

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Lt. Governor Pat Quinn :
 :
Petition for an Emergency Investigation of : **06-0686**
ComEd's Relationship to CORE and :
Advertising Misleading Information. :

PETITIONER'S BRIEF ON EXCEPTIONS

Lt. Governor Pat Quinn (Petitioner) submits this Brief on Exceptions pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (Commission), 83 Ill. Admin. Code 200.830. Petitioner supports the Proposed Order dated December 15, 2006 without exception. The fundamental right to free speech is not implicated by Petitioner's request that the Commission investigate energy utility Commonwealth Edison's (ComEd) use of Consumers Organized for Reliable Electricity (CORE) as a front group for its false and misleading advertising. Petitioner's request that the Commission adopt a rule requiring that utility companies doing business in Illinois place conspicuous identification in their issue advertising about economic and regulatory matters does not offend the First Amendment.

The regulatory change should require any utility regulated by the Commission to disclose that it paid for or contributed money to pay for an advertisement. The proposed regulation does not infringe upon the First Amendment or any other fundamental right. Since no fundamental right is infringed, rational basis review is the applicable level of constitutional scrutiny. Additionally, Illinois' governmental interest in preventing deceptive advertising is at stake. The proposed regulation fosters that government interest without burdening free speech.

BACKGROUND

The Proposed Order granted Respondent's Motion to Dismiss, in part, and denied the Motion in part. *Proposed Order at 20*. The Administrative Law Judge found that ComEd is a "public utility" as defined in the Illinois Public Utilities Act and that it is subject to the jurisdiction of the Commission. *Id.* The Administrative Law Judge also found that the facts alleged in the Petition suggest such an investigation is warranted. *Id. at 19*. The Order proposed an investigation into the relationship between ComEd and CORE. *Id. at 20*. The Order also indicated that pending the results of the investigation, the Commission may take further action concerning Petitioner's request that the Commission impose disclosure requirements on the advertising of Illinois utilities. *Id. at 19*.

The Commission has the authority to regulate the promotional activities of electric and gas utilities in the State of Illinois. 83 Ill. Adm. Code 275; *Proposed Order at 18*. The Commission also has jurisdiction to investigate ComEd's financial relationship with CORE. *Proposed Order at 19*. Pursuant to Section 8-102 of the Public Utilities Act, the Commission has broad discretion to investigate "any aspect of the utility's operations" when it believes that the investigation is necessary to assure that the utility is providing reliable and safe service at the least cost. 200 ILCS 5/8-102; *Proposed Order at 16*. The Commission has the authority necessary to conduct an investigation into ComEd's advertising campaign and to enact regulatory changes requiring disclosure when a utility engages in issue advertising.

ARGUMENT

I. The Proposed Order is Not a Prior Restraint on the Fundamental Right to Free Speech

The regulation proposed by Petitioner, if narrowly tailored by the Commission, would not burden the constitutional rights of the parties that Petitioner seeks to regulate. The proposed regulatory change would not limit an Illinois utility's right to speak freely on political issues. Under the proposed rule, utilities would be free to spend as much as they want on issue advertising so long as other state and federal rules are not violated.

The proposed rule would be entirely content neutral and would not affect the substance of the speaker's message. The proposed rule would not suppress a point of view or compel communication of the views of others. The only effect of the proposed regulation would be the simple requirement of disclosure. *Proposed Order at 19.*

Furthermore, the proposed rule change would in no way restrict the time, place or manner of speech. Under the proposed rule change, utility companies would remain free to express themselves whenever they want, wherever they want, and however they want; so long as the speech is in keeping with all other applicable state and federal laws.

Prior restraint is an administrative or judicial order that forbids specified communications and is issued in advance of the time when such communications were to occur. *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993). The proposed disclosure requirement would not suppress communication, nor would the regulation require a utility to obtain permission to speak. Adoption of the proposed regulation would not result in a prior restraint.

II. By Attributing its Commercials to CORE, ComEd has Engaged in Deceptive, Not Anonymous Speech

The proposed regulation does not violate Respondent's right to engage in anonymous political speech because ComEd's own actions have rendered that right inapplicable. ComEd has chosen to not remain anonymous. ComEd's communications were not anonymous statements, but instead were attributed to CORE. *Proposed Order at 19.*

ComEd has unclean hands. The right to speak anonymously should not protect persons or entities that hide behind other organizations in order to purposely mislead the public. ComEd waived its right to anonymous speech when it established CORE as a front group to mislead and deceive ratepayers. Disclosure would serve the government's interest in preventing deceptive advertising.

III. Rational Basis Review is the Appropriate Level of Scrutiny With Which to Test the Constitutional Validity of the Proposed Regulatory Change

Under the proposed rule, disclosure of the corporate identity of the speaker would be required, but the speech itself would not be regulated. The disclosure requirement would have only an ancillary effect on free speech. Since no fundamental right would be infringed upon, rational basis review is the applicable level of constitutional scrutiny. The Respondent wrongly asserts that a fundamental right is implicated and that strict scrutiny must be applied. *Reply at 12.*

Since a utility company's fundamental right to speak would not be directly impacted by the regulation, strict scrutiny would not be applicable. *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). Where a fundamental right is not affected,

rational basis review is the appropriate level of scrutiny used to evaluate the constitutional validity of governmental regulation. *Id.*

The rational basis level of scrutiny has previously been applied in cases involving the challenge of disclosure regulations. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding that a regulation requiring attorneys to disclose in their advertising is subject to rational basis review). In the instant case, since speech is not directly regulated, rational basis is the appropriate level of constitutional scrutiny.

Respondent relies on *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986), for the proposition that a government-imposed disclosure requirement compels speech based on content and is subject to strict scrutiny. *Reply at 12.* Respondent has misinterpreted *Pacific Gas & Electric* in its application to the present circumstances.

Pacific Gas & Electric was an appeal to the Supreme Court of an order issued by the California Public Utilities Commission (PUC). PUC had ordered that the utility company Pacific Gas & Electric (PG&E) provide a third party with access to the extra space its billing envelopes mailed monthly to customers. The Court found that the order was not content neutral on the basis that it enabled the third party to communicate to ratepayers views and opinions directly contrary to the views of PG&E. *Pac. Gas & Elec.*, 475 U.S. at 12. Subjecting the PUC order to strict scrutiny, the Supreme Court determined that “the State’s interest in fair and effective utility regulation may be compelling”. *Id. at 16-17, 19.* However, the Supreme Court struck the PUC order upon finding that there was no substantially relevant correlation between compelled third party access to the mailing envelopes and that governmental interest. *Id. at 21.*

In *Pacific Gas & Electric*, the PUC order compelled access, which is not the same as compelled disclosure. The PUC order infringed on PG&E's First Amendment rights because it forced PG&E against its wishes to communicate the political messages of a third party. *Id.* at 20. However, compelled disclosure of the identity of the speaker would not require that an Illinois utility communicate the political message of another.

Unlike the order at issue in *Pacific Gas & Electric*, the disclosure requirement requested by the Petitioner would be content and viewpoint neutral, and reasonable people who see or hear the disclosure would not confuse a mandatory disclosure for the viewpoint of the utility. A content neutral disclosure requirement would not infringe upon protected First Amendment speech, thus strict scrutiny would be inapplicable and the rational basis level of scrutiny should be applied.

Respondent's brief also cites *Central Illinois Light Company v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), for the same proposition that it relies on in *Pacific Gas & Electric*. *Reply* at 12. *Central Illinois Light* was a challenge of the Illinois law that allowed for compelled third party access to provide billing inserts. *Central Illinois Light* can be distinguished on the same basis as we distinguished *Pacific Gas & Electric*. In each of those cases, compelled access was held unconstitutional because the court found that the compelled access was not content neutral. *Pac. Gas & Elec.*, 475 U.S. at 12; *Cent. Ill. Light Co.*, 827 F. 2d at 1174.

The proposed disclosure regulation would be content neutral, would not compel the utility to communicate the message of another, and would not infringe upon the utility's fundamental right to speak. Therefore, rational basis review is the correct level of scrutiny to apply in the present case.

IV. Illinois Has a Legitimate Interest in Preventing Deceptive Advertising

Several government interests have been implicated by ComEd's use of CORE as a front group to spread its false and misleading messages. These governmental interests protect consumers and the marketplace. Failure to adopt disclosure requirements would place these government interests in continued jeopardy.

The Administrative Law Judge noted that the prevention of consumer deception and false statements in commercial speech, as well as in mixed commercial and political speech, are legitimate state interests. *Proposed Order at 17*. Indeed, there is a government interest in ensuring that advertisements from regulated utilities properly disclose the role of the public utility in creating and paying for the ads. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court found that there is a direct link between state regulations concerning utility advertising and legitimate state interests in protecting ratepayers from unnecessary services and wasteful use of energy. *Id. at 569*.

There is also a public interest in preventing corporations from hiding behind front groups with dubious and misleading names. *Proposed Order at 18* (citing *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)). The public has a right to judge candidates and lawyers by their advertisements. Ratepayers in a competitive electric market should have the right to evaluate their utilities based on their advertising. Hiding one's identity behind a front group defrauds, misleads, and violates the public trust. The state has a compelling interest in preventing deceptive advertising, including the promulgation of misleading information as to the identity of a speaker. *Proposed Order at 18*.

The Administrative Law Judge found that Petitioner alleged sufficient facts in the Petition to satisfy Petitioner's burden of going forward. *Proposed Order at 19*. Consequently, the Order proposed an investigate the financial relationship between ComEd and CORE and ComEd's sponsorship of CORE advertisements. *Id. at 19-20*. Based on the government interests at stake and the fact that CORE continues to broadcast ComEd's opposition to a renewed freeze in electricity rates, the Commission should commence its investigation without further delay.

V. Mandatory Disclosure is Necessary to Prevent Deceptive Advertising

The Court established in *Virginia Board of Pharmacy v. Citizens Consumer Council* that where an industry is so affected with a public interest that state or federal regulation of that industry is justified, related commercial speech may be regulated to the extent reasonably necessary to serve the government's interest. *Va. Bd. of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748 (1976). Regulation of the type envisioned in *Virginia Board of Pharmacy* has never been more necessary to protect the consumer from the abuses of big business than in the instant case.

Compelled disclosure is needed to protect Illinois ratepayers from misleading advertising by front groups which speak on behalf of utility companies. Disclosure would provide ratepayers with vital information necessary in determining the relative weight to assign these frequently confusing and intimidating advertisements. Compelled disclosure would satisfy this substantial government interest.

The Administrative Law Judge has proposed an investigation into the relationship between ComEd and CORE. *Proposed Order at 20*. The Administrative Law Judge also indicated that the Commission may take further action concerning Petitioner's request that the Commission impose disclosure requirements on the advertising of Illinois

utilities. *Id. at 19*. The Commission should promulgate new disclosure rules requiring utility companies to fully disclose their identity when they advertise.

A. Disclosure Requirements in Federal Elections Have Been Upheld Based on Similar Government Interests

Congress strengthened existing federal campaign finance rules with adoption of the Bipartisan Campaign Reform Act (BCRA) in 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). The BCRA cracked down on soft money contributions and sham issue advocacy, and strengthened the disclosure requirements that existed under previous reforms. *Id. at 128, 132*. Significantly, BCRA extended disclosure requirements to persons who fund electioneering communications, including corporations. *Id. at 190*. The Court upheld these provisions in the *McConnell* decision. *Id. at 201*.

The Court's affirmation of the disclosure requirements and other provisions regulating political speech and corporate conduct in BCRA puts to rest any doubt that disclosure requirements have constitutional validity. Disclosure requirements should be extended to corporate issue advertising occurring outside the context of federal elections. Disclosure is necessary to safeguard the government's interest in protecting consumers from deceptive advertising aimed at manipulating public perception of the regulatory changes facing the electric industry.

Providing the electorate with relevant information about the candidates and their supporters, and deterring actual corruption and discouraging any appearance thereof, are important government interests. *McConnell*, 540 U.S. at 121, 196-97 (citing *Buckley*, 424 U.S. at 66-68). The Court cited these interests in upholding the disclosure requirements found in the BCRA. *Id.* Similar governmental interests would be served by disclosure if

Illinois were to adopt a disclosure requirement for its utility companies. Disclosure in corporate advertisements would provide the public with relevant information about the issue of rate hikes, inform the public about the utility companies which support rate hikes, and help to avoid the appearance of corruption that accompanies the use of dubious front groups.

Precedent exists in Illinois within the context of election advertising to extend required disclosure to corporations. The State of Illinois requires that a political campaign disclose its identity as the payor any time the name of a specific candidate is mentioned in an advertisement directed at voters. 10 ILCS 5/9-9.5(a). The Supreme Court upheld a similar disclosure requirement in *McConnell*. See *McConnell*, 540 U.S. at 230. See also *Morefield v. Moore*, 540 S.W. 2d 873 (Ky. 1976) (holding that a statute providing that political advertising shall contain the words “paid for by” followed by the name and address of payor, committee, organization or association does not violate the First Amendment right of free speech).

ComEd’s use of CORE as a front group undermines the principles articulated in *McConnell* of uninhibited, robust, and wide-open communication. *McConnell*, 540 U.S. at 197. Uninhibited, robust, and open communication cannot reasonably occur without disclosure in the instant situation because the primary speaker, ComEd, is hiding its identity from the public through the use of a front group. In the case of electric rate hikes, it is necessary to know the identity of the speaker in order to determine the weight to give the message. ComEd deceived the public by using an apparent grassroots consumer advocacy group to communicate its message.

Disclosure is necessary to satisfy the governmental interest in educating the public about the speakers and their message, and allowing the public to make a better-

informed choice. *Id.* Disclosure requirements should be extended to corporate speech in certain non-election situations, such as in cases involving the economic regulation of an industry, when it can be done in a nondiscriminatory and content neutral manner, without otherwise infringing on the corporation's First Amendment right to speak. Application of these principles from *McConnell* and adoption of a disclosure requirement are necessary to safeguard Illinois' government interests.

B. Compelled Commercial Advertising is Allowed in Regulated Industries When There is a Substantial Government Interest

If the Commission were to find that the proposed disclosure regulation is compelled commercial speech, the regulation can still stand. In a series of cases, the Supreme Court has considered the constitutional implications of checkoff-programs that require producers of certain products to pay a tax for a common advertising campaign.

In 1997, the Court held that a tax for an industry-wide advertising campaign is constitutional as the program was part of an economic regulation and not a limitation on individual speech. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997). The Court rejected the use of the *Central Hudson* commercial speech doctrine. *Id.* Instead, the Court found that the required advertising campaign was part of a broader economic policy to regulate and promote the entire industry. *Id.* at 474-75.

The *Glickman* court found that compelled advertising campaigns are constitutional provided that they do not impose any prior restraint on any participating individual to advertise on his or her own, or compel any participating individual to endorse any specific political or ideological ideas. *Id.* at 469-70.

Four years after *Glickman*, the Court found that the government lacks a substantial interest for compelling common advertisements when the industry is loosely

regulated. *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001). Thus, the Court allows for common advertising as part of a broader economic policy for a regulated market, but will not allow checkoff programs for an industry where the government has no substantial interest.

The electric power market in Illinois is a highly regulated industry where the Commission plays an active role in ensuring that ratepayers receive full and accurate information, competitive choices and low-cost services. Illinois Public Utilities Act, 220 ILCS 5/102. Illinois has a substantial government interest in ensuring electricity rates are reasonable and that communications by utility companies are not misleading. Since there are substantial interests at stake, the proposed regulation could be evaluated under the *Glickman* standard.

Pursuant to *Glickman*, the proposed regulation would be permissible because it is an economic regulation that does not regulate First Amendment speech. *Glickman*, 521 U.S. at 469-70. The proposed disclosure regulation would not impose a prior restraint, nor would it compel Illinois utilities to convey messages other than disclosure, and the proposed regulation is viewpoint neutral. *Id.* The proposed regulation merely requires the respondent to acknowledge its responsibility for the speech. Under the standards set out by the Court in *Glickman*, the proposed regulation would be permissible economic regulation rather than compelled First Amendment speech.

In a competitive utilities market, the proposed regulation allows the consumer to properly evaluate the power company options. The free and full flow of information this regulation seeks will help create a more efficient competitive market. Respondent should not be allowed to unfairly benefit from its use of a deceptive front group.

The Proposed Order correctly acknowledges that there are questions of fact concerning ComEd's involvement in the multimillion-dollar CORE public relations campaign. *Proposed Order at 19*. The involvement of ComEd and CORE should be investigated in a full and open proceeding. Furthermore, the Commission has the legal authority to order that regulated public utilities acknowledge their involvement in advertising campaigns.

C. Compelled Disclosure of the Speaker's Identity Has Been Upheld in Commercial Settings

The proposed regulation is a disclosure requirement designed to provide consumers in a regulated market with accurate and complete information. The appropriate comparison is not with regulations of content in commercial speech, but with other government disclosure requirements designed to protect the public interest.

Respondent claims that it has a First Amendment right to speak anonymously relying on cases involving electioneering. *Respondent's Reply at 14*. Respondent provides no legal authority to support its claim that there is a right for anonymous commercial speech. Federal and state governments require disclosures in several different types of commercial situations.

The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 requires a telemarketer to disclose his or her identity in every call. Public Law 103-297, 15 U.S.C. 6102. The regulation helps consumers evaluate their commercial options in the telemarketing industry, and judge those options with full and fair information.

The federal government also requires disclosure of a pharmaceutical company's name and basic drug information in an advertisement. 21 U.S.C. 352(n) and 21 CFR 202. Additionally, Illinois attorneys are required to include the identity of the responsible

attorney in all advertisements. ARDC Rule 7.2. *See also Zauderer*, 105 U.S. 626 (holding that Ohio could constitutionally require an attorney to include in a commercial advertisement purely factual and uncontroversial information about the terms under which the attorney's services are available).

The government should require disclosures in advertisements for the purpose of protecting the public interest. The proposed disclosure regulation in this matter will help ensure that the Illinois ratepayers in the regulated power market receive full and accurate information.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that the Illinois Commerce Commission deny the Motion to Dismiss filed by Respondent. Petitioner also requests that the Commission investigate the relationship between ComEd and CORE. Petitioner further requests that the Commission impose disclosure requirements upon the issue advertising of utility companies that are within its jurisdiction.

Dated: January 5, 2007

Respectfully submitted,

Lt. Governor Pat Quinn



By One Of His Attorneys

Daniel Persky
100 W. Randolph, Suite 15-200
Chicago, Illinois 60601

Counsel for Lt. Governor Pat Quinn