* Section 113(b)(5) (to be codified at 16 U.S.C. § 2623) provides: "No electric utility may recover from any person other than the shareholders (or other owners) of

regulators find that the Act's purpose would not be served thereby or if the standard is not consistent with applicable state law.[75]

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such utility any direct or indirect expenditure by such utility for promotional or political advertising as defined in section 115(h)."

[75]*Id.* Sections 113(a) and (c) (to be codified at 16 U.S.C. § 2623) provide:

> (a) . . . Not later than two years after the date of the enactment of this Act, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall provide public notice and conduct a hearing respecting the standards estabished by subsection (b) and, on the basis of such hearing, shall—
>
> (1) adopt the standards established by subsection (b) (other than paragraph (4) thereof) if, and to the extent, such authority or nonregulated electric utility determines that such adoption is appropriate to carry out the purposes of this title, is otherwise appropriate, and is consistent with otherwise applicable State law . . . .
>
> . . . .
>
> For purposes of any determination under paragraphs (1) . . . any review of such determination in any court in accordance with section 123, the purposes of this title supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to adopt such standard, pursuant to its authority under otherwise applicable State law.
>
> . . . .
>
> (c) . . . Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility, within the two-year period specified in subsection (a), shall (1) adopt, pursuant to subsection (a), each of the standards established by subsection (b) or, (2) with respect to any such standard which is not adopted, such authority or nonregulated electric utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

Id. Sections 117(a) and (b) (to be codified at 16 U.S.C. § 2627) clearly indicate that state regulatory agencies are not constrained by PURPA to adopt any advertising standard inconsistent with state law:

> (a) . . . Nothing in this title shall authorize or require the recovery by an electric utility of revenues, or of a rate of return, in excess of, or less than, the amount of revenues or the rate of return determined to be lawful under any other provision of law.
>
> (b). . . Nothing in this title prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subtitle.

The provision in § 113(a) for PURPA to supplement state regulatory authority is apparently not intended to give state regulators authority to adopt any policy which it is clear they are prohibited from adopting under state law, but if their authority is unclear the federal law is meant to enable them to act:

> The conferees intend that the discretion under this title of a State regulatory authority or nonregulated electric utility to adopt the standards established by section 113 or not to adopt them . . . is very broad, so long as the requirements of this title are met. Such authority and utility are not required by these sections to adopt or implement such standards. However,

Under this provision the state policies which are not consistent with PURPA would not have to be revised to conform with the federal law if the state regulators determined that their present policies are more likely to achieve Title I's purpose.

PURPA's terms require only a regulatory finding that the federal standard is inappropriate.[76] Another PURPA provision, however, allows any party who participates in the state regulatory proceeding to recover his litigation costs, including attorney fees, from the affected utility if he successfully appeals the regulatory decision in state court and, by doing so, substantially contributes to the ultimate approval of a position he espoused before the regulatory agency.[77] This provision substantially increases the

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any provisions of State law or regulations that may require such adoption or implementation are not affected by this title.

The conferees wish to emphasize that for purposes of the determination in accordance with paragraph (1) or (2) of section 113 and for the purposes of any review of the consideration and determination in any court, the purposes of this title shall supplement State law.

It should be noted that the test of consistency with State law, as described in section 113(a)(1) and (2) is with respect to State law alone and not with respect to State law as supplemented by the three purposes of the title. The intent here is that where a State regulatory commission or nonregulated utility finds insufficient authority pursuant to otherwise applicable State law, under which it may adopt a standard established in section 113, then these three purposes of the title provide such authority. In effect the three purposes expand the discretion of the State regulatory commission or nonregulated utility to adopt the standards of section 113. However, the conferees also intend that three [*sic*] purposes do not override State law.

JOINT COMM. OF CONFERENCE ON H.R. 4018, JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, H. CONF. REP. No. 95-1750, 95th Cong., 2d Sess. 75 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7975, 7987. The distinction between "insufficient authority" and authority assumed in violation of state law by a regulatory commission unsure of the extent of its power under state law to adopt PURPA's standard is a fine one which may generate state review of the regulatory authority to make the findings encouraged by PURPA. See notes 82, 88, 90, 91 *infra* and accompanying text for three similar regulatory enabling statutes and the differing judicial constructions of the authority they confer to regulate electric utility advertising.

[76]Note 75 *supra*.

[77]PURPA, *supra* note 6. Sections 122(a) and (b) (to be codified at 16 U.S.C. § 2632) provide:

Consumer representation:

(a) . . . (1) If no alternative means for assuring representation of electric consumers is adopted in accordance with subsection (b) and if an electric consumer of an electric utility substantially contributed to the approval, in whole or in part, of a position advocated by such consumer in a proceeding concerning such utility, and relating to any standard set forth in subtitle B [including § 113(b)(5) on advertising], such utility shall be liable to compensate such consumer . . . for reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position

likelihood that a regulatory determination against PURPA's advertising terms will be subjected to state judicial review. In particular, regulatory determinations that applicable state law precludes adoption of PURPA are apt to be appealed and, in states which have adhered to the traditional, *West Ohio Gas*[78] position that electric utility advertising costs are properly absorbed by consumers, *West Ohio Gas* will probably receive attention in any such litigation.

IV. Constitutional Limitations Upon State Regulation of Electric Utility Advertising

A. Recent State Judicial Review, West Ohio Gas, and the Due Process Clause

Few state courts have considered the propriety of the tougher regulatory policies toward electric utility advertising. Those decisions have interpreted *West Ohio Gas* in conflicting ways and frame an issue which is likely to be brought before other state courts as a result of PURPA.

As discussed above, the common state regulatory approach to electric utility advertising in recent years has been to categorize advertisements in terms of content and to either exclude certain categories from operating expense or to ban all advertising of certain types. The use of content categories itself was held to be an unreasonable and confiscatory mode of regulation in *Alabama Power Co. v. Alabama Public Service Commission.*[79] The issue in that case was the propriety of the Commission's exclusion of advertising costs from operating expense on the grounds that the advertising content was within an institutional category. The Alabama Supreme Court held that the use of content categories to determine whether advertising costs would be included in rate calculations was beyond the Commission's authority under the Alabama Code[80] which was inter-

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in such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position).

. . . .

(b) . . . Compensation shall not be required under subsection (a) if the State . . . has provided an alternative means for providing adequate compensation

. . . .

[78]294 U.S. 63 (1935).

[79]359 So. 2d 776 (Ala. 1978).

[80]Ala. Code § 37-1-80 (Supp. 1978) provides:

The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Every utility shall be entitled to such just and reasonable rates as will enable it at all times to fully perform its duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of its property devoted to the public service . . . . In any determination of the commission as to what constitutes such a fair return, the commission shall give

preted to incorporate the *West Ohio Gas* opinion as a bar to usurpation of management functions by state regulation.[81] Under the Alabama view, the use of advertising categories to determine operating expenses improperly presumes what constitutes legitimate public utility management decisions, and is, in that sense, confiscatory. This view assigns the primary responsibility for energy decisions to the utility and is similar to the traditional state regulation applied during the boom periods of electric power industry growth. The Alabama Commission, however, does have the authority under this opinion to hear each rate case on its merits and to determine which advertising expenses are the products of "honest, efficient and economical management"[82] and, thus, are proper to include in rate calculations. The Commission cannot presume that one type of advertising is per se an illegitimate means of providing reliable utility service at reasonable cost.

In *State v. Oklahoma Gas & Electric Co.*,[83] the categorization of advertising content to determine operating expense was considered to be a proper use of regulatory power,[84] but an outright ban on

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due consideration among other things to the requirements of the business with respect to the utility under consideration, and the necessity, under honest, efficient and economical management of such utility, of enlarging plants, facilities and equipment of the utility under consideration, in order to provide that portion of the public served thereby with adequate service.

[81]359 So. 2d at 780. The court stated:

> Advertising is of vital importance to corporations in establishing and maintaining their public image, as well as in educating the consuming public. As such, it is a responsibility of the duly authorized manager of a utility to decide the type, quantity, or form of advertising which would most benefit the corporation in its continued growth. The Utility has the initial right to decide the amount and type of advertisement which comports with good management practices. The function of the Alabama Public Service Commission is that of regulation, and not of management. The Commission should not be allowed to interfere with the proper operation of the utility as a business concern by usurping managerial prerogatives.

Id.

[82]ALA. CODE § 37-1-80 (Supp. 1978).

[83]536 P.2d 887 (Okla. 1975). This case is discussed in depth in Note, *Public Utilities: The Allowance of Advertising Expenditures for Rate-Making Purposes—Is This Trip Really Necessary?*, 29 OKLA. L. REV. 202 (1976). The author argued that promotional and institutional advertising expenses should not be borne by consumers and that prohibition of all promotional energy utility advertising is in the public interest. The Note does not address constitutional issues, except to say that prohibition of promotional advertising may abridge the utility stockholders' rights. The Note was written before Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), established first amendment protection for commercial speech.

[84]536 P.2d at 894 (institutional advertising), 896 (promotional advertising). New Hampshire has taken this approach. Public Serv. Co. v. State, 113 N.H. 497, 311 A.2d 513 (1973).

advertising on the basis of categories was held to be unreasonable.[85] The Oklahoma Supreme Court held that a categorical ban of promotional and institutional advertising by state utilities crossed the line between management and regulation and, thus, exceeded the Oklahoma Corporation Commission's statutory authority.[86] The court held that the utility had the burden of proving that the advertising expenses benefited all ratepayers.[87]

In contrast to the Oklahoma and Alabama positions, a prohibition on all promotional advertising was held to be within the power of the New York Public Service Commission in *Consolidated Edison Co. v. Public Service Commission.*[88] The opinion did not mention *West Ohio Gas* and relied heavily on the Commission's finding that promotional advertising was not in the public interest.

In these cases, the state statutes pertaining to regulatory authority were similar in content[89] but were construed to give com-

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[85]536 P.2d at 897.

[86]OKLA. STAT. ANN. tit. 17, § 152 (West 1953) provides:

> The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.

[87]536 P.2d at 894-96. *Accord, In re* Hawaiian Elec. Co., 56 Haw. 260, 535 P.2d 1102, 1108-09 (1975).

[88]407 N.Y.S.2d 735 (App. Div. 1978). The court held that the Commission had authority to prohibit promotional advertising, citing the following statutory provisions:

> Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe in the manner provided by and subject to the provisions of section seventy-two of this chapter the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished.

N.Y. PUB. SERV. LAW § 66(5) (McKinney 1955) (in pertinent part).

> The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.

Id. § 5(2) (Supp. 1978).

[89]*Compare* the statutes in notes 82, 88, 90 *supra*, *with* the exception of N.Y. PUB.

missions significantly different power to regulate electric utility advertising. Each decision suggests a different interpretation of the nature of proper regulation and of *West Ohio Gas*. The conflict between the decisions suggests that *West Ohio Gas* should be reexamined, in light of subsequent Supreme Court cases, to determine the limitations of the fourteenth amendment due process clause upon regulation of utility advertising. *West Ohio Gas* can obviously be interpreted in differing ways in determining whether regulatory limits upon advertising are proper under state law, but the case itself was decided on federal constitutional grounds and its authority as constitutional doctrine should be separated from its use to support state law. The current constitutional significance of *West Ohio Gas* may not preclude conflicting state positions, but it should have some import in the re-evaluation of state law on the extent to which regulatory authority controls electric utility advertising.

An initial issue is whether *West Ohio Gas* grants a regulated business an unqualified right to advertise in any manner it chooses at customer expense. For sometime prior to *West Ohio Gas*, the Court interpreted the due process clause to grant such substantive economic rights,[90] but this doctrine was abandoned a year before *West Ohio Gas*, in *Nebbia v. New York*.[91] *West Ohio Gas* may suggest that "normal growth"[92] is an essential aspect of a business venture with which a state cannot constitutionally interfere. However, "normal growth" was perceived in *West Ohio Gas* as a means to a regulatory goal rather than as a due process limitation on regulation. The holding was based on an awareness of the need for a regulated business to have sufficient income to keep it viable, so that it could maintain service to its customers.[93] At the time *West Ohio Gas* was decided, energy utilities were subject to severe competition.[94] In that context, "normal growth" fostered by advertising was a response to a condition threatening a utility's market and its

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SERV. LAW § 5, *supra* note 93. They are all as general as the Supreme Court's standards, notes 26-30 *supra* and accompanying text.

[90]291 U.S. 502 (1934). (State control of milk prices held not to violate due process).

[91]The classic embodiment of this approach is Lochner v. New York, 198 U.S. 45 (1905), in which a New York law regulating bakery work hours was stricken as a denial of the liberty to contract protected by the fourteeneth amendment due process clause. On economic due process and its demise, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 548-96 (9th ed. 1975); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

[92]294 U.S. at 72.

[93]See note 52 *supra* and accompanying text.

[94]*E.g.*, the quotation from *Consolidated Gas Co.*, note 52 *supra*.

financial health. Under such conditions, exclusion of advertising expenses from retail energy rates, without evidence that the expenses were excessive, would have discouraged utility management from using a business tool indispensible to the continued discharge of the utility's public duty. *West Ohio Gas*'s "normal growth" and advertising are management responses to economic conditions and are not to be unreasonably impaired by regulation unless evidence indicates that the conditions have abated. Recovery of advertising expenses is, hence, dependent on the presence of competition and not an unqualified, substantive due process right.

Read in this light, *West Ohio Gas* is not inconsistent with current Court authority regarding the due process standard of state economic regulation. The standard is essentially that contained in *Nebbia*:

> [The fifth and fourteenth amendments] do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, artibrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[95]

The Court stated, in a later case,[96] that evaluation of the end to be attained and the means used requires only a rational relation between the end and the means—a relation which need not be supported by a showing of the facts relied on by the legislative authority in making the regulation:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[97]

Under this standard, the judgment of a regulatory agency exercising the police power of a state legislature is to be presumed to com-

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[95]291 U.S. at 525.

[96]United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[97]*Id.* at 152. *Accord*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Olsen v. Nebraska, 313 U.S 236 (1941).

port with the requirements of due process if it appears to have a proper concern for the public welfare and protects that concern by means which have only a plausible efficacy.[98]

In *West Ohio Gas*, the exclusion of utility advertising expenses from consumer rates did not have this "rational basis." Justice Cardozo took judicial notice of the debilitating effect which competition was apt to have upon a utility. Applying Justice Cardozo's analysis to current conditions, one finds that competition has been supplanted by the dilemmas of demand growth and rising costs in the electric power industry. These modern developments are sufficient to support the "rational relation" presumption that a regulatory decision excluding advertising costs from operating expenses or even prohibiting categories of advertising is based on facts which warrant the conclusion that advertising is not a necessary element of utility service.

Under the rational relation standard categorical exclusion of promotional, institutional, or controversial subject advertising from operating expenses is constitutional economic regulation. It is reasonably in the public interest, given the serious problems with the price and supply of electric energy, and it represents a legislative judgment that a public electric utility does not need such advertising to accomplish its duty to serve consumers reliably at reasonable rates. Even a prohibition of some categories of utility advertising, as a method of regulation, has a "rational basis" sufficient to warrant the presumption that the prohibition does not violate due process. The ban could be overcome on appeal if a sufficient showing of facts by the utility rebutted the presumption of reasonableness.

All of the regulatory approaches represented by the state cases discussed above comport with fourteenth amendment standards of economic due process, thus, the conflict between the cases must be regarded as a matter of differing state law. Hence, the use of *West Ohio Gas* as authority for the conflicting state positions has no constitutional significance; however, the difference between the

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[98]Williamson v. Lee Optical Co., 348 U.S. at 489. The "rational relation" standard is not used when the governmental regulation affects noneconomic, personal rights which are "fundamental." If fundamental rights are in issue, the government regulation must meet a high level of scrutiny requiring a compelling government interest protected by a regulation which has no more impact on the personal right than necessary. Roe v. Wade, 410 U.S. 113 (1973) (right to privacy violated by law prohibiting abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy violated by law prohibiting use of contraceptives); United States v. Guest, 383 U.S. 745 (1966) (right to travel freely between states). The personal nature of "fundamental rights" and their noneconomic quality would seem to preclude any application of high-level scrutiny fundamental rights protection to utility advertising.

Alabama and the Oklahoma or New York approaches is critical to the success of PURPA's advertising standard. The Alabama view that categorical presumptions about advertising as an operating expense is confiscatory precludes adoption of PURPA's promotional and "political" categories.[99] Other states which must review their regulation of electric utility advertising costs should remember that *West Ohio Gas* poses no constitutional impediment to the use of PURPA's categories as long as the current problems besetting the electric power industry persist.

B. First Amendment Protection for Electric Utility Advertising

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[100] the Supreme Court ruled that advertising which does "no more than propose a commercial transaction" has a degree of first amendment protection.[101] This new constitutional doctrine[102] places a significant limitation upon the trend for stricter state control of electric utility advertising.

Prior to *Virginia State Board*, first amendment law was based on a traditional, two-level formulation.[103] A few limited categories of speech content were held to have no first amendment value and hence were subject to complete governmental prohibition.[104] All

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[99]*See* note 73 *supra*.

[100]425 U.S. 748 (1976). The issue was the constitutionality of a statute which prescribed criminal penalties for pharmacists who advertised the prices of nonprescription drugs.

[101]Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973), *quoted in* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 762.

[102]For discussions of commercial speech, see Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357 (1977); Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); Elman, *The New Constitutional Right to Advertise*, 64 A.B.A. J. 206 (1978); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Comment, *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64 (1978); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976); 31 VAND. L. REV. 349 (1978).

[103]Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 33 (1975).

[104]The classic statement of these categories is in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the

other varieties of speech content were given a "preferred position"[105] which required that any state control over expression have as its purpose the protection of an "important," "significant," or "compelling" governmental interest,[106] and the means of control cannot impinge on expression any more than "necessary" to effect the state's purpose.[107] The high level of judicial scrutiny given to speech regulation was implemented to insure that the government's exercise of its police powers had minimal impact upon the free exchange of ideas, the primary value protected by the first amendment.[108] Because commercial speech was regarded as making negligible contributions to the social dialogue in ideas,[109] it was regarded as beyond the ambit of the first amendment.[110] Accordingly, regulations impinging on commercial speech were subject to low-level scrutiny.

Virginia State Board found a first amendment interest in the free exchange of commercial information, recognizing that individuals would be able to make better-informed economic decisions and thereby assure the efficient operation of commercial markets in

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> libelous, and the insulting or "fighting words"—those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnotes omitted).

[105]*See* Thomas v. Collins, 323 U.S. 516, 530 (1945).

[106]Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); United States v. O'Brien, 391 U.S. 367, 376-77 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963).

[107]For illustrations of the "means" test, see Shelton v. Tucker, 364 U.S. 479 (1960) (holding law requiring teachers in state schools to annually disclose all organizations joined violated the first amendment because the state's interest in assuring moral fitness in teachers could be protected by less drastic means); Schneider v. State, 308 U.S. 147 (1939) (holding ordinances prohibiting leaflet distribution invalid because the governmental interest—prevention of fraud, littering, and disorder—could be protected effectively by criminal penalties aimed at the undesirable consequences rather than at the leaflets).

[108]*E.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

[109]Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[110]New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (distinguishing editorial advertisements from "purely commercial" speech); Breard v. Alexandria, 341 U.S. 622, 642 (1951); Martin v. City of Struthers, 319 U.S. 141, 142 n.1 (1943); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

matching material resources with material needs.[111] Justice Blackmun's majority opinion accorded little weight to the "purely economic" interest of the advertiser,[112] an approach consistent with the "rational relation" standard the Court adopted for the regulation of economic activity under the fourteenth amendment due process clause.[113] The majority opinion instead focused upon the consumer audience's need for commercial information, which was said to be "indispensible" to consumer welfare.[114]

The Court carefully and clearly indicated that false and misleading commercial advertising has no first amendment value in the economic decision process and hence is unprotected speech.[115] Time, place, and manner regulations[116] of commercial speech were recognized as permissible, provided that such regulations were justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for communication of the information.[117]

The Court also stated that commercial speech has a lesser degree of first amendment protection than that accorded to non-commercial speech under traditional, high-level scrutiny.[118] The standard for the implementation of this lesser commercial speech protection, however, was not clearly distinguished from that applied in non-commercial, high-level contexts. *Virginia State Board* used a balancing test to determine whether Virginia's restriction on drug price advertising had either a "significant" governmental interest to protect or a sufficiently narrow means of regulation[119] to effect the

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[111]425 U.S. at 765.

[112]*Id.*

[113]*See* notes 97-100 *supra* and accompanying text.

[114]425 U.S. at 765.

[115]*Id.* at 771.

[116]Time place, and manner restrictions have been recognized by the Court as constitutional regulation, if conduct is sought to be controlled and the impact on the exercise of speech is incidental and content-neutral. *E.g.*, Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972).

[117]425 U.S. at 771.

[118]The Court said:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

Id. at 771-72 n.24.

[119]Virginia asserted that the interests its regulation was intended to protect were the level of professionalism among state phramacists, which the severe price competi-

protection. Because the Virginia law was clearly insufficient under this balancing test, it is not certain what effect the difference between the commercial speech standard and the traditional high-level standard will have upon the facts of closer cases.[120] The high value assigned in *Virginia State Board* to the advertising audience's ability to evaluate commercial messages for itself, without "paternalistic" state censorship,[121] will probably be the critical factor in future cases. Given the repugnance of censorship to first amendment values, most commercial advertising prohibitions will fall. Time, place, and manner restrictions will generally withstand challenge due to the availability of other forums for the speech.

In assessing *Virginia State Board*'s impact upon the regulation of electric utility advertising, an initial issue is which, if any, of the content categories used in the new regulatory approach are protected by the non-commercial, strict first amendment standard rather than the weaker commercial standard. Clearly, the resolution of this issue does not depend on whether a category of utility advertising proposes a commercial proposition. The Court's rationale for its commercial/non-commercial differential in the context of the first amendment indicates that the test must be the relative value of the content in each category of advertising.

The issue in *Virginia State Board* was whether speech which did no more than propose a commercial transaction such as "I will sell

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tion engendered by drug price advertising would allegedly erode, and the health of its citizens, which would be endangered by the lowered professional standards. The means, of course, was prohibition of all non-prescription drug price advertising. *Id.* at 776.

[120]The Court's subsequent commercial speech cases have not significantly refined the standard for *Virginia State Board's* balancing test. In Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977), the town ordinance prohibiting posting of "For Sale" signs to avoid "white flight" from neighborhoods on the verge of integration was as unreasonable in its means as Virginia's law on drug prices.

Court cases applying the commercial speech doctrine to advertising by professionals are of marginal relevance to situations in which advertising of a product like electricity is restricted. The issue in the professional advertising cases was, fundamentally, whether services not readily subject to price standardization could be advertised without misleading the consumer. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding regulation barring advertisement of "routine" legal services unconstitutional).

[121]The Court stated:

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. . .
>
> . . . .
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> . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are all well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

425 U.S. at 769-70.

you the X prescription drug at the Y price"[122] was "so removed from any 'exposition of ideas' . . . that it lacks all protection."[123] The Court thus considered commercial speech's position under the first amendment in terms of the traditional content test. In holding that the drug advertisement was protected speech, the Court recognized its value as information in the consumer's decision process and in the general allocation of society's resources.[124] This value, based on the advertising's content, was not perceived as being directly related to "the exposition of ideas." The only ideational value which the Court recognized in this advertising was indirect, derived from its use in the aggregate: "[I]f [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[125]

The relatively low ideational value of information "as to who is producing and selling what product, for what reason, and at what price"[126] would seem to be the basis for assigning such information lower protection under the first amendment.[127] The primary value of

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[122]*Id.* at 761-62.

[123]*Id.* at 762.

[124]*Id.* at 765.

[125]*Id.*

[126]*Id.*

[127]The Court has avoided an express formulation of the commercial/non-commercial first amendment protection differential in these terms, notwithstanding *Virginia State Board*'s initial use of an ideational content test, *see* note 125 *supra* and accompanying text, in its commercial speech discussion. In the most recent commercial speech case, Friedman v. Rogers, 47 U.S.L.W. 4151, 4154 (U.S. 1979) (holding, inter alia, that a Texas ban on the use of trade names in advertisements of optometrical services was permissible regulation of misleading commercial speech), the Court relied instead upon *Virginia State Board*'s recognition that commercial speech needs a lesser degree of protection from regulation because it is objective and more readily verifiable than non-commercial speech and because it is less apt to be inhibited by government control due to the resilience of the commercial advertiser's economic motive. 425 U.S. at 771-72 n.24.

But these two characteristics of commercial speech relied upon in *Friedman* are significant in the protection differential not so much because they define what commercial speech is as because they indicate what it is not:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected . . . whether or not it contains factual representations and even if it includes inaccurate assertions of fact. . . . "Under the First Amendment there is no such thing as a false idea" . . . .
>
> Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value conveyed," rather than

this information is its indispensability to individual and aggregate economic activity, a value which deserves first amendment recognition, albeit to a lesser degree.

Whether commercial information appears in an advertisement proposing a product sale or in some other form should not alter the information's first amendment value. As a matter of doctrine, the commercial proposition formula functions only to indicate the type of speech which has the commercial level of ideational value and does not limit the commercial standard's reach to speech containing proposals to sell. The types of speech which are not commercial were identified in *Virginia State Board*: "[T]he question whether there is a First Amendment exception for 'commercial speech' is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters."[128]

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because of any direct contribution to the interchange of ideas.
425 U.S. at 779-80 (Stewart, J., concurring) (citations omitted).

The Court's apparent preference to formulate the commercial/non-commercial first amendment distinction in terms of commercial speech's greater amenability to regulation rather than its low ideational content seems to arise from a desire to limit the first amendment's involvement in commercial matters, for two reasons. First, the Court has indicated that it wants to avoid any unnecessary first amendment inhibition of the governmental power to regulate economic conduct: "[W]hile the First Amendment affords [commercial] speech a 'limited measure of protection,' it is also true that 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.'" *Friedman*, 47 U.S.L.W. at 4154 n.9 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). Second, the Court may be reluctant to use a formulation emphasizing the relation of the commercial speech standard to the traditional first amendment protection lest the traditional doctrine be weakened by association: "To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a levelling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." 436 U.S. at 456. The Court's desire to avoid diluting either traditional first amendment protection of "the exposition of ideas" or governmental power to regulate economic activity explain both the retention of a commercial/non-commercial distinction in first amendment law and the formulation of that distinction in terms of commercial speech's objective, more regulable characteristics. Commentators agree that the constitutionality of commercial speech regulation is a matter properly resolved in terms of the traditional, ideational-content first amendment doctrine. *Compare* Note, *Yes, FTC, There Is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833, 847-48 (1977) (asserting that commercial speech is of same value to society as any other category of speech and that its suppression must be justified under traditional first amendment principles rather than under "degree of protection" doctrine) *with* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 222-34 (1976) (criticizing objective characteristics of commercial speech as bases for defining commercial speech and concluding only workable definition is the lower first amendment value of commercial speech).

[128] *Id.* at 760-61.

This evaluation of *Virginia State Board* indicates that promotional electric power advertisements, which contain information about the uses of electricity, its cost, and its general value as a product, are commercial speech. Conservation advertising provides the public with information on the characteristics of electricity's use, but it also generally contains an element of editorial opinion on the broader subject of energy supply and the ramifications which energy use has for society at large. Such information, hence, has ideational content which exceeds the commercial speech level. Consumer information advertising, to the extent that it does no more than inform the public of the ways in which a commercial relationship with a utility can be started or maintained or of the prices charged for electricity, is commercial speech. Such advertising, however, often provides information about safety precautions or emergency procedures which has significance apart from the purchase or sale of electricity. This variety of consumer information advertising would be protected by the non-commercial level of first amendment scrutiny. "Controversial subject" advertising is editorial in nature, consisting primarily of ideas and opinions, and hence is non-commercial speech.

Institutional "image"[129] advertising has been recognized as having an element of commercial speech, in an indirect manner.[130] In effect, "image" advertising can often operate as an implicit proposal of a commercial transaction. An implicit proposal of a product sale, however, does not make speech commercial. The proper test for commercial speech is whether the content of the advertising has no more than commercial value. The "institutional" category of utility advertising usually contains information which is "newsworthy," without any commercial import—information on anti-pollution practices or community assets, for example. Even institutional advertising which amounts to no more than an appeal for public sympathy

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[129]The FTC has defined corporate "image" advertising as:

> [A]dvertising which describes the corporation itself, its activities, or its policies, but does not explicitly describe any products or services sold by the corporation. Within the wide range of subjects covered in image ads are descriptions of the corporation's behavior in such diverse areas as research and development and activities and programs reflecting a sense of social responsibility towards, for example, the community or the environment.

FTC, *Statement of Proposed Enforcement Policy by the Staff of the FTC Regarding Corporate Image Advertising* 2 (Dec. 4, 1974), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE & PROC. OF THE SEN. COMM. ON THE JUDICIARY, SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING 1488-89 (1978).

[130]FTC, *Statement of Proposed Enforcement Policy by the Staff of the FTC Regarding Corporate Image Advertising* 4-10 (Dec. 4, 1974), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE & PROC. OF THE SEN. COMM. ON THE JUDICIARY, SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING 1490-96 (1978).

does more than merely give information about a product, although its value as an idea may not be appreciably greater than commercial speech. Hence, even the least informative "image" advertisement is non-commercial and is protected by the traditional strict first amendment scrutiny.

The mode of regulation which divides advertising expenses between power customers and stockholders appears on its face not to violate the first amendment. It does not prohibit any variety of advertising. Its nature as a means of regulation is economic in purpose and effect.[131] Complete prohibition of a class of electric utility advertising, however, must be subjected to serious first amendment scrutiny. If institutional, "controversial subject," conservation, or consumer information advertising were prohibited, traditional first amendment strict scrutiny would be required. Promotional advertising would be protected by the *Virginia State Board* standard.

Whether a prohibitory mode of regulation could withstand a first amendment challenge would depend primarily upon whether the state could demonstrate an interest sufficiently important to justify prohibition. The prohibition would then have to be shown to be sufficiently narrow in scope to protect the state's interest adequately without unnessarily infringing on protected speech. A sufficient justification for a prohibition would have to be more than elimination of a utility practice which was not an essential element of electric service. The regulatory rationale would have to be based on the threat which the prohibited advertising would ultimately pose to the utility's ability to meet power demands or to the consumer's ability to pay for the service.[132] The retarding of demand

[131]One ramification of this type of regulation, however, recently provoked a first amendment claim in Consolidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978). After receiving requests that consumer groups be allowed to include anti-nuclear power material in Consolidated Edison's bill mailings as a response to the utility's sending its customers pro-nuclear power information with their bills, the New York Public Service Commission ordered utilities not to send any material concerning controversial public policy matters with bills. The trial court held that the Commission's order violated the first amendment, but the judgment was reversed on appeal. The appellate court held that the Commission order was a constitutional exercise of the regulatory power to determine which utility expenses should be borne by stockholders rather than consumers. The court found that the utility's use of bill mailings for its controversial advertising was subsidized by the consumers who were charged the postage costs. The appellate court's reasoning is persuasive. The bill insert regulation was a time, place, and manner regulation whose purpose was primarily economic and, beyond its abstract "controversial subject" category, was content neutral. The effect on speech, whether it be characterized as commercial or political, was incidental to the economic purpose of the regulation, and the regulation left open ample alternative channels for the utility to put the information before the public, at stockholder expense.

[132]A critical need for reduction in the growth of electric demand was asserted as the interest underlying New York's prohibition of promotional advertising in Con-

and of cost increases for electric power, both for the utility producing it and for the consumer buying it, would seem to be a sufficient interest to meet first amendment standards. Under either the "compelling" or the "significant" standard, the state would have an important interest to protect.

The critical issue thus becomes the propriety of the prohibition as a means to a justified end. A prohibition of promotional advertising would be difficult to justify as an efficacious method of reducing power demand or consumption, primarily because the prohibition is under-inclusive in removing the inducements for consumers to use electrically-powered equipment.[133]

Promotional advertising prohibitions would also prevent the utility from using advertising which would help reduce one dimension of its difficulties under the current conditions—its declining load factor. Promotion of non-peak electric use would aim at increasing utility revenues without significantly increasing the need for new plant investment. A regulatory commission could constitutionally determine that such advertising was of little effect and hence should not be charged to customers, but in order to justify a prohibition the commission would have to show that the advertising either excessively contributed to the peak load or was so effective at en-

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solidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978). The court held that the promotional advertising ban did not violate the first amendment, due to what it deemed to be a "compelling" finding of the New York Public Service Commission:

> [P]romotional advertising will increase the use of electricity causing spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity; that such advertising provides misleading signals that energy conservation is unnecessary; and that additional usage will increase the level of dependence on foreign sources of fuel oil . . . .

Id. at 366, 407 N.Y.S.2d at 738.

The court took its "compelling" state interest test from First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (holding law providing criminal penalties for corporations contributing money to interest groups promoting one side of a public referendum violated the first amendment). The *Bellotti* decision concerned political speech, and the *Consolidated Edison;* opinion's use of a traditional, strict scrutiny test in a commercial speech context was error. The use of a standard which was more rigorous than the case required made little difference in *Consolidated Edison;* the court summarily accepted the Commission's "compelling" finding without any attempt to balance the utility's commercial speech interest with the prohibitory mode of regulation to see if the Commission could obtain substantially similar results from a less restrictive type of regulation.

[133]An under-inclusive regulation does not reach all the causes of the effect it is intended to prevent. For example, a regulation intended to stop the sale of whiskey is under-inclusive if it prohibits only Scotch whiskey. A regulation intended to stop the sale of whiskey is over-inclusive if it prohibits the sale of all liquor. The classic discussion of under-/over-inclusive regulation is in Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341, 344-53 (1949).

couraging off-peak load that it significantly reduced the utility's fuel supplies. It is unlikely that such effects could be demonstrated.

The single significant justifications for a prohibition of promotional electric utility ads is that they give consumers a false impression that power is in abundant supply and that conservation is a principle to be observed by others.[134] Advertising which does not expressly assert that conservation is unnecessary, however, should not be prohibited if it provides consumers with information about a particular use of electricity. The value to consumers in the express content of such advertising justifies its free communication despite any implicit misleading message it may contain about the need to conserve. The ill-effects of such an implicit message would seem to be properly countered, under *Virginia State Board*, by consumer judgment rather than censorship.[135]

Consumer groups have suggested another rationale for prohibition of non-commercial advertising. If the advertising is done at stockholder expense, the reduction in dividends to investors caused by the diversion of earnings to pay for the advertising reduces the utility's ability to attract capital and forces it to obtain financing for new facilities to meet demand growth by borrowing at inflated interest rates.[136] The effect of stockholder-financed advertising on utility interest expenses, with its consequent effect on utility rates and the fiscal health of the utility, would have to be severe in order to justify a prohibition on that basis alone. It is highly unlikely that utility managements would use stockholder-financed advertising so extensively that the dividend rates on utility stock would be reduced

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[134]False or misleading advertising is within the jurisdiction of the FTC, which is empowered to police an "unfair or deceptive act or practice in or affecting commerce . . . ." 15 U.S.C. § 52(b)(1) (1976). The FTC, however, has expressed a reluctance to involve itself with deceptive or misleading electric utility advertising. In response to a petition to, inter alia, take enforcement action against a utility ad alleged to be misleading, the FTC stated: "If we were to question the representations made, we would be inextricably drawn into the complicated area of setting utility rates." FTC, *Corporate Image Advertising: Memorandum to the Commission from Staff of Division of National Advertising* 141 (Mar. 18, 1974), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE & PROC. OF THE SEN. COMM. ON THE JUDICIARY, SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING 1149 (1978).

[135]*See* note 121 *supra* and accompanying text for discussion of *Virginia State Board*'s preference for consumer judgment rather than censorship.

[136]*Ad Campaigns, supra* note 9, at col. 5 (referring to remarks of F. Wiecking, executive director of Indiana's Citizens Action Coalition):

> Wiecking also said the utility distinction between stockholder-paid ads and those paid out of rates is "in many ways a paper argument." Using stockholder funds will reduce the utility's equity income, he said, which in turn makes it more difficult and expensive for the firm to borrow money. Those higher capital expenses eventually result in higher rates, he said.

to the point that the utility's ability to obtain equity capital would be severely damaged. If the outlays for stockholder-financed advertising did approach that point, the stockholders would undoubtedly remedy the situation themselves. If the stockholders failed to halt the imprudent outlays, a regulatory order limiting the amount of earnings which could be spent on advertising would be preferable to a complete prohibition addressed directly to the advertising.

Under the first amendment, whether the level of protection is commercial or traditional strict-level, the prohibitory mode of advertising regulation is seriously suspect. The inefficacy and paternalistic nature of promotional advertising prohibitions and the availability of less restrictive alternatives to either commercial or non-commercial content prohibitions are factors which made the prohibitory mode of regulation appear to violate the first amendment.

V. Conclusion

The history of state regulation of investor-owned electric utilities has a certain quality of anomaly, a product of the unique circumstances in which the nation's electric power industry developed. Due to technological improvements which permitted consistent economies of scale to be achieved in the production of an energy form that became increasingly indispensable, electric prices fell while others rose. Under such conditions it was reasonable to promote the use of electricity and have the promotion paid for by the consumer. *West Ohio Gas*, promulgated a year after substantive economic due process was abandoned by the Supreme Court, cannot be read to dilute the state's police power under the "rational relation" due process standard, yet for years it has been relied upon by state decisions holding that electric utility advertising was a proper expense for consumers to bear. As long as electricity was becoming less costly, the state policies toward electric power advertising were reasonable and their reliance on *West Ohio Gas* to support the practice of charging the consumer for advertising fostering utility expansion was not misplaced.

Circumstances have changed. Growth is no longer profitable for either the electric utilities or cheaper for their customers, yet it also seems inescapable. It is no longer reasonable to have consumers pay the cost of promotional or "image" advertising by electric utilities, if that advertising contributes to the need for new utility plants or encourages uneconomical and wasteful electric consumption. Many states have recognized this, and have exercised their power under the rational relation standards of due process to exclude nonessential advertising costs from electric rates. PURPA will force states

adhering to the traditional standard to re-evaluate their policies. In considering whether the traditional approach should prevail over PURPA, these states should recognize that *West Ohio Gas* does not constitutionally prevent them from using content categories to determine which advertising expenses are charged to consumers.

At almost the same time that it became uneconomical to promote electric consumption, the value of commercial speech to society was recognized in *Virginia State Board*, which brought commercial speech within the protection of the first amendment. As a matter of public policy, it is certainly desirable to encourage consumers to avoid unnecessary power use and to reduce nonessential utility advertising expenditures. However, the use of prohibitions of utility advertising to achieve these policy objectives is unnecessary and unreasonable. Economic regulation in most cases would seem to be sufficient to discourage improvident advertising. And under the standard of protection afforded advertising either by *Virginia State Board* or traditional strict scrutiny, a balancing of the legitimate need for and the efficacy of a prohibition on a category of electric utility advertising would appear to put prohibitory modes of regulation outside the first amendment.

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