WestVirginiaUniversity
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Volume 76 | Issue 4 Article 7

June 1974

Constitutional Law--Obtaining Due Process in Public Utility Pre-Termination Procedures

Mark A. Summers
West Virginia University College of Law

STUDENT NOTES

CONSTITUTIONAL LAW—OBTAINING DUE PROCESS IN PUBLIC UTILITY PRE-TERMINATION PROCEDURES

I. INTRODUCTION

On December 25, 1973, an elderly couple was found in their home in Schenectady, New York, apparently frozen to death as a result of having their heat disconnected by the utility company. The couple had received notices that their bill was overdue but had not paid it, so the company discontinued service during a severe northern winter. Ironically, more than enough money was found in the house to cover the utility bill, but, apparently, no effort was made by the utility company either to contact the elderly couple personally or to determine their reasons for nonpayment. Those reasons will probably never be known.[1]

This incident is probably the most dramatic illustration to date of the need for procedural due process guarantees prior to the termination of utility services. Few cases, and still fewer commentators, have, as yet, even considered this issue. This note will (1) analyze the existing case law dealing with the furnishing of procedural due process by a public utility to its customers; (2) explore the inadequacies of the case by case approach as a solution to the due process problem; and (3) examine the West Virginia law relating to public utilities to determine whether West Virginia utilities can be required to furnish procedural due process to their customers.

II. PUBLIC UTILITIES AND PROCEDURAL DUE PROCESS—THE EXISTING CASE LAW

All the cases in which a plaintiff has contended that a public utility's termination of service was without due process have been brought under title forty-two, section 1983 of the United States Code[2] and its corresponding jurisdictional statute, title twenty-

[1] N.Y. Times, Dec. 28, 1973, at 25, col. 1.

[2] 42 U.S.C. § 1983 (1971):

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 other person within the jurisdiction

eight, section 1343(3).[3] The plaintiff must affirmatively prove two elements in order to maintain an action under section 1983: (1) That the defendant has deprived him of a right secured by the Constitution and laws of the United States; and (2) that the defendant deprived him of this right under color of a statute, ordinance, regulation, custom, or usage, of any state or territory.[4] The first of these elements is often referred to as the "rights or entitlements" requirement and the second as the "state action" or "under color of state law" requirement.[5] These are the initial questions with which a court must deal prior to deciding whether, in a particular case, the plaintiff has been deprived of due process. These two issues are also a categorically convenient way to examine the existing cases in the area of due process as applied to public utilities.

A. The Rights or Entitlements Element

The courts that have considered this issue have, in general, had little difficulty finding that public utility service is a constitutionally protectable interest.[6] It was not until recently, however, that such a conclusion could have been so easily reached. Traditionally, property protected by the due process clause was only that in which individuals had possessory or statutorily granted

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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 for redress.

[3]28 U.S.C. § 1343(3) (1971):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

[4]Adickes v. S.H. Kress & Co., 398 U.S. 144 (1969).

[5]It should be noted at this point that the theory in the public utility cases is that if utility service is the type of property contemplated by the due process clause of the 14th Amendment to the United States Constitution, then it is protected by the "right" of due process.

[6]*E.g.*, Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Stanford v. Gas Service Co., 346 F. Supp. 717 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).

interests.[7] In *Goldberg v. Kelly*,[8] the traditional rule was extended to include "statutory entitlements," *i.e.*, welfare payments. A further extension of the rule in the public utility cases[9] has generally been grounded on reasoning similar to that found in *Stanford v. Gas Service Co.*:

> [W]hatever the classification of utility services, be they rights, privileges, or entitlements, such life-sustaining services would seem to fall within the same constitutional protections afforded welfare benefits, wages, drivers' licenses, reputation in the community, and possession of personal property, all as has been previously decided by the United States Supreme Court.[10]

This reasoning reflected the feeling of the court that the type of services provided by utilities was far more important to the welfare of the individual than some of the property interests which the United States Supreme Court had previously found to be constitutionally protected.[11]

Although it seems clear that public utility service is a "right or entitlement" which is constitutionally protected, until recently there existed another possible barrier to litigating the applicability of the due process clause to public utilities via section 1983. It was long believed that only personal rights—not property rights—were protected by section 1983.[12] However, in *Lynch v. Household Finance Corp.*, the United States Supreme Court held that property

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[7]Note, *Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.U.L. REV. 493, 512 (1973) [hereinafter cited as *Constitutional Safeguards*].

[8]397 U.S. 254 (1970).

[9]While in a sense these cases might be viewed as an extension of *Goldberg*, their conclusions are soundly based. The right to utility service is not technically granted by statute or license, so *Goldberg* might be distinguished on this ground. Yet the state statutes require utilities to serve all who apply, and evince a strong interest in assuring that utility service is provided fairly. Thus it can be argued that the state has conferred a benefit upon the public, denial of which requires due process. *Constitutional Safeguards*, *supra* note 7, at 512.

[10]346 F. Supp. 717, 721 (D. Kan. 1972) (citations omitted). *See also* cases collected *supra* note 6.

[11]The court, in Palmer v. Columbia Gas Co., 342 F. Supp. 241, 244 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973), stated:

> [T]he consequences of shutting off gas service inflicts hardships upon the consumer that far transcend the loss of driving privileges, Bell v. Burson, 402 U.S. 535 (1971), delay in paying unemployment compensation, California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971) . . . or even the denial of direct relief payments, Goldberg v. Kelly, 397 U.S. 263 (1970). . . .

[12]*See* Hague v. CIO, 307 U.S. 496 (1939).

rights were within the scope of section 1983.[13] In *Ihrke v. Northern States Power Co.*, the circuit court of appeals reversed the lower court's ruling that a property right in public utility service was not cognizable in a section 1983 civil rights action and cited *Lynch* as authority for so doing.[14] There is, thus, little doubt, in view of these authorities, that public utility service is a constitutionally protected right or entitlement and that one can seek to protect this right under section 1983.

B. The "State Action" Element

The more difficult question in the public utility cases is whether public utilities are "state actors," or in section 1983 language, whether they act "under color of state law."[15] Although the United States Supreme Court has never directly dealt with the issue of public utilities as state actors,[16] three theories of state action enunciated by the Court can be applied in the utility cases. These theories can be characterized as (1) the governmental regulation theory;[17] (2) the public function theory;[18] and (3) the agent

[13]405 U.S. 538 (1972). This holding is significant, particularly in public utility cases where the amounts of money involved are normally small and, thus, the jurisdictional amount requirements found in other federal statutes are difficult to meet.

[14]459 F.2d 566, 568 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

[15]Some courts appear to have predicated a finding of state action on the grossness of the utility's abuse of minimum procedural fairness. *Compare* Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973), where the court felt the attitude of the utility was "shockingly callous," *with* Lucas v. Wisconsin Electric Power Co.,466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973), where the court apparently felt that the utility's procedures were fair. This kind of judicial reasoning can, however, lead only to confusion since the determination of whether a utility is a state actor should be independent of and not predicated on the nature of the due process violation in question.

[16]It is probably more correct to say that the United States Supreme Court has never held a utility a state actor for purposes of applying the fourteenth amendment due process clause, since the Court did hold, in Public Utility Comm'n v. Pollak, 343 U.S. 451 (1952), that a utility was a state actor for the purposes of applying the first and fifth amendments.

[17]American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Smith v. Allwright, 321 U.S. 649 (1944) (private entities closely regulated by the state are state actors).

[18]Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946) (private entities which have significant control over the operation, management, or supply of a governmental or public service are state actors for the purpose of § 1983).

or joint participant theory.[19] These theories are overlapping, rather than distinct, and they all can have some applicability in public utility cases.[20] Therefore, this note will not attempt to categorize the cases on the basis of these theories, nor will it specifically analyze which theories may apply to an individual case.[21] It will, however, isolate the factors which some courts have felt determinative in finding that public utilities are state actors and, in so doing, attempt to define a "state action" standard which can be applied to all public utilities.

1. The Monopoly Factor

Many of the courts which have found that public utilities are state actors have considered significant the fact that utilities are granted exclusive franchises by the states or their subordinate branches; that is, utilities are monoplies.[22] The natural consequence of a monopoly is to eliminate the consumer's ability to obtain alternative utility services. As the court in *Ihrke v. Northern States Power Co.* stated:

> By its own actions, the City of St. Paul has in effect given Northern a monopoly on the retail distribution of gas and electricity, and as a practical matter, the Ihrkes could not buy these commodities from any other source. Under these circumstances, we think it is abundantly clear that the action of Northern in threatening to terminate the service to the Ihrkes was under 'color of law' as used in 42 U.S.C. § 1983 . . . .[23]

The insulation from competition received by a utility—although certainly not without reason—can be a powerful weapon in the hands of a utility bent on taking advantage of the powerless consumer.[24] Most importantly, it is an advantage given the utility by the state. Thus, although the utilities will argue vehemently that

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[19]Cooper v. Aaron, 358 U.S. 1 (1958); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932) (an individual acting as an agent of the state does so under color of state law).

[20]*See Constitutional Safeguards, supra* note 7, at 501.

[21]For an excellent analysis of these theories, see *Constitutional Safeguards, supra* note 7, at 500-11.

[22]Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972); Stanford v. Gas Service Co., 346 F. Supp. 717 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973).

[23]459 F.2d 566, 570 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

[24]*See Constitutional Safeguards, supra* note 7, at 493 & n.4.

the fact that they are monopolies is not alone sufficient to support a finding that they are state actors, the same utilities seek shelter as "state actors" when they are threatened with an antitrust violation.[25] The courts have agreed with the contentions of the utilities and have exempted them from the antitrust laws as "state actors" when their "practices were at all times within the ambit of regulation of and under the control of SCC [Virginia's State Corporation Commission]."[26]

Therefore, several important factors relating to state action exist as a result of a utility's monopoly status: (1) The utility is free from competition because the state allows it to be; (2) the consumer is deprived of other sources of utility services allowing, in some instances, for high-handed treatment of the customer;[27] and (3) the utilities have sought and received exemption from the antitrust laws as state actors. These would appear to be strong reasons for finding that any utility operating as a monopoly or having an exclusive franchise is a state actor. However, most courts have considered monopoly status alone inadequate and have, therefore, applied another factor in finding state action—the amount and type of state regulation involved in the utility's activities.

2. *The Regulation Factor*

The extent to which a utility is subject to regulation by the state[28] is probably, in most cases, determinative of the question of

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[25]*See* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971).

[26]*Id.* at 252.

[27]For an example of the nightmarish situations which some utility customers have faced, see Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972) and Comment, 6 CREIGHTON L. REV. 417 (1973).

[28]The following are some of the considerations to which the courts have looked to determine the nature of the regulation involved:

> [W]hether 1) the entity is subject to close regulation by a statutorily-created body . . . 2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given a total or partial monopoly by the regulatory body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity, 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law.

Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 628 (7th Cir. 1969) (concurring opinion), *cert. denied*, 396 U.S. 846 (1969).

state action. In fact, this element accounts for the split between the decisions in cases which have found state action and those which have not. This split probably results from the application of two different doctrines to the utility cases. The cases finding state action have generally relied on the theory of *Evans v. Newton:* "Conduct that is formally 'private' may become so entwined with governmental policies or impregnated with a governmental character as to become subject to the constitutional limitations placed on state action."[29] On the other hand, the cases not finding state action appear to have applied the rationale of *Moose Lodge v. Irvis*.[30] *Moose Lodge* announced a more restrictive standard to be used in determining state action.[31] The Court held that the general scheme of regulating liquor clubs in Pennsylvania was insufficient state involvement to justify a finding that the clubs, as a result of being regulated, had become state actors.[32]

Two cases illustrate the different application of these theories.[33] In *Lucas v. Wisconsin Electric Power Co.*, the court assumed that the power company was "pervasively" regulated by the Wisconsin Public Service Commission.[34] The court refused, however, to hold the utility company a state actor because it was unable to find that the state had affirmatively supported the utility in its termination procedures.[35] The court cited *Moose Lodge* and noted that the United States Supreme Court had expressly rejected the argument that the state's granting of a liquor license fostered the racial discrimination complained of in that case.[36] The court's decision is perplexing because it noted, but dismissed, the argument that the state affirmatively supports the utility by granting it a

[29]382 U.S. 296, 299 (1966).

[30]407 U.S. 163 (1972).

[31]The court apparently rejected the argument that a regulatory scheme makes a private individual a joint participant with the state and the theory that governmental regulation can, by itself, be state action. *Constitutional Safeguards, supra* note 7, at 503.

[32]407 U.S. at 175-77.

[33]For a decision which considers the applicability of both theories to public utilities and adopts the *Evans v. Newton* position, see Hattell v. Public Service Co., 350 F. Supp. 240 (D. Colo. 1972).

[34]466 F.2d 638, 641 n.5 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). The regulations set forth in that footnote made it clear that the company was, in fact, extensively regulated.

[35]The Power Commission had, however, approved the termination procedures which the utility company used. *Id.* at 642.

[36]*Id.* at 655 n.37.

monopoly. This support is related to the termination procedures because it results in the customer being denied an alternative source of supply.[37] It is unfortunate that the court failed to see this relationship because termination procedures are directly related to sources of supply, in that regulation of a utility's activities is to protect the public which has nowhere else to turn to procure such vital services.[38] Termination procedures are obviously related to the utility's monopoly status, and failure to apply due process standards to those procedures is not in the public interest.

In opposition to the conclusion reached in *Lucas* is *Stanford v. Gas Service Co.*,[39] in which the court relied on the *Evans v. Newton* concept in finding state action. The Kansas statute under consideration in *Stanford* authorized the Kansas Corporation Commission to "supervise and control the public utilities" and to "do all things necessary and convenient for the exercise of such power, authority and jurisdiction."[40] In holding this authorization sufficient to support a finding of state action the court said:

> The defendant Company is an included public utility in this extremely broad grant of authority and due to such extreme

[37]Although the United States Supreme Court did not base its decision in *Moose Lodge* entirely on alternative sources of supply, it did point out that such sources were available and that, although the number of liquor licenses was limited, the private club business was far from a monopoly. 407 U.S. at 177. One can also distinguish the nature of the regulation in *Moose Lodge* from that in the public utility cases. It is apparent that liquor clubs are regulated because there is some feeling that they are not really in the public interest; on the other hand, utilities are regulated to insure that they operate in the public interest. Finally, the nature of the property involved is entirely different. Most view liquor as a non-essential item, while it has been previously noted that utility service has been viewed by the courts as essential to life. Such a case is discussed in note 11 *supra*. This distinction is valid even though the plaintiff in *Moose Lodge* was seeking to protect a personal right, *i.e.*, the freedom from racial discrimination, because the Court may very well have viewed this right in connection with the nature of the service which the plaintiff was seeking to obtain.

[38]One can speculate that the reasoning in *Lucas* is a result of the court's desire to be consistent with its earlier decisions which refused to find that utilities were state actors. Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir. 1972), *cert. denied*, 409 U.S. 890 (1972); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir. 1969), *cert. denied*, 396 U.S. 846 (1969). Additionally, the court in *Lucas* had apparently made up its mind that due process had been satisfied prior to making its decision on the issue of state action. *See* 466 F.2d at 641-45.

[39]346 F. Supp. 717 (D. Kan. 1972).

[40]KAN. STAT. ANN. § 66-101 (1972). It is interesting to note that this statute is much broader and, if anything, less "pervasive" than the regulations considered in *Lucas*.

> regulation, has tended to lose its "private character." It and a very few other corporations or business enterprises in privately owned public utility businesses, do in fact enjoy a complete monopoly of supplying an essential commodity to the citizens of this and other states. . . . Such public utilities, beyond question, perform public functions in the public interest under public regulation. As such, they are subject to constitutional restraint.[41]

The court, in this statement, reached the very essence of the issue. The existence of procedural fairness in the dealings of large utilities with their customers cannot be dependent on a narrow distinction as to whether the activity in question is affirmatively supported by the state. Rather, by granting utilities monopoly status, the states have, in effect, brought all their activities, whether directly regulated or not, under the umbrella of constitutional scrutiny. Thus, regulation which admittedly applies to other industries, coupled with monopoly status which most others do not have, places the utility in the position of being exactly what its name implies—"public." As such, it is a state actor and should be required to provide standards of procedural fairness in dealing with its customers.

III. Inadequacies of the Case by Case Approach

Thus far, it is clear that public utilities can and should be considered state actors. Given this premise, it is appropriate to examine whether the application of due process standards to public utilities can best be accomplished in the judicial forum. There are strong arguments that the problem could be better dealt with either administratively or legislatively so long as the legislature or administrative agency feels that utility customers should be able to avail themselves of greater procedural safeguards.

A. Reasons for the Inadequacies of the Judicial Approach

The first reason for suggesting that the judicial method is inadequate is that cases involving state action are decided on an individual basis according to their facts.[42] As suggested earlier, there would appear to be applicable standards under which all, or nearly all, public utilities could be considered state actors. However, it is also clear that for various reasons some courts have been

[41]346 F. Supp. at 722.

[42]*See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

reluctant to so hold.[43] Thus, the initial problem with the judicial approach in utility cases is the varying application of different standards to utilities in different regions of the country. Inherent in this problem is an additional dilemma. Namely, various utilities can be considered "state actors" only after they have been individually challenged and their cases have been resolved in the courts. As a result, some utilities within a state might be required to furnish procedural safeguards to their customers while others might not. Finally, the judicial process of applying state action standards to all the utilities within a state (let alone all the utilities in the United States) would be extremely time consuming.

Second, because of the very nature of a public utility case, litigation is impractical. In many instances, the amount of money involved is small.[44] Therefore, litigation is often impractical unless the plaintiff can bring his case as a class action. Additionally, the greatest harm to the plaintiff results from the loss of his essential utility services for some period of time until an action can be initiated or agreement can be reached with the utility. Thus, although the plaintiff may have a judicial remedy, he needs procedural protection prior to the time utility services are terminated.

One of the best examples of the need for more effective pretermination procedures occurred in *Bronson v. Consolidated Edison Co.*[45] The court described the situation in *Bronson* as "an Orwellian nightmare of computer control . . . ."[46] Mrs. Bronson began receiving electric bills several times higher than those she was accustomed to paying. She paid only her normal bill, and

[43]See *supra* note 38 for some of the cases which found no state action.

[44]The amount involved in *Lucas* was $9.89. Furthermore, many of the plaintiffs involved in public utility cases are welfare recipients. *See* Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Col. 1972).

[45]350 F. Supp. 443 (S.D.N.Y. 1972). Another example is Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973). In *Palmer*, the defendant utility company sent out 120,000-140,000 shut-off notices annually, of which only about four percent were actually ever acted upon. The meters were read infrequently and computer-estimated billings were inevitably lower than actual readings, thus considerably increasing the amount owed when actual readings became available. Notices allowed four days for payment, and no actual notice was given when the shut-off was made. In fact, the metermen did not even notify the customers that they were on the property to disconnect the gas lines. The court said: "The evidence as a whole revealed a rather shockingly callous and impersonal attitude upon the part of the defendant. . . ." *Id.* at 243.

[46]350 F. Supp. at 444.

attempted through inquiry to correct the discrepancy. After an investigation of sorts by the defendant, it was discovered that Mrs. Bronson's landlord had been diverting current through her meter. In spite of this finding, the defendant continued to bill her at the higher rate and finally shut off her electricity. After three weeks without electricity, Mrs. Bronson obtained an emergency check for $147.81 from the Department of Social Services from which she received welfare assistance. This should have covered the amount the defendant insisted that she owed, but subsequent bills kept demanding her "arrears" payment. Finally, she was again threatened with disconnection when two of the defendant's representatives visited her home and demanded an arrears payment of $175.00.[47]

The *Bronson* case illustrates the need for effective pretermination procedures in utility cases. The fact that Mrs. Bronson was successful in resolving her dispute with the utility company through the judicial process is probably of very little comfort to her when she remembers the three weeks she spent without electrical service. The most effective way to prevent recurrences of the Bronson case or the situation involving the elderly couple from Schenectady mentioned at the beginning of this note would be to enlarge the already substantial powers of the regulatory commissions that control utilities to include procedural safeguards. In this manner, all utilities within a state could be effectively required to furnish adequate termination procedures and other safeguards to their customers. Additionally, the utility commissions could effectively supervise the implementation and use of these procedures. They could also ameliorate the additional cost of such procedures by slight adjustments in the utility rates which, in most states, are under their control. Thus, legislative or administrative implementation of due process standards would be more effective than any attempt to apply these standards through the judicial process.

B. The Due Process Standard

The next logical question to consider is what due process standards, regardless of how implemented, should a public utility be required to meet? The fundamental requirements of procedural

[47]The defendant's explanation of what happened to Mrs. Bronson's check for $147.81 is quite interesting. Defendant asserted that: "(1) [T]he check was lost at the bank; (2) 'the bank notified the company that they had not received the check'; and (3) the company, 'by an unknown employee,' then reentered the $147.80 deficit on Mrs. Bronson's account." *Id.* at 445.

fairness are notice and the opportunity to be heard prior to being deprived of some constitutionally protected personal or property right,[48] but these requirements are not absolute. For example, a hearing may be dispensed with if the government's interest in summary adjudication substantially outweighs the deprivation facing the plaintiff.[49] However, the *Bronson* court was not pursuaded by the defendant's argument that its interests—potential cash flow decrease, greater administrative burdens, and added expenses—substantially outweighed those of the plaintiff.[50] Thus, prior notice and hearing should be required in the normal utility cases, but it is uncertain exactly what form such notice or hearing must take. Due process requires only that which is fundamentally fair to the individual under the circumstances.[51] Clearly, the notice must apprise the customer of the amount owed, the consequences of nonpayment or delay in payment, and the availability of any dispute-solving mechanisms.[52] To insure receipt of the notice, it should be sent by registered mail and probably followed up with a

[48]Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[49]Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits). In *Goldberg* the Court made it clear that "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266. Similar reasoning applied in utility cases would seem to effectively eliminate a utility's argument that additional procedures would prohibitively increase expenses. This argument should carry relatively little weight in any case because, as previously noted, utilities could receive slight rate increases to compensate for their additional administrative expense.

[50]350 F. Supp. at 448.

[51]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The *Bronson* court concluded, after examining the "informal" procedures available before either the utility or the Public Service Commission, that no determination as to fundamental fairness could be made on "the present state of the record." 350 F. Supp. at 450.

[52]Fuentes v. Shevin, 407 U.S. 67 (1972). The notice in *Bronson* said simply:

> TURN-OFF NOTICE—WE ARE SORRY, BUT YOUR SERVICE WILL BE DISCONTINUED UNLESS THE TOTAL AMOUNT SHOWN BELOW IS PAID BY MAR 02 1970.

Although the court could not prescribe what notice of the available remedies should have been given since it could not determine whether the existing hearing procedures were adequate, it did state: "Con Ed has not undertaken in any way to advise the customer of the recourses allegedly available to him or her. . . . Thus, whatever form of hearing is ultimately determined appropriate in this case, it is clear now that customers such as Mrs. Bronson are entitled to more adequate notice." 350 F. Supp. at 450.

phone call.[53] Some actual and personal notice should also be given to the customer when the utilities are disconnected.[54] Furthermore, in situations where landlords and tenants are involved, both should receive the appropriate notice.[55] Finally, sufficient time must be given to allow the customer either to pay his bill or initiate any action to contest the amount in question.[56]

Prescribing the essentials of a fair hearing is more difficult.[57] Initially, the customer should be able to attempt to settle the dispute in an informal hearing with the company. Such a hearing should be prompt, stay any pending termination, and be without special charge to the customer. If dissatisfied with the company's resolution of the problem, the customer should be allowed an appeal to the public utility commission consisting of a hearing, which meets the general qualifications described above, before an impartial hearing examiner. If the commission's findings are adverse to the customer, the utility could then terminate service, and the customer would still be free to utilize any judicial remedies available to him. Providing this kind of notice and hearing to the customer would surely cost the utility very little in comparison to the consequences of wrongful termination of utility service.

IV. West Virginia Public Utilities and Procedural Due Process

The final topic to be considered in this note is West Virginia public utility law. More precisely, this section will examine the regulatory powers of the West Virginia Public Service Commission [hereinafter referred to as the Commission] and attempt to determine if its powers are similar to those of the commissions in the states where public utilities have been found by the courts to be state actors. Finally, this section will discuss the possibility of the imposition of due process standards by the Commission in light of its present regulatory powers.

The West Virginia Public Service Commission is authorized to regulate all "public utilities."[58] The West Virginia Supreme

[53] *Constitutional Safeguards, supra* note 7, at 518.

[54] A procedure such as this would remedy the situation found in *Palmer v. Columbia Gas Co.*, which is described in note 45 *supra*.

[55] *See* Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).

[56] *Constitutional Safeguards, supra* note 7, at 518-19.

[57] See *supra* notes 51 & 52 for an example of the difficulty the *Bronson* court had in prescribing the essentials of a fair hearing.

[58] A "public utility" is defined as: "any person or persons, or association of

Court of Appeals has said that the distinguishing characteristic of a public utility is "the devotion of private property by the owner or person in control thereof to such a use that the public generally . . . has the right to demand that the use or service, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges."[59] The purpose of the Commission, in regulating utilities, "is to require such entities to perform in a manner designed to safeguard the interest of the public and the utilities."[60] In this connection, the Commission is given the power to: (1) Regulate all rates, methods and practices of public utilities; (2) require copies of all reports, rates, classifications and timetables in effect and used by utilities; (3) require utilities to conform to all rules, regulations, and orders of the Commission; (4) compel obedience to lawful orders by mandamus or injunction; (5) change any rate or toll which is unjust and prescribe rates or tolls which are just and reasonable; and (6) prohibit any practice which shows undue favoritism or discrimination.[61] In addition, the Commission has the power to inspect the property and equipment of a utility,[62] establish a system of accounts to be kept by utilities,[63] and require a "certificate of public convenience and necessity" prior to the time a utility begins operation or expands an existing facility or service.[64] Furthermore, there are many transactions, such as sale of franchises and merger, into which a utility cannot enter without the prior approval of the Commission.[65] Finally, all public utilities pay a special license fee to the Public Service Commission in order to provide revenue for operating expenses.[66]

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persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service." W. VA. CODE ANN. § 24-1-1 (1971 Replacement Volume).

[59]Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 151-52, 174 S.E.2d 331, 335 (1970).

[60]*Id.* at 154, 174 S.E.2d at 336.

[61]W. VA. CODE ANN. § 24-2-2 (1971 Replacement Volume).

[62]*Id.* § 24-2-5.

[63]*Id.* § 24-2-8.

[64]*Id.* § 24-2-11.

[65]*Id.* § 24-2-12.

[66]*Id.* § 24-3-6. Payment of a special fee or tax, such as this one, to the City of St. Paul was considered a significant factor in finding state action in Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972). The court felt that such a payment, based on percentage of gross revenues, made the city a direct beneficiary of the utility's operation and, thus, further integrated the operation of the utility with that of the "state."

Even this cursory examination of the regulatory powers of the Commission reveals that utilities are extensively regulated in West Virginia. In fact, the West Virginia court has characterized the power of the Commission as almost unlimited in controlling the "facilities, charges and services of all public service corporations . . . ."[67] The regulatory powers of the Commission also are similar to and compare favorably with the powers of those commissions discussed previously in the state action cases.[68] Thus, the extent to which utilities are regulated in West Virginia, coupled with monopoly status, where it exists,[69] could allow the courts to treat West Virginia utilities as state actors.

Neither judicial action nor any further legislative action would appear necessary to require West Virginia utilities to furnish procedural due process to their customers. The Commission apparently already has the power to require due process, because if it finds

> any regulations, measurements, practices, acts or service to be unjust, unreasonable, insufficient or unjustly discriminatory . . . or . . . that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, [it] shall determine and declare, and by order fix, reasonable measurements, regulations, acts, practices or service, to be furnished, imposed, observed and followed in the State . . . .[70]

This grant of authority is apparently broad enough to allow the Commission to prescribe due process standards to be followed by the utilities in West Virginia if it finds that the present practices are inadequate to serve the needs of the public. Such action by the Commission would certainly serve its purpose of safeguarding the interests of the public and would be justified by a finding that some or all of the abuses shown to exist in other states either exist in West Virginia or could arise due to the inadequacies of present procedure. West Virginia, therefore, has the advantage of having a Public Service Commission which can correct any existing procedural deficiencies and prevent such deficiencies from arising in the

[67]United Fuel Gas Co. v. Public Serv. Comm'n, 103 W. Va. 306, 310, 138 S.E. 388, 390 (1927).

[68]See *supra* note 28 for a list of the relevant regulatory powers often considered by the courts.

[69]The Commission controls competition and prevents duplication of facilities by granting certificates of public convenience and necessity. Monopoly status is, therefore, directly controlled by the State and is a benefit conferred by the State upon the utility.

[70]W. VA. CODE ANN. § 24-2-7 (1971 Replacement Volume).

future. All this can be done without the necessity of costly and impractical litigation or additional legislative action.

V. Conclusion

This note has actually been written in the form of an hypothesis; that is, given that there presently are deficiencies in the procedures of public utilities, such deficiencies should be corrected in West Virginia administratively, rather than judicially or legislatively. This method has been necessitated by the difficulty of obtaining information as to present practices of the utilities. However, several conclusions can be drawn from the discussion of this newly emerging area of the law. First, utilities do enjoy a unique economic position in modern society and their operations are closely entwined with those of the regulatory commissions in the various states. Therefore, utilities are not merely private business enterprises attempting to market products but, rather, are sanctioned monopolies operating under the imprimatur of the state itself. Second, the services which utilities provide are essential to modern life. Heat, light, gas, and water are necessities on which life itself can depend. Finally, society has a strong interest in assuring that these vital services are not wrongfully terminated or otherwise affected. This interest is so strong that utility customers should be procedurally protected even if there is not a high incidence of wrongful terminations.

Procedural fairness, so far as is practicable, should be guaranteed to all utility customers regardless of whether any abuses presently exist—if the potential for abuse exists. These additional safeguards could be implemented with no cost to the utilities themselves and only a nominal cost to consumers. Thus, it is imperative that the West Virginia Public Service Commission take the initiative in assuring that this necessary service will be furnished to the public.

Mark A. Summers