DUE PROCESS RESTRAINTS UPON TERMINATION OF SERVICE BY A MUNICIPAL UTILITY

The application of the due process clause has recently been expanded by the Supreme Court to cover new types of property interests.[1] Despite this expansion, the application of due process protection to utility service and the constitutional adequacy of utility termination procedures remain subject to doubt. In *Craft v. Memphis Light, Gas and Water Division*,[2] the Sixth Circuit determined that due process applies to the acts of municipal utilities. In addition, it held that the utility's termination procedures did not meet the minimum requirements of the fourteenth amendment.[3]

The plaintiffs in *Craft* contested the validity of their utility bills and refused to pay.[4] As a result of this nonpayment, their utility service

1. The concept of entitlement is one new form of property interest developed by the federal courts and protected by the due process clause. *See* note 17 *infra*. For the academic origins of this concept, see Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). The courts have used entitlement analysis to protect a wide variety of governmental benefits from termination by administrative discretion. *See* note 17 *infra*.

2. 534 F.2d 684 (6th Cir. 1976).

3. *Id.* at 687-89. The defendant utility's termination procedures consisted of the following: (1) If the bill was not paid within twenty-four days after the meter reading, a notice was sent out by regular mail stating that service would be terminated in approximately four days if no payment was received or some provision was not made for payment of the outstanding balance. A flyer was attached to the notice informing the subscriber that if he had difficulty paying the bill to contact the credit department. The flyer also included an appropriate neighborhood location for credit assistance. No mention was made of any right to dispute a bill. (2) Electricity was usually terminated by the meter reader four days after the final notice. While the meter reader was required to attempt to contact the customer to see if payment was in the mail, the defendant conceded that no personal notice was given in nearly half of the terminations by the utility. *Id.* (3) Approximately five days after the electricity cutoff, the gas and water were terminated if the customer had not paid the bill or made other plans for payment. The defendant had no established procedures to deal with disputed bills except those procedures set up in connection with its credit and collection department, which dealt almost exclusively with the company's extended payment plan. Petitioner's Brief for Certiorari at 34-35, Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684 (6th Cir. 1976).

4. Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 685 (6th Cir. 1976). Two of the plaintiffs, Mr. and Mrs. Willie Craft lived in a dwelling which they used as a

was terminated by the defendant utility company without notice or prior hearing.[5] After considering class action[6] and equal protection[7] issues, the court reaffirmed its decision in *Palmer v. Columbia Gas*[8] by holding that the defendant's termination procedures violated due process through inadequate notice and lack of formalized procedures to resolve customer complaints.[9]

single-family unit. They noticed, however, that the residence had previously been used as a duplex and included two separate gas and electric meters. The Crafts had a private contractor combine the two meters in October, 1973, but the defendant continued sending dual bills (including dual city taxes) until January, 1974. Mrs. Craft made repeated attempts to straighten the matter out, but on five separate occasions their utilities were terminated. Petitioner's Brief for Certiorari at 35, Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684 (6th Cir. 1976). For a discussion of other plaintiffs involved, see note 7 *infra*.

5. At no time were the Crafts personally contacted by the utility prior to termination, nor were they allowed to speak to a management level official concerning their problem. Petitioner's Brief for Certiorari at 35, Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684 (6th Cir. 1976).

6. The plaintiffs in *Craft* filed a class action on behalf of all subscribers of the utility. The court affirmed the district court's refusal to certify a class action. The court concluded that as a class asserting a damage claim, there would be no predominant common question of fact as required by Fed. R. Civ. P. 23(b)(3). Furthermore, the court found "no useful purpose to be served" by a class asserting claims to injunctive or declaratory relief since any relief granted would automatically accrue to the benefit of others similarly situated with or without a class action. Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 686 (6th Cir. 1976).

The use of a class action proceeding when attacking utility termination procedures has received varying treatment by other courts. *See, e.g.*, Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972). *But see* Davis v. Weir, 497 F.2d 139 (5th Cir. 1974); Palmer v. Columbia Gas, 479 F.2d 153 (6th Cir. 1973); Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976); Cottrell v. Virginia Elec. & Power Co., 62 F.R.D. 516 (E.D. Va. 1974).

7. The equal protection issue arose because of defendant's refusal to initiate service to the third plaintiff Holmes. The defendant's policy was to divide new subscribers into two classes: those who desired service at a residence with an outstanding debt to the utility and those who wished service at a residence free of such debts. The fact that the prospective subscriber had not incurred the debt was irrelevant to the utility.

In this instance, plaintiff Holmes returned to the residence which she previously occupied with another tenant and for which there remained an outstanding utility bill. The defendant refused to initiate service until the full amount was paid, even though the district court had found that Mrs. Holmes was responsible for only a portion of the debt. 534 F.2d at 689. The court of appeals found that these collection policies violated the equal protection clause. *Id.* at 690.

The Sixth Circuit's holding on the equal protection issue followed a similar ruling from the Fifth Circuit. In Davis v. Weir, 497 F.2d 139 (5th Cir. 1974), the court found such a classification to be unconstitutional. "A collection scheme . . . that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relationship to the collection of unpaid water bills from the defaulting debtor." *Id.* at 144-45.

8. 479 F.2d 153 (6th Cir. 1973).

9. 534 F.2d at 687-89. The termination procedures in *Craft* are similar to those procedures challenged in *Palmer*. *See* note 3 *supra*. In *Palmer*, the utility's termination

Before analyzing what procedures satisfy due process, a court must decide whether due process protections are even applicable. In each case, a three step analysis must be made. First, the state action requirements of the fourteenth amendment must be met.[10] In *Jackson v. Metropolitan Edison Co.*,[11] the Supreme Court held that, in most situations, the acts of a privately-owned utility do not constitute state action under the fourteenth amendment.[12] Lower federal courts, how-

procedure involved sending a termination notice if a bill was not paid within five days of the due date. This notice made no mention of any right to dispute a bill. If payment was not made within the prescribed period, an agent was sent out to shut off gas service. This agent was under no obligation to inform the subscriber of the termination. Palmer v. Columbia Gas, 479 F.2d 153, 157-58 (6th Cir. 1973).

10. The fourteenth amendment, by its terms, applies only to state activities. "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. Amend. XIV, § 1. The enforcing statute, 42 U.S.C. § 1983 (1970) reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any 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 proper proceeding or redress.

The Supreme Court has long endorsed this state action analysis, first enunciated in the Civil Rights Cases, 109 U.S. 3 (1883). *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (insufficient nexus between regulated privately-owned utility and state to support a finding of state action).

11. 419 U.S. 345 (1974). Catherine Jackson's service was terminated because of delinquent payments. She opened a new account in the name of James Dodson, another occupant of the residence, and service was restored. Dodson left and no payments were made for service on the Dodson account. Agents of the defendant came to the plaintiff's residence to inquire about Dodson's whereabouts and found that the plaintiff's electricity meter had been altered. Plaintiff denied knowledge of the tampering and requested that service be instituted in the name of her twelve-year old son. Four days later, without further notice, service was discontinued. *Id.* at 347.

12. *Id.* at 353. *See* Note, *Termination of Service by Privately-Owned Public Utilities: The Test for State Action*, 12 URBAN L. ANN. 153 (1976). In doing so, the Court distinguished the case of Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state action exists when a city agency leases property to a restaurant which discriminates against blacks, when the city receives five per cent of the restaurant's profits) by finding that a "symbiotic relationship" of the type found in *Burton* did not exist in *Jackson*. *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club which discriminated against blacks and owned a city liquor license held not to be state action for purposes of the fourteenth amendment).

The majority in *Jackson* did not find a sufficient nexus between the regulated utility and the state to hold the private utilities' acts to be state action. The Court emphasized that the mere fact that a business is subject to state regulation, even extensive and detailed regulation, does not convert that business' acts into state action. 419 U.S. at 350. One must instead look to see if the utility is furnishing a service that is traditionally the exclusive prerogative of the state and also if the allegedly unconstitutional provision has been *expressly* approved by the state. *Id.* at 351-59.

ever, have held with near unanimity that the acts of a municipally-owned utility constitute state action.[13]

Second, the court must determine whether there has been a deprivation of a recognized property or liberty interest that is entitled to due process protection.[14] Prior to *Goldberg v. Kelly*,[15] the Supreme Court narrowly construed the range of protected interests by embracing a rights-privileges distinction.[16] The court now extends due process pro-

Prior to *Jackson*, there had been considerable conflict as to whether a private utility's acts constituted state action. *See, e.g.*, Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir. 1969). *Contra*, Palmer v. Columbia Gas, 479 F.2d 153 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972).

13. *See, e.g.*, Davis v. Weir, 497 F.2d 139 (5th Cir. 1974) (municipal water company acts held to be state action); Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976) (municipal gas company's acts held to be state action). The *Jackson* case is inapposite since it clearly deals exclusively with privately-owned utilities. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974).

14. The due process clause by its express terms applies solely to deprivation of life, liberty and property. U.S. CONST. Amend. XIV § 1.

15. 397 U.S. 254 (1970).

16. This distinction was first enunciated by Justice Holmes in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (policeman dismissed from force for violating regulation which restricted his right of free speech). Holmes stated, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

Stated simply, Holmes's epigram came to mean that while a constitutional right could not be denied without due process of law, any governmental benefit was a privilege and thus unprotected. The Supreme Court repeatedly applied this doctrine. *See e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954) (physician's license suspended for failing to produce certain papers for a House of Representatives' committee); Bailey v. Richardson, 341 U.S. 918 (1951) (dismissal of government employee from non-sensitive position because of suspected disloyalty); Hamilton v. Board of Regents of the Univ. of California, 293 U.S. 245 (1934) (requirement to take military science course as a condition of enrollment upheld); Davis v. Massachusetts, 167 U.S. 43 (1897) (preacher convicted for giving speech in Boston Commons in violation of city ordinance).

Strictly applied, this concept would deny a person all of his constitutional rights if he wished to use them in connection with any governmental benefit. The court mitigated the harshness of the distinction through a series of judicial doctrines. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (receipt of governmental benefit premised on foregoing an explicit constitutional right not allowed); Shelton v. Tucker, 364 U.S. 479 (1960) (governmental benefit premised on a condition which indirectly limits an important constitutional right not allowed); Wieman v. Updegraff, 344 U.S. 183 (1952) (privilege may not be withheld from some but granted to others arbitrarily). Despite these doctrines, the right-privilege distinction limited the effectiveness of the due process clause as a tool to protect individuals against the broad discretionary powers of an increasingly omnipresent government. An historical analysis of the right-privilege bifurcation in government benefit analysis can be found in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court finally abandoned the right-privilege distinction. "The constitutional challenge cannot be answered by an

tection to any property interest that has been "created and its dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[17]

This concept of entitlement has enabled the utility customer to claim that utility service is protected by due process from termination without notice and prior hearing.[18] The Supreme Court in *Jackson v. Metropolitan Edison Co.*[19] expressly refused to consider this claim.[20] Most lower courts, however, have agreed that utility service is a protected entitlement.[21]

Finally a court must determine what procedures are constitutionally sufficient.[22] The Supreme Court has held that where a property interest is involved, a prior judicial hearing is not necessarily required if a later

---

argument that public assistance benefits are a 'privilege' and not a 'right'. . . . Relevant constitutional constraints apply to withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Id.* at 262.

17. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Government benefits are protected as an entitlement under the due process clause if they are not of a *de minimis* nature and are based on mutually explicit rules or understandings between the individual and the government. *Id.* at 571. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 601 (1972). Cases using the concept of entitlement to protect governmental benefits include: Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation); Caulder v. Durham Housing Auth., 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (tenant evictions); Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970) (rent increase); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (governmental contracts).

18. *See* note 21 *infra*.

19. 419 U.S. 345 (1974).

20. *Id.* at 348.

21. *Compare* Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976) *and* Stanford v. Gas Service Co., 346 F. Supp. 717, 721 (D. Kan. 1972) (in both cases utility service was found to be more important than other property interests so it, too, was protected) *with* Davis v. Weir, 328 F. Supp. 317, 321 (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974) *and* Limuel v. Southern Union Gas Co., 378 F. Supp. 964, 967 (W.D. Tex. 1974) (in both cases utility service was protected because of its importance and because of legitimate reliance on continued service by the consumer). *Contra*, Jackson v. Metropolitan Edison Co., 483 F.2d 754, 762 (3d Cir. 1973) (utility service held to be essentially a state concern and thus was not a protected entitlement).

22. At a minimum, due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Exactly what sort of hearing satisfies this requirement is unclear. The Supreme Court has long noted that due process is an extremely flexible concept with fairness as its fundamental tenet. Cafeteria and Restaurant Workers Local 473, v. McElroy, 367 U.S. 886, 895 (1961). *See* note 24 *infra*.

opportunity for full judicial determination of liability exists and is adequate.[23] In determining whether a pre-termination hearing is required, courts generally balance the importance of the interest to the beneficiary against the governmental interest in summary adjudication.[24]

---

23. *See, e.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975); Ewing v. Mytinger & Casselbury, Inc., 339 U.S. 594 (1950). All the above cases rely upon Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) to support that position. The holding of the *Phillips* case, however, is arguably not as broad as the Court later interpreted it to be. All the *Phillips* case may stand for is the right of the government to deprive an individual of a property interest without prior hearing when it is "essential that government needs be satisfied."

Thus, in some situations at least, the government may terminate a benefit without any type of hearing so long as the beneficiary can eventually present his case before a court of law or equity. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (evidentiary hearing not required prior to termination of social security payments); Mitchell v. W.T. Grant, 416 U.S. 600 (1974) (replevin statute without pre-seizure hearing but with judicial oversight of the replevin process valid); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1959) (hearing not required prior to removing potentially dangerous, misbranded goods from stores under Federal Food and Drug Act); Bowles v. Willingham, 321 U.S. 503 (1944) (hearing for landlords not required prior to state enforcement of rent control); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) (hearing prior to state seizure of unused or inactive deposits in banks not required under due process).

24. Board of Regents v. Roth, 408 U.S. 564, 570 (1972) (". . . [A] weighing process has long been part of any determination of the form of hearing required in particular situations by procedural due process."). *Goldberg v. Kelly* expressly involved a balancing test by matching the governmental interest in administrative convenience against the extent to which the welfare recipient could be condemned to suffer grievous loss. The Court decided on the basis of this balancing that a pre-termination hearing was required. 397 U.S. 254, 266 (1970). *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (state interest in protecting claimant against unrecoverable judgment after an auto accident balanced against driver's interest in a hearing to establish fault prior to invalidation of his license); Morgan v. United States, 309 U.S. 1 (1937) (interest of stockyard agencies in hearing prior to price fixing by government balanced against governmental interest in speed and efficiency).

The case of Fuentes v. Shevin, 407 U.S. 67 (1972), *rehearing denied*, 409 U.S. 902 (1972), at first appeared to have abandoned the traditional balancing test in favor of a mandatory pre-termination hearing whenever a "significant property interest" was threatened with termination. While the Court's opinion recognized that an extraordinary situation could require postponement of the pre-termination hearing, three prior conditions had to be met: (1) Seizure was required to secure an important governmental interest; (2) There had been a special need for very prompt action; and (3) The state has kept strict control over its monopoly of legitimate force. *Id.* at 91-92.

Later decisions, however, have indicated a return to the balancing approach. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), upheld a Louisiana replevin statute. The Louisiana statute was similar to the one overturned in *Fuentes* in that neither provided for a pre-termination hearing. Justice Rehnquist, speaking for the majority, emphasized that a pre-termination hearing is not always granted for protection of a property interest. The recent case of Mathews v. Eldridge, 424 U.S. 319 (1976) reaffirmed the return to a balancing test indicated in *Mitchell*. The Court in *Mathews* held that three factors had to

This balancing test, when applied to deprivations of utility service has yielded conflicting results. The Fifth[25] and Sixth[26] Circuits, in addition to several district courts[27] have held that a utility must provide both clear notice of a right to protest a bill and some form of permanent procedures to handle such complaints prior to the cessation of service. The Seventh Circuit in *Lucas v. Wisconsin Electric Power Co.*[28] held the defendant's termination procedures valid despite the lack of an extensive pre-termination hearing. Justice Stevens, writing for the majority, found that due process requirements were satisfied by a right to an informal conversation with a company employee combined with the availability of legal remedies such as a temporary injunction or a suit in tort for improper termination.[29] At least one state court has

be balanced before concluding that a pre-termination hearing was required: (1) The private interest affected; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional safeguards; and (3) the governmental interest, including fiscal and administrative burdens that additional procedures would entail. *Id.* at 901-03.

25. Davis v. Weir, 497 F.2d 139 (5th Cir. 1974). Despite the fact that Willie Davis was current in his rental payments, which included water service, the Atlanta Department of Water Works terminated his service without prior notice. Defective plumbing at the apartment had led to an exorbitant loss of water for which the landlord refused to pay. Davis requested that the defendant be required to inform the actual user of the impending termination of water service and allow the tenant to reinstate service in his own name.

26. Palmer v. Columbia Gas, 479 F.2d 153 (6th Cir. 1973). For a description of the termination procedures involved in *Palmer*, see note 9 *supra*.

27. Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976) (water service of welfare recipient terminated without prior hearing because of delinquent bills); Donnelly v. City of Eureka, 399 F. Supp. 64 (D. Kan. 1975) (utility service termination without hearing because of plaintiff's refusal to pay the refuse collection portion of a utility bill); Limuel v. Southern Union Gas Co., 378 F. Supp. 964 (W.D. Tex. 1974) (gas service terminated when plaintiff refused to pay inordinately high bills due to a gas leak); Bronson v. Consolidated Edison, 350 F. Supp. 443 (S.D.N.Y. 1972) (electricity cut off when plaintiff refused to pay inordinately high bills which utility had established were incorrect); Lamb v. Hamblin, 57 F.R.D. 58 (D. Minn. 1972) (plaintiff's utilities terminated without hearing upon refusal to pay bill of a prior tenant).

28. 466 F.2d 638 (7th Cir. 1972) (en banc). Alvin Lucas alleged that he had paid his monthly bill on December 23, 1969, but had not received a receipt. Thereafter he paid current charges but refused to pay the alleged arrearance. The utility's disconnection procedures, approved by the Wisconsin Public Service Commission, provided for a written notice stating the amount owed and the date of termination. If at the end of that period the debt had not been paid, service was disconnected without further notice to the consumer.

29. *Id.* at 652. The court reasoned that a subscriber can always speak to a company official about a bill. While this allows the utility to judge its own case, the inherent bias of the official is balanced by the desire to avoid costly litigation and to keep the subscriber as a paying customer. Also, while an official may be biased, the company's accounting record must deal "impartially with all customers." While such a hearing

agreed with the Seventh Circuit.[30]

The Sixth Circuit in *Craft* considered both the state action and property interest questions before finding utility service to be a protected entitlement. First, the court found state action in that the defendant utility was municipally owned.[31] In so doing, Judge Peck rejected the defendant's claim that municipal ownership is irrelevant if the utility behaves exactly as a private utility does.[32] While such an argument is logically compelling in light of the *Jackson* decision, the Supreme Court has long recognized that mere difference in ownership is, in fact, the key to invoking the fourteenth amendment.[33]

Second, the court in *Craft* held that utility service is a protected entitlement.[34] This simple assertion, however, does not substitute for the proper analysis. The correct test of whether a benefit is protected by due process is whether the interest is not of *de minimis* nature and is

---

alone might not satisfy due process, an aggrieved customer always may resort to legal remedies. Thus, the consumer always has the opportunity for a full judicial hearing. *Id.* at 647-52. A notice of disconnection which includes only the amount due and the date of termination is sufficient to satisfy due process since a customer may call the utility to inquire about a bill. In addition, the customer is assumed to know his legal rights. The five-day period between notice and termination is sufficient time for one to call the utility or initiate legal action. *Id.* at 652-53.

30. Turner v. Rochester Gas and Elec., 74 Misc.2d 745, 345 N.Y.S.2d 421 (Sup. Ct. 1973); Goldenthal v. N.Y. Tel. Co., 68 Misc.2d 749, 327 N.Y.S.2d 732 (Sup. Ct. 1972).

31. Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 687 (6th Cir. 1976).

32. *Id.* The utility contended that under its charter, it operated exactly as a private utility does in that it is required to set rates to meet its operating expenses and has no governmental immunity. It also contended that the only difference between it and a private utility is that its rates are set by the municipality while a private utility's rates are approved by a public commission. As a result, defendant argued that the court should not hold, as a general rule, that mere difference in ownership subjects it to constitutional constraints from which a private utility is immune.

33. *See* notes 10-12 and accompanying text *supra*. At least one commentator has recognized that Justice Rehnquist's decision in *Jackson* is a clear indication of the Court's view of the importance of procedural due process in utility service termination procedures. The Court's reasoning, as Justice Marshall noted in dissent, would seem to imply that a private utility could legally provide service only to people of certain races or religions. Since such a result is virtually unthinkable, the Court's narrow interpretation of state action may only be a "shorthand phrase" obscuring an analysis far more sophisticated than merely looking for a sufficient quantum of state involvement in otherwise private conduct. The underlying question is not whether state action exists, but whether there is state action that violates a constitutional right. The Court's negative response to that question in *Jackson* is, perhaps, indicative of how it would deal with a case like *Craft* involving a municipal utility. Note, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817, 824-27 (1975).

34. 534 F.2d at 687.

secured by existing rules and understandings.[35] Most courts that addressed this problem adopted this form of analysis.[36] The failure of the Sixth Circuit to do likewise is inexplicable since it could easily have reached the same conclusion.[37]

The most critical issue which the *Craft* case raises is the need for an extensive hearing prior to termination of utility service. The Sixth Circuit in *Craft* endorsed procedures which would grant the utility customer extensive due process protection. The procedures, adopted from *Palmer*, require that: (1) Prior to any termination the adult involved must be personally contacted; (2) if the client has mailed in or disputes the bill, no disconnection may occur for twenty-four hours; (3) if the client fails to contact the company within that time, service may be disconnected; (4) if the client does contact the company then

35. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). Courts further confuse the question of protected interests when they hold utility service subject to due process protection merely because of its importance in relation to other protected entitlements. This analysis confuses the weight of the interest with its fundamental nature. Perry v. Sindermann, 408 U.S. 593, 601 (1972). The only court to deny that utility service is a protected entitlement based its conclusion on this weighing of interests analysis. Jackson v. Metropolitan Edison Co., 483 F.2d 754, 759-60 (3d Cir. 1973).

36. *See, e.g.*, Condosta v. Vermont Elec. Coop., 400 F. Supp. 358 (D. Vt. 1975); Donnelly v. City of Eureka, 399 F. Supp. 64 (D. Kan. 1975); Limuel v. Southern Union Gas Co., 378 F. Supp. 964, 967 (W.D. Tex. 1974); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972); Davis v. Weir, 328 F. Supp. 317, 321 (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974). All of the above cases found utility service to be protected by due process.

A few courts have chosen to approach this problem by holding that utility service is a vital element of a livable home and thus is subject to the same protection as housing. *See* Escalera v. New York Housing Auth., 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970). It is clear that housing in an urban environment has come to mean more than four walls and a roof. It includes utilities, safe access and reasonable maintenance and repair. When a tenant rents an apartment an implied part of the rental agreement is that the premises will be fit for habitation during the duration of the lease. Without utilities, no urban residence could be considered habitable. Davis v. Weir, 497 F.2d 139 (5th Cir. 1974). *See also* Green v. Superior Ct., 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175 (1974).

The Supreme Court has, however, refused to make housing a protected fundamental interest under "new" equal protection. The Court found that despite the importance of decent, safe and sanitary housing, nothing in the Constitution guarantees people access to dwellings of a particular quality. The assurance of adequate housing, it held, is a legislative, not a judicial function. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

37. Overall, the analyses used by courts to support the concept of utility service as a protected entitlement have been neither complete nor compelling. *See* notes 35 and 36 *supra*. It is arguable that utility service is not an entitlement at all since the consumer is simply buying a product and not receiving any type of governmental benefit. One could respond to this reasoning by noting that all governmental benefits (*e.g.*, driver's license, unemployment compensation, social security) are paid by the consumers' taxes. Arguably, it is irrelevent that utility service is paid for directly, while social security is paid for indirectly through taxes.

there may be no disconnection until the customer speaks to a management level official; and (5) if a dispute persists after such a conversation, then the client may post a surety bond and litigate.[38]

These procedures allow a consumer adequate notice of a right to protest a bill and give him an opportunity to discuss his complaint with an official of higher rank than the one who ordered the termination. Unfortunately, the hearing it provides is deficient in two respects. First, it does not provide for an impartial arbitrator to guard against the bias inherent in an organization ruling on its own case.[39] Without an independent hearing officer, the consumer is dependent upon the good faith of the utility. It would be unreasonable to rely upon such a hearing to determine the probable validity of the utility's action.[40] Second, the hearing is not adversary in character. The consumer has no right to confront witnesses and examine relevant information.[41]

Despite these deficiencies, the procedures endorsed in *Craft* are a considerable improvement over those found acceptable by the Seventh Circuit in *Lucas*.[42] Constitutionally sufficient notice must inform the recipient of a right to a hearing, not merely state a date of termination.[43] The *Lucas* court's reliance upon judicial remedies to protect the utility consumer is unfounded for several reasons. First, a temporary

38. Palmer v. Columbia Gas, 479 F.2d 153, 159-60 (6th Cir. 1973). *See also* THE NATIONAL CONSUMER LAW CENTER, INC., MODEL RESIDENTIAL UTILITY SERVICE REGULATION (1974). The model regulations have been developed in response to court decisions such as *Craft*. The regulations in articles five, six and seven grant utility customers a full pre-termination evidentiary hearing, but only as a last resort. The authors favor resolution by an informal hearing process with an impartial complaint officer selected by the state or municipal regulatory agency.

39. The right to an impartial judge is a key element of due process. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 671 (7th Cir. 1972) (Sprecher, J., dissenting). *See also* Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 391 (1973).

40. The pre-termination hearing's only function is to produce an initial determination of the validity of the grounds on which the discontinuance is based. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

41. The abuses of juvenile courts and *in loco parentis* theories demonstrate the inherent danger in informal adjudicatory procedures. McCormack, *The Purpose of Due Process: Fair Hearing or a Vehicle for Judicial Review*, 52 TEX. L. REV. 1257, 1262 (1974). The defects of this hearing process might be alleviated by including a second hearing after the informal conversation with the management level official. This second hearing would be adversary in nature and presided over by an impartial judge. If, after this hearing, a customer was still dissatisfied, he could resort to the legal remedies discussed by Justice Stevens in *Lucas*.

42. *See* notes 28-29 and accompanying text *supra*.

43. Palmer v. Columbia Gas, 479 F.2d 153, 166 (6th Cir. 1973).

injunction is difficult to obtain.[44] This especially affects the poor who often do not have the funds to initiate any legal action or are too ignorant of the judicial system to recognize that such a right exists.[45] Second, the option to pay in protest and then sue for a refund or to file a tort action for improper termination is inappropriate because it forces the debtor to initiate and bear the cost of legal action instead of the creditor.[46]

The utility, of course, has a legitimate interest in summary adjudication and administrative efficiency. The Supreme Court, however, has often held that administrative efficiency cannot be used as an excuse to limit due process protection of a vital property or liberty interest.[47] In addition, little hard evidence exists to support the utility's contention that a formal hearing process would result in a deluge of complaints making daily functioning of the utility impossible.[48] The hearing procedure can also be made flexible enough to discourage frivolous claims while allowing clients with real complaints an opportunity to be heard.[49]

---

44. An injunction is a particularly burdensome and expensive remedy. The litigant must establish a right to be protected, inadequacy of remedies at law, irreparable injury and a likelihood of prevailing on the merits. Lamb v. Hamblin, 57 F.R.D. 58, 63 (D. Minn. 1972). In addition, the customer has no guarantee that he will get a hearing prior to the termination even if he does initiate the injunctive action. Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 393 (1973).

45. The Supreme Court has recently looked with disfavor upon taking advantage of the poor who have little access to legal assistance and little familiarity with legal procedure. Fuentes v. Shevin, 407 U.S. 67, 83 (1971). *See also* Pabst Corp. v. City of Milwaukee, 193 Wis. 522, 527, 213 N.W. 888, 890 (1927) (cost of a proceeding in equity so out of proportion to the amount involved as to be prohibitive in utility termination case). *Contra*, Jackson v. Metropolitan Edison, 483 F.2d 754, 760 n.11 (3d Cir. 1973) (district magistrates and small claims courts allow the consumer to present his case at little expense).

46. "To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure . . . that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof." Wood v. Auburn, 87 Me. 287, 293, 32 A. 906, 908 (1895) (water company may not terminate service for nonpayment of an old disputed bill after it accepts payment on later bills; it must go to court to enforce its claim).

47. Fiallo v. Bell, 97 S.Ct. 1473 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Mathews v. Lucas, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting); Hampton v. Mow Son Wong, 426 U.S. 88, 116 n.48 (1976).

48. Despite the ten thousand service disconnections by the Wisconsin Electric Co. in one year, only 71 persons went so far with their disputes as to contact the public utility commission or a public utility officer. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 672 (7th Cir. 1972)(Sprecher, J., dissenting).

49. Lamb v. Hamblin, 57 F.R.D. 58, 63 (D. Minn. 1972). Improper decisions to terminate a state benefit are not uncommon. An empirical study in Wisconsin revealed

The *Craft* case represents an increasing trend in the federal courts to require a utility to provide some type of formalized hearing prior to termination of a vital service.[50] The attitude of the Sixth Circuit is a realistic and necessary one given the importance of utilities in modern urban life[51] and the overwhelming power of the utility against the individual consumer.[52] While flawed, it represents the most extensive protection that the federal courts have been willing to grant to the aggrieved consumer.

Bennet Rodick

---

that administrative decisions to terminate welfare benefits have been reversed with considerable frequency. *See* Handler, *Justice for the Welfare Recipient: Fair Hearing in A.F.D.C.—The Wisconsin Experience*, 43 SOC. SCI. REV. 12, 22 (1969).

50. *See* notes 25-27 *supra*.

51. *See* note 3 *supra*. The utility cutoff is particularly improper because, unlike the garnishment of wages or replevin, it does not provide a fund from which a claim can be fully repaid, nor is there any relation between the value of the property and the amount owed. Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973). In addition, damages cannot repay the consumer for the period of time he was forced to live without utility service. Fuentes v. Shevin, 407 U.S. 67, 81-82 (1971).

52. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 668 (7th Cir. 1972) (Sprecher, J., dissenting). The dependence of the consumer on the utility's services provides the utility with an overwhelming bargaining advantage. Discontinuance can be used to force a customer to pay a bill where there is a *bona fide* dispute concerning its validity. Note, *The Duty of a Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 326 (1962). *See also*, Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 391 (1973); Note, *Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.-.U.L. REV. 493 (1973).