Billing Inserts: A Unique Forum for Free Speech - Consolidated Edison Company v. Public Service Commission

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BILLING INSERTS: A UNIQUE FORUM
FOR FREE SPEECH—CONSOLIDATED
EDISON COMPANY V. PUBLIC
SERVICE COMMISSION

In recent decisions, the United States Supreme Court has expanded the protection granted to corporations in the area of freedom of speech.\(^1\) Although the Court has continued to recognize a difference between the free speech rights of a corporation and those of an individual,\(^2\) this distinction has decreased in significance.\(^3\) The Court’s recent statement regarding free speech in \textit{Consolidated Edison Co. v. Public Service Commission},\(^4\) reflects this protective stance toward corporate speech. This decision granted public utilities the constitutional right to include statements of their views on controversial issues in inserts sent to customers with utility bills.\(^5\) Although this Note generally supports the Supreme Court’s recent protection of corporate speech, it questions the Court’s approach in resolving that issue in the \textit{Consolidated Edison} decision.


\(^2\) The Court has never endorsed the notion that the free speech rights of an individual and those of a corporation are coextensive. Although the Court refused to address the question of whether individuals’ speech rights are the same as corporations’ in First Nat’l Bank v. Bellotti, 435 U.S. 765, 777 (1978), the Court indicated that corporations should be treated much like individuals. It found “no support in the [Constitution] or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation. . . .” \textit{Id.} at 784.

\(^3\) In Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court struck down a Virginia statute that proscribed the advertising of prescription drug price information as a violation of the free speech rights of pharmacists, and granted the commercial speech of corporations constitutional protection, unless it was false or misleading. Two years later in First Nat’l Bank v. Bellotti, 435 U.S. 765 (1978), the Court struck down a Massachusetts criminal statute that prohibited a corporation from making expenditures for the purpose of influencing the vote on any question submitted to state voters not effecting the business of a corporation. The Court found the statute unconstitutional because it restricted the protected speech of the corporation. “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.” \textit{Id.} at 777. Most recently, in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557 (1980), the Court struck down a regulation of a state commission that prohibited promotional advertising by gas and electric companies. This decision extended the constitutional protections afforded commercial speech to a heavily regulated public utility.

\(^4\) 447 U.S. 530 (1980).

\(^5\) In \textit{Consolidated Edison}, the Supreme Court struck down an order of a regulatory commission which proscribed the use of billing inserts that discussed controversial matters of public policy as a violation of the free speech rights of a utility. The Court stated that “[t]he restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech.” \textit{Id.} at 533.
Consolidated Edison Company of New York placed written material in its January 1976 billing envelope advocating the use of nuclear power. Two months later, the National Resources Defense Council (NRDC) requested that the utility enclose a rebuttal prepared by the NRDC in the next billing envelope. Upon Consolidated Edison's refusal to comply, the NRDC petitioned the New York Public Service Commission (Commission) to require the utility to include contrasting views in its billing inserts. On February 19, 1977, the Commission denied the NRDC request, but prohibited all utilities from using bill inserts to advance their positions on controversial matters of public policy.

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6. For a reprint of the original insert, see Appendix to Appellant's Brief at 34, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). The insert was entitled, Customer News, Independence is Still a Goal, and Nuclear Power is Needed to Win the Battle. The insert stressed, first, that nuclear power is a proven technology, not new or experimental. It stated that nuclear power is safe because no member of the public has ever been injured—much less killed—in a nuclear related incident at a nuclear power plant. The insert also stated that nuclear power is economical: the cheapest source of energy available today from which to make electricity, except for water power. Further, the flyer averred that nuclear power is clean; even the most modern oil or coal plant cannot match nuclear plants for cleanliness, and although low level radiation is released into the air, the small amounts are well within established local and national health standards. In addition, the insert stated that a nuclear power plant cannot explode. Finally, it contended that nuclear power is needed for energy independence from foreign oil sources, and is better suited for practical everyday use now than are solar power and fusion. Id.

7. The NRDC is a public interest organization that has supported various environmental and consumer causes. A primary concern of this group has been the development of nuclear power. Several similar groups monitor utility regulation in New York State on behalf of their members and the general public. For a general discussion of this aspect of utility regulation, see Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 ALB. L. REV. 707 (1975) [hereinafter cited as Utility Rates].

8. For a reprint of the rebuttal, see Appendix to Appellant's Brief at 38, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). The rebuttal was entitled Rebuttal to Con Edison "Customer News," January 1976. The rebuttal urged that the facts presented in the Consolidated Edison insert needed to be examined from an opposing viewpoint in order to enable citizens to develop informed opinions, and it proceeded to contest each of Consolidated Edison's claims.

9. 447 U.S. at 532.

10. Id. The Commission is the regulatory body that oversees more than 700 public utilities in New York State. The Commission is composed of five commissioners appointed by the governor with the advice and consent of the state senate. See Utility Rates, supra note 7, at 707-11.

11. 447 U.S. at 532.

12. Id.

13. Id. at 532-33. See also Appendix to Appellant's Jurisdictional Statement at 58a, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (setting forth the Commission's order). In relevant part, the order provided: "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing the material inserted in bills rendered to customers as a mechanism for the dissemination of the utilities' position on controversial matters of public policy." Id. The Public Service Commission's opinion stated further:
Consolidated Edison subsequently sought review of the Commission's order in the New York state courts. At the trial level, the state supreme court held the order unconstitutional, finding no substantial governmental interest in the regulation because consumers were not subsidizing the utility's speech. The appellate division reversed, determining that the cost of the billing inserts was subsidized by the ratepayers. The New York Court of Appeals affirmed the appellate division, holding that the regulation was a valid time, place, or manner regulation designed to protect the privacy of Consolidated Edison customers.

Consolidated Edison appealed to the United States Supreme Court, claiming that the Commission's order violated its freedom of speech under the first and fourteenth amendments. The Supreme Court reversed the New York State Court of Appeals, holding that the regulation was not a valid time, place, or manner restriction, nor a permissible subject matter

We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy.

Id. at 43a (emphasis added). The order also prohibited all financing of advertising by ratepayers, in any form which sought "to sway opinion—legislative, environmental, consumer or any other kind—to the utilities’ position on public policy disputes." Id. at 42a. It appears that the rebuttal procedure was not ordered because the Commission based its decisions on the allocation of costs and did not perceive that a rebuttal procedure would allocate advertising costs more equitably. The Commission also denied the petition for a rehearing. 447 U.S. at 533.

15. Id. at 315-16, 402 N.Y.S.2d at 553.
17. Id. at 367-68, 407 N.Y.S.2d at 737. In addition, the court stated that the Commission’s order caused no infringement of speech because the utility had alternative channels available to express its opinion. The court also held that the regulation was not vague. Id.
19. Id.
21. See Appellant’s Jurisdictional Statement at 4, Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980). The appellants presented this question: “Whether the order of the Public Service Commission, insofar as it prohibits utilities from communicating their views on ‘controversial matters of public policy’ by means of bill inserts, is invalid as a denial of freedom of speech.” Id.
22. 447 U.S. at 544. Justice Powell delivered the opinion of the Court in which Chief Justice Burger and Justices Brennan, Stewart, White and Marshall joined. Justice Marshall also filed a concurring opinion. Justice Stevens filed an opinion concurring in the judgment, and Justice Blackmun filed a dissenting opinion in which Justice Rehnquist joined. Id. at 531.
regulation, and that a compelling state interest did not exist to justify the restriction.

**The Decision**

The Supreme Court used a "preferred freedoms" approach as the basis of its analysis. Under this approach, legislation directly infringing upon a fundamental freedom is assumed to be unconstitutional until the government demonstrates a compelling state interest. The *Consolidated Edison* Court asserted that the utility was entitled to freedom of speech and concluded that there was no compelling interest to justify the Commission's order. In determining that Consolidated Edison's right to freedom of speech had been violated, the Court addressed three major questions.

23. *Id.* at 535. The Supreme Court has recognized that there are some liberties, including freedom of speech, which are so fundamental to the democratic order that their preservation merits special consideration. The usual presumption of constitutionality and the test of mere "reasonableness," used to settle challenges to economic regulations, were thought insufficient to protect these basic liberties from devastating abridgment. The standard formulated to protect these freedoms may be sketched as follows:

1. Legislation directly infringing upon a fundamental freedom is assumed to be unconstitutional until the government demonstrates otherwise.
2. The state must establish that the legislation advances a "compelling interest."
3. The regulation at issue must constitute the least restrictive alternative.


Lower federal and state court decisions offer support for the proposition that Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions. *See, e.g.*, Public Media Center v. FCC, 587 F.2d 1322, 1324-26 (1978) (remand of FCC decision that radio stations did not violate the fairness doctrine when they had broadcast advertisements by utilities promoting the desirability of nuclear power); *Pacific Gas & Elec. Corp. v. City of Berkeley*, 60 Cal. App. 3d 123, 127-29, 131 Cal. Rptr. 350, 351-53 (1976) (court enjoined city from enforcing an act restricting expenditures or contributions of regulated utilities in support of or in opposition to municipal ballot measures).

25. 447 U.S. at 544.

26. The first and fourteenth amendments protect freedom of speech from infringement by the states. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (Court overturned criminal conviction for disturbing the peace by wearing a coat with objectionable message); *Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495, 500-01 (1952) (Court invalidated a New York statute that required
The Court first decided that the regulation could not be upheld as a content-neutral time, place, or manner restriction. The majority reiterated the familiar maxim that a permissible time, place, or manner restriction must not be based upon the content or subject matter of speech. The majority concluded that the Commission’s order was content-based because the Commission suppressed only billing inserts covering controversial public issues and yet allowed inserts that presented information on other, more neutral, topics.

The Court next rejected the Commission’s argument that the regulation was a permissible subject matter restriction. Government regulations of speech based upon subject matter have been approved only in narrow circumstances. As the Consolidated Edison Court observed, prior decisions a license to show films as impermissible restraint on freedom of speech. In addition, the first amendment embraces the liberty to discuss publicly and truthfully all matters of public concern. See Mills v. Alabama, 384 U.S. 214, 218 (1966) (criminal statute that prohibited editorials on election day urging people to vote in a particular way invalidated); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (statute that outlawed picketing and related activities struck down as unrelated to state’s purpose). Because the Commission had limited the means by which Consolidated Edison could participate in the discussion of controversial issues of public policy, the Court surmised that the restriction struck at the heart of freedom of speech. 447 U.S. at 535.

27. Id. at 535-44.
28. Id. at 537. The Court has recognized the validity of a reasonable time, place, or manner restriction that serves a significant government interest and leaves ample alternative channels for communication. See Linmark Assocs. v. Willingboro, 431 U.S. 85, 92 (1977) (invalidating an ordinance that prohibited the posting of for sale and sold signs, because ample alternative channels were not available); Koveas v. Cooper, 336 U.S. 77, 87-89 (1949) (upholding regulation forbidding use of sound truck on public streets); Cox v. New Hampshire, 312 U.S. 569, 575 (1941) (upholding the validity of a state law requiring a special license for parade or procession on public streets).

29. 447 U.S. at 536. For support, the Court cited Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (invalidating a city ordinance making it unlawful for a drive-in theater to exhibit films containing nudity when the screen was visible from a public place). The Erznoznik Court stated that a reasonable time, place, or manner restriction must be applicable to all speech regardless of content. Id. Also cited by the Consolidated Edison Court was Police Dep’t v. Mosley, 408 U.S. 92, 99 (1972) (striking down an ordinance that prohibited all picketing except peaceful labor picketing). The Mosley Court held that government cannot regulate expression on the basis of “its ideas, its subject matter, or its content.” Id. at 95.
30. 447 U.S. at 537.
31. Id. at 539-40. The first amendment has been interpreted as meaning that the government has no power to restrict speech because of its subject matter. See, e.g., Police Dep’t v. Mosley, 408 U.S. 92, 95 (1972) (striking down city ordinance that allowed labor picketing, but disallowed all other picketing). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 214-15 (1975).

32. When cases sanctioning subject matter regulations are examined they appear to be consistent with established free speech doctrine. See generally Farber, Content Regulation and the First Amendment, A Revisionist View, 68 Geo. L.J. 727, 760 (1980) (asserting that despite the Court’s oft-stated adherence to the principle of content-neutrality, in recent years it has upheld a number of restrictions which are obviously based on content; and arguing that these decisions reveal a pattern of principled decision making); Stone, Restriction of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions, 46 U. Chi. L. Rev. 81, 83 (1978) (asserting that subject matter restrictions unquestionably regulate content “but appear to do so
permitted the government to impose subject matter regulations only on government facilities not open to the general public as a public forum, because of possible disruptive effects.\textsuperscript{34} Because private property—utility bills—and not a government facility was involved in Consolidated Edison, the Court summarily concluded that the Commission's order could not be sustained as a permissible subject matter regulation.\textsuperscript{35}

Finally, the Court reasoned that the regulation was not justified by a compelling state interest.\textsuperscript{36} In an attempt to show such an interest, the Commission presented three justifications for its regulation. First, the Commission contended that the regulation was necessary to avoid forcing the utility's views on a captive audience, but the Court was not persuaded.\textsuperscript{37} It concluded that because customers could avoid further exposure to the billing inserts simply by averting their eyes and tossing the billing insert into the wastebasket, the customers did not constitute a captive audience.\textsuperscript{38}

The majority next rejected the Commission's contention that the regulation was necessary to allocate limited billing resources in the public interest.\textsuperscript{39} The Commission argued that because only a limited amount of information could be included in the billing envelope, political inserts should not be allowed to take the place of other inserts that utilities lawfully might be

\textsuperscript{33} 447 U.S. at 538-39.
\textsuperscript{34} See Greer v. Spock, 424 U.S. 828, 838 n.10 (1976) (government may prohibit partisan political speech on military bases, even though civilian speakers had lectured there on other subjects); Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974) (plurality of Court held that municipal transit system that sold space on vehicles for commercial advertising could refuse to accept partisan political advertising). In both of these cases, the Supreme Court allowed subject matter restrictions after it had ascertained "that partisan political speech would disrupt the operation of government facilities even though other forms of speech posed no such danger."

\textsuperscript{447 U.S. at 539.}
\textsuperscript{35} Id. at 540.

\textsuperscript{36} Id. at 540-44. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (state regulation "may prevail only upon showing a subordinating interest that is compelling"). See also note 23 supra.

\textsuperscript{37} 447 U.S. at 541-42. The Court reasoned that "[w]hen a single speaker communicates to many listeners, [the government may not prohibit] speech as intrusive unless the 'captive' audience cannot avoid the objectionable speech." Id. In Public Utils. Comm'n v. Pollack, 343 U.S. 451 (1952), the Court allowed radio broadcasts on municipally-owned buses despite the fact that the riders were a captive audience. But see id. at 468-69 (Douglas, J., dissenting). In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the Court found a captive audience, but did not base its decision on the captive audience concept. Specifically, the Court approved the city's regulation which allowed commercial advertising but prohibited partisan political advertising on vehicles of a city's rapid transit system. But see id. at 307-08 (Douglas, J., concurring). In both opinions, Douglas asserted that no speaker should be allowed to force his or her views upon an audience incapable of declining to receive it.

\textsuperscript{38} 447 U.S. at 542.
\textsuperscript{39} Id. at 543. In the Court's words, "the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope." Id.
ordered to include. The Court, however, discovered no limited resources in utility bills because all persons are free to send correspondence through the mail.

Finally, the Court concluded that there was no basis in the record from which to assume that the cost of the bill inserts would be borne by ratepayers. Therefore, the prohibition was not necessary to prevent a ratepayer subsidy of the cost of the policy oriented bill inserts. Thus, the majority disagreed with all of the justifications that the Commission offered to show a compelling state interest in the regulation. Because a compelling state interest was not found, the Court held that the regulation unconstitutionally abridged the utility’s right of free speech.

**Criticism**

The initial problem with the Court’s analysis was the manner in which it characterized the Commission’s regulation. The Court refused to view the regulation as a valid time, place, or manner restriction because the order made a distinction based on content. Admittedly, in previous decisions the Court permitted time, place, or manner restrictions even though they made a distinction based on content. In certain special forums, however, the Court permitted time, place, or manner restrictions even though they made a distinction based on content.

40. *Id.* at 542. The inserts that the utility might be ordered to include with bills would promote energy conservation, safety, or remind consumers of their legal rights. *Id.* The Commission argued that the billing insert situation was comparable to the broadcast medium, over which the FCC has been allowed unusual authority to regulate speech because the licensed broadcaster communicates through a scarce, publicly owned resource, the electromagnetic spectrum. *Id.* See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1958) (Court upheld validity of speech restriction in part because of limited broadcast resources). See also notes 67-73 and accompanying text infra.

41. 447 U.S. at 543.

42. *Id.* The dissenting opinion of Justices Blackmun and Rehnquist focused entirely on the issue of allocating the costs of the billing inserts. The dissenters were concerned that the ratepayers should not subsidize any part of the utility’s speech. The dissenters concluded that because of the utility’s monopoly status and rate structure, its use of the inserts amounted to an exaction of forced aid from the customers for the utility’s speech, which was unconstitutional. *Id.* at 548-49 (Blackmun, J., dissenting). Justice Marshall emphasized that the majority decision failed to address the cost allocation question or to intimate what sort of cost allocation might be appropriate. *Id.* at 544 (Marshall, J., concurring). Utilities may discontinue the use of billing inserts if the total cost (calculated on the basis of sending a separate mailing) is later held to be properly chargeable to shareholders. This speech subsidy problem, however, is not determinative of the free speech issues that the Court considered. If the cost of the advertising is large, it can easily be allocated to the proper accounts to prevent a ratepayer subsidy of the utility’s speech. If the cost is small, to the point that it cannot be identified, then the additional cost borne by the ratepayers is de minimus.

43. *Id.* at 543.

44. *Id.* at 537.

45. See notes 28-30 and accompanying text *supra*.

46. *Id.*

47. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (approving municipal policy of not permitting political advertising but allowing other types of advertising on public transit
In *Lehman v. City of Shaker Heights*, the Court permitted a place restriction that also made a content distinction. The municipal policy at issue allowed commercial but not political advertising on the city's rapid transit commuter trains. The restriction was properly characterized as a place restriction because only one place, the inside of commuter trains, was restricted. The Court focused on the nature of the forum and the competing interests involved to determine the degree of protection afforded by the first amendment to the speech in question. Because the speakers could express their views in any other forum, the Court reasoned that the restriction had little effect on speech or on the audience's ability to receive information.

In *Red Lion Broadcasting Co. v. FCC*, the Court also approved a place restriction which was based, in part, on content. Specifically, the Court upheld the fairness doctrine, which requires that discussion of public issues not only be presented on broadcast stations but that each side also be given fair coverage. The restriction obviously embodied a content element, but was more properly characterized as a place restriction because only one place, the broadcast medium, was restricted and the overall effect on speech was minor.

Similarly, in *Consolidated Edison*, the Commission's regulation only prevented the utility from using one forum for communications—billing inserts. The regulation can be properly viewed as a place restriction because Consolidated Edison could still use any other forum to express its views. Further, the restriction's effect on speech and on the audience's ability to receive information was de minimus. Because the Commission's regulation is best characterized as a place restriction, the Court merely should have

system); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the validity of the fairness doctrine that requires broadcasters to present issues of public importance and that mandates that each side of a public issue presented be given fair coverage).

49. Id. at 304.
50. Id. at 299-300.
51. Id. at 300-01.
52. Id. at 302-03.
54. Id. at 387-401.
55. Id. at 369.
56. The restriction made a distinction between communications about public issues and other types of communications.
57. Id. at 393. The *Red Lion* Court concluded that the fairness doctrine would not censor the speaker or lessen the audience's ability to receive information. Rather, the decision was based on the audience's interest in being exposed to a marketplace of ideas. Id. at 386-90.
58. 447 U.S. at 532. Although the Commission's restriction referred to subject matter (controversial issues of public policy), it did not prevent the utility from discussing that subject matter in any of the other available means of advertising. Hence, it cannot be called a true subject matter restriction.
scrutinized the place, or forum, to determine if a reasonable justification for the restriction existed.  

The unique nature of the billing insert forum suggests several justifications for such a restriction. First, because the utility was created by the grant of a monopoly from the state, the utility is given a special forum which would be unavailable absent state action.  

Second, due to the monopoly that Consolidated Edison maintains, the ratepaying audience has no choice as to which utilities' views it will be exposed to in billing inserts.  

Third, there is a danger of imposing on a captive audience because all of the customers in the service area automatically receive these inserts.  

Finally, the cost of the inserts are significantly less than the cost of a separate mailing, thus allowing the utility greater access to an inexpensive and exclusive forum for dissemi-

59. Unless the time, place, or manner restriction affects a public forum, or unless the inhibition of speech resulting from the regulation is significant, the government's burden is merely to present a reasonable justification. Thus, the Court has recognized the validity of reasonable time, place, or manner restrictions "that serve a significant governmental interest and leave ample alternative channels for communication." 447 U.S. at 535. See note 28 supra.  

60. Consolidated Edison and other utilities are permitted to operate as monopolies because of a determination by the state that the public interest is better served by protecting them from competition. The essence of the regulatory approach is the acceptance of a single company as society's chosen instrument for performing the services in question. Because of the utilities' special status, the state imposes obligations upon them that go far beyond the obligations imposed on private companies generally and subjects them to numerous controls. For a background in this area, see 2 A. KAHN, THE ECONOMICS OF REGULATION 113-71 (1971) [hereinafter cited as ECONOMICS OF REGULATION]; Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 COLUM. L. REV. 426, 458-61 (1971) [hereinafter cited as Certificate of Public Convenience] and for specific coverage of the New York public utility system, see Utility Rates, supra note 7, at 707-17.  

61. The utility bill insert situation differs from a competitive business environment. If a competitive business offended a customer with a controversial bill insert, that person could easily switch to a competing business. The utility consumer could not similarly react to an offensive utility insert. Due to the absence of competition, the utility customer may not choose between alternate viewpoints in billing inserts. No competing channels with the billing insert forum exist because there is only one type of utility in each service area. Therefore, a consumer is unable to choose between an electric utility which endorses nuclear power and one which does not. See note 60 supra. See generally Note, Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills, 64 VA. L. REV. 921, 922 (1978) [hereinafter cited as Political Inserts].  

62. The billing process is essential to receiving utility service. In addition, utility service is a necessity to the average American. See generally ECONOMICS OF REGULATION, supra note 60; Utility Rates, supra note 7; Political Inserts, supra note 61, at 922. Therefore, all of the consumers in the service area receive these inserts. Thus, the audience of ratepayers in Consolidated Edison is similar to the captive audience that the Court identified in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (passengers of rapid transit deemed captive of advertisements). The Court in Consolidated Edison distinguished the ratepayers from the passengers of rapid transit because the utility "customers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" 447 U.S. at 542 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). The flaw in the Court's reasoning is that the passengers on rapid transit can escape in the very same manner.
nating its views. Because of the cost and the less certain effectiveness of other forms of advertising, it will be more difficult for views contrary to those of Consolidated Edison to reach the same consumer audience. For these reasons, a speech restriction or an alternative regulation is justified.

Typically, the Court will search for a less restrictive alternative to a regulation when time, place, or manner restrictions are presented. Because the Commission's order can be characterized as a place restriction, the Consolidated Edison Court simply should have scrutinized the forum in an effort to find a less restrictive way for the Commission to prevent abuse of this channel of communication. For example, the Court could have required the utility to make the billing insert forum available to other views once it had presented controversial views in the inserts.

Such an equal access arrangement was suggested by the Supreme Court in Red Lion Broadcasting Co. v. FCC, where the validity of the fairness doctrine was upheld. The fairness doctrine mandates equal access to the forum of radio and television broadcasting so that opposing views may be aired. In Red Lion, the Court imposed the fairness doctrine requirement because the state had granted a radio station the exclusive use of a forum, an

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63. See Appendix to Brief for Appellant at 15, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). The company presented this evidence to the Commission. First, a separate mailing would be prohibitively expensive. Second, television is not an adequate medium for communicating lengthy messages on complicated subjects to a mass audience. Finally, newspaper advertising is more expensive in reaching as wide an audience among utility customers as billing inserts. Id. at 15-17.

64. Under the rational basis analysis for time, place, or manner restrictions, part of the test to determine if ample alternative channels of communication are available necessitates a discussion of less restrictive alternatives. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (invalidating ordinance that prohibited distributing circulars in light of less drastic alternatives to protecting privacy). See generally Note, Less Drastic Means and the First Amendment, 78 YALE L.J. 464, 469-70 (1969) (evaluating the less drastic alternative approach under the rational basis test). See also notes 23 & 28 supra.

65. See notes 44-59 and accompanying text supra.

66. Permitting Consolidated Edison to use the forum only if it presented opposing views in the same manner, would not be as restrictive as an absolute denial of the use of the forum.


68. Id. at 389.

69. Id. at 380. "[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Id. at 391. The fairness doctrine imposes a twofold duty on broadcasters. First, a broadcaster must afford adequate coverage to political issues. Second, the "coverage must be fair in that it accurately reflects opposing views." Id. at 377. Cf. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1972). In CBS the fairness doctrine was not extended to paid political advertisements. CBS is consistent, however, with requiring Consolidated Edison to present controversial matters of public policy in a manner which gives opposing views fair coverage once it begins to use the forum. The CBS Court addressed the question of whether the network was required to accept paid political advertisements from individuals or groups. The network was already complying with the fairness doctrine by presenting fair and adequate coverage. Therefore, the issue was not whether there would be fair discussion, "but rather who shall determine what issues are to be discussed. . . ." Id. at 130.
electromagnetic frequency, which had few competing forums. Although the forum in Red Lion was private property, it was created, in part, through state action. Absent the fairness doctrine, only messages tailored to the owner's viewpoint would be aired. The Court held that the rights of the listening audience were paramount and therefore imposed the fairness doctrine which allowed access to the broadcast forum for other points of view. Similarly, in Consolidated Edison, the utility monopoly is economically based and has no direct free speech impact. The billing insert forum, however, is also the product of this state action in granting a monopoly. Therefore, the government action does have an impact on speech. As in Red Lion, the only viewpoints broadcast in the billing insert forum would be those of the owners of the forum, Consolidated Edison. In addition, there are no comparable channels of communication to the billing insert forum for those with opposing points of view to reach the same audience. Following the rationale of Red Lion, the rights of the audience in the billing insert forum, even though it is private property, should be paramount and the fairness doctrine applicable. Moreover, a rebuttal procedure would be a less restrictive way to regulate a utility's use of billing inserts than an absolute denial of the use of that forum.

Although the Court referred to Red Lion in its opinion, it failed to accord adequate weight to the significance of the fairness doctrine. The Supreme Court, however, has limited the availability of the fairness doctrine. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the fairness doctrine was not extended to newspapers, apparently because the Court did not consider them to be a limited resource. Id. at 254-58. Because there is no competition among utilities, the billing insert forum has no comparable channels of communication. Therefore, the billing insert forum is a limited forum and is more akin to Red Lion than Tornillo.

70. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969). Without state action in allocating broadcast frequencies the broadcaster would be unable to operate effectively. Id.
71. Id. at 376-77, 389.
72. Id. at 382-92.
73. Id. at 390.
74. See notes 59-63 and accompanying text supra.
75. See note 66 and accompanying text supra.
76. 447 U.S. 541-43.
77. Id. The Court distinguished Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), from the billing insert forum at issue in Consolidated Edison, reasoning that the billing insert was not a limited resource comparable to the broadcast spectrum:

[A] broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a cacophony of competing voices.

Id. at 543 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969)). Although all persons are free to send correspondence to private homes through the mails, they are not free to use the billing insert forum for the presentation of their own views. The Court muddled the distinction between an individual's right to send correspondence through the mails and a utility's right to unrestricted use of a unique channel of communication, billing inserts. The issue was not whether the utility could send a separate mailing presenting those views, but whether it could use a forum created by the state, which had no competitive channels. This is the same situation the Court encountered in Red Lion.
crux of the fairness doctrine is that it guarantees the listener's right to hear alternate viewpoints.\(^7\) This right to hear alternate views has also been the basis of recent corporate speech cases.\(^9\) These cases emphasize the right of the audience to benefit from an open marketplace of ideas and the free flow of information.\(^8\) Hence, to be consistent with both the fairness doctrine and the Court's own developments in corporate speech,\(^8\) the protection of the ratepayers' rights, as readers of inserts, apparently would require a fairness doctrine result.\(^8\) Furthermore, because the NRDC had requested a rebuttal procedure,\(^6\) the Court could, on the record before it, have created such a right.

The NRDC's original request for a rebuttal opportunity actually was quite workable. The presentation of opposing points of view could be overseen by the Public Service Commission, which could evaluate the fairness of the presentations and would possess the authority to proscribe the use of the billing insert forum if the utility failed to meet its obligation of rebuttal.\(^4\)

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78. The essence of Red Lion is that when there is a state granted forum with one (or few) competing forums, those with other views should have the opportunity to express themselves. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

79. The most recent corporate speech cases have been based primarily on the interests of the consumer audience in being exposed to a free flow of information and a marketplace of ideas. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980) (commercial expression "furthers the societal interest in the fullest possible dissemination of information"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (recent commercial speech cases illustrate that the first amendment prohibits the "government from limiting the stock of information from which members of the public may draw"); Virginia Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (free flow of information promotes goal of public decision making in a democracy).

80. See note 79 supra.


82. Although the Consolidated Edison decision is an expansive free speech case from the utilities' viewpoint, it is not consistent with the recent developments in corporate speech which were based on the interests of the audience. Thus, it can be seen as a departure from the trend in corporate speech. The Consolidated Edison decision sanctions the monopolization of a channel of communication. The fairness doctrine would have better preserved the marketplace of ideas. 

83. 447 U.S. at 532. See notes 10-13 and accompanying text supra.

84. Leaving the Commission with the authority to proscribe the use of the billing insert forum if the utility does not meet its equal access obligation would mirror the obligation imposed on the broadcast media by the fairness doctrine. See CBS, Inc. v. Democratic Nat'l Comm., 412
In the alternative, responsible opposing points of view could be gathered from various sources and allowed to use the forum through a lottery procedure, or an independent person could oversee the presentation of opposing points of view. Therefore, the rebuttal procedure, a more workable and less restrictive alternative to the Commission's order, could have been implemented by the Court. Thus, the most favorable result would have been for the Court to have required a rebuttal opportunity before it granted Consolidated Edison the exclusive use of the billing insert forum. This fairness doctrine approach is compelled by the unique nature of the forum at issue and it more closely follows free speech precedent.

**IMPACT**

The most significant result of the Consolidated Edison decision is that it gives an unfair advantage to the utility’s point of view on all public issues because it will be more difficult for opposing points of view to reach the same audience. As a result, society’s interest in informed judgment on such significant issues as nuclear power will be neglected, and the public decision making which results from such a one-sided flow of information will be of questionable merit. In addition, the Consolidated Edison decision set no limit on the scope of the subject matter which the utility could discuss. Therefore, the decision ignores the ratepayers’ interest in being fairly informed and gives an unwarranted advantage to the views of a public utility on any conceivable issue.

Further, the decision sets an uncertain precedent for future corporate speech cases. Although past corporate speech cases were based on informed public decision making, the Consolidated Edison Court disregarded this

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U.S. 94, 125 (1972) (public interest requires periodic accountability on part of broadcasters); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969) (government can require broadcasters to present other viewpoints). This policy would give the public assurance that the utility would be answerable if it fails to meet its obligation of equal access. Cf. Political Inserts, supra note 61. This Note supports the idea of equalizing speech resources by requiring a rebuttal, but concludes that an absolute ban on political inserts in utility bills is the most favorable solution. Id. at 931.

85. See B. SCHMIDT, FREEDOM OF THE PRESS v. PUBLIC ACCESS 15-22 (1976) (Schmidt emphasizes that there are numerous ways that a right of access might be implemented in any given forum).

86. See notes 60-63 supra.


88. Recent corporate speech cases recognize that proper public decision making would result only from a fairly informed public. See notes 77-82 & 87 supra.

89. The Court merely held that the Commission could not prohibit utilities from using bill inserts to discuss controversial issues of public policy. 447 U.S. at 544.

90. See notes 77-82 and accompanying text supra.
factor entirely. Instead, the Court recognized for the first time the intrinsic free speech right of the corporation. This approach proves to be unsuited for the unique billing insert forum because it leads to poor public decision making.

Finally, the decision may threaten the traditional control that government has exercised over public utilities. Historically, the government has been able to impose obligations on utilities that go beyond the obligations generally imposed on private companies due to the public policy against monopoly power. In addition, the Court has consistently preserved a distinction between the constitutional rights of utilities and those of individuals. The Consolidated Edison Court, however, minimized the significant power held by the government over utilities in its free speech analysis and muddied the distinction between the rights of the utility and the rights of individuals. Because of this development, the decision may signal a further expansion of the constitutional rights of utilities in other areas. For instance, as the decision infringes upon the power previously maintained by New York over the billing procedure, a government's assumed authority to control a utility's ratemaking process or supervise the property of a utility may now be subject to sharper constitutional scrutiny.

91. 447 U.S. at 533. The majority cited First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978), for the proposition that the worth of speech is directly related to its capacity for informing the public. 447 U.S. at 533. The Consolidated Edison Court, however, did not consider the societal interest in informed public decision making as it had in Bellotti and other corporate speech cases. See notes 76-81 & 86-89 and accompanying text supra.

92. The Court in Consolidated Edison did not consider the public interest in informed decision making, and can be properly viewed as recognizing that the free speech rights of a corporation may exist apart from the interests of the public.

93. See notes 86-89 and accompanying text supra. For a critical look at how the Consolidated Edison decision may affect federal regulation of corporate and union speech in the political environment, see Nicholson, The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures, 65 CORNELL L. REV. 945 (1980).

94. See note 60 and accompanying text supra.

95. Thus, although the Court in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), held that the speech of a corporation was entitled to some first amendment protection, it did not hold that a utility with monopoly power is entitled to the same degree of protection. In contrast, "utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976) (footnotes omitted) (holding that federal antitrust laws apply to public utilities even though utility regulation is primarily a function of the state). See also notes 2 & 60 and accompanying text supra.

96. New York state law explicitly gave the Commission control over the format of the utility bill and any material included in the envelope with the bill. N.Y. PUB. SERV. LAW § 66(12-a) (McKinney Supp. 1980-81).

97. New York State regulates, by statutory authority through the Commission, the rates utilities may charge. Id. § 66(12).

98. New York state law granted the Commission plenary supervisory power over all of the property "used or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity. . . ." Id. § 2(12).
CONCLUSION

While Consolidated Edison superficially appears to continue the positive trend in corporate speech, on closer inspection the decision proves an unwise extension of free speech in this area. By minimizing the interest of the audience, the decision gives an unwarranted advantage to the viewpoint of utilities in public policy decisions. Because the decision is not based on the rights of the audience, it sets a questionable precedent for future corporate speech cases. In addition, the decision may threaten the traditional control the state has exercised over public utilities. A better approach would have been for the Court to have focused on the specific forum involved, instead of on the generalized right of utilities to express their views. By focusing on the nature of the forum the Court would have determined that Consolidated Edison's monopoly status had a significant impact upon the characteristics of this forum and that these characteristics are inconsistent with an absolute right of free speech. As the Commission's order can best be characterized as a place restriction, the Court should have merely searched for a less restrictive alternative to this regulation. A rebuttal procedure would have been a less restrictive alternative. Application of such a procedure would have preserved society's interest in informed decision making while at the same time endorsing the utility's right to speak in this forum. In addition, the rebuttal opportunity was originally requested by the NRDC and could have been implemented easily. Therefore, unless Consolidated Edison agreed to present opposing points of view in billing inserts it should not be able to use that forum to advocate its position on controversial issues. Rather than reaching this just result, the Court chose to extend the speech rights of the utility to the detriment of the public.

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