

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-1044

**TITLE** PACIFIC GAS AND ELECTRIC COMPANY, Appellant v.  
PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.

**PLACE** Washington, D. C.

**DATE** October 8, 1985

**PAGES** 1 thru 50



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PACIFIC GAS AND ELECTRIC :  
4 COMPANY, :  
5 Appellant :  
6 V. : No. 84-1044  
7 PUBLIC UTILITIES COMMISSION :  
8 OF CALIFORNIA, ET AL. :  
9 - - - - - x

10 Washington, D.C.

11 Tuesday, October 8, 1985

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United  
14 States at 1:51 p.m.

15 APPEARANCES:

16 ROBERT L. HARRIS, ESQ., San Francisco, California;  
17 on behalf of the Appellant.

18 MARK FOGELMAN, ESQ., San Francisco, California;  
19 on behalf of the Appellees.

20 - - -

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 ROBERT L. HARRIS, ESQ., 3  
4 on behalf of the Appellant

5 MARK FOGELMAN, ESQ., 21  
6 on behalf of the Appellee

7 ROBERT L. HARRIS, ESQ., 47  
8 on behalf of the Appellant -- rebuttal

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1 to include in its monthly billing envelope the fund solicitation  
2 of a third party, in this case, TURN, Toward Utility Rate  
3 Normalization.

4 Utility speech is protected by the First Amendment.  
5 In Consolidated Edison, this Court decided in 1980 that  
6 the State of New York could not regulate the political speech  
7 that Consolidated Edison put in the billing envelope unless  
8 the state showed a compelling state interest for that  
9 regulation.

10 The right not to carry the message of others applies,  
11 indeed, to a corporation.

12 QUESTION: What case holds that?

13 MR. HARRIS: First National Bank of Boston versus  
14 Bellotti, decided in 1978. In that case, this Court was  
15 faced with the issue as to whether or not the corporation  
16 was entitled to the protection of the First Amendment. As  
17 a matter of fact, that was the first time the issue was  
18 squarely presented to this Court.

19 And, Justice Powell writing for the Court, said  
20 that the inherent worth of speech is not determined by identity.  
21 He said that you look not to the identity of the person  
22 who is asserting the right, you look to see if the right  
23 that is being asserted is a right that is protected by the  
24 First Amendment.

25 QUESTION: Did that case hold that the kind of

1 Wooley versus Maynard type of First Amendment rights the  
2 right not to carry a message you don't agree with applied  
3 to corporations?

4 MR. HARRIS: That case was not faced with that  
5 issue.

6 QUESTION: Do, it didn't hold it?

7 MR. HARRIS: It did not hold that a person had  
8 a right -- that a corporation had a right not to carry some-  
9 body else's message.

10 QUESTION: So, what case of ours do you rely for  
11 that proposition?

12 MR. HARRIS: There is no case that specifically  
13 holds that in the case of a corporation, however, we do  
14 rely heavily upon at least two cases, Miami Herald versus  
15 Tornillo and Wooley versus Maynard.

16 In the Miami Herald case, the Court held that  
17 the State of Florida could not compel the Miami Herald to  
18 publish the reply messages of third parties and in that  
19 decision Chief Justice Burger, writing for the Court, indicated  
20 that although the State of Florida made good arguments in  
21 terms of why a wide variety of views are necessary or desired,  
22 but the Court says in each instance where there is an enforced  
23 right of excess -- access -- necessarily calls for some  
24 mechanism, either consensual or governmental.

25 QUESTION: Do you think there is a difference

1 between a newspaper, which is not a regulated enterprise,  
2 and a public utility, which is quite strictly regulated,  
3 a difference for these purposes?

4 MR. HARRIS: For these purposes, I think that  
5 the same principle that applies in Tornillo should apply  
6 here.

7 The mere fact of regulation, as this Court  
8 indicated in Consolidated Edison, does not preclude a utility  
9 from asserting First Amendment rights.

10 In Tornillo, the difference, of course, is that  
11 Tornillo involved a newspaper.

12 Here we are involved with a situation where you  
13 have a utility's billing envelope. But, the principle is  
14 the same; that is, as the Court said in Tornillo, newspapers  
15 should not be compelled to publish that which reason tells  
16 them should not be published.

17 Here a utility should not be compelled to carry  
18 a message in the billing envelope that reason tells it should  
19 not be carried.

20 QUESTION: Yes, but hasn't the Court distinguished  
21 between different kinds of media? The Red Lion case, for  
22 example, involving the fairness doctrine who was dealing  
23 with the broadcast station which is regulated in a sense  
24 and yet the broadcasters are required to do certain things.

25 MR. HARRIS: In the case of Red Lion, there Red

1 Lion did not rest upon the basis that the broadcasters had  
2 a monopoly. It rested rather upon the basis that they were  
3 using a scarce resource that was not open to the public.

4 Here, the mail is not a scarce resource. And,  
5 as the Court reasoned in Red Lion, and again emphasized  
6 in Consolidated Edison, is that a broadcaster can only  
7 communicated through those scarce resources.

8 QUESTION: Mr. Harris, do you concede that the  
9 Public Utilities Commission can require PG&E to carry in  
10 its billing envelopes notices of public rate hearings or  
11 things of that kind?

12 MR. HARRIS: Justice O'Connor, we have, indeed,  
13 carried such notices. We are willing to do that.

14 QUESTION: Well, I am asking if you concede whether  
15 the Public Utilities Commission can properly, under the  
16 First Amendment, require the company to do that?

17 MR. HARRIS: Yes, we do concede that.

18 QUESTION: And, why is that different in your  
19 view?

20 MR. HARRIS: That is different because in the  
21 case of a government notice, here an informational notice,  
22 informing utility customers that a hearing is going to be  
23 on such and such date or that there is a public health or  
24 safety matter pending somewhere concerning the utility,  
25 it is quite different from compelling PG&E to carry in its



1 billing envelope the fund raising message of a third party  
2 unregulated by the Commission, a third party who is free  
3 to --

4 QUESTION: Does this argument suggest, Mr. Harris,  
5 that the PUC order that we have before us, you would not  
6 object to it if they permitted TURN to insert only factual  
7 matter that dealt with the public utility business?

8 MR. HARRIS: No, it would not, Justice Brennan.

9 We would object to it because we would be forced  
10 to carry --

11 QUESTION: I asked you that question because I  
12 thought you answered Justice O'Connor that the PUC could  
13 require you to insert matter that dealt with rates.

14 MR. HARRIS: As I understand Justice O'Connor,  
15 it was whether or not we could be compelled to carry a state's  
16 notice.

17 As I understand your question, it is whether or  
18 not we can be compelled to carry a private person's notice.

19 QUESTION: That is right.

20 MR. HARRIS: And, no, we cannot, I don't think,  
21 consistent with the First Amendment unless the state shows  
22 a compelling state interest for ordering us to do it. We  
23 rely on Wooley versus Maynard.

24 QUESTION: It is the death or die or whatever.

25 MR. HARRIS: No, it is not the death or die.

1           We also rely on the general principles of the  
2 First Amendment and that is compelling someone to speak  
3 when there are other ways available.

4           QUESTION: Are you going so far as to suggest  
5 that a corporation's negative First Amendment right, as  
6 you perceive, is co-extensive with the individual?

7           MR. HARRIS: Yes. I think that this Court intimated  
8 that to a certain extent in Harper and Row versus Nation  
9 Enterprise by Justice O'Connor where she indicated and cited  
10 really that the right to speak also necessarily includes  
11 the right not to speak. And then she quotes New York's  
12 Chief Judge Poole in terms of how they serve the same  
13 ultimate purpose.

14           The purpose that is being served here is the right  
15 not to be compelled to carry someone else's message.

16           QUESTION: It makes no difference whether it is  
17 an individual or a corporation?

18           MR. HARRIS: I don't think it is any different  
19 at all whether it is an individual or a corporation. You  
20 cannot look and say in the one instance this is a corporation,  
21 therefore, you carry the message without regard to anything  
22 else. I think you have to look at the nature of a right  
23 involved. Is that right protected by the First Amendment.

24           Here, the right involved is the right not to carry  
25 the message of someone else.

1 QUESTION: Is there any difference with a utility?

2 MR. HARRIS: I think there is a difference. I  
3 don't think there is any difference whether it is a utility  
4 or any other corporation.

5 QUESTION: Did the state order the utility to  
6 publish the rate schedule?

7 MR. HARRIS: Yes, indeed, Your Honor.

8 QUESTION: Well, there is a difference.

9 MR. HARRIS: Yes, there is a difference if it  
10 is the message of the state. If it is a message of a third  
11 party, then I would disagree.

12 QUESTION: Why shouldn't it or why doesn't it  
13 make a difference, as the Court below held, that the extra  
14 space in an envelope doesn't belong to the utility?

15 MR. HARRIS: It is true that the Commission below  
16 held that the extra space does not belong to the individual.

17 QUESTION: It doesn't belong to the utility.

18 MR. HARRIS: Doesn't belong to the utility.

19 QUESTION: Yes.

20 MR. HARRIS: Sorry.

21 QUESTION: Yes.

22 MR. HARRIS: It doesn't matter because what we  
23 are talking about is the regulation of what goes into the  
24 billing envelope.

25 QUESTION: Well, I know, but the space doesn't

1 belong to the utility, it belongs to the consumer, it was  
2 held below, right? So, the Commission said we are going  
3 to fill up that space that belongs to the consumer with --  
4 periodically with something that we think the consumer would  
5 be more interested in.

6 MR. HARRIS: It is true that that is what the  
7 Commission held. But, we argue that the First Amendment  
8 cannot depend upon a metaphysical definition of space.

9 QUESTION: How does the First Amendment give the  
10 utility the right to use that space?

11 MR. HARRIS: What we are talking about, Justice  
12 White, in addition --

13 QUESTION: We are talking about who gets a free  
14 ride on that space.

15 MR. HARRIS: If the question is who gets a free  
16 ride, the Commission can certainly deal with that question  
17 by assessing an economic value to that extra space.

18 But, here, in order for the consumer group to  
19 use that space, they must use an envelope, an envelope that  
20 the Commission has not said belongs to the rate payer.  
21 And, in using that envelope we are compelled to associate,  
22 we are compelled to be the courier of someone else's  
23 message and we think that is protected by the First Amendment.

24 QUESTION: Mr. Harris, a moment ago you referred  
25 to the Harper and Row opinion and the suggestion that the

1 right to speak and the right not to speak are somewhat  
2 similar. Do you think the right not to be a courier is  
3 equivalent to the right not to speak?

4 MR. HARRIS: I think it is very, very close.

5 QUESTION: It is clearly not the same, is it?

6 MR. HARRIS: They are not identical, no.

7 QUESTION: Does any consumer object to having  
8 the consumer space in the envelope used in this manner?

9 MR. HARRIS: We don't know, Your Honor. That  
10 wasn't part of the record below. But, I would suspect that  
11 many consumers will object, because there are many consumer  
12 groups.

13 QUESTION: Wouldn't you say the Commission would  
14 have the power to order -- to prevent the utility from  
15 putting anything in the envelope except the bill?

16 MR. HARRIS: I don't think so. I think that would  
17 clearly reverse Consolidated Edison.

18 QUESTION: Well, why? The space doesn't belong  
19 to the utility. Why should it get a ride out of it?

20 MR. HARRIS: But, the outcome of this case does  
21 not turn upon who owns the extra space.

22 QUESTION: But, it does on who owns the envelope.

23 MR. HARRIS: Well, I don't think it necessarily  
24 turns on who owns the envelope either.

25 QUESTION: Well, that is the way you are being

1 a courier.

2 MR. HARRIS: The envelope has not been held to  
3 be the property of the rate payer. The envelope carries  
4 the name of PG&E. The envelope is material that we must  
5 sent to the rate payer. Whatever is in that envelope is  
6 associated with PG&E.

7 QUESTION: Of course, PG&E could change that very  
8 easily if it wanted to by saying PG&E and then adding TURN  
9 to the envelope, I mean, if it disliked the notion that  
10 it was misleading people.

11 MR. HARRIS: Then the association would become  
12 even worse because there you have both PG&E and TURN being  
13 the sender of the bill. The purpose of the billing envelope  
14 is to send a bill.

15 Even aside from any other document included therein,  
16 it is the forced association, the forced compulsion to speak  
17 when we prefer not to speak that is at issue here.

18 QUESTION: Don't you think there is some difference  
19 between the loyal, fiesty citizen of New Hampshire who didn't  
20 believe in live free or die and, therefore, didn't want  
21 to carry it on his license plate, kind of an individual  
22 thing that always struck me, though I must say I didn't  
23 agree with the result in that case, and the corporation.  
24 I don't see quite the same personality element there.

25 MR. HARRIS: It is not the same personality, of

1 course, but it is the right that is involved, the right  
2 not to be the courier of someone else's message that I think  
3 is at stake here.

4 In Wooley, live free or die. Here, we carry  
5 whatever the message may be that is given to us from TURN  
6 into a billing envelope that we have mailed out for over  
7 60 years. People associate what we mail in the PG&E envelope  
8 with PG&E.

9 QUESTION: Can't you, under the Commission's ruling,  
10 put a disclaimer on what you circulate, saying this is not  
11 produce by PG&E or something like that?

12 MR. HARRIS: The opportunity to put a disclaimer --

13 QUESTION: TURN has to under the order.

14 MR. HARRIS: Under the order, TURN must put a  
15 disclaimer. But, a disclaimer would not clear the violation.  
16 As I indicated, for over 60 years this has been the PG&E  
17 envelope. The forced association causes the injury. The  
18 opportunity to disclaim an inaccurate or an inflammatory  
19 message will not suffice to undo whatever damage that may  
20 have been done by including the message.

21 The State of California cited PruneYard as its --

22 QUESTION: Would you kind of enlighten me a little  
23 more about the nature of the damage to the corporation.  
24 It is not pecuniary interest, is it?

25 MR. HARRIS: No, it is --

1 QUESTION: It is kind of an insult.

2 MR. HARRIS: It is reputation.

3 QUESTION: Now, what is it? Does it adversely  
4 affect the reputation or it is misleading or how does it  
5 hurt the corporation?

6 MR. HARRIS: It affects us in this way. Over  
7 the years, we have expended a lot of money building up the  
8 image of PG&E, building up our corporate image. To the  
9 extent --

10 QUESTION: Is it part of your image that you don't  
11 like people to oppose rate increases?

12 (Laughter)

13 MR. HARRIS: No, Your Honor. We have not even  
14 carried the message of those who support rate increases.  
15 We have not carried the message of anyone other than PG&E,  
16 although we have been requested by numerous jurisdictions,  
17 including the City and County of San Francisco to carry  
18 its messages.

19 But, as you can probably see, once we become involved  
20 in that, then we find ourselves irretrievably entangled  
21 in a mess.

22 This order requires that the PUC place itself  
23 in the position of selecting the speakers. In other words,  
24 who uses this envelope, whether it is TURN or some other  
25 person. They must first come to the Commission, must first



1 indicate to the Commission the subject matter that it intends  
2 to talk about. Once it indicates that, then the person  
3 must indicate whether or not the viewpoint expressed is  
4 one that is in support of PG&E or opposed to PG&E, because,  
5 as the decision said, it is the purpose to get a variety  
6 of views in addition and opposed to PG&E.

7 I think the government really will become so entangled,  
8 unlike in PruneYard, in picking and choosing speakers, that  
9 government will end up being the ultimate arbitrator of  
10 what is or what is not said.

11 QUESTION: Suppose a citizens' committee is  
12 organized in favor of public ownership of all utilities.  
13 Under this order, could that committee put its material  
14 out through the monthly bills?

15 MR. HARRIS: If the Commission so decrees. It  
16 is up to the Commission. Under this order the Commission  
17 can allow anyone that it pleases to use the envelope. All  
18 they need do is file a complaint and if the Commission believes  
19 that the subject matter is proper or the viewpoint expressed  
20 is proper, then the Commission will allow -- will compel  
21 us to carry that message.

22 QUESTION: Not flyers for candidates for public  
23 office?

24 MR. HARRIS: No. It would discriminate against  
25 them. It did that, as a matter of fact, a year ago.

1 A Committee for One Million, Proposition 36, a Jarvis/Gann  
2 initiative, applied to the Commission because they wanted  
3 to indicate to rate payers that there was a measure on the  
4 ballot that would affect rate payers. But, the Commission,  
5 and that is in the Appendix to the Jurisdictional Statement,  
6 said that because it did not directly relate to a Commission  
7 proceeding that they shall be denied and they were denied.

8 QUESTION: How about solar energy? I guess you  
9 wouldn't mind carrying that, would you?

10 MR. HARRIS: We have carried Commission notices  
11 concerning solar energy before, but we have not been compelled  
12 to carry the messages, for example, of a private corporation  
13 in the solar industry who wants to promote his particular  
14 device, as TURN is trying to promote its --

15 QUESTION: That is the one I was talking about.

16 MR. HARRIS: We have not been compelled to do  
17 that.

18 QUESTION: Suppose some group came in with material,  
19 information, propoganda, whatever you want to call it, about  
20 tariffs, uring that tariffs be put on all imports from Japan.  
21 Would the Commission have the authority to have that  
22 circulated?

23 MR. HARRIS: Under this order, of course, it would,  
24 but I don't think that the Commission would necessarily  
25 have the authority to compel us to carry that message as

1 promulgated.

2 I think it is important to remember that we do  
3 not take the position that the Commission can never compel  
4 us to carry someone's message. We think that when the  
5 Commission endeavors to do that the Commission still has  
6 to show an overriding governmental interest for making us  
7 carry the message that you indicate.

8 And, in the instant case, the Commission, we don't  
9 think has met its burden of proof of showing that there  
10 is a compelling state interest for carrying TURN messages.

11 The Commission already has California state law  
12 which says specifically that intervenor funding can be given  
13 to people who intervene in rate cases.

14 For example, the Commission has awarded more than  
15 \$160,000 to TURN during the past year, the last two years.  
16 Pending now before the Commission is an application for  
17 over \$800,000 by some other consumer group.

18 So, the Commission already has at its disposal  
19 a very clear mechanism for taking care of a problem that  
20 it wants to resolve.

21 Thus, there is no reason for it to broadly stifle  
22 First Amendment right. There is no reason for it to compel  
23 PG&E to become the courier of TURN's message. TURN can  
24 mail it to the householder.

25 QUESTION: I am not sure I understand. You say

1 the Commission has ordered the utility to pay TURN \$160,000  
2 or give it from public funds?

3 MR. HARRIS: From public. What it does is it  
4 will order the utility to pay it and then the utility recoups  
5 it in its next rate case that comes up.

6 QUESTION: I see. And, is it in the nature of  
7 like paying for their attorneys' fees for participating  
8 in the procedure?

9 MR. HARRIS: Attorneys' fees.

10 QUESTION: I see.

11 MR. HARRIS: All fees associated with the case.

12 In PruneYard which, of course, is the case which  
13 they rely upon very heavily, there you had a shopping center,  
14 a shopping center that was open to the public to come and  
15 go as it pleased. Some 25,000 people congregated there  
16 daily. There was no requirement that government pick or  
17 choose the speakers. The only requirement was that the  
18 facility -- in that case the shopping center -- be made  
19 available.

20 But, here, in order for government to carry out  
21 its order, it must become ensnarled in picking and choosing  
22 speakers, precisely what the Court said in Police Department  
23 of Chicago versus Mosley. Government should not be involved  
24 in picking and choosing speakers.

25 When you have other ways to accomplish the

1 governmental purpose, then government ought not to be allowed  
2 to then use means that will broadly stifle First Amendment  
3 activities.

4 Here, unlike in PruneYard, government did not  
5 permit PruneYard, as Justice Rehnquist pointed out, to open  
6 those portions of the shopping center that had never been  
7 open to the public. Here, PG&E is required to open its  
8 billing envelope that it has never opened to the public.

9 The question is basically one of does it really  
10 make sense, in view of all these other alternatives, to  
11 compel PG&E to carry somebody else's message that can easily  
12 be disseminated in another manner.

13 QUESTION: I suppose the Commission could say  
14 to PG&E, well, if you are going to use this extra space,  
15 you ought to pay for it.

16 MR. HARRIS: We have no problems with paying for  
17 the extra space. We conceded that in the Court below, that  
18 if that is the governmental interest involved, recoupment --  
19 the value of that extra space, which it said it was in its  
20 decision, then there is no reason why government cannot  
21 assess -- Let's say, for example, if it is worth \$300,000  
22 and probably charge that, assuming it is reasonable, to  
23 PG&E. PG&E would have no constitutional right to --

24 QUESTION: And that is your argument. Couldn't  
25 they recoup from the consumer.

1 MR. HARRIS: That is right. That is quite correct.

2 QUESTION: Stockholders.

3 MR. HARRIS: It would have to be borne by the  
4 stockholders.

5 I will reserve the balance of my time.

6 CHIEF JUSTICE BURGER: Mr. Fogelman?

7 ORAL ARGUMENT OF MARK FOGELMAN, ESQ.

8 ON BEHALF OF THE APPELLEE

9 MR. FOGELMAN: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 In order to put this case --

12 QUESTION: Would you raise your voice some, Mr.  
13 Fogelman?

14 MR. FOGELMAN: Yes, Your Honor.

15 In order to put this case in its proper perspective,  
16 it is important to step back a moment and look at what the  
17 Commission did and why it did it.

18 PG&E is the largest investor-owned gas and electric  
19 public utility in the country. It has a lawful and practical  
20 monopoly for the delivery gas and electric service with  
21 in its service area, which included most of the State of  
22 California.

23 It recovers its reasonable costs and a reasonable  
24 rate of return in rates paid by the rate payers.

25 Its representation in Commission rate cases is

1 very effective. That representation by some of the best  
2 expert witnesses, consultants, and lawyers that money can  
3 buy is considered an operating expense to the utility and  
4 is paid for ultimately by the rate payers.

5 The public utility --

6 QUESTION: Well, to some extent, for the stop  
7 orders too, isn't there?

8 MR. FOGELMAN: Not really, Your Honor, because --

9 QUESTION: Doesn't it produce the revenue? Isn't  
10 there some reduction of --

11 MR. FOGELMAN: Well, it is an operating expense  
12 and all of their operating expenses are recovered in rates,  
13 I believe.

14 QUESTION: Well, aren't the operating expenses  
15 shared by the rate payers and the stockholders?

16 MR. FOGELMAN: It is my understanding that 100  
17 percent of operating expenses would be recovered. Of course,  
18 costs which are unreasonable or imprudent would be disallowed  
19 from the rate base and would be borne by the shareholders.

20 QUESTION: What are the limits on how this  
21 authority of the Commission can be used?

22 MR. FOGELMAN: The Commission is limited by its  
23 state-authorized authority under the State Constitution  
24 and it is limited by the United States Constitution.

25 Insofar as it does not violate the principles

1 of either of those authorities, it is essentially free to  
2 regulate public utilities in the public interest.

3 With respect to ordering a public utility to carry  
4 the messages of a third party, it is difficult to pose the  
5 precise limits. There are probably many questions which  
6 the Commission ultimately will be required to decide in  
7 pursuing this program.

8 QUESTION: Who is going to define those limits?

9 MR. FOGELMAN: Your Honor, ultimately the  
10 Commission will do so.

11 QUESTION: Suppose someone comes in and says here  
12 is a -- in the next election there is going to be a recall  
13 of three state Supreme Court Justices on the ballot and  
14 we aren't taking any position as to whether they should  
15 be recalled or not recalled, but here we want this message  
16 put in that you should be sure to vote on this because that  
17 is a exercise of your right to control your public servants,  
18 including the courts. Would the Commission let that go  
19 in?

20 MR. FOGELMAN: Well, under this program they cer-  
21 tainly wouldn't and that is the only --

22 QUESTION: I didn't get that, under what?

23 MR. FOGELMAN: Under this program, they certainly  
24 would not.

25 QUESTION: Why not?



1 MR. FOGELMAN: Because the purpose of this program,  
2 the primary purpose, the reason why the state has done what  
3 it has done here, is to permit consumer groups to solicit  
4 funds to increase their participation in Commission proceedings  
5 involving PG&E.

6 And, insofar as the access furthers that primary  
7 purpose, access would be granted. Now, it is possible that  
8 the Commission could enlarge the scope of the program.

9 QUESTION: Well, the predicate for its act was  
10 though that -- for the order was that the space belongs  
11 to the consumer, and, hence, we will act as proxy for the  
12 consumer and send them out something that we think they  
13 might be interested in.

14 MR. FOGELMAN: Well, Your Honor --

15 QUESTION: Based on that I wouldn't think the  
16 utility -- doesn't own the space, I wouldn't think the  
17 utility would have standing to object to whatever it was  
18 the --

19 MR. FOGELMAN: Your Honor, there is no question  
20 in our mind that the determination of rate payer property  
21 is an independent basis for the decision.

22 QUESTION: Yes.

23 MR. FOGELMAN: It is res judicata here.

24 QUESTION: I agree with that. All I am saying  
25 is --

1 MR. FOGELMAN: However, we don't think it makes  
2 any difference.

3 QUESTION: Why is it res judicata here?

4 MR. FOGELMAN: It is res judicata here because  
5 it was decided in an earlier proceeding that the extra space  
6 in the envelope is rate payer property. PG&E was a party  
7 to that proceeding, did not take it up to a higher court,  
8 and in this case, the Commission refused to allow that  
9 particular finding to be relitigated.

10 The California Supreme Court essentially affirmed  
11 the finding of res judicata.

12 QUESTION: Well, it essentially denied review.

13 MR. FOGELMAN: Well, denial of review is a decision  
14 on the merits under California law and all questions of  
15 law and fact.

16 QUESTION: Mr. Fogelman --

17 MR. FOGELMAN: Yes, Your Honor.

18 QUESTION: There are no guidelines, right?

19 MR. FOGELMAN: Under this present program, there  
20 are a number of guidelines.

21 QUESTION: Well --

22 MR. FOGELMAN: Which can be inferred from the  
23 criteria under which --

24 QUESTION: I don't consider guidelines that can  
25 be inferred. I consider guidelines as something you can

1 point to.

2 MR. FOGELMAN: All right. TURN was permitted  
3 in the billing envelope because of four characteristics  
4 enunciated in the Commission's decision. The first was  
5 an ability to represent a significant segment of the rate  
6 payer population.

7 The second was a present, current involvement  
8 in proceedings involving PG&E.

9 The third was that it was a duly constituted non-  
10 profit corporation, and the fourth was that it had a  
11 financial hardship if it were not permitted access in  
12 participating in PG&E proceedings.

13 QUESTION: That is it?

14 MR. FOGELMAN: Those were the characteristics,  
15 yes.

16 QUESTION: Well, then, could you compel them to  
17 carry an advertisement from the sun people that want to  
18 use that energy?

19 MR. FOGELMAN: Your Honor, I think it would be  
20 fair to assume that since their participation and their  
21 intention to solicit funds, specifically for the purpose  
22 of participation -- In fact, there is an auditing procedure --

23 QUESTION: Is there any other governmental agency  
24 in California that can control what a corporation may say?

25 MR. FOGELMAN: Your Honor, there are a number

1 of state agencies that can do that?

2 QUESTION: Like what?

3 MR. FOGELMAN: The State Banking Commission regu-  
4 lates banking. There are truth-in-lending type laws, truth-  
5 and-lending type disclosure.

6 QUESTION: Truth in lending.

7 MR. FOGELMAN: In fact, the state often requires  
8 speech to be carried. This Court --

9 QUESTION: What other corporation is required  
10 to carry something that they don't want to carry?

11 MR. FOGELMAN: There are many disclosure requirements.  
12 The SEC proxy statements --

13 QUESTION: This isn't disclosure. This is propaganda.

14 MR. FOGELMAN: Well, Your Honor, what it is is  
15 fund solicitation messages which this Court in the Schaumburg  
16 and the Cornelius case indicated was fully protected speech.  
17 It involves the provision of information and advocacy of  
18 causes and that is all that TURN is --

19 QUESTION: Well, freedom in lending doesn't  
20 require you to send it to everybody. You are only required  
21 to send it to your customers.

22 MR. FOGELMAN: That is the program.

23 QUESTION: So, these are not freedom-of-lending  
24 customers. These are customers who can't help themselves.

25 MR. FOGELMAN: Well, these are customers of the

1 utility.

2 QUESTION: My point is that you see no difference  
3 between a utility and an ordinary corporation.

4 MR. FOGELMAN: Your Honor, I do. I think a public  
5 utility is far more heavily regulated than many corporations.

6 QUESTION: That is why you want to use it here.

7 MR. FOGELMAN: Well, I think --

8 QUESTION: If it were not a utility, you wouldn't  
9 be interested, would you?

10 MR. FOGELMAN: Well, the Commission does regulate  
11 public utilities.

12 QUESTION: It is aimed at a utility.

13 MR. FOGELMAN: Yes.

14 QUESTION: Mr. Fogelman, a moment ago you made  
15 the statement that under California law denial of review  
16 by the Supreme Court of California is an affirmance on fact  
17 and law. Is that true where the only proceeding below is  
18 an agency proceeding and it has never been to court?

19 MR. FOGELMAN: Yes, the Consumer Lobby against  
20 Monopolies case specifically holds that. I think it is  
21 page 901, 25 Cal. 3rd.

22 QUESTION: You said that although the property  
23 matter was an independent ground for decision, you don't  
24 think it is necessary or important.

25 MR. FOGELMAN: Well, I think it doesn't make a

1 difference to this decision, because I believe that the  
2 Public Utilities Commission, under its broad regulatory  
3 powers, has an authority on the objective facts of this  
4 case to enter the order that it did, even if the space  
5 inside the envelope were deemed utility property.

6 QUESTION: Yes. Well, let's assume that the bill  
7 takes -- There is no spare space in an envelope and the  
8 PUC orders the utility to use a larger envelope and to let  
9 TURN put its material in it as long as TURN pays for it.  
10 That would be the same case, wouldn't it?

11 MR. FOGELMAN: I think that would be a legitimate  
12 situation. I think also if the rate payers paid for this  
13 space --

14 QUESTION: So, then, the Commission really would  
15 be -- the company really would be a courier of somebody  
16 else's materials.

17 MR. FOGELMAN: That is right. Basically the billing  
18 envelope is a unique medium of communication.

19 QUESTION: Well, let's suppose that your answer  
20 to that question is wrong, that they couldn't make the  
21 utility carry TURN's message on those facts. Would that  
22 mean that you have to lose this case?

23 MR. FOGELMAN: No, because if the Court were --

24 QUESTION: Then you have to get to the property  
25 thing.

1 MR. FOGELMAN: Then you would have to get the  
2 the property thing and that is binding on this Court as  
3 a res judicata determination.

4 QUESTION: Well, Mr. Harris, isn't your general  
5 regulatory rationale really foreclosed by the Consolidated  
6 Edison case?

7 MR. FOGELMAN: No, it is not, Your Honor, for  
8 a couple of reasons.

9 QUESTION: It seems very similar.

10 MR. FOGELMAN: Well, the big distinction there  
11 is that Consolidated Edison involves a restriction on  
12 utility speech.

13 It is very important, I think, for this Court  
14 to look at the purposes of the First Amendment which underlies  
15 the difference between affirmative speech and negative speech  
16 rights.

17 Insofar as someone is attempting to speak, and  
18 the state says you can't speak, you have a situation where  
19 the marketplace of ideas, society's interest in obtaining  
20 information, wide-open debate, is limited and that is the  
21 Consolidated Edison case.

22 QUESTION: Well, in some cases, the Court has  
23 indicated at least that there is a concomitant right not  
24 to speak, has it not?

25 MR. FOGELMAN: Yes, it has, Your Honor. But,

1 the underlying purposes which serve the right not to speak,  
2 the right to refrain from speaking and to refrain from associati  
3 the views of another, is very different from the marketplace  
4 of ideas notion.

5 It is, and this is not to be trivialized, it is  
6 an important purpose. It is the scanty and integrity  
7 of an individual's belief and thought. It is the interest  
8 that was involved in Barnett --

9 QUESTION: And, you take the position that that  
10 does not extend to a corporation?

11 MR. FOGELMAN: I take the position that it does  
12 not extend to a corporation which is an artificial entity.  
13 Furthermore, that it certainly doesn't extend to a public  
14 utility which is a very heavy regulated artificial entity.

15 Furthermore, I don't believe that it is co-extensive  
16 with the affirmative counterpart which serves entirely  
17 different interests.

18 QUESTION: Does it strike you that the Commission's  
19 theory about broader participation or expression of a variety  
20 of views is basically a content-based determination? The  
21 Commission has to look at what it is that TURN is doing  
22 and wants to say as the basis for its order that it be allowed  
23 to use the envelope.

24 MR. FOGELMAN: The order in a broad sense is  
25 content-neutral, because the Commission has disavowed any



1 intention of looking at the way that TURN solicits funds.

2 However, there is a limited purpose --

3 QUESTION: It certainly has to look at the nature  
4 of what TURN is doing and saying in order to decide that  
5 it is going to order that its message be carried.

6 MR. FOGELMAN: Well, to the extent that TURN's  
7 speech might hypothetically -- and, again, this has never  
8 occurred -- I might say in a similar experience, the UCAN  
9 situation, no problem certainly developed over a two-year  
10 period, but assuming that TURN were to exceed the purposes  
11 of the program and to make -- engage in some sort of use  
12 of the extra space, which was not a solicitation of funds,  
13 in that situation the Commission would have to look at that.  
14 I am not sure precisely what --

15 QUESTION: At least it is content-based because --  
16 At least it says we prefer to have TURN's material in this  
17 extra space than the company's.

18 MR. FOGELMAN: What it says, Your Honor --

19 QUESTION: Well, isn't it? Isn't that right?  
20 It prefers TURN's to the company's material.

21 MR. FOGELMAN: No. The company gets in the billing  
22 envelope every month of the year and it gets in the extra  
23 space at least eight months of the year and possibly all  
24 twelve.

25 QUESTION: That may be so, but when it can't get

1 into the envelope, can't use the extra space, the Commission  
2 has said we prefer TURN's material to go in the extra space.

3 MR. FOGELMAN: Well, there is --

4 QUESTION: That is four times a year it makes  
5 that preference.

6 MR. FOGELMAN: Four times a year TURN has priority,  
7 that is correct. However, --

8 QUESTION: Well, that is based on content.

9 MR. FOGELMAN: Well, in a sense. I don't see  
10 how the company --

11 QUESTION: I don't see what else it is.

12 MR. FOGELMAN: We are concerned with a supposed  
13 violation of the company's First Amendment rights.

14 QUESTION: Did I understand you to answer Justice  
15 O'Connor that a corporation has no First Amendment right  
16 to refuse to carry the message of somebody else if ordered  
17 by the Public Utility Commission?

18 MR. FOGELMAN: Your Honor, I certainly don't think  
19 that the corporation has a right to refrain from speaking  
20 which is implicated in this case. I would think that you  
21 could possibly postulate a situation in which some area  
22 of corporate autonomy would be so threatened by a state  
23 compulsion to speak that there would be a violation of the  
24 principle.

25 QUESTION: Of what principle, First Amendment?

1 MR. FOGELMAN: Of the right to refrain from speaking  
2 under the First Amendment.

3 QUESTION: Yes.

4 MR. FOGELMAN: On the other hand, I don't think --

5 QUESTION: What about an incorporated church?

6 MR. FOGELMAN: Well, that would raise other First  
7 Amendment questions.

8 QUESTION: How about the John Birch Society?

9 MR. FOGELMAN: The compulsion of the John Birch  
10 Society to speak would --

11 QUESTION: It is a corporation.

12 MR. FOGELMAN: It is a corporation. And, I guess  
13 my answer would have to be that you can postulate situations  
14 in which a corporation which concededly has some degree  
15 of private autonomy would have that autonomy violated by  
16 a compulsion to carry.

17 QUESTION: Such as the NAACP?

18 MR. FOGELMAN: You could probably postulate a  
19 set of facts involving the NAACP.

20 QUESTION: So, you couldn't really mean to say  
21 that an old case is a corporation and a right under the  
22 First Amendment to refuse to carry somebody else's message.

23 MR. FOGELMAN: I think what I meant, Your Honor,  
24 is that in this case there is no violation of any right  
25 to --

1 QUESTION: Let me narrow that down to a little  
2 narrower question than Justice Brennan's. Take a regulated,  
3 a regulated activity, the three major commercial networks.  
4 Could the Federal Communications Commission come down with  
5 an order and have it constitutionally enforced providing  
6 that no prime minister of any other country or any chief  
7 of state of any other country could be on the television  
8 program unless it was approved by the State Department?

9 MR. FOGELMAN: That is quite a difficult hypothetical.  
10 It certainly is not this case.

11 QUESTION: They are both regulated industries.

12 MR. FOGELMAN: I am not sure, Your Honor, but  
13 it is a heavily regulated medium of communication, that  
14 is the airwaves.

15 QUESTION: Well, a broadcast station, not necessarily  
16 a network -- a broadcasting station is more regulated than  
17 the electric utility in the sense that the Federal  
18 Communications Commission can terminate their license and  
19 put them off the air every three years, I think it is.

20 MR. FOGELMAN: That is true. On the other  
21 hand --

22 QUESTION: That is pretty heavy regulation, isn't  
23 it?

24 MR. FOGELMAN: That is heavy regulation. Of course,  
25 the state here has granted a monopoly to a public utility

1 and it is only at the pleasure of the state that the utility  
2 has that monopoly and it is to protect the public that the  
3 state regulates the public utility in the public interest.

4 QUESTION: Is an example of the sort of corporate  
5 First Amendment right that would be sustained the Tornillo  
6 case where certainly the Miami Press was a corporation and  
7 its First Amendment right to publish obviously allowed it  
8 not to have to carry the messages of others.

9 MR. FOGELMAN: Well, the Tornillo case, in our  
10 view, does not turn on the fact that the Miami Hearld was  
11 a corporation.

12 QUESTION: No. The press freedom extends to  
13 private individuals or corporations alike. And, I take  
14 it what you are saying is the since the PG&E is not in the  
15 business of running a newspaper, it isn't governed by that  
16 case.

17 MR. FOGELMAN: Well, no, that is not what we are  
18 saying. In some sense, a pamphlet, a document like Progress,  
19 would be equivalent to a newspaper.

20 PG&E's position is that the billing envelope,  
21 the medium of delivery of its newspaper, is somehow subject  
22 to inviolable editorial discretion and that is not the case.

23 QUESTION: Would Tornillo come out any differently  
24 if the Florida statute had said along with the newspaper  
25 you have to put in a little envelope that you delivery the

1 newspaper a retraction. It doesn't have to be in the paper  
2 itself.

3 MR. FOGELMAN: I think it might well have come  
4 out differently, particularly if the supplement were clearly  
5 identified as being the views of the speaker, and, further-  
6 more, if there were no cost to the newspaper.

7 One of the critical features of Tornillo on which  
8 that case turned was the fact that there was a penalty on  
9 the affirmative speech of the newspaper. Because the newspaper  
10 spoke about certain subjects, the right-of-reply statute  
11 was triggered and space had to be given.

12 That is not involved here because TURN gets access  
13 to the billing envelope under this program no matter what  
14 PG&E says.

15 So, there is no chilling effect which would tend  
16 to cause the newspaper not to address a specific point  
17 of view.

18 QUESTION: Mr. Fogelman, a little while ago you  
19 said there was absolutely no content regulation here if  
20 I understood you correctly. Is it not true that there is  
21 a requirement that there be a disclaimer enclosed and isn't  
22 that part of the content --

23 MR. FOGELMAN: Yes, Your Honor. That would be  
24 comparable probably to the disclosure requirements that  
25 the Court --

1 QUESTION: It is content regulation?

2 MR. FOGELMAN: It is content regulation, but it  
3 is designed to protect PG&E's First Amendment rights.

4 QUESTION: Well, I am not going beyond that.  
5 It is that much.

6 MR. FOGELMAN: Actually, Your Honor --

7 QUESTION: Mr. Fogelman?

8 MR. FOGELMAN: Yes, Your Honor.

9 QUESTION: Have you answered his question?

10 MR. FOGELMAN: Yes, Your Honor.

11 QUESTION: I was under the impression that the  
12 Commission order was limited to neutral messages. Did it  
13 use the word "neutral?"

14 MR. FOGELMAN: The statement was that in a broad  
15 sense you might consider this regulation to be content-  
16 neutral because --

17 QUESTION: Did the Commission use that term?

18 MR. FOGELMAN: No, it did not use that word.

19 QUESTION: That is your word?

20 MR. FOGELMAN: That is my word.

21 QUESTION: Well, the purposes of TURN are not  
22 entirely consistent with those of the public utility, I  
23 understand. What is the constitutional bylaw stated  
24 purposes were these?

25 MR. FOGELMAN: The purpose of -- I believe TURN's

1 bylaws state that its purpose is to provide representation  
2 to the interests of residential rate payers of Public Utility  
3 Commission proceedings.

4 QUESTION: To oppose rate increases?

5 MR. FOGELMAN: To oppose rate increases.

6 QUESTION: Let's assume, for example -- You have  
7 had a good many hypotheticals posed to you this afternoon,  
8 but suppose the entity that came along and asked for permis-  
9 sion for space opposed private ownership of utilities.

10 Would that be a neutral message?

11 MR. FOGELMAN: Your Honor, any message is not  
12 a neutral message. Any message that takes a position --

13 QUESTION: Slightly contrary to the private utility  
14 point of view.

15 MR. FOGELMAN: Right. It is an advocacy message.

16 QUESTION: Right.

17 MR. FOGELMAN: But, the point is that in letting  
18 a participant in Commission proceedings into the billing  
19 envelope to solicit funds to improve its participation,  
20 the Commission is letting that entity, whoever it may be,  
21 as long as it satisfies certain criteria, speak and advocate  
22 its own position as best it can in order to try and raise  
23 money.

24 QUESTION: So, content-neutral is not a require-  
25 ment?



1 MR. FOGELMAN: No, I don't think it is precise  
2 content-neutrality in the sense that you are using the term  
3 would be required to sustain this regulation.

4 QUESTION: Some Justice asked you, is there any  
5 limiting principle -- Assume for example that a cause  
6 organization that wanted space urged the customers of PG&E  
7 to vote for people like the legislature who would support  
8 public ownership of all utilities. Would that be neutral?

9 MR. FOGELMAN: Well, to the extent -- Would it  
10 be neutral?

11 QUESTION: Obviously not.

12 MR. FOGELMAN: No, it is not a neutral message.  
13 It is an advocacy position, but permitting --

14 QUESTION: Would it be lawful?

15 MR. FOGELMAN: I would believe the Commission  
16 would have the power, if it faced the question, to permit  
17 CAUS into the billing envelope because the Commission is  
18 doing this to provide the consumers with a diversity of  
19 viewpoints, not merely only the views of PG&E.

20 It is also doing it to increase the ability of  
21 different viewpoints to participate in Commission proceed-  
22 ings.

23 QUESTION: Why would that be contrary to Miami  
24 Herald?

25 MR. FOGELMAN: It is contrary to Miami Herald

1 for several reasons. First --

2 QUESTION: Why wouldn't it be contrary to Miami  
3 Herald if the Commission permitted the sort of insert that  
4 I described advocating public ownership of utilities,  
5 absolutely contrary to the basic perception of private  
6 utilities? Miami Herald did not want to be a forum for  
7 the views contrary to its own.

8 MR. FOGELMAN: Well, I think -- First of all,  
9 that case is not, of course, involved here. But --

10 QUESTION: You think it is not involved?

11 MR. FOGELMAN: I think it would not be -- The  
12 reason why Miami Herald came out the way it did is basically  
13 two reasons. The first was that there was a penalty on  
14 what the newspaper said and that is not involved in this  
15 case.

16 The second reason is that there was an intrusion  
17 on editorial discretion.

18 But, I don't think the cases of this Court hold  
19 that you can never, never compel a newspaper to carry the  
20 speech of third parties. In fact, there is a Lorain Journal  
21 case --

22 QUESTION: Did we not sustain the right of Columbia  
23 Broadcasting System to reject certain paid ads because they  
24 said it wasn't necessary to get the information out, Demo-  
25 cratic Committee against Columbia Broadcasting?

1 MR. FOGELMAN: Yes, you did. But, you also, in  
2 the CBS verus FCC case, permitted candidates for public  
3 office to have a limited right of access to get their --

4 QUESTION: That was under the fairness doctrine.

5 MR. FOGELMAN: Right, right. And, in a sense,  
6 what the Commission has done here -- The previous discussion  
7 of Red Lion is to do something similar to a fairness doctrine  
8 to provide fair access.

9 QUESTION: It seems to me you are going a lot  
10 further than you have to to win your case here when you  
11 start saying that, yes, the Commission, of course, could  
12 have stuff advocating the public ownership of utilities.  
13 I thought the Commission allowed TURN to come in because  
14 TURN is concerned with Commission rate-making proceedings.  
15 And, I take it there is no proceeding presently before the  
16 Commission about whether PG&E should be publicly owned.  
17 So, you really don't have to get to that, do you?

18 MR. FOGELMAN: You are absolutely right, Your  
19 Honor.

20 QUESTION: But, the principles are the same, of  
21 course.

22 MR. FOGELMAN: The principles are the same.

23 QUESTION: You mentioned the word "neutral."  
24 Do you know anything today in the public view that is  
25 neutral?

1 MR. FOGELMAN: Well, I suppose any position you  
2 take is likely to have some repercussions.

3 QUESTION: Well, would your Commission consider  
4 the use of an ad urging the abolishment of your Commission?

5 (Laughter)

6 MR. FOGELMAN: I think --

7 QUESTION: Or counsel.

8 MR. FOGELMAN: I think the Commission, Your Honor,  
9 is concerned with this program. There are many hypotheticals  
10 that can be raised. But, the point is the Commission has  
11 taken a very limited step here and basically PG&E --

12 QUESTION: Why?

13 MR. FOGELMAN: It has taken a step to try --

14 QUESTION: Why is the state taking this step?

15 MR. FOGELMAN: It is taking this step to try to  
16 improve consumer participation in its own proceedings so  
17 it can get a fuller record and make wiser decisions which  
18 is --

19 QUESTION: You suggest that a tornado is different  
20 because there was a cost to a newspaper. It would chill  
21 its own speech if it had to print replies.

22 MR. FOGELMAN: That is right.

23 QUESTION: Is it perfectly clear that if the utility  
24 here had never initiated a program of using this space for  
25 its own propaganda, that this order would have ever come

1 about?

2 MR. FOGELMAN: I think it is fair to say that  
3 the Commission only recently discovered the existence of  
4 the extra space, this income-generating asset. And, I think  
5 at that point it had a problem. What do you do with it  
6 that utilizes it in the public interest?

7 QUESTION: Putting my question just in a little  
8 different form, do you think the case would be precisely  
9 the same in terms of its constitutional issues if the utility  
10 had never made use of the space for a similar purpose?

11 MR. FOGELMAN: I think it would be quite similar,  
12 yes.

13 QUESTION: Well, could the Commission order that  
14 any unused offices in PG&E buildings be turned over to TURN  
15 for its office space and that sort of thing?

16 MR. FOGELMAN: Well, the Commission has an obliga-  
17 tion to see that the utility operates in an efficient manner  
18 and to the extent that unused offices are not being used,  
19 the Commission can make PG&E rent them out presumably. But,  
20 that is not this case.

21 If I may address some critical points here, I  
22 think there are five critical aspects of this decision that  
23 preclude the notion that there is a violation of the First  
24 Amendment.

25 First, there is no limitation on the continuing

1 availability of Progress in the envelope. PG&E can still say  
2 whatever it wants, as much as it wants, in the billing  
3 envelope. It only is possibly losing a subsidy of its speech  
4 to which it is not constitutionally entitled.

5 Second, each speaker is to determine its own  
6 content and TURN's solicitation messages will not be looked  
7 at insofar as they are consistent with the program.

8 Third, TURN's is required to identify itself as  
9 the source of the message and to indicate that neither PG&E  
10 nor the Commission have reviewed the message. This  
11 effectively means that there will be no confusion and this  
12 Court can be sure that if there is confusion the Commission  
13 will immediately take steps to rectify that.

14 QUESTION: To that extent, TURN is not free just to say  
15 what it wants to say. So, two and three are somewhat  
16 contradictory.

17 MR. FOGELMAN: I beg your pardon?

18 QUESTION: I say to that extent TURN is not  
19 absolutely free to use the space exactly as it chooses.

20 MR. FOGELMAN: You are right. The disclosure --

21 QUESTION: Two and three are inconsistent with  
22 one another.

23 MR. FOGELMAN: That is right. We are making TURN  
24 carry that speech.

25 Fourth, there is no cost to PG&E for the inclusion

1 of TURN's message, not one cent. So, the utility is really  
2 not being disabled in any sense or being required to pay  
3 any penalty.

4 QUESTION: Unless it wants to send out its material  
5 that it now can't -- that under this order it can't send  
6 out. If it is going to have to do that, it will have to  
7 pay for it.

8 MR. FOGELMAN: It will have to pay for it, but  
9 it is still in the same billing envelope. The only thing  
10 is it may be moved from the subsidized space to the  
11 unsubsidized space.

12 QUESTION: I know, but it would cost them money.

13 MR. FOGELMAN: And, finally, and this really ties  
14 to the program, the grant of access to the ultimate purpose,  
15 the money which TURN receives from its solicitation message  
16 must be used for participation in Commission proceedings  
17 involving PG&E.

18 Basically, I think an expansive reading of the  
19 three cases, the Barnett, Wooley, and Tornillo cases are being  
20 asserted before this Court. The Court is being asked to  
21 expand negative speech rights to a set of facts that they  
22 have never reached in the past. And, I think it is fair  
23 to say that the Commission's decision is reasonable  
24 regulation. It has been done in other states. California  
25 is not alone in this. It is an experimental program, but

1 I submit to the Court that there is no infringement of any  
2 First Amendment rights here. And, if there is an infringe-  
3 ment, it is so minimal, the intrusion is so minimal and  
4 the state interests are sufficiently significant to warrant  
5 that intrusion.

6 QUESTION: Have the other states that have done  
7 this taken the action that the California Commission did  
8 in declaring the unused or extra space to be rate payers'  
9 property?

10 MR. FOGELMAN: No, Your Honor, they have not.

11 QUESTION: They just used their general regulatory  
12 power?

13 MR. FOGELMAN: Yes, they have.

14 CHIEF JUSTICE BURGER: Do you have anything further,  
15 Mr. Harris?

16 ORAL ARGUMENT OF ROBERT L. HARRIS, ESQ.

17 ON BEHALF OF THE APPELLANT -- REBUTTAL

18 MR. HARRIS: Mr. Chief Justice, and may it please  
19 the Court:

20 I have just a few notes. In regards to the owner-  
21 ship of the extra space, we would disagree, as we did in  
22 our reply brief to their motion to dismiss, that that is  
23 foreclosed. And, we quoted from the California Supreme  
24 Court itself at 25 Cal. 3rd 891, where the Court explained  
25 that "when the issue is a question of law rather than a



1 fact, the prior determination of" -- and I am adding in  
2 the word Commission -- "is not conclusive either if injustice  
3 would result or if the public interest requires that  
4 litigation not be foreclosed."

5 As we indicated earlier, if the California Supreme  
6 Court or any other California court decided that this was  
7 critical in any other proceeding, it could be relitigated.

8 QUESTION: You wouldn't ask us though here to  
9 second guess a state court on what is the property interest?

10 MR. HARRIS: No, no. I just wanted to clear up  
11 the record in terms of whether or not this is forever fore-  
12 closed.

13 QUESTION: All right.

14 MR. HARRIS: We certainly don't believe it is.  
15 First of all, we believe it is contrary to what this Court  
16 said in New York Public Service Commission versus Public  
17 Board; that when rate payers pay for service, they do not  
18 pay for the property used to deliver that service.

19 QUESTION: We judge the case on the basis of the  
20 property -- that that unused space is the property of the  
21 consumer. That is the way the case gets here, isn't it?

22 MR. HARRIS: No.

23 QUESTION: Why?

24 QUESTION: We can't second guess the state court  
25 on that.

1 MR. HARRIS: No. We brought the issue here, Your  
2 Honor, on the basis that it infringed upon our First Amendment  
3 rights --

4 QUESTION: Even if the property does belong to  
5 the --

6 MR. HARRIS: Even if that ephemeral concept of  
7 extra space, which may be there one month, may not be there  
8 the next month, it is the putting of that message in the  
9 billing envelope which belongs to PG&E that is at issue.

10 QUESTION: Can PG&E just put their bills on heavier  
11 paper and solve this problem?

12 (Laughter)

13 MR. HARRIS: The Commission cautioned us not to  
14 do that, Your Honor, and we would try to be fair.

15 (Laughter)

16 MR. HARRIS: But, on the other hand, it is quite  
17 possible for TURN to use heavy paper for its message and  
18 preclude us from putting in Progress.

19 I think what this case really points out is what  
20 this Court said in Cohen versus California; that it is the  
21 purpose of the First Amendment to remove government from  
22 picking and choosing and from deciding who should speak,  
23 when they should speak, etc.

24 I think it is even more important here, because  
25 here the State of California has at its disposal many other

1 ways to resolve this problem and it never has to become  
2 involved in picking this group or picking that group.

3 If the problem that is bothering California that  
4 there is some extra space there where, as it said, it is  
5 not recouping the economic value of that space, then let  
6 it do what it always does in a rate-making proceeding, assess  
7 a value.

8 So, I think that this case clearly comes down  
9 in terms of saying that here is a case where government  
10 really has gotten itself involved in a situation that it  
11 will be impossible to retrieve itself from, picking and  
12 choosing speakers.

13 Thank you very much, Your Honor.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.

15 The case is submitted.

16 (Whereupon, at 2:53 p.m., the case in the above-  
17 entitled matter was submitted.)  
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1044 - PACIFIC GAS AND ELECTRIC COMPANY, Appellant V.

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PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.

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BY Paul A. Richardson

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