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Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities

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V. CONCLUSION

Absent agreement between the parties, determination of state and local employees' bargaining units has been left to the discretion of the State Board of Mediation. Although it is difficult to tell how effective this arrangement has been, few complaints have been voiced. As public employment swells¹⁶⁰ and becomes more organized, however, it is questionable if the Board's machinery and procedure will be sufficient. The Legislature, with the aid of a special commission to make recommendations,¹⁶¹ should study the problem and establish the Missouri public policy in this area more specifically.¹⁶²

ROSS ESHELMAN

 CONSTITUTIONAL RESTRICTIONS ON TERMINATION OF SERVICES BY PRIVATELY OWNED PUBLIC UTILITIES

I. INTRODUCTION

Recent years have witnessed a definite judicial trend towards expanding the impact of 14th amendment procedural due process. Procedural due process requires that states, or entities acting under color of state law, give notice and an impartial hearing to certain classes of adversely affected parties prior to the termination of privileges, benefits, services, entitlements, or rights.¹ This comment will consider whether privately owned public utilities, particularly in Missouri, engage in "state action" or act under "color" of state law, thus requiring them to extend to their subscribers the procedural due process protections mandated by the 14th amendment.² To the extent state action exists, the scope and nature of these constitutional requirements will be examined.

160. For an exhaustive study of probable increases in state and local employment generally see R. EHRENBERG, *THE DEMAND FOR STATE AND LOCAL GOVERNMENT EMPLOYEES* (1972).

161. Special commissions have been used in several states. For a discussion of some of the results see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).

162. See text accompanying notes 142-44 *supra*.

1. Note, *Constitutional Law—Public Utilities—The State Action and Due Process Doctrines*, 14 B.C. IND. & COM. L. REV. 317 (1972).

2. Private parties wishing to assert rights protected by the fourteenth amendment usually bring their actions pursuant to 42 U.S.C. §1983 (1970). Section 1983 was enacted under the authority of the fourteenth amendment; it provides private parties with remedies for violations of the fourteenth amendment by actions taken by authorities under "color of any statute, ordinance, regulation, custom, or usage of any State or Territory." Although the language of § 1983 appears broader than the language in the fourteenth amendment, which refers only to the "state," the Supreme Court has held that in cases under § 1983, "under color" of law "has consistently been treated as the same thing as the state action under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). See also *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Smith v. Holiday Inns of America, Inc.*, 336 F.2d

II. THE PLIGHT OF THE UTILITY SUBSCRIBER

Existing Missouri law provides little protection for the privately owned public utility subscriber who is threatened with termination of service for a mistaken or unjust reason.³ For example, consider the subscriber who believes his latest bill overcharges him. He has three traditional remedies: he can either sue to enjoin the utility from terminating service, wait until services are terminated and then sue the utility in tort for the resulting damage, or pay the charges under protest and sue for a refund.⁴ The problem with these traditional approaches is that the amounts of money at stake are usually small but the cost of litigation is high. Furthermore, most individuals are wary of challenging a large public utility with its full arsenal of legal remedies and virtually unlimited resources. It is no wonder that, as a practical matter, disputes over small sums are not litigated.⁵

A potential alternative for the subscriber might be to seek the assistance of the Missouri Public Service Commission (hereinafter PSC). The PSC's Rules of Practice and Procedure provide for formal and informal complaints.⁶ The effectiveness of these administrative remedies is limited, however. There is no assurance that the PSC will act on an informal complaint, and it is problematic for a subscriber to find the requisite 24 subscribers to join him in a formal complaint. In addition, the general public is unaware of the existence of the PSC's Rules of Practice and Procedure. In short, a subscriber may have no effective means to challenge a utility's termination of his service. The obvious result of this impotence is that the subscriber will often pay his bills to preserve a necessary service, though convinced it is unfair.⁷

630 (6th Cir. 1964); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963); *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945).

3. MO. PUB. SERV. COMM'N GEN. ORDER No. 20, R. 11, provides for discontinuance of service for violation of a utility rule. The most common violation is the nonpayment of charges for service. This comment will deal with nonpayment of charges as the sole reason for terminations of service, although there are other reasons for which service may be terminated.

4. *Lamb v. Hamblin*, 57 F.R.D. 58, 62 (D. Minn. 1972).

5. *Palmer v. Columbia Gas Co.*, 479 F. 2d 153 (6th Cir. 1973).

6. MO. PUB. SERV. COMM'N R. PROC. 3. Informal complaints may be made by any person, either verbally or in writing, and "shall be disposed of as the Commission may determine." *Id.* at 3.01. The PSC will entertain formal complaints about the reasonableness of utility charges only if the complaint is signed by the mayor or other executive officer of the legislative body of a political subdivision within which the complaint is generated, or by not less than 25 utility subscribers. *Id.* at 3.02. If a formal complaint states facts upon which relief can be granted, the PSC serves the utility with an order requiring it to satisfy the complaint or answer why it cannot be satisfied. *Id.*

7. For a discussion of the unfortunate situation of the utility subscriber in the state of Washington see Comment, *The Shutoff of Utility Services For Nonpayment: Plight of the Poor*, 46 WASH. L. REV. 745 (1971).

III. "ENTITLEMENTS": A NEW FORM OF PROPERTY

A. *In General*

The 14th amendment of the United States Constitution provides that "no state shall . . . deprive any person of life, liberty, or property without due process of law . . ." This has been construed to extend to an aggrieved party the "right to be heard before being condemned to suffer grievous loss of any kind."⁸ In recent years 14th amendment due process protection has been expanded in civil,⁹ as well as criminal,¹⁰ areas of the law, particularly in the expansion of the concept of property beyond traditionally recognized common law property rights.¹¹ Today, 14th amendment procedural due process protects more and different types of property.

One such new form of property is known as "entitlements,"¹² first recognized by the Supreme Court in *Goldberg v. Kelly*.¹³ An entitlement is a judicially determined property right arising from the relationship between the state and an individual,¹⁴ created when a state confers a particular status on an individual.¹⁵

The characterization of a status, or a relationship with government, as an entitlement has led to the development of the so-called *Goldberg* rationale.¹⁶ The *Goldberg* rationale holds that once the state has undertaken to provide a service or extend a benefit to an individual, it must comply with the requirements of 14th amendment due process prior to its termination.¹⁷ The *Goldberg* rationale "provides the individual with his only line of defense against arbitrary withdrawal by the state of his access to what, although initially not his right to demand, he has become dependent upon."¹⁸

8. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951).

9. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Thorpe v. Housing Authority*, 386 U.S. 670 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

10. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

11. Comment, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . In Our Economic System"*, 66 Nw. U.L. REV. 502, 504 (1971).

12. 397 U.S. 254, 262 (1970).

13. *Id.*

14. Comment, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 747 (1972). For a comprehensive discussion of status as a property right see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

15. Reich, *supra* note 14, at 733.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property. . . . The wealth of more and more Americans depends upon a relationship to government.

16. *Davis v. Weir*, 328 F. Supp. 317, 320 n.5 (N.D. Ga. 1971).

17. *Bronson v. Consol. Edison, Inc.*, 350 F. Supp. 443, 447 (S.D.N.Y. 1972).

18. *Id.*

Examples of various relationships between individuals and government that have been held to be entitlements include welfare benefits,¹⁹ drivers licenses,²⁰ occupational licenses,²¹ governmental contracts,²² public housing,²³ and unemployment compensation.²⁴ The concept of an entitlement betokens a "sort of right to exist in society, a personal right . . ." ²⁵

B. Public Utility Services as Entitlements

Because American life style is dependent on utility services and the assurance they will not be terminated arbitrarily,²⁶ it is logical to suggest that these services be treated as entitlements.²⁷ There is no marketplace of utility services from which an individual may choose, but only a single supplier for any individual subscriber. This means that the individual, when negotiating with a utility, has no bargaining power, not even, in the present urban environment, the option of doing without.²⁸

Courts have acknowledged that gas²⁹ and water³⁰ services are entitlements based on their importance to health and comfort.³¹ By analogy sewer and electrical services would seem to be entitlements though no case has yet so held. Telephone services present a more difficult question because they normally do not fulfill such basic human needs as do the other services. Yet there are situations in which persons are dependent on telephones for employment or to summon emergency aid. Whether the courts will find telephone service an entitlement is unclear and admits of some doubt.³² Although entitlements in most instances involve services provided

19. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

20. *Bell v. Burson*, 402 U.S. 535 (1971).

21. *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963).

22. *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964).

23. *Thorpe v. Housing Authority*, 386 U.S. 670 (1967).

24. *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

25. *Johnson v. Harder*, 438 F.2d 7, 12 (2d Cir. 1971).

26. Comment, *supra* note 14, at 748.

27. *Id.* at 747.

28. *Re: Guarantee and Deposit Rules and Disconnect Procedures*, 11 P.U.R. (N.S.) 439, 443 (Wisc. Pub. Serv. Comm'n 1935). There can be little doubt that the availability of heat, light, water, and sanitation is necessary to ensure adequate public health and to maintain a minimum "quality" of life.

29. *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972).

30. *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971).

31. The court in *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972), said there was:

[N]o doubt whatever that the consequences of shutting off gas service inflicts hardships upon the consumer that far transcend the loss of driving privileges [citation omitted], delay in paying unemployment compensation [citation omitted], or even the denial of direct relief payments [citation omitted]. A person can freeze to death or die of pneumonia much more quickly than he can starve to death. Thus there is no question of the entitlement involved.

Id. at 244.

32. See *Boykin v. New Jersey Bell Tel. Co.*, 87 P.U.R.3d 440 (N.J. Bd. Pub. Util. 1971), noting that "[O]ne cannot ordinarily function in this day and age without a phone. Its use in emergency is vital." *Id.* at 443. But see *Holt v. New England Tel. & Tel. Co.*, 11 P.U.R.3d 50 (Mass. Dept. Pub. Util. 1955), holding that telephone service is not a property right, the deprivation of which is subject to either the United States or the Massachusetts Constitution.

by government, they may be found to exist in a purely private context like the sale of services by a privately owned utility.³³

No matter how necessary to life a utility service may be, access to it is limited to those who are able to pay. There is no recognized right to free utility service.³⁴

IV. STATE ACTION

A. In General

Assuming that privately owned public utility services are property for 14th amendment purposes, does the utility's action in terminating service constitute state action or action under color of state law? The 14th amendment, of course, is inapplicable to private actions.³⁵

The courts have found state action to exist in a variety of contexts. An obvious but little encountered one is the company town in which a private entity establishes and operates a town, performing the public functions normally associated with a municipal government.³⁶ A more common one is the performance of functions governmental in nature by private persons.³⁷ A third context is private activity which is substantially controlled or regulated by the state.³⁸

No comprehensive definition of state action has been developed.³⁹ The Supreme Court, however, has indicated some of the factors it considers determinative of state action. "[W]hen authority derives in part from government's thumb on the scale, the exercise of that power becomes closely akin, in some respects, to its exercise by government itself."⁴⁰ In *Evans v. Newton*⁴¹ the Supreme Court elaborated on the role that public regulation plays in making a private person or entity's conduct state action or action under color of state law:

33. See, e.g., *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972).

34. *Lamb v. Hamblin*, 57 F.R.D. 58, 62 (D. Minn. 1972).

35. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

36. *Marsh v. Alabama*, 326 U.S. 501 (1946). See also *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); but see *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

37. *Borman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). In *Borman* state action was found to exist when a privately owned transit company operating under a franchise granted by a municipal corporation issued segregated seating regulations. See also *American Comm. Ass'n, C.I.O. v. Douds*, 339 U.S. 382 (1950); *Steel v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Kissinger v. New York Transit Authority*, 274 F. Supp. 439 (S.D. N.Y. 1967).

38. *Public Util. Comm'n v. Pollack*, 343 U.S. 451 (1952).

39. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1960), states: "[T]o fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'this court has never attempted'.

Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed to its true significance.

Id. at 722, quoting *Kotch v. River Port Comm'rs*, 330 U.S. 552 (1948).

40. *American Comm. Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 401 (1950).

41. 382 U.S. 296 (1972).

Conduct that is formerly private may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state actions That is to say, when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations.⁴²

B. Privately Owned Public Utilities as State Actors

To date the United States Supreme Court has not dealt squarely with the issue whether a privately owned public utility acts under color of state law. The lower courts, however, have had several opportunities to examine the relationship between the utility and the state. The Eighth Circuit, in *Ihrke v. Northern States Power Co.*,⁴³ has taken a lead in this regard. The city of St. Paul granted Northern States its operating franchise, received a franchise fee of five percent of gross earnings, and approved the utility's regulations.⁴⁴ The court, through application of a multifactor test,⁴⁵ found that Northern States acted under color of state law.⁴⁶ Important indications of state action, the court suggested, were: (1) Is the utility subject to close regulation by a statutorily created body; (2) must it file its regulations with an administrative agency as a condition precedent to operation; (3) must the regulations be approved by the administrative agency to be effective; (4) is the entity given a total or partial monopoly under color of state law; (5) does the administrative agency control the rates charged by the entity; (6) are the actions of the entity subject to review by an administrative agency; and (7) can the administrative agency permit the entity to perform acts which it could not otherwise perform without violating state law?⁴⁷ *Ihrke* emphasized in particular that the city government received a five percent fee based on the utility's gross profits, and thus was a beneficiary of the utility's collection procedures.⁴⁸ This fact, in conjunction with the monopoly status granted the utility, made it "abundantly clear" to the court that the utility acted under color of state law.⁴⁹

42. *Id.* at 299.

43. 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972). *Ihrke* was vacated as moot because plaintiff moved from the area the utility served and ceased to be a direct subscriber. *Id.* at 571. The Eighth Circuit, however, decided the case as an exception to the mootness doctrine because it was a case with a question of recurring public interest. *Id.* Although *Ihrke* has no stare decisis effect it is reasonable to assume the Eighth Circuit would reach the same holding on the same or similar facts.

44. *Id.* at 570.

45. This multifactor test was first proposed in a concurring opinion by Judge Kerner in *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624, 628 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969).

46. *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 570 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972).

47. *Id.* at 568.

48. *Id.* at 569.

49. *Id.* at 570.

Other courts have agreed that when the state has franchised the utility to carry on a "clearly . . . quasi-public function,"⁵⁰ and/or is subject to an encompassing network of regulatory statutes, ordinances, and administrative agencies,⁵¹ it acts under color of the law.⁵² But this determination is not inevitable. The Seventh Circuit, in *Kadlec v. Illinois Bell Telephone Co.*,⁵³ found an insufficient nexus between the utility and the state where the only connection between them was the filing of the utility's regulations with the state public utility commission, noting that the state in no sense benefited from, encouraged, requested, or cooperated with the utility.⁵⁴ Similarly, the required relationship between the utility and the state was lacking in *Lucas v. Wisconsin Electric Power Co.*⁵⁵ because the state gave the utility "insignificant support" in terminating service to delinquent accounts.⁵⁶ The Seventh Circuit, in deciding *Kadlec* and *Lucas*, emphasized that (1) the utilities acted out of purely private economic motives,⁵⁷ and (2) the state did not benefit from the utility's terminations of service.⁵⁸ And in *Jackson v. Metropolitan Edison Co.*⁵⁹ a Pennsylvania district judge relied on both *Kadlec* and *Lucas* to hold there was no action under color of state law where the only state involvement was a state public service commission requirement that utilities impose penalties on customers for failure to pay

50. *Bronson v. Consolidated Ed., Inc.*, 350 F. Supp. 443, 446 (S.D.N.Y. 1972); *Stanford v. Gas Serv. Co.*, 346 F. Supp. 717, (D. Kan. 1972), where the court held that utilities often perform "quasi-public functions" because normally, the state grants privately owned public utilities a monopoly in supplying essential commodities. The court went on to say that the function utilities perform is vital to society and thus the state regulates them in the public interest because otherwise the state would have to perform their function. Therefore, the court reasoned, privately owned utilities lose their private character and become instruments of the state subject to constitutional restraint. *Id.* at 722. The court emphasized the importance of KAN. STAT. ANN. § 66-101 (1969) to its decision. The statute provides, *inter alia*, that the Kansas Corporation Commission "is empowered to do all things necessary and convenient for the exercise" of its power, jurisdiction, and authority. *See also* *Hattel v. Public Serv. Comm'n*, 350 F. Supp. 240 (D. Colo. 1972).

51. *Palmer v. Columbia Gas Co.*, 479 F.2d 153, 164 (6th Cir. 1973).

52. Courts have set some limits on the state action in this area. "Only the particular activity which comes under the umbrella of a state statute or state authorized regulation constitutes state action." *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241, 246 (N.D. Ohio 1972) *aff'd*, 479 F.2d 153 (6th Cir. 1973). The mere fact that a corporation is subject to some degree of state regulation, or is granted a special right or privilege by the state, is insufficient to convert the essentially administrative or business action of the corporation or activity into state action. *Id.* at 244. *See also* *Public Util. Comm'n v. Pollack*, 343 U.S. 451 (1952).

53. 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969).

54. *Id.* at 626.

55. 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

56. *Id.* at 658. For support to be significant so that state action results, the state must give aid, comfort, or incentive, real or apparent. *Id.* at 655. *See Haydock, Public Utilities and State Action: The Beginning of Constitutional Restraints*, 49 DENVER L.J. 413 (1973).

57. *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624, 626 (7th Cir. 1969).

58. *Id.*

59. 348 F. Supp. 954 (M.D. Pa. 1972), *aff'd*, 483 F.2d 754 (3d Cir. 1973).

bills promptly and set forth clearly in their tariffs the exact conditions under which the penalties could be imposed.⁶⁰

V. STATE INVOLVEMENT WITH PRIVATELY OWNED PUBLIC UTILITIES IN MISSOURI

In deciding whether a Missouri utility is a state actor the *Ihrke* standards must be applied. *Ihrke* is important because Missouri is an Eighth Circuit jurisdiction and because *Ihrke* has been well-received by subsequent courts faced with analogous problems.⁶¹ *Ihrke* requires a close look at Missouri regulatory practices.

Privately owned public utilities in Missouri are subject to regulation at both the state and local level. Opportunities for local initiative are particularly strong. Many municipalities require that utilities obtain business licenses as a condition precedent to operation. Much more significant is the broad and comprehensive power granted to local governments which authorizes cities, towns and villages to grant franchises to private companies seeking to provide utility services "subject to such rules, regulations, and conditions as shall be expressed [by] ordinance."⁶²

The city charter of the city of St. Louis illustrates the degree of regulation to which privately owned public utilities may be subjected. This charter permits the board of aldermen to grant utility franchises "subject always to the city's power of taxation and its authority to regulate rates, quality of use, service, and products and methods of conduct and operation."⁶³ It further provides that the grantee of a franchise for a public utility "shall keep such reports of its finances and operation as may be prescribed by ordinance, and the city may at any time examine its records and accounts."⁶⁴ Further, the board of aldermen "may regulate the charges for the use, service or product . . . and establish whatever requirements may be necessary to secure efficient use, service of products."⁶⁵ Pursuant to its charter⁶⁶ St. Louis places taxes on public utilities based on a percentage of gross receipts of electrical companies,⁶⁷ telephone companies,⁶⁸ gas companies,⁶⁹ and water works.⁷⁰

Missouri public utilities are subject also to close supervision by the state administrative agency, the PSC.⁷¹ The PSC has comprehensive powers⁷²

60. *Id.* at 958.

61. *See, e.g.,* Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972).
But see Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973).

62. § 71.520, RSMo 1969.

63. St. L. Mo. City Charter, art. XIX, § 1 (1960).

64. *Id.*

65. *Id.* § 2.

66. *Id.* § 1.

67. St. L. Mo. Rev. Code § 152.030 (1960).

68. *Id.* § 153.050.

69. *Id.* § 155.010.

70. *Id.* § 156.020.

71. § 386.010, RSMo 1969. Note also that private utilities as corporations must get a certificate of incorporation prior to doing business in the state. *Id.* § 351.060.

over those public utilities subject to its jurisdiction.⁷³ Before a public utility may operate in Missouri, it must obtain a certificate of convenience and necessity.⁷⁴ The PSC only grants such certificates upon a showing that the operation of a utility is convenient or necessary to the public welfare.⁷⁵ In effect, the PSC allocates territories to monopolies or to regulated competitors.⁷⁶

There are two additional features of Missouri public utility regulatory law which support a finding that privately owned utilities act under color of Missouri law. The legislature has granted utilities the right to use public property in providing utility services,⁷⁷ and certain public utilities are granted the power of eminent domain,⁷⁸ a power traditionally reserved to the sovereign.⁷⁹ The granting of such powers indicates a degree of cooperation between the state and utilities sufficient to elevate the status of the utility beyond that of a mere private entity.

72. The PSC is endowed by statute with general supervisory powers over utilities to investigate and determine the quality of service provided by the utilities; to fix standards for the measurements of electricity, purity of water, quality of sewage treatment, *etc.*; to prescribe uniform methods of keeping accounts, records, and books; to inspect the property, facilities, equipment, and offices of the utilities; and to examine the accounts, books, contracts, and records of the utility and compel their production by *subpoena duces tecum*. § 393.140, RSMo 1969. The activities of utilities are subject to review by the PSC when the utilities petition for rate increases (*Id.* § 393.150), or whenever complaints by subscribers are submitted. *Id.* § 393.260. The PSC is empowered to examine the rules and regulations of the utilities, and under proper circumstances it may prescribe "the just and reasonable acts and regulations to be done and observed." *Id.* § 393.140(5). Pursuant to its statutory power, the PSC requires utilities to file their rules and regulations as a part of their tariff schedules. MO. PUB. SERV. COMM'N GEN. ORDER 20, R. 13. In addition, the management of the utilities is under the scrutiny of the PSC and the right to issue stocks, bonds, notes, and other forms of indebtedness is subject to PSC regulation. *Id.* at R. 11.

The termination of service by Missouri utilities is subject to regulation by the PSC. § 383.180, RSMo 1969. The PSC requires 48 hours notice stating the reason for the discontinuance before a subscriber's service can be cut off. Thus, when a privately owned utility terminates a subscriber's service, it acts pursuant to a regulation of the PSC.

73. See §§ 386.250, 393.140, RSMo 1969; State *ex rel.* Consumers Pub. Serv. Co. v. Public Serv. Comm'n, 180 S.W.2d 40 (Mo. En Banc 1944).

74. § 393.170, RSMo 1969.

75. *Id.* See also State *ex rel.* Harline v. Public Serv. Comm'n, 343 S.W.2d 177 (K.C. Mo. App. 1960).

76. State *ex rel.* Consumers Pub. Serv. Co. v. Public Serv. Comm'n, 180 S.W.2d 40 (Mo. En Banc 1944).

77. § 393.010, RSMo 1969, which grants utilities power to lay conductors for conveying gas, electricity, and water through the streets, alleys, and squares of towns and to set poles, wires, *etc.*, along public road, streets, and waters of the state.

78. *Id.* §§ 393.020-030.

79. Palmer v. Columbia Gas of Ohio, 479 F.2d 153, 164 (6th Cir. 1973); Green Street Ass'n v. Daley, 373 F.2d 1, 6 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967); Garrow v. United States, 131 F.2d 724, 726 (5th Cir.), *cert. denied*, 318 U.S. 765 (1942); United States v. Federal Land Bank, 127 F.2d 505, 508 (8th Cir. 1942).

In summary, there appears to be sufficient state regulation of Missouri's utilities to support a finding, under *Ihrke*, that the actions of at least some utilities (particularly those in cities which have taken full advantage of section 71.520) are under color of state law. The state benefits monetarily in the form of increased franchise fees and tax revenues from the profits that accrue to utilities from overcharges. This fact, coupled with the state's grant to the utilities of the power of eminent domain and the right to use public lands, demonstrates a unique partnership between the state and the utilities that is a viable basis for considering the actions of the utilities to be state action for 14th amendment purposes.

VI. DUE PROCESS AND THE UTILITY SUBSCRIBER

A. In General

The significance of characterizing utility services as entitlements proffered under the aegis of state action depends on the applicable standards of procedural due process. These standards will likely parallel due process standards in related areas.

Minimal due process standards usually require that parties whose property rights are adversely affected by state action be afforded notice and an opportunity to be heard. These rights must be granted at a meaningful time and in a meaningful manner.⁸⁰ Presumably, in the case of utility services, notice and a hearing should be granted prior to the termination of service.⁸¹

The formalities and procedural niceties of the required hearing vary in accordance with the importance of the interests involved.⁸² Although the Supreme Court has yet to establish generic guidelines for due process broadly applicable to all nonjudicial hearings,⁸³ the Court in *Goldberg v. Kelly*⁸⁴ did set forth the necessary elements for a pretermination hearing regarding welfare benefits. *Goldberg* held that a pretermination hearing need not take the form of a judicial or quasi-judicial proceeding, but that an administrative proceeding is sufficient.⁸⁵ *Goldberg* essentially required tendering notice that details the reasons for the proposed termination, and an effective opportunity to defend, including the right to confront adverse witnesses and present oral arguments and evidence.⁸⁶ The Court required the hearing to be tailored to the capacities and circumstances of the welfare recipient and that there be a right to counsel.⁸⁷ Finally, the Court required that there be a procedure that would insure an impartial decision maker whose decision would rest solely on the rules and evidence adduced at the

80. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

81. *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

82. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

83. *See Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972); *Bell v. Burson*, 402 U.S. 535, 542-43 (1971).

84. 397 U.S. 254 (1970).

85. *Id.* at 266.

86. *Id.* at 267-68.

87. *Id.* at 269.

hearing⁸⁸ and who would preserve an adequate record of the reason for his ruling.⁸⁹

B. *Alternative Procedures for Compliance with Due Process*

Two approaches to public utility due process procedures have been advanced. One model calls for the utility itself to provide a forum with a procedure analogous to that used in *Goldberg* administrative hearings. The other suggestion is a *Goldberg* administrative proceeding provided by a state agency.

1. Hearing Provided by the Utility

The Sixth Circuit Court of Appeals⁹⁰ approved the use of the approach in *Palmer v. Columbia Gas Co.*⁹¹ In *Palmer* the district judge ordered⁹² the utility not to terminate service to customers without complying with the following procedure: Prior to the termination of service an employee of the utility must speak personally with the subscriber and inform him of the intent to terminate service; if the subscriber disputes the reason for termination (*e.g.*, claims the bill has been paid), then the utility may not terminate service for 24 hours. If the subscriber fails to contact the utility within 24 hours service may be terminated; if the subscriber presents defenses, they are to be heard by an employee of the utility with a minimum rank of office manager. This employee is required to inquire into the factual dispute and make a direct individual response to the subscriber explaining the utility's position.⁹³ If this action does not resolve the dispute the subscriber may stay termination of service by posting a bond of the amount in dispute. Final resolution is made by a higher company official or by litigation commenced by the utility to collect the disputed amount.⁹⁴

The *Palmer* procedure complies with most of *Goldberg's* due process requirements. Adequate notice and a pretermination hearing are provided, thereby protecting the subscriber from an erroneous termination. A decision maker is provided, who, although not impartial in a judicial sense, is far enough removed from the controversy to provide a degree of objectivity.⁹⁵ One court theorized that officials of utilities are qualified to serve as impartial decision makers because a utility's incentive to sell services is at least as great as their desire to collect past due accounts.⁹⁶ An additional

88. *Id.* at 270.

89. *Id.* at 271.

90. 479 F.2d 153 (6th Cir. 1973).

91. 342 F. Supp. 241 (N.D. Ohio 1972).

92. The order of the district court was summarized by the Sixth Circuit on appeal. 479 F.2d at 159-60.

93. *See* *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), in which the Supreme Court approved as an impartial decision maker an official in the welfare department who had not participated in the initial determination of the case. The implication is that a utility official may, if not involved in the dispute, serve as an impartial decision maker.

94. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 160 (6th Cir. 1973).

95. *Lamb v. Hamblin*, 57 F.R.D. 58, 64 (D. Minn. 1972).

96. *National Foods v. Union Elec.*, 494 S.W.2d 379 (Mo. App., D. St. L. 1973).

incentive to impartiality is the official's awareness of the utility's potential tort liability for wrongful termination of service. The *Palmer* procedure appears to afford fair protection in a very practical manner.

A very important additional feature of *Palmer* is that it provides the aggrieved party with an opportunity for judicial review prior to termination of service. Moreover, the utility is given the burden of going forward with the judicial action, thereby placing the burden of proof on it.

2. Hearing Provided by a State Agency

A second alternative is an administrative procedure conducted by a state agency. Such procedures have been characterized as providing an appropriate forum and assuring a meaningful opportunity to be heard in a simple, inexpensive, informal, and flexible proceeding.⁹⁷

New York provides an example of the use of an administrative procedure to provide an orderly and regularized process of dispute settlement. The New York Public Service Commission procedure is two-staged.⁹⁸ The initial stage provides an ombudsman-type complaint handling procedure.⁹⁹ A utility subscriber is granted the right to seek a hearing with the commission by filing a complaint, either formal or informal, oral or in writing.¹⁰⁰ The commission investigates the complaint, serving it on the utility, which in turn must satisfy the subscriber or file an answer.¹⁰¹ If the complaint is not settled, the commission provides the opportunity for a conference-type hearing at which the subscriber and utility are given the opportunity to present evidence and to contest the other party's assertions before an impartial officer of the commission.¹⁰² The commission's impartial hearing officer makes a determination of the dispute in writing and provides it to the parties.¹⁰³

If the initial proceedings fail to resolve the dispute to the parties' satisfaction, or if the informal ombudsman proceedings proves inadequate to settle the dispute, the commission, by motion of the subscriber, utility, or itself, may conduct a formal public hearing.¹⁰⁴

97. *Lamb v. Hamblin*, 57 F.R.D. 58, 64 (D. Minn. 1972).

98. N.Y. Pub. Serv. Comm'n Opinion 73-16 (1973). The Public Service Board of Vermont has issued proposed rules that follow a procedure similar to that of New York. See Proposed General Order No. _____ regulating the disconnection of utility services. (July 31, 1973).

99. *Id.* at 5. See also 16 N.Y.C.R.R. I(B), § 11.2(b).

100. *Id.* at § 11.1.

101. *Id.* at § 11.2(a).

102. *Id.* at § 11.2(b).

103. *Id.*

104. 16 N.Y.C.R.R. I(B), § 11.2(c). The procedure for a formal hearing is set forth in 16 N.Y.C.R.R. I (B), § 2.3. The rules provide that as a matter of course complaints involving disputed bills in which termination of service is threatened shall be resolved at a formal public hearing. *Id.* at § 11.2(c). The commission may disclaim jurisdiction over the dispute if it deems a judicial resolution of the dispute more appropriate, or if the dispute is subject to concurrent administrative and judicial jurisdiction. *Id.* See also N.Y. Pub. Serv. Comm'n Opinion 73-16 at 7 (1973).

In any case, pending resolution of a complaint the New York Public Service Commission may provide the subscriber with interim relief in the form of a stay of discontinuance of service.¹⁰⁵ The commission is not required, however, to stay termination of service if the complaint is frivolous or designed primarily to delay payment for properly billed services.¹⁰⁶ To insure that its system will be effective, New York has adopted rules that require utilities to adequately publicize the complaint procedures¹⁰⁷ and which modify the procedures by which the utilities process the complaints of their subscribers.¹⁰⁸

VII. CONCLUSION

Fourteenth amendment procedural due process requirements appear to be satisfied by either a state administrative hearing procedure similar to New York's, or a proceeding conducted by the utility consistent with *Palmer*. Both alternatives have deficiencies. The establishment of a state administrative body such as the PSC to settle disputes between utility subscribers and utilities can be criticized as creating another level of bureaucratic red tape. Such an administrative body might run afoul of article II, section 1 of the Missouri Constitution, which prohibits legislative bodies (including administrative bodies such as the PSC) from performing functions the constitution reserves for the courts.¹⁰⁹

The *Palmer* method of internal resolution of disputes over bills will be criticized as an instance of the fox guarding the hen house. The imprecise nature of the due process protections afforded and the lack of a sufficient impartial decision maker suggest some skepticism as to its effectiveness.

In any case the legislature should act to assure the public utility subscriber in Missouri inexpensive, fair, and quick pretermination relief. The alternative to legislative action is almost certain to be judicial imposition of a pretermination process, and the courts are not as qualified to study or implement viable alternatives.

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105. 16 N.Y.C.R.R. I(B), § 11.2(d).

106. N.Y. Pub. Serv. Comm'n Opinion 73-16 at 9 (1973).

107. See, e.g., 16 N.Y.C.R.R. II(D), § 143.9; 16 N.Y.C.R.R. III(D), § 434.9; 16 N.Y.C.R.R. V(C), § 533.9; 16 N.Y.C.R.R. VI(C), § 631.10.

108. See, e.g., 16 N.Y.C.R.R. II(D), § 143.8.

109. The PSC arguably renders a money judgment when it issues an order settling a dispute over a bill between a utility and its subscriber. "To determine whether one person is entitled to recover money from another cannot be anything but a judicial question, and as such must be determined by the courts. The Public Service Commission is not, and under our Constitution cannot be a court." *State ex rel. Missouri Pac. Ry. v. Public Serv. Comm'n*, 303 Mo. 212, 259 S.W. 445, 447 (1924). The Missouri courts have emphatically held that the PSC "has no authority to adjudicate and determine individual or personal rights . . . because under the Constitution the legislature has no power or authority to invest such commission with judicial powers." *State ex rel. Rutledge v. Public Serv. Comm'n*, 316 Mo. 233, 289 S.W. 785 (1926). See also *State ex rel. Laundry, Inc. v. Public Serv. Comm'n*, 327 Mo. 93, 34 S.W.2d 37 (1931).