

clusion is deprived of its fullest significance by the apparent delusion of the Court that it is here merely applying the old and established principle when it says, "The course of decision in this court exhibits a firm adherence to these principles." That is highly questionable, to say the least. Opportunities, however, are presented. The door to economic realism has been opened; it remains to be seen whether the judicial mind will choose to cross the threshold.

NORMAN PARKER, '34.

THE EXTENT OF THE RIGHT OF A PUBLIC UTILITY TO REFUSE SERVICE

The primary question in any discussion of the activities known as public utilities always comes back to one central point, which is the problem of regulation. In facing this pervasive issue we are bound to arrive either immediately or ultimately at the limits of the regulative power. Perhaps the two main divisions into which all the problems fall are simple, namely, (1) is the particular issue one in which the public is interested as a body? or (2) is the issue one in which primarily an individual and the public utility are at odds? Of course, the classification cannot be as simple as stated because in many situations the individual is involved as one of the public and, therefore, it is a public question. Again, the utility may appear to have infringed the rights of some individual and the infringement may be unjustified because it is a discrimination, while in another instance an apparent discrimination may be due entirely to action on the part of the individual and investigation may show that in the particular case the action taken by the utility is not discriminatory in its nature.

The word "regulate" seems always to be used in connection with the state and federal commissions' administrative functions in regard to public utilities and few persons ever think of the utilities right of self-regulation. Yet such a right exists, though it is not as self-evident and as prominent as in businesses which are not affected with a public interest. This right of self-regulation is that right of management in the business of utilities which the law concedes to remain in them after the commissions are delegated their general supervisory and regulatory powers, since the power of the state to regulate the conduct and business of a public service corporation is limited by the consideration that it is not the owner of the property of such corporation, nor clothed with the general power of management incident to ownership.¹

¹ Missouri ex rel. Southwestern Bell Tel. Co. v. Mo. P. S. Comm. (1923) 262 U. S. 275.

Aside from regulation of rates the most important function of a commission is the supervision of public utility service. Competition, the natural incentive to good service is usually removed by state sanction, and in its stead the commission is empowered to lay down a standard as to quality and extent of service which shall be fair and reasonable, both to the company and to the public. The utilities themselves establish regulations and rules to govern their service relations with their patrons, which are usually filed with the commission. These, when so filed, may be passed upon by the commission as to their reasonableness insofar as they may affect the health, comfort, safety, or convenience of the public.² The Missouri statutes expressly give the state commission this right in so many words.³

The purpose of this note will be to inspect that branch of self-regulation wherein the utility has a right to refuse service to an applicant because of some matter concerning the latter's conduct or character which runs athwart the utility's rules and regulations governing its business dealings with its customers and where such refusal is based on the utility's own business policy or practice rather than upon some rule or regulation imposed on it by the state commission. An attempt will be made to collate the decisions of the various commissions and state courts in order to determine if possible, (1) whether there is any true field in which it can be said that the situations arising therein are truly within the scope of what might be called unregulated managerial discretion or self-regulation; and (2) to ascertain the governing principles, if any, which control such situations.

RULES AS TO THE USE OF THE SERVICES OFFERED

A public utility is not required to, and may refuse to serve one who wishes to use the services the utility offers for an illegal purpose. There seems to be no question of such a right in the decisions, the main issue in most cases being whether the utility had reasonable grounds for believing the applicant would put the services to an immoral or illegal use. Thus an innkeeper may refuse a room to a card shark⁴ where the circumstances point to the fact that the room is to be used for gaming; or to a known prostitute,⁵ where he has reason to believe the room will be used for purposes of prostitution. The same rule holds good as to such passengers on a railroad.⁶ But the innkeeper or carrier

² State ex rel. K. C. Power & Light Co. v. Mo. P. S. Comm. (1925) 310 Mo. 313, P. U. R. 1926 A, 783, 275 S. W. 940.

³ R. S. Mo. 1929, sec. 5190.

⁴ Watkins v. Cope (1913) 84 N. J. L. 143, 86 Atl. 545; Jones v. Bland (1921) 182 N. C. 70, 10 S. E. 344.

⁵ Curtis v. Murphy (1885) 63 Wis. 4, 22 N. W. 825.

⁶ Thurston v. Union Pac. R. Co. (1887) 4 Dill. 321, Fed. Cas., Case No. 14,019.

must have good grounds for believing that the person seeking his services is going to use them for such an illegal or immoral purpose—the mere fact that the person is of doubtful character not being in itself a solid basis for refusing to render services, especially in the case of carriers⁷ (since hotels and inns from their very nature are more likely to be the places resorted to by such people to ply their illegal trades). Along with the fact that the carrier and innkeeper are duty bound to protect other users of their facilities and may also protect their own interests, the rule is founded on the reasoning that these two utilities owe the duty of serving to only bona fide travelers.⁸

In the case of what may be called municipal utilities, in contradistinction to the old common-law-created utilities of carriers and innkeepers, the same principle applies, no duty of service being owed to one who wishes to further an illegal or immoral purpose thereby. So a customer of an electric, water, telephone or gas company may be denied the right to receive service in any case where the use to which it is to be put involves, primarily, something unlawful, either by aiding the act directly or else making it more possible of consummation. Thus a telephone company may refuse service where it is intended to be used in a bawdy house, since it would directly aid and abet what not only is a public nuisance but a criminal profession and trade as well.⁹ However, a discontinuance or refusal to give telephone service cannot be justified solely on the ground that the user is a person of immoral or illegal habits and, therefore, the home of a prostitute or bawdy-house keeper must be tendered such service if such home is not used as a place of prostitution.¹⁰ The same rule and its qualification is applicable where a subscriber conducts a betting business.¹¹ And a telegraph company may refuse a message which, on its face, is obscene or indecent,¹² or is for a notoriously illegal purpose.¹³

The purpose or use to which the service is put need not necessarily be illegal or immoral; if it violates a reasonable rule of the company prohibiting such a use it may be a solid basis for discontinuing service until the customer ceases his violation of the rule in the particular instance. A rule of a water company which

⁷ *Brown v. Memphis & C. R. Co.* (1880) 5 F. 499; *Reasor v. Paducah & Ill. Ferry Co.* (1913) 152 Ky. 220, 153 S. W. 222; *Thurston v. U. P. R. Co.*, *supra* note 6.

⁸ *Rex v. Luellin* (1700) 12 Mod. 445; *Beale v. Posey* (1882) 72 Ala. 323; *Lamond v. Richard* (1897) 1 Q. B. 541.

⁹ *Godwin v. Carolina T. & T. Co.* (1904) 136 N. C. 258, 48 S. E. 636.

¹⁰ *Ibid.*

¹¹ *People ex rel. Restmeyer v. N. Y. Tel. Co.* (1916) 173 App. Div. 132, 159 N. Y. S. 369.

¹² *See West. Union Tel. Co. v. Ferguson* (1877) 59 Ind. 495.

¹³ *Smith v. Tel. Co.* (1887) 84 Ky. 664, 2 S. W. 483.

prohibits sprinkling,¹⁴ filling a swimming pool,¹⁵ or using the water for building purposes¹⁶ has been upheld where a limited supply, or the fact that the customer was charged a certain rate in reliance upon his promise to use the water only for domestic household purposes, has been shown to exist. Such regulations are clearly reasonable in such cases, a limited supply giving the company the right to limit the use to only that which is for necessary purposes in order to protect the public as a whole, and secure a supply to each consumer which will supply his needs if not his other requirements, while the company clearly has the right to have the customer set forth in his application the property and purpose for which the water is to be used and hold him to such an employment of the advantages it extends to him.¹⁷

Where a telephone subscriber allows and permits nonsubscribers to use his telephone to avoid payment of toll charges which the latter would otherwise have to pay the company may sever his connection,¹⁸ and the same result has been reached as to a customer of a water company who furnishes water regularly to a non-paying consumer in a case where the charge for the service is a flat rate per month.¹⁹ A county court in Pennsylvania went so far as to refuse to enjoin the removal of a telephone by the telephone company where the subscriber violated a regulation of the former in permitting the use of his 'phone by others than his immediate family and other subscribers.²⁰ These decisions may all be justified on the grounds that it would be unfair to the service company and to other patrons to allow one of the latter to overcrowd the telephone lines with, or draw water for, persons who should be paying their proportionate share to the upkeep of the utility.

Not only must the applicant be desirous of the service and intend to use it for a legal and proper purpose, but also he must put himself in a proper position to demand service; and until he does so and complies with the conditions precedent there is no present obligation on the part of the utility to serve him. Thus a municipal service company may impose reasonable conditions as to connections with its system and refuse to serve one who neglects or declines to put himself into the prerequisite condition as commanded by the rules of the company. An applicant who wishes

¹⁴ *Antisdell v. Mocatawa Resort Co.* (Mich. 1929) 220 N. W. 768.

¹⁵ *Re Peters-Rhodes Co.* (Calif. 1925) P. U. R. 1926 B, 787.

¹⁶ *Bleach v. Momouth County Water Co.* (N. J. 1917) P. U. R. 1917 C, 602.

¹⁷ See notes 10, 11, and 12.

¹⁸ *Re Lincoln T. & T. Co.* (Nebr. 1916) P. U. R. 1916 D, 416.

¹⁹ *Ariz. Corp. Comm. v. Morenci Water Co.* (Ariz. 1915) P. U. R. 1915 C, 525.

²⁰ *Att. v. Johnston Tel. Co.* (Ct. Com. Pleas, Cambria Co., Pa. 1908).

water, gas, electric or telephone service cannot hire an independent contractor to connect his premises with the water or gas main, or the electric or telephone cables of the utility. The latter has the sole right to make such connections itself by means of its own men. The well known principle of the right of self-protection underlies the right of the company to refuse to make connections or allow connections with a building owned, occupied and wired or connected by a third person or his agent, liable to be improperly wired or equipped for connection with the mains or cables. This possibility gives to the utility a power to dictate in a reasonable manner in such matters as the entrance of the connection, the manner and type of wiring, and the type and style of the switch box and other safety appliances.²¹ A case in Missouri²² goes so far as to say that the company may designate a certain style of hydrant, or cut-off, as the only one which shall be used. Another decision from the same state²³ allowed an electric company to adopt a rule requiring a particular kind of patented fuse box, in place of a cheaper box approved by the National Board of Fire Underwriters and by the city electrician. The Supreme Court of Missouri, though the new box was three times as expensive as the old one and though the consumer has to pay the cost of replacement, held the rule not to be arbitrary or unreasonable in view of the greater convenience, safety, economy and reduction of damage to property and life resulting from fires which would be achieved by the change. These two cases show the extreme liberality of Missouri on the question, the highest efficiency being allowed to govern the decision as to whether such a rule is reasonable or not. The position taken, however, seems questionable because consumers are put at a decided disadvantage, inasmuch as new and safer devices are continually being perfected, and to require the public to pay for such changes is putting a severe strain on the individual's purse. Moreover, in both cases the device was patented and therefore the company was allowed to profit at the expense of the public, since the utility controlled the installation of the device. A Kentucky case goes to the other extreme in holding that no proper plumber may be excluded from making water and sewerage connections.²⁴ The usual holding seems to be that though the company cannot dictate as to the type of fixtures on the premises, it can insist upon all installation requirements made by it which affect the safety of the premises wired; since the company is liable for property damage

²¹ *Hawkins v. Vt. Hydro-Elec. Corp.* (1924) 98 Vt. 176, 126 Atl. 517.

²² *State v. Goodfellow* (1876) 1 Mo. App. 495.

²³ *State ex rel. K. C. Power & Light Co. v. Mo. P. S. Comm.* (1925) 310 Mo. 313, P. U. R. 1926 A, 783, 275 S. W. 940.

²⁴ *Franke v. Paducah Water Supply Co.* (1889) 88 Ky. 467, 11 S. W. 432.

or personal injuries sustained by reason of defective wiring or appliance, when it should know of the unsafe condition prevailing on the premises.²⁵

A carrier is not compelled to receive goods so long before the time of departure as to add unfairly to its risk,²⁶ nor to accept freight on a passenger train or a passenger on a freight train; nor must it accept dangerous persons or goods.²⁷ And the same rules would apply in the case of the innkeeper.²⁸ But though a hotel cannot refuse accommodations to a traveler regardless of the time of day or night he makes application for accommodations²⁹ since the weary wayfarer needs the protection of the inn at the very time he arrives, the carrier may do so³⁰ since trains and the men who work on them cannot be running continually. As applied to the water, gas, electric and telephone companies the rule would seem to be the same as in the case of the innkeeper, yet the small size or the habits of a community may negative the right of patrons and consumers to a continuous supply at all hours.³¹

CHARACTER AND CONDUCT OF THE PATRON

For the protection of others being served as well as for the protection of its own interests, any applicant for service who will endanger person or property may be rejected by the utility at the outset or afterwards. Thus one who attacks another on a carrier,³² or who attempts to break down the door of a hotel³³ may be refused service. This principle is applicable in the case of all disorderly and dangerous persons; and it seems too clear to cite the wealth of cases supporting it.³⁴ However, the rule differs when the previous conduct of the applicant, as contrasted to his present actions, is used as a basis for refusing him service.

²⁵ *Hawkins v. Vt. Hydro-Elec. Corp.* (1924) *supra* note 21.

²⁶ *Bouker v. Long Island R. Co.* (1895) 89 Hun. 205, 35 N. Y. S. 23; *Lane v. Colton* (1701) 12 Mod. 472.

²⁷ *Louisville & N. R. Co. v. Logan* (1889) 88 Ky. 232, 10 S. W. 655; *The Nitro Glycerine Case* (1873) 15 Wall. 524; *Leonard v. St. L. Trans. Co.* (1905) 115 Mo. App. 349, U. S. W. 452; *Markham v. Brown* (1837) 8 N. H. 523.

²⁸ *Reg. v. Rymer* (1877) 2 Q. B. D. 136.

²⁹ *Rex v. Ivens* (1837) 7 Car. & P. 213; see *Lawson on Bailments* sec. 73 and cases cited.

³⁰ *Pitlock v. Wells, Fargo & Co.* (1872) 109 Mass. 452; *Cronkhite v. Wells* (1865) 32 N. Y. 247; *Re Am. Ry. Express Co.* (1919) 20 N. Y. Off. Dept. R. 125, P. U. R. 1919 E, 548.

³¹ See 1 *Wyman*, sec. 396.

³² *Louisville & N. R. Co. v. Logan* (1889) *supra* note 27.

³³ *Goodenow v. Travis* (1808) 3 Johns. (N. Y.) 427.

³⁴ Among others, see *Garricott v. N. Y. State Rys.* (N. Y. 1918) 119 N. E. 94; *Atchison, T. & S. F. R. R. Co. v. Weber* (1885) 33 Kan. 543, 6 Pac. 877; *Howell v. Jackson* (1837) 8 N. H. 523.

The general rule seems to be that service cannot be refused where the applicant presents himself in a decent and orderly fashion and condition even though his conduct on previous occasions caused his ejection or rejection.³⁵ This is because the past misconduct has no relation to the present service. But if the past misconduct has been so long continued that it makes only too probable a repetition of it, then, notwithstanding protests of reformation, there may be a refusal to give another chance; however, the case must be extreme to justify such action by the company.³⁶

Yet, what may be reasonable rule for one utility may not be for another. Therefore though a hotel may refuse service to an unchaste woman merely on that ground,³⁷ a carrier or municipal utility cannot, if her conduct is proper in presenting herself. The exception in the case of the inn seems to be based on the fact that the proprietor has a right to keep his guests, who would otherwise doubtless leave, while the other utilities because of their usual complete monopolies and the less close relation of their patrons have not the same justification. The same rule and exception as to innkeepers applies also in the case of gamblers, thieves, and other followers of illegal professions.³⁸

A person may also be undesirable, and therefore refused service, on account of the impropriety of his attire. But unconventionality of costume alone is usually no excuse for rejection. Thus it has been held that a woman in bloomers could not be excluded from an inn,³⁹ yet that a chimney sweep in his working clothes might.⁴⁰ However, in the former case it was held that the innkeeper had a right to refuse to serve the woman in the coffee room of the inn and could confine her to the accommodations in the bar parlor. To the same effect is a recent Oklahoma case⁴¹ in which the Court held reasonable a rule requiring coats to be worn by men when served in the dining room. In that case coats were supplied to the patrons lacking them and the lunch counter

³⁵ *Atwater v. Sawyer* (1884) 76 Me. 539; *Story v. Norfolk & S. R. Co.* (1903) 133 N. C. 59; *Reasor v. Paducah & Ill. Ferry Co.* (1913) 152 Ky. 220, 153 S. W. 222; *Huffman v. Marcy Mutual Tel. Co.* (1909) 143 Ia. 590, 121 N. W. 1033.

³⁶ *Stevenson v. West Seattle Land & Imp. Co.* (1900) 22 Wash. 84, 60 Pac. 51; *Minerva & Canton Trans. Co. v. Farmers & Merchants Tel. Co.* (Ohio, 1920) P. U. R. 1920 C, 801; *Pugh v. City & Sub. Tel. Co.* (1883) 9 Conn. Law Bull. 104.

³⁷ *Raider v. Dixie Inn et al.* (1923) 198 Ky. 152, 248 S. W. 229; *Brown v. Memphis & C. R. Co.* (1880) 5 F. 499.

³⁸ *Nelson v. Boldt* (1910) 180 F. 779; *Thurston v. Union P. R. Co.* (1877) 4 Dill. 321; *Watkins v. Cope* (1913) 84 N. J. Law 143, 86 Atl. 545; *Markham v. Brown* (1837) 8 N. H. 523.

³⁹ *Regina v. Sprague* (1899) 63 J. P. 233.

⁴⁰ *Pidgeon v. Legge* (1857) 5 Week. Rep. 649, 21 J. P. 743.

⁴¹ *Harvey v. Corp. Comm.* (1924) 102 Okla. 266, 229 Pac. 428.

could be used, where the patron refused to comply with the coat rule. Under such circumstances the rule is clearly not unreasonable.

Peculiar circumstances may justify a refusal to serve at times. Thus in the famous case of *Pearson v. Duane*⁴² the Supreme Court held that though the plaintiff could recover because he was ejected after being accepted, yet the captain of the ship might well have rejected his original application to travel to San Francisco, where a violent fate probably awaited plaintiff, who had been banished from that city by the Vigilance Committee.

The mere fact of infancy or that a married woman is traveling alone is no excuse for refusing to serve such person merely because of the applicant's inability to contract.⁴³ This is assumed to be the law in a Missouri case⁴⁴ wherein a married woman applied for gas service on her own responsibility but was wrongfully refused by the company. It should be noted, however, that at that time the Married Women's Act had been in force in that state for some time. Unattended and helpless persons may be refused accommodations by a carrier or innkeeper because of the liability of the latter if injury results after acceptance.⁴⁵ This applies to sick persons,⁴⁶ those blind⁴⁷ or insane⁴⁸ and to very young children,⁴⁹ also to those in a very intoxicated condition.⁵⁰ The same rule applies with more force to those infected with a contagious disease.⁵¹

Since a utility has a right to self-protection, a customer who abuses the privileges extended to him by the company may be refused further service. An innkeeper may refuse to continue to furnish accommodations to one who, by the length of his stay or otherwise, ceases to be a "traveler."⁵² One who resorts to a hotel solely for immoral intercourse with a woman companion is not entitled to be allotted a room,⁵³ neither is a party seeking such a room for purpose of card-playing.⁵⁴ Where water is supplied

⁴² (1867) 4 Wall. 605.

⁴³ *Watson v. Cross* (1865) 2 Duv. 147.

⁴⁴ *Vanderberg v. K. C. Mo. Gas Co.* (1907) 126 Mo. App. 600, 105 S. W. 17.

⁴⁵ *Connors v. Cunard S. S. Co.* (1910) 204 Mass. 310, 90 N. E. 601.

⁴⁶ *Ibid.*

⁴⁷ *Zachery v. Mobile & O. R. R. Co.* (1898) 75 Miss. 746, 23 So. 435.

⁴⁸ *Meyer v. St. L. I. M. & S. R. Co.* (1893) 54 F. 116.

⁴⁹ *Braun v. N. P. Ry. Co.* (1900) 79 Minn. 404, 82 N. W. 675; *Warfield v. L. & N. Ry. Co.* (1900) 104 Tenn. 74, 55 S. W. 304.

⁵⁰ *Jenks v. Coleman* (1835) 2 Summ. 221; *Paris & G. N. R. Co. v. Robinson* (1909 Tex. Civ. App.), 114 S. W. 658.

⁵¹ *Pullman Co. v. Krauss* (1906) 145 Ala. 395, 40 So. 398; *State v. Steele* (1890) 106 N. C. 766, 11 S. E. 478.

⁵² *Lamond v. Richard* (1897) 1 Q. B. 541.

⁵³ *Curtis v. Murphy* (1885) 63 Wis. 4, 22 N. W. 825.

⁵⁴ *Jones v. Bland* (1921) 182 N. C. 70, 108 S. E. 344.

upon tap basis, a water company may refuse to continue serving one who wantonly wastes water,⁵⁵ or persists in supplying non-consumers.⁵⁶ An innkeeper can refuse shelter to one who insists upon bringing in dogs,⁵⁷ so can entrance be forbidden into a street car to one who attempts to bring in cumbersome parcels⁵⁸ or insists upon being accompanied by a dog,⁵⁹ because were the innkeeper or carrier to permit this it would not only hinder and delay service to others but might be the basis of tort liability of the utility to other guests or passengers injured thereby. One who permits access to his telephone by others than his immediate family, contrary to the basis upon which service is being rendered to him, may be refused further service.⁶⁰ And as a telephone company undertakes to provide all the apparatus necessary for its service, it may positively forbid any interference with the instruments. Thus where a subscriber insisted upon violating a rule of the company providing that no extension instruments, not furnished by it, were to be attached to the regular receiver, it was held the company had a right to refuse him all further service.⁶¹ It is justification enough for such a regulation that the company may protect its circuit from possible interference. Again, a telephone company may cut out a subscriber who persists in using profane and indecent language to the operators and to those with whom he talks,⁶² or who habitually breaks in upon a party line when others are using it,⁶³ the company having a right to protect its employees from abuse as well as its subscribers. Furthermore, the maintenance of proper efficiency on the whole service demands that interruptions should be summarily dealt with. One who is engaged in a scheme of defrauding a utility by tampering with the meter, or by tapping the mains, of course cannot complain if his service is shut off.⁶⁴ In a case before the Missouri Public Service Commission where the evidence showed

⁵⁵ Harbinson v. Knoxville Water Co. (Tenn. 1899) 53 S. W. 993; Robbins v. Bangor Ry. & Elec. Co. (1905) 100 Me. 496, 62 Atl. 136.

⁵⁶ Ariz. Corp. Comm. v. Morenci Water Co. (Ariz. 1915) P. U. R. 1915 C, 525.

⁵⁷ Reg. v. Rymer (1877) 2 Q. B. D. 136, 25 Week. Rep. 415.

⁵⁸ Dowd v. Albany Ry. Co. (1900) 47 App. Div. 202, 62 N. Y. S. 179; Ray v. United Traction Co. (1904) 96 App. Div. 48, 89 N. Y. S. 49.

⁵⁹ Gregory v. Chi. & N. W. Ry. Co. (1896) 100 Ia. 345, 69 N. W. 532.

⁶⁰ Att. v. Johnstown Tel. Co., *supra* note 20; People v. Hudson R. Tel. Co. (1887) 19 Abb. 466; Re Lincoln T. & T. Co. (Neb. 1916) P. U. R. D., 416.

⁶¹ Gardner v. Providence Tel. Co. (1901) 23 R. I. 262, 49 Atl. 1004.

⁶² Minerva & Canton Trans. Co. v. Farmers & Merchants Tel. Co. (Ohio 1920) P. U. R. 1920 C, 801; but see Metzger v. Clinton Co. Tel. Co. (Mo. 1917) P. U. R. 1918 A, 567, 5 Mo. P. S. C. 509.

⁶³ Huffman v. Marcy Mut. Tel. Co. (1909) 143 Ia. 590, 121 N. W. 1033.

⁶⁴ Macke v. Union Elec. Lt. & Power Co. (1928) 16 Mo. P. S. C. 669; Hoberg v. N. Y. Edison Co. (1932) 258 N. Y. 701, 144 Misc. 726, P. U. R. 1932 C, 38; Krumenaker v. Dougherty (1902) 74 App. Div. 452, 77 N. Y. S. 467.

that a patron's electric meter had been tampered with and a "jumper" affixed to it the Commission held that the company had a right to refuse service to such patron until the latter paid \$25.00 for the installation of lock-box to protect the meter.⁶⁵ In this case a statute imposed penalties for using "jumpers" so that a rule of the company to that effect was unnecessary. Yet had neither statute nor company rule been in existence the decision would have been the same since—

"all electric users who do not indulge in such practices must pay for the current that is diverted"

and because the company is entitled to a fixed rate of return upon its investment and rates are adjusted to insure such return.⁶⁶

RULES AS TO PAYMENTS

Although one who engages himself in public employment is bound to serve all who apply, it is necessarily upon the condition that he may demand in advance his reasonable charge for the service required. This is a fundamental principle in the law relating to utilities and appears to be a privilege in consideration of an extraordinary liability and duty.⁶⁷ The carrier of goods may in all cases insist upon the payment of his charges when the goods are tendered to him.⁶⁸ The carrier of passengers may make it a condition before accepting a passenger for carriage that the fare be paid in advance,⁶⁹ or that a ticket shall be purchased and presented.⁷⁰ Similarly an innkeeper is not obliged to receive one who is not able to pay for entertainment.⁷¹ So must a telephone user pay the usual charge for the subsequent period,⁷² and even one who has paid may be denied service, where payment was wrongfully tendered. Thus one using a pay telephone must deposit the coin according to the instructions posted on the transmitter and cannot successfully contend that he should get his number, even though he has deposited his coin, if such deposit was made contrary to the posted rules.⁷³ It is universally conceded by the courts that either a municipal or private concern supplying water to the public may prescribe and enforce a rule or regulation which provides for shutting off the water supply

⁶⁵ *Macke v. U. E. Lt. & P. Co.*, *supra* note 64.

⁶⁶ *Ibid.*, and see *Handelman v. Union Elec. Light & Power Co.* (Mo. 1927) P. U. R. 1928 A, 94, accord.

⁶⁷ *Evergreen Cem. Ass'n v. Beecher* (1885) 53 Conn. 551, 5 Atl. 353.

⁶⁸ *Fitch v. Newberry* (Mich. 1843) 1 Doug. 1.

⁶⁹ *Elder v. International Ry. Co.* (1910) 122 N. Y. S. 880.

⁷⁰ *Illinois Central R. Co. v. Loutham* (1898) 80 Ill. App. 579.

⁷¹ *Markham v. Brown* (1837) 8 N. H. 523.

⁷² *Ashley v. Rocky Mt. Bell Tel. Co.* (1901) 25 Mont. 286, 64 Pac. 765.

⁷³ *Gifford v. Glen Tel. Co.* (1907) 54 Misc. 468, 106 N. Y. S. 53.

from a consumer who has defaulted in payment of the same; at least where there is no dispute as to the amount owing or the justness of the charge and the water was not furnished for some other place or person, or for a separate and distinct transaction from that for which a right to the continuance of the supply is claimed.⁷⁴ Even a rule requiring a subscriber to pay for all long-distance messages originating from his office or house telephone, whether previously approved or authorized by him or not, has been held reasonable,⁷⁵ the court pointing out that the large number of subscribers in the community made it impossible for operators to distinguish voices and that the complainant could protect himself by locking the room where the phone was located.

In many cases it may be seen that the rule of payment in advance is not workable in its simple form, for it cannot be known in advance how much service will be taken. This is particularly true of gas, water and electric service where, instead of a flat rate, measured service is given. In such cases the utility is allowed to require a deposit or else satisfactory evidence from the applicant of the stability of his credit. The deposit normally required is that sum which the average consumer usually pays on his monthly bill, say five dollars. But circumstances may warrant the demand for a larger sum. Thus a hotel which used \$60.00 worth of gas a week was required to make a \$100.00 deposit.⁷⁶ On the other hand, an applicant may be refused service for failure to establish his credit by answering a questionnaire in regard to his ability to pay.⁷⁷ The rule of a company requiring advanced payments or deposits to guarantee payment for services to be rendered has been approved in numerous cases.⁷⁸ The Wisconsin Commission⁷⁹ went so far as to hold that a rule requiring that new telephone subscribers pay a whole year's rental in advance, with a provision for a refund should service be discontinued for any reason, was reasonable and valid. In a New York case a subscriber complained to the commission because the telephone company refused to serve him any longer unless he made a deposit to cover future bills two months in advance. Such de-

⁷⁴ *Dodd v. City of Atlanta* (1922) 154 Ga. 33, 113 S. E. 166; *Sims v. Ala. Water Co.* (1920) 205 Ala. 378, 87 So. 688; *Mulrooney v. Obear* (1903) 171 Mo. 613, 71 S. W. 1019.

⁷⁵ *S. W. T. & T. Co. v. Sharp* (1915) 118 Ark. 541, 177 S. W. 25.

⁷⁶ *Williams v. Mutual Gas Co.* (1884) 52 Mich. 499, 18 N. W. 236.

⁷⁷ *In Re Practices of Utilities in Requiring Deposits from Consumers Before Connecting Service* (D. C. 1929) P. U. C. No. 22.

⁷⁸ *Univ. Sch. Exchange v. S. W. Bell Tel. Co.* (Okla. 1929) Corp. Comm. No. 9047; *Riegel v. P. U. Comm. of D. C.* (App. D. C. 1931) 48 F (2) 1023 Rehearing denied Apr. 25, 1931; *In Re Richmond Home Tel. Co.* (Va. 1929) P. S. C. No. 9826.

⁷⁹ *In Re Lake Shore Tel. Co.* (Wis. 1928) R. R. C. U. -3687.

posit would amount to \$250.00 and the subscriber pointed out that credit was extended to others than himself and contended that the company's action amounted to a discrimination against him. But the commission, after reviewing the evidence which showed that the complainant was habitually delinquent in the payment of his bills and could not give a satisfactory reference (as that of a bank rather than that of his own customers), went into the matter quite thoroughly and, finding that the uncollected revenues of the company for the previous year had amounted to \$793,000.00, mostly composed of uncollected bills, pointed out that losses of this character naturally had to be taken up somewhere in the rate structure and were finally reflected in the rates of paying subscribers. The Commission, in dismissing the complaint, said it was manifestly unjust that subscribers who did pay their bills promptly should be taxed an extra amount to make up the losses incurred by delinquent accounts.⁸⁰

A Washington case⁸¹ seems to have been the first decision wherein the question was raised as to the justness of a rule of a utility requiring payment in advance, or else service at a higher rate. The case came up in 1910; though the practice seems to have been quite general in the utility field much earlier. The court decided that the rule was reasonable inasmuch as it aided greatly in reducing defaults and delinquencies in payments, with resulting lowering of the companies' outlay for the employment of collectors and office forces, which saving ultimately accrued to the consuming public as a whole. In close analogy to this rule is the one of making an extra charge for collections from delinquent subscribers, which is based on the same reasoning for its justification as the previous rule.⁸²

In connection with the rules of a company requiring payment in advance, or a deposit, or higher rates and extra charges to delinquents, arises the problem of discrimination in requiring some customers to conform to such a regulation, while not enforcing it as to others. As to carriers it is apparently well established that, as no one has a right to have service without prepayment, there can be no complaint made if some are given service without making them pay in advance, while others are obliged to make a prepayment.⁸³ Upon this reasoning the same thing holds

⁸⁰ *Manhattan Reporting Bureau v. N. Y. Telephone Co.* (1925) P. U. R. 1926 B, 1.

⁸¹ *State ex rel. McMahan v. Indep. Tel. Co.* (1910) 59 Wash. 156, 109 Pac. 366.

⁸² *Irvin v. Rushville Co-op. Tel. Co.* (1903) 161 Ind. 524, 69 N. E. 258, and see *State v. Commander* (1925) 211 Ala. 230, 100 So. 223.

⁸³ *Randall v. R. R.* (1891) 108 N. C. 612, 13 S. E. 137; *Brown & B. Coal Co. v. Grand Trunk Ry. Co.* (1910) 159 Mich. 565, 124 N. W. 528.

good in the case of other public utilities. Thus a telephone company may, it has been held, extend credit to such persons as it may deem advisable, demanding payment in advance from all others.⁸⁴ Yet such a discrimination seems always open to search for its good faith, the New York Court of Appeals in a case before it saying that one telegraph company had to transmit dispatches of a rival company upon the same terms as it did for any other customer, irrespective of the fact that it was a competitor, since the facts disclosed that the latter's credit was as good or better than that of the numerous parties to whom the former was extending credit.⁸⁵

The tender of payment must be made in such a denomination of money that change can be reasonable and quickly given. This applies especially in the case of street car fares. A tender of a five dollar bill to pay a five cent fare has been held to be sufficient grounds for a denial of service,⁸⁶ though it is only fair to point out that in such a case the carrier had a well-known and actually enforced rule that change for amounts above two dollars would not be given by the company's conductors. The Supreme Court of California, in 1889, held that in view of local conditions, a tender of a five dollar gold coin (the lowest denomination of gold coin in use in that section), could not be a basis for refusal of service. The court went on to say, however, that—

“a passenger upon a street railway is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender, and furnish change to a reasonable amount.”⁸⁷

So it seems that though the courts are undecided as to the adequacy of a five-dollar bill tender, anything above that amount would be inadequate. As to other utilities than carriers the question does not seem to have arisen, probably since the circumstances usually allow time for either customer or company to get change for a sum which the latter cannot change at the place of tender.

There exists a sharp conflict in the authorities as to the right to deny service when a customer is in arrears yet is willing to tender payment for present service. A carrier, most authorities

⁸⁴ *Johnstown Tel. Co. v. Berkebile* (Mo. App. 1926) 283 S. W. 456; *S. W. T. & T. Co. v. Sharp*. (1915) 118 Ark. 541, 177 S. W. 25.

⁸⁵ *People ex rel. Western U. Tel. Co. v. P. S. Comm.* (1920) 230 N. Y. 95, 129 N. E. 220.

⁸⁶ *Funderburg v. Augusta & A. Ry. Co.* (1901) 81 S. C. 141, 61 S. E. 1075; *Barker v. Central Park N. & E. River Ry. Co.* (1896) 151 N. Y. 237, 45 N. E. 550.

⁸⁷ *Barrett v. Market St. R. Co.* (1889) 81 Cal. 296, 22 Pac. 859.

agree, cannot refuse transportation to a person who has rightfully tendered payment for present carriage, because of the fact that on a previous occasion he failed to pay.⁸⁸ The basis of such decisions as to other utilities seems to be that in refusing to serve those who come with ready payment, the company in question acts contrary to its public duty, which is to serve all that apply without discrimination.⁸⁹ The argument that the policy of a company requiring back payments is a helpful device in making collections is answered by saying that the company need not extend credit in the first place; since payment in advance can always be required, and to permit the utility to refuse service to one whom it claims to be indebted to it, makes it virtually the judge of the justice of its claim, and puts it into a position to exact payments to which it may not be entitled.

There are a great number of cases holding to the opposite view, however, that a present applicant is in no position to demand a further supply if he has not paid in the past. As was said in a Washington case:⁹⁰

“The condition imposed, that the company might refuse to furnish water to an applicant refusing to pay it a sum due for water thereunder, is in one sense a security for the payment thereof. Instead of forming an estimate of the water that would likely be used, and requiring a deposit in advance of a sufficient sum of money to cover the same, or requiring other security for the payment thereof, the water company provides that at stated periods payments shall be made in order that a large sum may not accumulate, it being willing to take its chances for a stated time without other security; surely this is more lenient than either to demand a bond or other security, or a deposit of a sum of money in advance large enough to be reasonably certain of covering the sum that should become due.”

Again, the United States Supreme Court has said:⁹¹

“Not only are telephone rates fixed and regulated in the expectation that they will be paid, but the company’s ability

⁸⁸ *Atwater v. Delaware, L. & W. R. Co.* (1886) 48 N. J. L. 55, 2 Atl. 803.

⁸⁹ *State ex rel. Payne v. Kinlock Tel. Co.* (1902) 93 Mo. App. 349, 67 S. W. 684; *O’Neal v. Citizens P. S. Co. of S. C.* (1930) 157 S. C. 320, 154 S. E. 217; *Crow v. San Joaquin & K. R. C. & Irr. Co.* (1900) 130 Cal. 309, 62 Pac. 562; *Freeman v. Macon Gas-Light Company* (1908) 126 Ga. 843, 56 S. E. 61; *S. W. T. & T. Co. v. Lockett* (Tex. Civ. App. 1910) 127 S. W. 856.

⁹⁰ *Tacoma Hotel Co. v. Tacoma Light & Water Co.* (1891) 3 Wash. 316 28 Pac. 516; see *Dodd v. Atlanta* (1922) 154 Ga. 33, 113 S. E. 166.

⁹¹ *S. W. T. & T. Co. v. Danohar* (1915) 238 U. S. 482; see also *Taylor v. N. Y. Tel. Co.* (1916) 160 N. Y. S. 865, 97 Misc. 160.

properly to serve the public depends upon their prompt payment. They usually are only a few dollars per month, and the expense incident to collecting them by legal process would be almost prohibitive."

It is submitted that the arguments on both sides of this issue are well put, yet the one requiring payment of arrearages before the duty of serving arises seems the more persuasive in view of the fact that rules requiring an extra charge and higher rates to delinquents have been approved and held reasonable.⁹² Of course, in many states the right to shut off the supply for past defaults, notwithstanding present willingness to pay, is authorized by the legislature in the granting of the franchise to the company.

A serious problem as to shutting off service for non-payment or arrears arises is the case where the water supply is to a building divided into tenements. Since the duty of the company is only to bring its pipes to the cellar wall it follows that a tenant must bring his own service pipes to the cellar wall and there have his supply handed over to him. Where the faucet is available to both tenants, but only one applies for and gets the connection, the latter is liable for the whole amount due for the service and cannot pay half and be entitled to service.⁹³ Where more than one apartment or building is supplied from a single service pipe, to cut off the entire service for violation of the company's rules by one of the parties is unreasonable and should be modified so as to permit an innocent consumer a reasonable time to attach his pipes to a separately controlled service connection, which must be supplied by the company in case the consumers occupy different buildings.⁹⁴ The duty of service is owed to the occupier of the premises in the case of gas, electric, water and telephone companies; and therefore a regulation of such a company by which it refuses to turn on water for a building until unpaid rates of previous owners or tenants are paid, is unreasonable and invalid,⁹⁵ and no lien, furthermore, can attach to the premises for such charges.⁹⁶ But the legislature may provide by statute that such charges shall constitute a lien upon the property itself.⁹⁷

⁹² See notes 81 and 82, *supra*.

⁹³ *Sims v. Ala. W. Co.* (1920) 205 Ala. 378, 87 So. 688.

⁹⁴ *Borough of Scottsdale v. Citizens' Water Co.* (Pa. 1920) P. U. R. 1920 D, 292; *Borough of Warren v. Warren Water Co.* (Pa. 1923) P. U. R. 1924 B, 400.

⁹⁵ *McDowed v. Avon-by-the-Sea Land & Improvement Co.* (1906) 71 N. J. Eq. 109, 63 Atl. 13; *Vanderbilt et al. v. Hackensack Water Co.* (N. J. Chan. 1932) 160 Atl. 825; *Turner v. Revere Water Co.* (1898) 171 Mass. 329, 50 N. E. 634; *Farmer v. Nashville* (1912) 127 Tenn. 509, 156 S. W. 189.

⁹⁶ *Turner v. Revere Water Co.* (1898) 171 Mass. 329, 50 N. E. 634.

⁹⁷ *East Grand Forks v. Luck* (1906) 97 Minn. 373, 107 N. W. 393; see *So. Ry. Co. v. McNabb* (1914) 130 Tenn. 197, 169 S. W. 757.

In the case of carriers, more than prepayment alone may be required. The ticket system is so necessary to the protection of the carrier that a ticket may be made indispensable to the right to travel on the company's lines.⁹⁸ Of course the rule cannot be enforced where, in the circumstances, a ticket cannot be secured, as, for instance, where a passenger boards the carrier at a station where there is not office or station of the company.⁹⁹ Otherwise, a rule that cash will not be received in lieu of a ticket is within the power of a carrier to make,¹⁰⁰ as is one prohibiting the transfer of a ticket.¹⁰¹ As the company has a right to reject for failure to produce a ticket, it necessarily follows that it has the lesser right of making a rule requiring an extra charge for not having a ticket.¹⁰²

All authorities agree that a public service company cannot refuse to render the service which it is authorized by its charter to furnish, because of some collateral matter not related to that service. Therefore a gas company cannot refuse to supply one who owes for coke sold by the company.¹⁰³ In an Illinois case¹⁰⁴ an electric company attempted to make an owner pay for a transformer, usually furnished free to those who had their premises wired by it, because he had not let the company wire his premises; but the court held that the company's position was untenable. The proprietor of a summer resort who furnished water and light to owners of cottages was not allowed, in a Michigan decision,¹⁰⁵ to deny one of the latter such service because of his failure to comply with a rule requiring owners of cottages to provide septic tanks for disposal of sewage. In a Pennsylvania case¹⁰⁶ it was held that the plaintiff's water supply could not be shut off because he was delinquent in his payment of sewer and maintenance assessments.

DUPLICATION OF SERVICE

It may be laid down as a general rule that a service company must serve all who apply, whether or not they are dealing with a rival of such company.¹⁰⁷ Nor may the company excuse a

⁹⁸ *Corwin v. Long I. R. Co.* (1885) 2 N. Y. City Ct. 106.

⁹⁹ *So. Kan. Ry. Co. v. Hinsdale* (1888) 38 Kan. 507, 16 Pac. 937.

¹⁰⁰ *St. L. & S. F. R. Co. v. Blythe* (1910) 94 Ark. 153, 126 S. W. 386.

¹⁰¹ *Schuman v. McDonald* (1903) 179 Mo. 163, 168 S. W. 1020, writ of error dismissed (1904) 196 U. S. 644.

¹⁰² *Reese v. Penn. R. Co.* (1890) 131 Pa. 422, 19 Atl. 72; *Wilsey v. L. & N. R. Co.* (1886) 83 Ky. 511.

¹⁰³ *Re Commercial Bank & London Gas Co.* (1860) 20 Up. Can. Q. B. 233.

¹⁰⁴ *Snell v. Clinton Elec. Lt., Heat & P. Co.* (1902) 196 Ill. 626, 63 N. E. 1082.

¹⁰⁵ *Ten Broek v. Miller et al.* (1927) 240 Mich. 667, 216 N. W. 385.

¹⁰⁶ *Penn. Chautauqua v. P. S. Comm. of Pa.* (1932) 160 Atl. 225.

¹⁰⁷ *State ex rel. Gwynn v. Citizens Tel. Co.* (1901) 61 S. C. 83, 39 S. E. 257; *Portland Nat. Gas & Oil Co. v. State* (1893) 135 Ind. 54, 34 N. E. 818.

breach of its duty to serve all applicants on the ground that another utility is willing and able to perform the duties which are sought from it. As was said in a New Hampshire case:¹⁰⁸

"the utility cannot question the motive which prompts a consumer to desire service of it in preference to obtaining it from some other source. The point is that the one desiring service is willing to meet the reasonable terms of the utility, and that, therefore, it is the duty of the utility to furnish it. The reason set forth by the Laconia company for its unwillingness to serve the district is untenable. However praiseworthy may be the altruistic spirit which prompts its reluctance to take away business from another utility with which it is on friendly terms, this does not fulfil its legal obligation to furnish service upon reasonable terms to anyone in its territory desiring it."

And in a Pennsylvania case,¹⁰⁹ where a druggist used his landlord's small lighting system and had the electric company's connection only for emergency purposes, it was held that the company could not cut off his supply in accordance with its rule that a customer could not use any facilities except those furnished by it unless the company consented thereto. The commission intimated that in such situations the company could establish a flat rate since it had a right to adopt rates which would secure it an adequate return for the facilities it afforded the public. The company, were it allowed in such cases to enforce a rule requiring a consumer to take all his service from the company or none at all, could insure itself a monopoly and at the same time violate its plain common law duty to serve the public impartially.

However, there are numerous cases holding that duplication of service is not required of a service company.¹¹⁰ But most of these decisions are based on the facts of each particular case, for instance, as where the present service is satisfactory and to have the other company duplicate it could put it to great expense,¹¹¹ or overload its present plant.¹¹² A West Virginia decision¹¹³ went so far as to say that where the commission allows two rivals to

¹⁰⁸ Village Dist. of Belmont v. Laconia Gas & Elec. Co. (N. H. 1924) P. U. R. 1925 A, 349; see Ind. Nat. Gas Co. v. State (1904) 162 Ind. 690, 71 N. E. 133 accord.

¹⁰⁹ Strathie v. Bucks Co. Elec. Co. (Pa. 1920) P. U. R. 1920 D, 290; see People v. P. S. Comm. (1914) 148 N. Y. S. 583, 163 App. Div. 705.

¹¹⁰ For an early case see Fleming v. Montgomery Lt. Co. (1892) 100 Ala. 657, 13 So. 618; Okla. Nat. Gas. Co. v. Kelly (Okla. 1926) P. U. R. 1926 C, 414.

¹¹¹ United Fuel & Gas Co. v. P. S. Comm. of W. Va. (W. Va. 1927) 138 S. E. 388; Marr v. Glendale (1919) 40 Cal. App. 748, P. U. R. 1919 E, 679.

¹¹² Re Batesville Elec. Lt. & P. Co. (Ind. 1922) P. U. R. 1922 E, 10.

¹¹³ United Fuel & Gas Co. v. P. S. Comm. of W. Va., note 111, *supra*.

charge different rates, patrons of the company charging the higher rate could not change simply to get the benefit of the lower rate offered by the other company. This reasoning seems clearly wrong, though the commission seems to be in greater fault than the court for allowing such a situation to exist.

SERVICE TO A COMPETITOR

There is high authority for the general proposition of law that one competitor in business cannot demand service of another in the promotion of its business, even though the competitor seeks only the finished product delivered at his door.¹¹⁴ But if a utility sells electric power for resale to its subsidiary corporation it has been held that it cannot then refuse such service to competitors of such subsidiary.¹¹⁵ A temptation always arises, when a public service company engages in a collateral business, to use the power in its public business to promote its collateral business. This clearly cannot be done because the rule as to serving a rival does not apply, since each of its businesses is to be looked at separately and when this is done no rivalry is seen to be present. Thus a telephone company which also conducted a carriage and coupe service could not, to promote its latter business, refuse full telephone service to a transfer company; the parties in such case not being rivals as to the telephone business.¹¹⁶ But where a former consumer started supplying others in his neighborhood from a private electric generating plant he had installed in his building, it was held that the electric service company could deny him "breakdown" service, which he wished to have in case of emergency.¹¹⁷ And a regulation of any utility forbidding service to customers refusing to enter a contract not to resell power received from the company has in several cases been held to be a reasonable regulation since a utility is not required to supply anyone who intends to compete with it.¹¹⁸ This right to deny service to a competitor of the utility is usually sustained on the ground that a public utility need not aid in furthering the rival's business.

¹¹⁴ State ex rel. Fletcher v. N. W. Bell Tel. Co. (Ia. 1932) 240 N. W. 252, P. U. R. 1932 C, 42; Home Tel. Co. v. Sarcoux L. & Tel. Co. (1911) 236 Mo. 114, 139 S. W. 108; Central Stockyards Co. v. L. & N. R. Co. (1903) 192 U. S. 568; People v. Hudson R. Tel. Co. (1887) 19 Abb. 466; Rogers Iron Works v. P. S. Comm. (1929) 323 Mo. 122, 18 S. W. (2d) 420; Fla. P. & L. Co. v. State ex rel. Malcolm et al. (Fla. 1932) 144 So. 657; Am. Lighting Co. v. P. S. Corp. of N. J. (C. C. N. J. 1904) 132 F. 794.

¹¹⁵ N. C. P. S. Comm. v. So. Power Co. (1922) 282 F. 837.

¹¹⁶ Louisville Trans. Co. v. Am. Dist. Tel. Co. (1881) 1 Ky. L. J. 144.

¹¹⁷ People ex rel. N. Y. Edison Co. v. P. U. Comm. (1920) 191 App. Div. 237, 181 N. Y. S. 259.

¹¹⁸ 67th St. Mum. Inc. v. P. U. Comm. of N. J. (N. J. 1929) 147 Atl. 735; Karrick v. Potomac Elec. P. Co. et al. (D. C. 1931) P. U. R. 1932 C, 40.

INSUFFICIENT FACILITIES

Where all the rooms of an inn are full, the innkeeper is under no obligation to receive further applicants.¹¹⁹ This seems too clear for doubt. And so the rule was at common law as to carriers, but modern conditions have changed the rule as to the latter and the modern railroad is now bound to use due diligence to provide sufficient cars to carry on its business, and in the ordinary case cannot excuse itself for failure to carry passengers or goods merely by showing it did not have sufficient cars at the particular locality to transport them.¹²⁰ As to the municipal utilities—gas, water, electric, railway and telephone companies—they are definitely required to give full service to all comers in the locality to which their franchise is limited. Only exceptions to this general rule need be pointed out. One of these centers around the question of extensions and as to when they are required to be made; the situation in the usual case being that of a member of a sparsely settled district wanting the utility to extend its facilities to his door. The law on this point is well expressed in a Missouri case:¹²¹

“The fact that defendant accepted a franchise and has undertaken to furnish the entire community with electricity does not of itself require the defendant to extend its service to any resident of the community who may request the same. The defendant has undertaken a duty of a public nature in supplying electricity to meet the necessities of the public. The obligation imposed by law upon defendant does not give each or any number of persons in the community the right to demand electric service from defendant under any and all circumstances. The defendant has only undertaken and incurred the legal obligation to discharge its duty to furnish electricity to the public when there is a reasonable demand for it; hence the question to be determined upon consideration of a proposed extension is whether there is a reasonable demand for such extension.”

A utility cannot extend its mains indefinitely to reach a single new consumer or a small number of new consumers and at the same time furnish service to all at the same average unit cost. Equitable rules as to extensions are necessary or else frequent readjustments of rates of all consumers to fit the changed condi-

¹¹⁹ *Browne v. Brandt* (1902) 1 K. B. 696; *Russell v. Fagan* (Del. 1886) 7 *Houst.* 389, 8 *Atl.* 258.

¹²⁰ *Tucker v. Pac. R. Co.* (1872) 50 *Mo.* 385; *Mo. Pac. Ry. Co. v. Harris* (1886) 67 *Tex.* 166.

¹²¹ *Harnage v. St. L. County Gas Co.* (Mo. 1924) P. U. R. 1925 B, 1.

tions would be necessary.¹²² Thus where an applicant has the means of supplying himself from a private or public source near at hand an extension may be denied.¹²³ Unreasonable extensions of plants into unprofitable territory which cannot support such service will not be required because, it has been held, it would be confiscatory in effect in certain instances.¹²⁴

The second exception to the general rule is this: a situation may develop in certain kinds of public service where service may be refused the applicant because of conditions beyond the control of the utility. This is particularly true where the commodity supplied is either water or natural gas. But if the drought in the case of water, or the inadequacy of sufficient wells in the case of natural gas, could have been provided against by the company, a failure to take reasonable precautions to anticipate the situation will not be excused. One case,¹²⁵ where the water company attempted to excuse its four failures to supply proper water in the preceding four years, on the grounds of a drought each time, which was shown to be usual, warranted forfeiture of its charter. In an Indiana case¹²⁶ where the town's supply of natural gas came from the near-by wells of the service company the situation had reached the stage where either the industries had to be cut off entirely or else neither they nor the domestic users could be given service that would halfway meet the needs of both. The state commission decreed that the company discontinue service to the industries upon thirty days' notice to them. The California commission¹²⁷ in a somewhat similar case held that water must be supplied for domestic use in preference to a swimming tank where the supply was inadequate to serve both. Thus the rule may be said to be that the domestic consumer is to be preferred over business or industrial users in any case where the supply is not sufficient to meet the demand in the circumstances, which seems correct in principle.¹²⁸

Where the supply is inadequate to supply present customers the courts invariably hold that that does not relieve the company from furnishing a new applicant with service. In a New York

¹²² Northern Woods Products Co. v. Jacobs (1924) P. U. R. 1924 A, 193.

¹²³ Hooper Realty Co. v. United Rys. & Elec. Co. (Md. 1915) P. U. R. 1915 A, 339; Booth-Schumaker Co. v. Wis.-Minn. Lt. & P. Co. (Wis. 1916) P. U. R. 1917 A, 758; Marr v. City of Glendale (1919) 40 Cal. App. 748, 181 Pac. 671, P. U. R. 1919 E, 679.

¹²⁴ P. S. Comm. v. Brooklyn & Curtis Bay L. & W. Co. (1914) 122 Md. 612, 90 Atl. 89.

¹²⁵ Capital City Water Co. v. State (1894) 105 Ala. 406, 432, 18 So. 62.

¹²⁶ Re Knightstown Nat. Gas Co. (Ind. 1919) P. U. R. 1919 F, 667.

¹²⁷ Re Peters-Rhoades Co. (Cal. 1925) P. U. R. 1926 B, 787.

¹²⁸ Boonton v. Boonton Water Co. (1904) 69 N. J. Eq. 23, 61 Atl. 390.

case¹²⁹ the supply of natural gas for the town had run so low that none had been used for several years for industrial or house-heating purposes. The company officials frankly admitted that every means was taken to "bluff out" all new applicants since even the present consumers could not be adequately served. But the commission, saying it had no discretion in the matter, held that in no case could the supply be restricted to consumers already being served, even though full service could not be given to all. As was said by the Indiana Supreme Court:

"In the rendering of such a service there should be no advantage accorded to prior applicants. It cannot be doubted that there is equality of right on the part of each of the inhabitants living along applicant's mains."¹³⁰

To the contrary is the rule in the case of the exhaustion of the irrigation supply. Prior takings appropriating the available supply is held to constitute a justification for the refusal of further applications.¹³¹ Though a noted authority¹³² criticises the rule in the case of natural gas companies on the ground that the result gives satisfactory service to none, not even to the applicant in question, and is hardly consistent with public service for all, that contention may be met by the argument that the company's duty is to serve all alike who are similarly situated, and it would be better that unsatisfactory service be given to all, than that some should get a full supply while others, merely because they are newcomers, should be totally denied any service at all. Logically and ethically it would seem that the public welfare would be better served by inconveniencing, somewhat, the present takers, rather than allowing the latter to enjoy complete service at the expense of later applicants. Of course, where the situation is so grave that to further divide the available supply would be to practically deny all any service of any value, then, but only then, should service be denied to the new consumer. But otherwise, a proportionate share of the supply should be given to new applicants.

SUMMARY

To attempt to say what situations are strictly up to the unregulated managerial discretion of the utility itself is apparently

¹²⁹ *Stevenson v. Baldwinville Lt. & Heat Co.* (N. Y. 1920) P. U. R. 1920 F, 903.

¹³⁰ *Indiana Nat. Gas & O. Co. v. State ex rel.* (1904) 162 Ind. 690, 71 N. E. 133; *see State ex rel. Wood v. Consumers' Gas Trust Co.* (1901) 157 Ind. 345, 61 N. E. 674, accord.

¹³¹ *Bardsly v. Boise Irr. & Land Co.* (1901) 8 Idaho 155 67 Pac. 428; *San Diego Flume Co. v. Southern* (1901) 122 F. 228.

¹³² 1 Wyman, *Public Service Corporations* (1921) 530.

a most difficult task. It seems that the company may refuse absolutely whenever the service is either wanted for an illegal purpose or else demanded without prepayment. The authorities agree that in both situations the utility may refuse service at its own discretion. But can these two situations be said to be truly matters in which the power of unregulated discretion exists in and of the company? In the case of illegal purposes the law itself says that the company should refuse service since otherwise it would be aiding and abetting crime. In the case of prepayment the only discretion which lies with the company is whether or not prepayment shall be required or else credit given.

In both of the instances mentioned above the company does not need to file any rule with the commission or serve notice to the public as such in order to refuse service. But where the utility wishes to lay down any other rule it must at least give sufficient notice¹³³ to the public in general so that customers may have a fair opportunity of knowing what it is and what they must do. Without regulations a company may refuse to accede to particular requests, but then it must show that the particular request is unreasonable.¹³⁴

When a rule is filed with the commission, the settled rule of law is that it is binding not only on the utility, but also the commission and the public as well.¹³⁵ But once filed, a rule cannot be changed without the consent of the commission.¹³⁶ The Missouri Commission has been held to lack power in specific instances, to compel a company to make extensions and furnish service in violation of the rules which are on file with it and have its approval, express or implied, and which are applicable to the public as a whole.¹³⁷ But the commission will not hesitate to modify a utility's rules and regulations in any particular case whenever it is satisfied that such modification is necessary to do justice either to the patrons or to the utility.¹³⁸

The regulation of rates have no real meaning without the quality of the service being considered also. And since this is so and since, also, nearly every rule is undeniably tied up with either the rates, the health, the comfort, the convenience, or the safety

¹³³ As to what constitutes sufficient notice: see *Renand v. N. Y., N. H., and H. R. Co.* (1912) 210 Mass. 553, 97 N. E. 98.

¹³⁴ *State ex rel. Kennedy v. P. S. Comm.* (Mo. 1931) 42 S. W. (2d) 349.

¹³⁵ *Bennett v. St. Louis County Water Co.* (Mo. 1931) P. U. R. 1932 A, 293.

¹³⁶ *State ex rel. P. U. Comm. v. Mo. K. & T. R. Co.* (1925) 117 Kan. 651, P. U. R. 1925 C, 761, 232 Pac. 1038.

¹³⁷ *State ex rel. St. Louis County Gas Co. v. P. U. Comm.* (1926) 315 Mo. 312, P. U. R. 1927 A, 187, 286 S. W. 84.

¹³⁸ *Lortz v. Union Elec. Light & Power* (Mo. 1918) P. U. R. 1918 F, 223. And see *Baltimore & Ohio R. R. Co. v. P. S. Comm.* (1917) 81 W. Va. 457, 94 S. E. 545.

of the public, the only conclusion is that in no case (but perhaps that of prepayment) is the utility actually possessed of "unregulated managerial discretion" in the making of its rules. Even the smoking and "move forward in the car" regulations of a street car company are subject to the full control of the commission.¹³⁹ As a result the inevitable conclusion is that there is no true field of unregulated "self-regulation"—as was said by the Missouri Supreme Court in a somewhat recent case, in speaking of the powers of the state commission, it possesses "plenary supervision of every business feature."¹⁴⁰

SIDNEY J. MURPHY, '34.

THE MODERN INNKEEPER'S LIABILITY FOR INJURIES TO THE PERSON OF HIS GUEST

In the busy and complex social and business life of today the innkeeper plays an important part. It is his function to furnish a place of temporary abode to our vast transient population, and entertainment to travellers and others. His place of business may be in the small structure which the village calls "hotel" or in one of the enormously costly plants which go under the same generic name in our large cities and which cater to the guest's every whim. His business has developed from the isolated inns of feudal times into an enterprise which in 1928 ranked ninth among the great industries of the United States. In that year there were in the United States nearly twenty-six thousand hotels, representing an investment of over five billion dollars, employing over a half-million people, and supplying service and accommodations to millions of people yearly.¹

It is the purpose of this paper to discuss the modern law as it relates to the innkeeper's liability for the personal injuries or death of his guest, while the guest is *infra hospitium*, that is, within the precincts of the inn and under the innkeeper's care.² Or, viewed conversely, it is the purpose of this paper to discover what degree of protection is afforded to the guest by the law as it has been developed by decisions or changed by statute. Because of the very nature of the topic, the paper will largely resolve itself into a survey of the pertinent law as it is in the United States today. But when the occasion offers the opportunity, a critical

¹³⁹ See *West End Business Men's Ass'n v. United Ry. Co. of St. Louis* (1915) P. U. R. 1915 D, 482; *Coombs v. So. Wis. Ry. Co.* (1916) 162 Wis. 111, 155 N. W. 922.

¹⁴⁰ *State v. Kansas City Gas Co.* (1913) 254 Mo. 515, 163 S. W. 854.

¹ *The Official Hotel Red Book* (1928).

² *Davidson v. Madison Corporation* (1932) 247 N. Y. S. 789.