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## ALTERNATIVES TO THE INDIVIDUAL'S RIGHT OF CONTINUED ENERGY- UTILITY SERVICE AFTER NONPAYMENT

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Public utility companies provide services that most people consider necessities,<sup>1</sup> especially energy service which provides fuel for heat. Since the mid-1970's, courts, legislatures, and administrative agencies have established various safeguards to protect residential consumers against the termination of energy service by public utilities.<sup>2</sup> These safeguards are attributable to the general trend of consumer protection and the growing inability of low- and moderate-income consumers to pay the continually increasing service rates.<sup>3</sup> These measures provide much greater consumer protection than existed at common law.

Recently, several states have enacted laws that prohibit energy utilities from terminating service to poor residential consumers during winter months or when the outside temperature falls below a certain level.<sup>4</sup>

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1. Examples of such services are natural gas, electric power, purified running water, sewage, and telephone communications. O'Brien, *Protecting the Consumer in Utility Service Terminations*, 21 ST. LOUIS U. L.J. 452, 452 (1977).

2. See *infra* notes 18-42 and accompanying text.

3. O'Brien, *supra* note 1, at 452.

4. During the winter months of 1977 and 1978 Maryland had a moratorium on shut-offs. Maryland currently prohibits termination of energy services on a day when the temperature falls below 32 degrees Fahrenheit or when there is a forecast of continued cold weather. *Maryland-Innovative Fuel Assistance, Conservation Programs Undertaken*, PUB. UTIL. FORT., March 3, 1983, 49, 50. In 1979 the Connecticut legislature adopted a statute that prohibited a utility from terminating service from November 1 to April 15 to residential customers unable to pay their entire bill, and required utility companies to reinstate service during this period to anyone previously terminated and still unable to pay. CONN. GEN. STAT. § 16-262c(b)(1) (1983). In 1983 Kansas estab-

This Note reviews the current state of the common law and the recent changes that have occurred in this area. In addition, this Note examines the consequences of regulations which prohibit service terminations, and then suggests that alternative approaches to assisting the underprivileged during winter months offer better solutions in terms of equity and the efficient use of scarce resources.

### I. COMMON LAW

At common law, most courts held that public utility companies could adopt and enforce reasonable termination rules to deal with customers who failed to pay for the service rendered.<sup>5</sup> In *Oklahoma Natural Gas Co. v. Young*,<sup>6</sup> the plaintiff was bedridden and required the care of a nurse because of injuries sustained in an automobile accident.<sup>7</sup> The defendant gas company sent the plaintiff a monthly bill due on December 1, 1936.<sup>8</sup> One week later the plaintiff had not paid her bill and the company, in accordance with its established termination policy, discontinued her service. The company had full knowledge of the plaintiff's condition and of the fact that she had no other means of heating her home. The plaintiff subsequently contracted pneumonia.

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lished a ban on utility shut-offs. *Kansas—Cut-offs Limited by Utility's Customer Assistance Program*, PUB. UTIL. FORT., March 3, 1983, 49, 49. The Utah Public Service Commission considered the adoption of a moratorium on shut-offs that same year. *Utah—Major Gas Distributor Experiences Decline in Shut-offs*, PUB. UTIL. FORT., March 3, 1983, 50, 50. Arizona currently forbids the termination of residential service when a customer is unable to pay her bill and when the temperature is 32 degrees Fahrenheit or below. *Ariz. Admin. Comp. R.* §§ R14-2-201, R14-2-211 (Supp. 1982). The Minnesota Public Service Commission adopted a similar "cold weather rule" providing that no utility may disconnect residential service when the temperature on the previous day falls below zero degrees Fahrenheit, and if the disconnection is scheduled for a Friday or the day before a legal holiday the utility cannot disconnect service if the low on the previous day fell below 32 degrees Fahrenheit. 11 MINN. CODE AGENCY R. § 279-376 (1976). Georgia utilities may not turn off service on days when the temperature is below freezing. *Georgia—Commission Issues Regulations on Service Shut-offs*, PUB. UTIL. FORT., March 3, 1983, 49, 49.

5. 2 O. POND, PUBLIC UTILITIES § 668 (4th ed. 1932); Annot., 132 A.L.R. 914 (1941); see, e.g., *Oklahoma Natural Gas Co. v. Young*, 116 F.2d 720, 722-23 (10th Cir. 1940) (gas company can refuse service to consumer who fails to make payment); *Sims v. Alabama Water Co.*, 205 Ala. 378, 379-80, 87 So. 688, 689 (1920) (water company can adopt and enforce a rule that it would terminate service after a consumer failed to pay); *Steele v. Clinton Elec. Light & Power Co.*, 123 Conn. 180, 184, 193 A. 613, 615 (1937) (public utility can adopt and enforce regulations terminating service after nonpayment).

6. 116 F.2d 720 (10th Cir. 1940).

7. *Id.* at 721.

8. *Id.* at 721-22.

She then sued the gas company for negligence.<sup>9</sup>

The Tenth Circuit Court of Appeals held that the gas company owed no legal duty to continue service to the plaintiff once she failed to comply with the demand for payment of the overdue account.<sup>10</sup> The court reasoned that a utility has a right to protect itself against "fraud, injury or undue risk and liability, and to make rules for that purpose."<sup>11</sup> Other courts suggest that requiring a utility to bring legal action in order to collect overdue accounts is impractical and would result only in a multitude of small suits.<sup>12</sup> Furthermore, the expense incident to collecting relatively small monthly bills by legal process would be almost prohibitive.<sup>13</sup>

Many courts recognize an exception to the public utility's right to terminate service when there exists a bona fide dispute over the customer's liability or the bill's accuracy.<sup>14</sup> When such a bona fide dispute exists, some courts have held that the utility cannot terminate service.<sup>15</sup> Other courts have held a utility liable for damages if it termi-

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9. *Id.*

10. *Id.* at 723-25.

11. *Id.* at 724 (citing *Huston v. City Gas & Elec. Co.*, 158 Ill. App. 307 (1910)).

12. *Huff v. Electric Plant Bd. of Monticello*, 299 S.W.2d 817, 818 (Ky. 1957); *Siegel v. Minneapolis Gas Co.*, 271 Minn. 127, 129, 135 N.W.2d 60, 62 (1965).

13. *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489-90 (1915). Other scholars and judges have provided additional rationales for recognizing the utilities' termination rights. The right to terminate service is "in the interest of efficient service and fair treatment to all customers . . ." O. POND, *supra* note 5, at § 668, p. 1291. "The company's ability properly to serve the public largely depends upon" the prompt payment for service. *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. at 489-90. These rules "are reasonable and necessary to properly protect" the utility's business and maintain its efficiency. *Central Louisiana Power Co. v. Thomas*, 145 Miss. 352, 362, 110 So. 673, 673 (1927).

14. O. POND, *supra* note 5, at § 668; Annot., *supra* note 5, at 915.

15. For examples of cases in which the plaintiffs obtained equitable relief (injunction or mandamus), see *Dodd v. City of Atlanta*, 154 Ga. 33, 113 S.E. 166 (1922) (injunction granted preventing water company from discontinuing service for a bill's amount which plaintiff disputed); *Payne v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S.W. 684 (1902) (mandamus granted requiring telephone company to reinstate service after termination for nonpayment of a disputed bill); *Sickles v. Manhattan Gaslight Co.*, 66 How. Pr. 314 (N.Y. Sup. Ct. 1884) (injunction granted preventing gas company from shutting off service for nonpayment of a disputed bill).

For examples of cases in which the court recognized a right to monetary damages after a utility terminated service for nonpayment over a disputed bill, see *Barry v. Commonwealth Edison Co.*, 374 Ill. 473, 29 N.E.2d 1014 (1940) (plaintiff had valid cause of action against electric company for damages after company terminated service for nonpayment of a disputed bill); *Barrett v. Broad River Power Co.*, 146 S.C. 85, 143 S.E. 650

nates service and then the court resolves the dispute in the consumer's favor.<sup>16</sup> The same reasoning underlies both rules: because of the relative disparity in bargaining power the utility cannot coerce the consumer into paying a bill that he in good faith disputes. To hold otherwise would permit a utility to pass judgment on its own case.<sup>17</sup>

## II. RECENT DEVELOPMENTS

In the last ten years consumers have gained additional protection against the termination practices of energy supplying utilities. In *Memphis Light, Gas & Water Division v. Craft*<sup>18</sup> the Supreme Court held that the due process clause of the fourteenth amendment<sup>19</sup> requires a municipally-owned utility<sup>20</sup> to provide a pretermination notice and hearing before exercising its right to discontinue service for nonpayment.<sup>21</sup>

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(1928) (electric company not liable for damages after terminating service when the dispute pertained to a separate contract for construction).

16. See, e.g., *Huff v. Electric Plant Bd. of Monticello*, 299 S.W.2d 817 (Ky. 1957) (company not liable when there was no dispute as to the correctness of the bill, but only an unsettled claim of negligence); *Steele v. Clinton Elec. Light & Power Co.*, 123 Conn. 180, 193 A. 613 (1937) (plaintiff had a valid cause of action against electric company for damages allegedly caused from terminating service for nonpayment of a disputed bill); *Kentucky Utilities Co. v. Warren Ellison Cafe*, 231 Ky. 558, 21 S.W.2d 976 (1929) (electric company held liable for damages resulting from the discontinuance of service because of a disputed amount owed calculated by a faulty meter); *Louisville Tobacco Warehouse Co. v. Louisville Water Co.*, 162 Ky. 478, 172 S.W. 928 (1915) (defendant's counterclaim for damages from water company's termination of service dismissed upon a finding by the jury that the amount charged was correct).

17. See, e.g., *Barry v. Commonwealth Edison Co.*, 374 Ill. 473, 477, 29 N.E.2d 1014, 1016 (1940); *Steele v. Clinton Elec. Light & Power Co.*, 123 Conn. 180, 185, 193 A. 613, 615 (1937); *Southwestern Gas & Elec. Co. v. Stanley*, 123 Tex. 157, 161-62, 70 S.W.2d 413, 415 (1934).

18. 436 U.S. 1 (1978).

19. U.S. CONST. amend. XIV, § 1 provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

*Id.*

20. The fourteenth amendment requires due process only if "state action" is "depriv[ing] any person of life, liberty or property." See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975). The Sixth Circuit Court of Appeals held that since *Memphis Light, Gas and Water Division (MLG&W)* is municipally owned and controlled, the actions of MLG&W are clearly "state actions." 534 F.2d 684, 687 (6th Cir. 1976).

21. 436 U.S. at 14-16. The Supreme Court affirmed the position that several lower courts had taken. See, e.g., *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684

The *Craft* case involved a family who received two utility bills because their home had a dual set of gas and electric meters.<sup>22</sup> The plaintiffs unsuccessfully attempted to resolve this problem with the utility company. After the company terminated the family's service five times for nonpayment, the Crafts filed suit in federal court claiming that the terminations had occurred without due process of law.<sup>23</sup> The Supreme Court held that entitlement to continued public utility service is a "property" interest<sup>24</sup> protected by the fourteenth amendment's due process clause.<sup>25</sup> The Court noted that Tennessee law recognized a consumer's right to public utility service and prohibited service termination when a bill was in dispute.<sup>26</sup> A pretermination notice must in-

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(6th Cir. 1976), *aff'd*, 436 U.S. 1 (1978); *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974) (city providing water service violated due process for failing to provide a pretermination notice and hearing); *Koger v. Guarino*, 412 F. Supp. 1375 (E.D. Pa. 1976) (city providing water service did not give occupants a pretermination notice and hearing and required tenants to pay landlords arrearages before reinstating service violated the due process clause); *Donnelly v. City of Eureka*, 399 F. Supp. 64 (D. Kan. 1975) (similar).

22. 436 U.S. at 4-5. The house served as a duplex before the Crafts moved there in October, 1972. They received the first set of bills in the early part of 1973 and the utility company continued to send two monthly bills until January, 1974. *Id.*

23. *Id.* at 1-5. The plaintiff was seeking declaratory, injunctive, and monetary relief. *Id.* at 1. The suit was brought under 42 U.S.C. § 1983 (1982), which reads in part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

*Id.*

24. *See supra* note 19. The district court held that continued utility service was not a property interest protected by the fourteenth amendment. The Sixth Circuit reversed the district court and held that continued utility service was a fourteenth amendment property interest. 534 F.2d 684, 687 (6th Cir. 1976).

25. 436 U.S. at 11. The fourteenth amendment protects state deprivations of "property, without due process of law." U.S. CONST., *supra* note 19. A plaintiff must establish that he has a certain property interest that a state actor has taken from him. The Supreme Court rarely has defined the concept of "property." Courts have held that a plaintiff can establish a property interest by showing that she has a legitimate claim of entitlement protected by the due process clause. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also* *Goss v. Lopez*, 419 U.S. 365 (1975) (entitlement and property interest found in attending a public school); *Bell v. Burson*, 402 U.S. 535 (1971) (entitlement and property interest found in drivers' license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (entitlement and property interest found in welfare benefits).

26. The underlying substantive interest constituting "property" is created by "an independent source such as state law;" federal constitutional law determines whether

form the public utility customer not only of the possibility of termination, but also that a procedure existed for challenging a disputed bill.<sup>27</sup> In addition, the Court held that due process required a hearing where the customer could appear before a designated company employee and present billing complaints.<sup>28</sup>

Realistically, the *Craft* decision does not afford all consumers protection. *Craft* involved a public utility that was subject to fourteenth amendment, state-action constraints.<sup>29</sup> Most utilities, however, are

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that interest rises to the level of a "legitimate claim of entitlement" protected by the due process clause. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Under Tennessee law public utilities are obligated to provide services to all citizens except for good cause and the courts have held that utilities may not terminate service "at will". 436 U.S. at 9-12. Therefore, because the utility can terminate service only "for cause," the consumer can assert a "legitimate claim of entitlement" within the due process clause. *Id.* The Court relied upon *Farmer v. Nashville*, 127 Tenn. 509, 156 S.W. 189 (1913), in which the Tennessee Supreme Court stated that public utilities were obligated to provide service to all of the inhabitants of the city in which it operated, without discrimination, and without denial, except for good cause (such as failure to pay for service). *Id.* at 514-15, 156 S.W. at 190. The Court also relied upon *Trigg v. Middle Tennessee Elec. Membership Corp.*, 533 S.W.2d 730 (Tenn. Ct. App. 1975) in which the Tennessee Court of Appeals held that a utility could be liable for terminating service when the controversy involved a disputed bill. *Id.* at 733.

27. 436 U.S. at 13-15. The "final notice" contained in MLG&W's bills stated only that payment was overdue and that MLG&W would discontinue service if payment was not made by a certain date. *Craft*, 534 F.2d 684, 688 n.4 (6th Cir. 1976). The Supreme Court found that the utility's notification procedures were adequate to warn of the threat of termination of service, but did not reasonably inform customers of the availability of "an opportunity to present their objections." 436 U.S. at 14 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). The Court noted that the purpose of notice under the due process clause is to apprise the individual and provide adequate preparation for a hearing. 436 U.S. at 14.

28. 436 U.S. at 16-19. The Court stated that "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Id.* at 16 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)). After discussing the balancing approach outlined in *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that some administrative procedure for hearing customer complaints before termination is required "to afford reasonable assurance against erroneous or arbitrary withholding of essential services." 436 U.S. at 17-18. The Court also noted that the utility could terminate service after it afforded the opportunity for a hearing when it was determined that the amount billed was justly due. *Id.* at 18-19.

29. Courts rarely characterize private utilities as state actors. Courts have taken two different approaches in examining private conduct for state action: 1) the public function approach and, 2) the joint participant approach. The theory of the public function approach is that when a private individual assumes obligations or supplies services normally provided by the state, the individual's conduct becomes state action. The joint participant approach focuses on the interrelationship between state and pri-

privately owned.<sup>30</sup> Despite the absence of fourteenth amendment pro-

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vate actor rather than the type of activity involved. Substantial contact between state and private actor can establish state action. Note, *Constitutional Safeguards for Public Utility Consumers: Power to the People*, 48 N.Y.U. L. REV. 493, 506-10 (1973); Note, *Public Utilities, The Tests for State Action*, 12 URB. L. ANN. 153, 165-71 (1976).

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court refused to find that a privately-owned utility was a state actor. *Id.* at 348 n.2. The Court held that the utility was not performing a public function because state law imposed no obligation on the state to furnish utility service; it only required a utility company to supply service on a reasonably continuous basis. *Id.* at 352-53. The Court also rejected the contention that state action was present because the state had granted Metropolitan Edison monopoly status. The Court stated that this fact is not determinative in deciding whether state action exists. *Id.* at 351-52. Finally, the Court held that the state and the utility were not joint participants. The state utility commission's approval of a private utility's proposed business practice does not transform the utility's business practice into state action under the fourteenth amendment. *Id.* at 354-57.

See also the following cases, which involve privately-owned utilities, for examples of when courts rejected state action arguments: *Cody v. Union Elec. Co.*, 518 F.2d 978 (8th Cir. 1975); *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949 (10th cir. 1975); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972); *Particular Cleaners, Inc. v. Commonwealth Edison Co.*, 457 F.2d 189 (7th Cir. 1972); *Strack v. Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R.I. 351, 103 A.2d 67 (1954).

But see the following cases, which involve privately-owned utilities, for examples of when courts accepted state action arguments: *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973) (statute authorizing company to enter the premises of a customer to disconnect for nonpayment after a twenty-four hour notice); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (company required to pay the city in which it operated 5% of all revenues received); *Condosta v. Vermont Elec. Coop.*, 400 F. Supp. 358 (D. Vt. 1975) (service terminated upon specific instructions from public service board after negotiations conducted by the board failed to resolve the conflict); *Limuel v. Southern Union Gas Co.*, 378 F. Supp. 964 (W.D. Tex. 1974) (city received flat rate fee and 2% of gross receipts from company revenues); *Salisbury v. Southern New England Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973) (statute requiring utilities to pay 56% of the public service commission's expenses); *Denver Welfare Rights Org. v. Public Util. Comm'n of Colo.*, 547 P.2d 239 (Colo. 1976) (public service commission adopted a termination rule after initiating rule-making proceedings and conducting two days of hearing); *Sokol v. Public Util. Comm'n*, 53 Cal. Rptr. 673, 418 P.2d 265 (1966) (commission ordered service termination if law enforcement officials advised the telephone company that the customer used service for unlawful purposes).

30 A. FINDER, *STATES AND ELECTRIC UTILITY REGULATION* 4-6 (1977). For example, in 1976, electric companies owned by a sponsoring governmental unit provided electricity for 13.5% of the nation's electrical consumers and billed only 16.4% of the total kilowatt hours consumed in this country. Privately-owned electric companies controlled by individual stockholders or holding companies, serviced 77.1% of all electric customers in 1976 and billed 78.7% of the total kilowatt-hours consumed. Electric cooperatives serviced the remaining consumers. *Id.*

tections, specific state statutes<sup>31</sup> and regulations governing notice and hearings<sup>32</sup> protect customers of privately-owned utilities.

31. See, e.g., NEB. REV. STAT. §§ 19-2702-17 (reissue 1983); N.Y. TRANSP. CORP. LAW § 15 (McKinney 1955) (amended 1981). See also *infra* notes 32-42 and accompanying text.

32. See, e.g., ARIZ. ADMIN. COMP. R. §§ R11-2-211 to R14-2-212 (Supp. 1982); CONN. AGENCIES REGS. § 16-3-100; 170 IND. ADMIN. CODE §§ 4-1-16, 4-1-17, 5-1-16, 5-1-17 (1984); 807 KY. ADMIN. REGS. 50:006 (1984); MICH. ADMIN. CODE R. §§ R460.2163-91 (1979 and Supp. 1981); N.Y. ADMIN. CODE tit. 16, §§ 143.1-143.9, 275.1-275.9 (1983); WIS. ADMIN. CODE §§ PSC 113.132, 113.134, 134.062, 134.064 (1983). See also *infra* notes 33-39 and accompanying text.

Courts generally recognize that a state may exercise its police power to regulate both privately-owned and publicly-owned businesses that devote their property to public use, like utility companies. In *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court referred to these businesses as "affected with a public interest." *Id.* at 126. The Court broadened the scope of this phrase in *Nebbia v. New York*, 291 U.S. 502 (1934), stating that: "[I]t can in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536. For examples of cases when the Court has upheld statutes based on a state's police power, see *Olsen v. Nebraska*, 313 U.S. 236 (1941) (statute regulated employment agencies), and *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949) (statute prohibited life insurance companies and undertakers from engaging in both businesses).

As of 1977, all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands had established regulatory commissions that exercise general regulatory power over privately-owned gas and electric utility companies. A. FINDER, *supra* note 30, at 17. For example, the Pennsylvania statute reads: "The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth." 66 PA. CONS. STAT. ANN. § 501(b) (Purdon 1979). The term "public utilities" is defined so as to include privately-owned utilities. *Id.* at § 102. The New York statute provides in pertinent part: [The Public Service Commission shall]

1. Have general supervision of all gas corporations and electric corporations. . . .
2. [E]xamine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity . . . and have power to order such reasonable improvements as will best promote the public interest, preserve the public health, and protect those using such gas or electricity. . . .
5. [W]henever the commission shall be of opinion . . . that . . . the acts or regulations of any such person, corporation, or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential . . . the commission shall determine and prescribe . . . the just and reasonable acts to be done and observed. . . .

N.Y. PUB. SERV. LAW § 66 (McKinney 1955).

The Supreme Court recognized a state legislature's authority to regulate a utility's termination practices in *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915). See also *Cambridge Elec. Light Co. v. Department of Pub. Util.*, 363 Mass. 474, 295 N.E.2d 876 (1973) (state regulatory agency has authority to adopt termination regulations).



Notice provisions generally require that the company send the consumer written notice five to thirteen days prior to the scheduled termination date.<sup>33</sup> The notice must state that the account is past due and inform the consumer of the date service will be terminated if the bill is not paid. Utilities send a pretermination notice after an account is delinquent, usually twenty to thirty days after the company mails the monthly statement.<sup>34</sup> In addition, the notice must inform the customer that a deferred payment plan is available. Finally, the notice must include information on how a consumer may dispute a bill's amount.<sup>35</sup>

The hearing provisions generally require that a utility company appoint a reviewing officer to handle disputes and attempt to reach a settlement with the customer.<sup>36</sup> After a customer lodges a complaint, the officer must investigate, and shortly thereafter, make a written determination. The officer must notify the complainant that he may appeal the decision.<sup>37</sup> The public service commission hears all appeals. The commission initially provides an *informal* review; it later holds a *formal*

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33. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-211(E)(1) (1982) (5 days); CONN. AGENCIES REGS. § 16-3-100(d)(1)(A) (13 days); 170 IND. ADMIN. CODE §§ 4-1-16(E), 5-1-16(E) (1979) (7 days); MICH. ADMIN. CODE R. § R460.2163 (1979 & Supp. 1981) (10 days); NEB. REV. STAT. § 19-2702 (Supp. 1982) (7 days); N.Y. ADMIN. CODE tit. 16, §§ 143.1, 275.1 (1983) (5 days); WIS. ADMIN. CODE §§ PSC 113.132, 134.062 (1980) (8 days).

34. See, e.g., ARIZ. ADMIN. COMP. R. §§ R14-2-210(c)(3), R14-2-211(c)(1)(b) (1982) (15 days); CONN. AGENCIES REGS. § 16-3-100 (30 days); 170 IND. ADMIN. CODE §§ 4-1-13, 4-1-16, 5-1-16 (1979) (17 days); MICH. ADMIN. CODE R. §§ R 460.2102, .2116, .2162, .2163 (1979) (26 days); WIS. ADMIN. CODE §§ PSC 113.132, 134.062 (1980) (20 days).

35. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-211 (1982); CONN. AGENCIES REGS. § 16-3-100(d)(2)(E); 170 IND. ADMIN. CODE §§ 4-1-16(6), 5-1-16(6) (1979); MICH. ADMIN. CODE R. § R 460.2164 (1979 & Supp. 1981); NEB. REV. STAT. § 19-2704 (Supp. 1982); N.Y. ADMIN. CODE tit. 16, §§ 143.2, 275.2 (1983); WIS. ADMIN. CODE §§ PSC 113.132, 134.062 (1980).

The deferred payment plans prohibit a utility company from terminating service if the customer agrees to pay all future bills on time, and agrees to pay an amortized portion of the delinquent amount over several months. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-210(H) (1982); 170 IND. ADMIN. CODE §§ 4-1-16(c), 5-1-16(c) (1979); MICH. ADMIN. CODE R. § R 460.2170 (1979); N.Y. ADMIN. CODE tit. 16, §§ 143.15, 275.15 (1983); WIS. ADMIN. CODE §§ PSC 113.133, 134.063 (1980).

36. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-212 (1982); 170 IND. ADMIN. CODE §§ 4-1-17, 5-1-17 (1979); MICH. ADMIN. CODE R. §§ R 460.2165, .2166, .2169, .2181, .2184-.2186, .2191 (1979); NEB. REV. STAT. §§ 19-2705, 19-2174 (Supp. 1982); N.Y. ADMIN. CODE tit. 16, §§ 143.8, 275.8 (1983); WIS. ADMIN. CODE §§ PSC 113.134, 134.064 (1980).

37. *Id.*

review.<sup>38</sup> During this dispute resolution process, a utility company cannot terminate services.<sup>39</sup>

Two other protections afforded consumers pertain to the actual practice of terminating service. First, a utility company cannot terminate service on a day, or the day before, the company's business office is closed.<sup>40</sup> This policy insures that a customer who desires to reinstate service quickly can tender payment without having to wait several days. The second protection prohibits termination of service to a residence when termination would aggravate an existing medical emergency.<sup>41</sup> A statement by a physician or a public health official usually is required to confirm the existence of such an emergency. A medical emergency will extend the pretermination period ten to thirty days.<sup>42</sup>

### III. ANALYSIS

At Congress' urging,<sup>43</sup> some states prohibit utility companies from

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38. *Id.*

39. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-212(B)(1)(c) (1982); CONN. AGENCIES REGS. § 16-3-100(b)(3)(D); 170 IND. ADMIN. CODE §§ 4-1-16(c), 5-1-16(c) (1979); MICH. ADMIN. CODE R. §§ R460.2166, 460.2187 (1979); NEB. REV. STAT. § 19-2708 (Supp. 1982); N.Y. ADMIN. CODE tit. 16, §§ 143.8, 275.8 (1983); WIS. ADMIN. CODE §§ PSC 113.132(1), 134.062(1) (1980).

40. See, e.g., CONN. AGENCIES REGS. § 16-3-100(b)(3)(N); 170 IND. ADMIN. CODE §§ 4-1-16(c), (d), 5-1-16(c), (d) (1979); MICH. ADMIN. CODE R. § R460.2151 (1979); N.Y. ADMIN. CODE tit. 16, §§ 143.5, 275.5 (1983); WIS. ADMIN. CODE §§ PSC 113.132(10), 134.062(10) (1980).

41. See, e.g., ARIZ. ADMIN. COMP. R. § R14-2-211(A)(2)(E) (1982); CONN. AGENCIES REGS. §§ 16-3-100(b)(3)(c), 16-3-100(e); 170 IND. ADMIN. CODE §§ 4-1-16(c), 5-1-16(c) (1979); MICH. ADMIN. CODE R. § R460.2153 (1979); NEB. REV. STAT. § 19-2704 (Supp. 1982); N.Y. ADMIN. CODE tit. 16 §§ 143.12, 275.12 (1983); WIS. ADMIN. CODE §§ PSC 113.132(8), 134.062(8) (1980).

42. See, e.g., ARIZ. ADMIN. COMP. R. §§ R14-2-211(A)(1)(e)(i), R14-2-211(A)(1)(g) (1982) (10-day extension allowed if the customer agrees to enter into a deferred payment plan); CONN. AGENCIES REGS. §§ 16-3-100 (b)(3)(c), 16-3-100(c) 16-3-100(e) (renewable 15-day extension if the customer agrees to an amortization plan for the outstanding amount); 170 IND. ADMIN. CODE §§ 4-1-16(c), 5-1-16(c) (1979) (10-day extension renewable for up to 20 days); MICH. ADMIN. CODE R. § R460.2153 (1979) (21-day extension); NEB. REV. STAT. § 19-2704 (Supp. 1982) (30-day extension); N.Y. ADMIN. CODE tit. 16, §§ 143.12, 275.12 (1983) (15-day extension); WIS. ADMIN. CODE §§ PSC 113.132(8), 134.062(8) (1980) (21-day extension renewable for up to 42 days).

43. Congress enacted the Public Utility Regulatory Policies Act of 1978, 15 U.S.C. §§ 3201-11 (1982), 16 U.S.C. §§ 2601-45 (1982), to promote the conservation of electric energy and natural gas. A portion of the Act requires each state's utility regulatory agency and non-regulated utilities to make a determination as to whether it would be in the state's interest to adopt and implement any of several rate designs and regulatory standards promulgated by the Act. 15 U.S.C. § 3203 (1982), 16 U.S.C. § 2623 (1982).

terminating service during the winter months or when the temperature falls below a certain level.<sup>44</sup> Connecticut even requires a utility to reinstate service during these periods to consumers who have had their service disconnected but still cannot pay their outstanding balance.<sup>45</sup> The rationale of these provisions clearly reflects a legitimate concern: the danger to the life and health of those without heat during extremely cold weather.<sup>46</sup>

At first glance, these provisions appear inequitable. They require a utility company to provide services to nonpaying customers. At common law, most courts were sympathetic to this reasoning and permitted the utility to terminate service upon non-payment.<sup>47</sup> Given the typical rate-making formula,<sup>48</sup> however, and the relatively low elastic-

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The states are not required to adopt or implement any of these standards; they are free to adopt any standard so long as they comply with the Act's regulations concerning the procedures that state commissions must follow when acting on proposed federal standards. For a discussion of the Act's constitutionality see Comment, *Federal Energy Regulatory Commission v. Mississippi*, 33 *DRAKE L. REV.* 195 (1983-84). The pertinent part of the Act's regulatory standards reads:

1) No gas (electric) utility may terminate natural gas (electric) service to any gas (electric) consumer except pursuant to procedures described in section 3204(a)/(2625(g)) of this title . . .

2) during any period when termination of service to a gas (electric) consumer would be especially dangerous to health, as determined by the State regulatory authority . . . and such consumer establishes that—

A) he is unable to pay for such service in accordance with the requirements of the utility's billings, or

B) he is able to pay for such service but only in installments, such service may not be terminated.

15 U.S.C. § 3204(a) (1982), 16 U.S.C. § 2625(g) (1982).

44. See *supra* note 4 and accompanying text.

45. *CONN. GEN. STAT.* § 16-262c(b)(1) (1983).

46. See *supra* text accompanying notes 6-9. Other accounts noted by the press include: *Aged Man Dies; Home Lacked Heat*, *St. Louis Globe-Democrat*, Dec. 23, 1983, at 1, col. 4; *Man Seventy-One Freezes to Death After Utility Shuts Off Gas*, *Boston Globe*, Feb. 19, 1974, at 17, col. 1.

47. See *supra* notes 5, 10-13 and accompanying text.

48. Utility companies are guaranteed a certain amount of revenue based on a formula used by regulatory agencies. The formula reads as follows:

$RR = E + rr(v - d)$ , where:

RR = Revenue Requirement

E = Expenses

rr = rate of return

v = valuation of plant investment

d = depreciation

Edwards and Matthews, *Ratemaking: Fair Value vs. Original Cost—Contemporary Problems*, 24 *HOWARD L.J.* 151, 153 (1981). Thus, the utility recovers its operating

ity of demand<sup>49</sup> these bad debt expenses normally are passed on to "paying" consumers in the form of higher rates.<sup>50</sup>

This cross-subsidization<sup>51</sup> of utility service presents the actual inequity. The inequity lies not, however, in the fact that those that "have" provide for those that "have not," for this is consistent with the nation's general philosophy favoring income redistribution.<sup>52</sup> Rather, the inequity arises from the fact that those who rely on alternative sources of energy<sup>53</sup> do not shoulder a proportionate share of the burden imposed by the increased rates because they use a share of utility-supplied energy<sup>54</sup> that is disproportionate to that used by the average consumer.

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expenses and also earns a rate of return on its capital investment. Utility rates are then based upon this revenue requirement. T. GRONIGER, *PUBLIC UTILITY RATEMAKING* 166 (1928). See also, A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 45-51 (1969); F. WELCH, *CASES AND TEXT ON PUBLIC UTILITY REGULATION* 256-58, 437-44 (1968).

49. J. HIRSCHLEIFER, *PRICE THEORY AND APPLICATIONS* 135 (2d ed. 1980). The price elasticity of demand is defined as "the proportional change in the quantity purchased divided by the proportional change in price." *Id.* at 133. If a product or a service has a low elasticity of demand, consumers will not decrease their consumption after an increase in price by as much as they would with a product or service having a high elasticity of demand. *Id.* at 126-36.

50. Bad debt expenses are part of the operating expenses contained in the rate-making formula. These expenses, therefore, partially determine the revenue requirement and hence, play a role in determining utility rates. As bad debts increase, rates will also increase. See *supra* note 48; *Chambersburg Gas Co. v. P.S.C.*, 116 Pa. Super. 196, 224-25, 176 A. 794, 805 (1935) (bad debts recognized as part of operating expenses within the rate-making formula); C. PHILLIPS, *THE ECONOMICS OF REGULATION* 401 (1969).

For example, a Utah utility company's primary concern while considering a regulation prohibiting service termination was the effect of the proposed regulation upon utility rates. *Utah-Major Gas Distributor Experiences Decline in Shutoffs*, *supra* note 4, at 50.

51. Cross-subsidization, as used herein, refers to situations where profitable operations provide the revenue to offset other unprofitable operations. For example, cross-subsidization can occur in other areas of utility service, where a company is required to provide service to a small rural area whose revenue does not pay for the full cost of the installation and service, thereby requiring users in the larger areas to subsidize the loss. C. PHILLIPS, *supra* note 50, at 401.

52. See generally J. LAPATRA, *PUBLIC WELFARE SYSTEMS*, 130-46 (1975). An example of the income redistribution philosophy is the graduated federal income tax. 26 U.S.C. § 1 (1982).

53. Examples of alternative sources of energy are solar, wood, and kerosene. The actual number of alternative energy users is surprisingly large. According to the Bureau of the Census' 1981 *Annual Housing Survey*, 25.3% of all households use nonutility supplied energy in the primary heating system in their dwelling. 1983 DEPT. OF ENERGY-ANN. ENERGY REV. 19.

54. Some alternative energy users, such as owners of solar energy units, do not use

Thus, the current system allows alternative energy users to "free-ride" at the expense of most consumers.<sup>55</sup>

As rates inevitably increase<sup>56</sup> during this subsidization process, a major problem arises. Climbing rates could force some paying consumers into the group of nonpaying consumers. In addition, other consumers that are not actually priced out of paid service will choose cheaper, alternative sources of energy. Both of these results further decrease the group of "paying" consumers and the accompanying loss of revenue will increase rates to an even higher level. This cyclical process could significantly increase the number of people who comprise the nonpaying group and the number of people requiring financial assistance.<sup>57</sup>

The final problem with this subsidization process is that it fosters economic inefficiency. Generally, as the price of a good or service decreases, the quantity a consumer will purchase for use increases.<sup>58</sup> This is especially true with regard to energy.<sup>59</sup> Thus, with the incen-

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any utility-supplied service; those who use wood or kerosene to heat their homes may continue to use utility service for cooking, lighting, and other non-heating tasks. In either case, these alternative energy users consume much less utility supplied service than used by the ordinary consumer.

55. The "free-rider" concept in economics involves individuals who attempt to avoid personal expenditures for a good, hoping that others will provide the necessary expenditure for them. "In short, individuals will tend to try to take a 'free ride' at the expense of his neighbours." Inland, *The Calculus of Philanthropy*, in *THE ECONOMICS OF CHARITY* 66 (1973). See also Coase, *The Lighthouse in Economics*, 17 *J.L. & ECON.* 357 (1974).

56. See *supra* notes 48-50 and accompanying text.

57. This absurd result obviously violates the most basic of welfare objectives: to provide for those that are without the necessities of life. "Every simple economic reform inflicts a loss upon some people. Reforms should have the characteristic that they will allow a compensation to balance the loss and still show a net advantage." J. LAPA-TRA, *supra* note 52, at 135.

58. J. HIRSCHLEIFER, *supra* note 49, at 27-28.

59. M. WEIDENBAUM, *BUSINESS, GOVERNMENT, AND THE PUBLIC* 119 (1981). The pattern of energy consumption by Americans demonstrates this phenomenon. The Eisenhower Administration's import quotas on oil, along with the Federal Power Commission's 1954 practice of setting wellhead prices for natural gas at levels substantially below market prices, encouraged greater domestic consumption of energy and *economic inefficiency*. The nation on balance consumed far more oil and natural gas than it would have consumed under a free market system. *Id.* at 115-20. Statistics support this conclusion. From 1973-1976, after the 1973 oil embargo and during an escalation in the world price of oil, consumption in the United States rose by 1%. In countries where consumers paid the world price, as opposed to a governmentally controlled price, consumption declined. For example, in the United Kingdom, consumption decreased 17%, in West Germany consumption decreased 7.6%, in France consumption decreased

tive to conserve removed, nonpaying consumers will tend to use more energy than they would if they had to pay for the service.<sup>60</sup> This phenomenon will accelerate depletion of nonrenewable energy resources and increase the amount paying consumers must contribute to meet rate increases.

IV. ALTERNATIVES

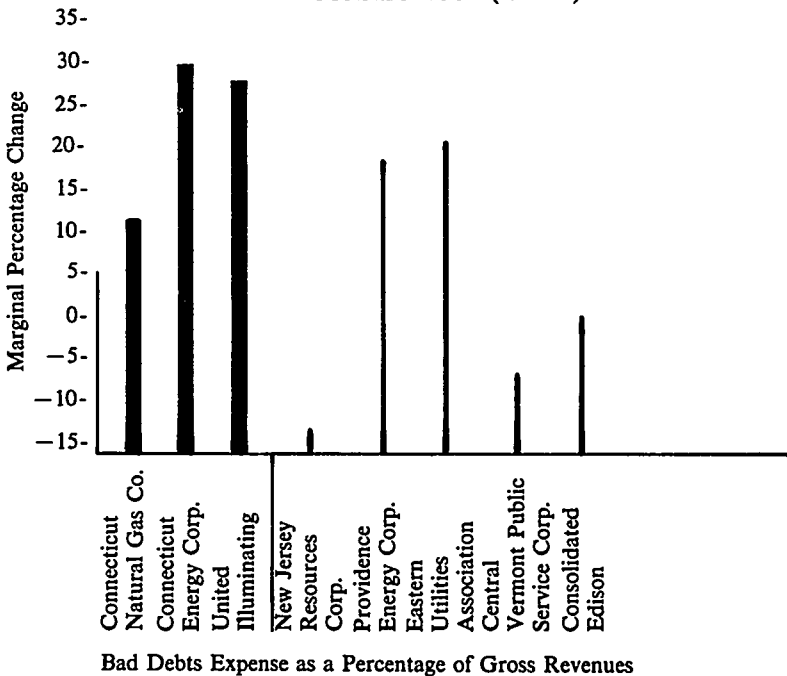
Alternative action by both the government and the private sector

6.5%, and in Japan consumption decreased 5%. G. SHULTZ & K. DAM, *ECONOMIC POLICY BEYOND THE HEADLINES 180-88* (1977).

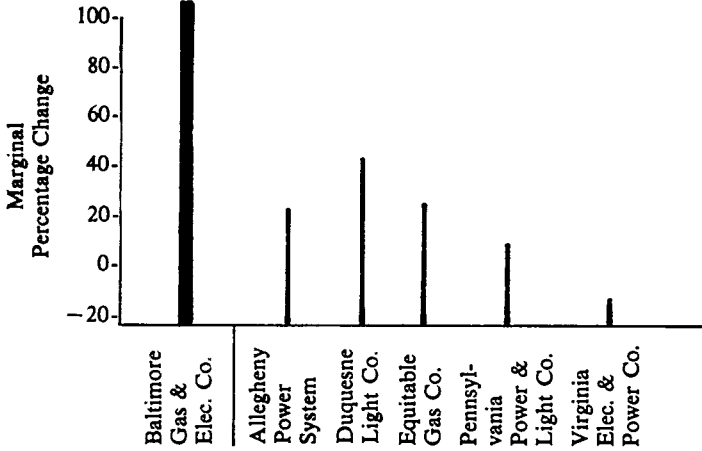
60. Charts A and B below demonstrate that during the period of Maryland and Connecticut's moratorium on shut-offs, utility companies in these states experienced a much higher level of bad debts expense than that experienced by utility companies in surrounding states.

Chart C illustrates the decline in bad debt expenses after the Maryland public service commission lifted the moratorium. Furthermore, this decline occurred when bad debt expenses at many utility companies in the surrounding area increased.

CHART A  
CONNECTICUT (1981-83)

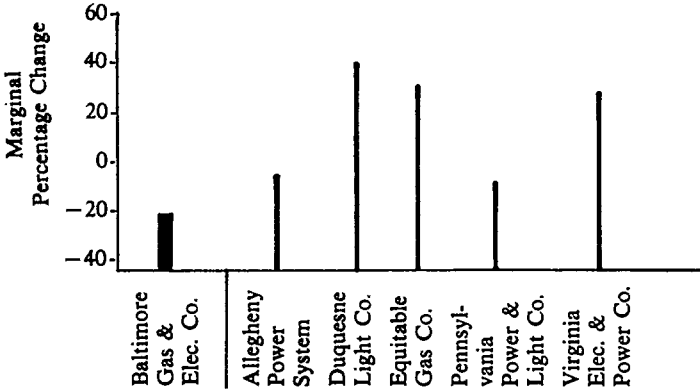


**CHART B**  
**MARYLAND (1977-79)**



Bad Debts as a Percentage of Gross Revenues

**CHART C**  
**MARYLAND (1979-81)**



Bad Debts as a Percentage of Gross Revenue

Compiled from S.E.C. 10-K Reports on file at the Securities and Exchange Commission, Washington, D.C.

The amount of bad debts expense incurred by the four companies in Connecticut and Maryland is a significant amount; the three companies in Connecticut have incurred \$25.9 million in bad debts since the moratorium was enacted in 1981. Baltimore Gas &

should be considered as a solution to the inequities<sup>61</sup> and economic inefficiencies<sup>62</sup> inherent in the present system. First, instead of the paying consumers absorbing the cost of providing service to the financially disabled, federal, state, and local governments should undertake this task. The government should shift expenditure priorities to eliminate any additional financial burden on taxpayers. If a shifting of expenditures is not feasible, then the public service commissions should decrease utility rates by an amount equal to the necessary increase in taxes. For most consumers this would not result in an increased financial burden and would eliminate the inequity that exists by equalizing the contribution from all taxpayers.

This alternative does not, however, eliminate the economic inefficiency that results from nonpaying consumers having no incentive to conserve energy. Instead of these consumers receiving *unlimited* utility service, the state or local government should grant limited assistance.<sup>63</sup> Ideally, the government should strive to develop an administratively feasible system that would provide the approximate amount of service that each consumer needs to maintain a particular comfort level. Under this system, the government could make direct monthly payments<sup>64</sup> to the utility companies for each qualified<sup>65</sup> recipient in an amount equal to the *average* utility usage for that consumer's particular dwelling.<sup>66</sup> Fluctuations in average monthly utility usage due to

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Electric Company alone had \$8.5 million in bad debt expense during the 1977-79 period. *Id.*

61. See *supra* text accompanying notes 51-55.

62. See *infra* text accompanying notes 63-68.

63. Limiting assistance for utility service is consistent with other public assistance programs. For example, the Federal Food Stamp Program only grants recipients a limited amount of stamps to purchase food. 7 U.S.C. §§ 2012(o), 2017(a) (1982).

64. Direct payments to the utility companies would ensure that the assistance program provides the service the government intended.

65. An entitlement criteria is necessary so that "paying" consumers are not included in the group that receives utility assistance. For example, Connecticut prohibits termination in "hardship" cases, defined as: "a) a customer receiving local, state, or federal public assistance, and b) a customer whose sole source of financial support is Social Security, Veterans Administration or unemployment compensation benefits." CONN. GEN. STAT. § 16-262c(b)(1) (1983).

Requiring entitlement to a separate assistance program decreases a program's administrative costs because administrators do not have to independently determine the financial merit of each claim.

66. Computing a monthly wage usage average should not present a problem for the utility companies given the present capabilities of computerized record keeping.



outside temperature would require payment adjustments.<sup>67</sup> Consumers would then have to pay for any usage beyond the amount the government provides or face temporary termination for nonpayment.<sup>68</sup>

Temporary heat shelters are another alternative that state and local governments should consider.<sup>69</sup> These shelters provide the necessary heated environment at a lower per capita cost than is required for heating individual dwellings. Such an arrangement not only grants the needed assistance to those individuals who cannot make any payments exceeding the governmentally provided amount, but also helps those that have not yet qualified for assistance.

Greater assistance in the insulation of homes and apartments is also needed. This type of aid significantly reduces heating costs so that some consumers could then pay their entire bill. Several utility companies already have initiated such assistance, providing free or low-cost installation service.<sup>70</sup> Some companies also offer advice and consultation through energy workshops.<sup>71</sup>

The government also should require level payment plans like the plans adopted in Georgia.<sup>72</sup> These plans permit a consumer to pay equal monthly bills. The company estimates a yearly utility usage cost and divides that by twelve to arrive at the monthly bill amount.<sup>73</sup> Such plans eliminate the burden on fixed income consumers who face winter bills that are much greater than other monthly bills. While many utilities currently offer this service, the state public service commissions should require all utilities to provide such plans.

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67. For example, if a community used 10% more energy in a particular month than the previous average for that same month, then the government would increase utility payments by 10%.

68. Termination in this instance would only last until the government made its next monthly payment.

69. The City of St. Louis, Missouri, currently provides such shelters under its "Operation Weather Survival." The Disaster Operations Department works closely with private charities in establishing shelter sites. The city makes public facilities available after private shelters become filled. Interview with Chuck Badgett, Deputy Director of the Disaster Operations Department of St. Louis (July 27, 1984).

70. See, e.g., *Connecticut-Major Conservation Programs Offered*, PUB. UTIL. FORT., March 3, 1983, 48, 48-49; *Maryland-Innovative Fuel Assistance, Conservation Programs Undertaken*, supra note 4, at 50.

71. See, e.g., *Kansas-Cutoffs Limited by Utility's Customer Assistance Program*, supra note 4, at 49; *Minnesota-Energy Workshops, Energy Bank, Among Programs Available to Ratepayers*, PUB. UTIL. FORT., March 3, 1983, 50, 50.

72. *Georgia-Commission Issues Regulations on Service Shutoffs*, supra note 4, at 49.

73. *Id.*

Finally, private donations can provide substantial assistance. Several utilities have made large contributions from retained earnings toward funds established to assist in the payment of winter heating bills.<sup>74</sup> In Minnesota, one utility company mailed pledge cards to customers asking how much they would care to contribute monthly to such a fund.<sup>75</sup> Each customer then had that amount added to his bill; the effort resulted in the collection of more than \$250,000.<sup>76</sup>

## V. CONCLUSION

In the last ten years the various branches of government have established numerous safeguards and protections for residential consumers of utility-supplied energy. The common law rationale for permitting utility shut-offs—that a denial of this right would result in great expense to the utility companies—no longer applies to the present system of guaranteed rates of return.<sup>77</sup> Statutes and administrative regulations that prohibit termination of energy services during the winter months provide nonpaying consumers with unlimited utility service during this season and no incentive to conserve energy. Such a system is illogical, inequitable and inefficient. State and local governments should now oversee the social policy of providing utility service to the poor, ensuring the protection of health, but without permitting waste of limited resources.

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74. See, e.g., *California-Innovative Program Provided by the Nation's Largest Utility*, PUB. UTIL. FORT., March 3, 1983, 48, 48; *Maryland-Innovative Fuel Assistance, Conservation Program Undertaken*, *supra* note 4, at 49-50. Because the contributions are from retained earnings they do not represent an expense that is passed on to the consumer.

75. *Minnesota-Energy Workshops, Energy Bank, Among Programs Available to Rate-payers*, *supra* note 71, at 50.

76. *Id.*

77. See *supra* notes 48-50.