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PROCEDURES FOR TERMINATION OF UTILITY SERVICE: THE REQUIREMENTS OF DUE PROCESS

INTRODUCTION

The procedures employed by utility companies for the termination of service have been attacked on constitutional due process grounds with increasing frequency in recent years.[1] Although the termination procedures of Kentucky utility companies have not been subjected to such attack, the rash of litigation in this area renders it appropriate to consider the requirements of due process under the fifth and fourteenth amendments[2] in the context of these procedures.

Such an inquiry cannot be conducted in the abstract, for any due process determination turns largely on the surrounding facts and circumstances. Therefore, this analysis will be limited to privately-owned Kentucky utilities which purchase their power from the Tenneesee Valley Authority (TVA). This factual framework is common in Kentucky and presents an unusual interplay of state and federal regulatory involvement.[3]

Due process issues must be resolved through a two-step

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[1] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Lucas v. Wisconsin Elec. Power Co., 406 F.2d 638 (7th Cir. 1972); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Hattel v. Public Serv. Co., 350 F.Supp. 240 (D. Colo. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972).

[2] U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

U.S. CONST. amend. XIV, § 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

[3] The relevant governmental regulations upon a public utility in Kentucky which purchases its power from the Tennessee Valley Authority may be found in Tennessee Valley Authority Act, 16 U.S.C. § 831 (1970) [hereinafter cited as TVA Act]; KY. REV. STAT. §§ 278.010-.460 (1970) [hereinafter cited as KRS]; Ky. Pub. Serv. Comm'n Reg., 807 KY. ADMIN. REG. 2:010 (1975) [hereinafter cited as KAR]. Kentucky law provides for the complete and exclusive regulation of municipally owned and operated electric companies which purchase power from TVA by a publicly selected municipal Electric Plant Board. Tennessee Valley Authority Act, KRS § 96.550-.900 (1970). The Kentucky Public Service Commission is expressly denied jurisdiction. KRS § 96.880 (1970). The courts have clearly recognized that any action by such a board constitutes state action for due process purposes. Cooper v. Aaron, 358 U.S. 1 (1958); Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968).

process. First, it must be determined that the questioned activity was perpetuated under the authority of the state.[4]

> The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, . . . but if not sanctioned in some way by the State, or not done under State authority, [the victim's] rights remain in full force . . . .
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> . . . .
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> This abrogation and denial of rights, for which the *States alone* were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.[5]

This basic distinction between nonremediable private action and constitutionally limited state action has been reiterated on numerous occasions,[6] but its application always entails the difficult process of balancing the peculiar facts of each case.[7] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[8]

Once this hurdle has been negotiated, the plaintiff must prove that the state action is a violation of due process. Again, the demands of due process must be ascertained on a case by case basis. This determination requires that the " . . . nature of the affected interest, the manner in which it has been adversely affected, the reasons for which it was affected and the viable alternatives to the challenged procedure . . . ." be carefully weighed.[9]

I. STATE ACTION[10]

The question of whether state action is present in the ter-

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[4] The Civil Rights Cases, 109 U.S. 3 (1883).

[5] *Id.* at 17-18. (emphasis added).

[6] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970). *See also* Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

[7] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952); Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973). *See also* Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963); *The Supreme Court, 1960 Term*, 75 HARV. L. REV.40 (1961).

[8] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[9] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).

[10] The term "state action" is used in this section in its generic sense rather than

mination of electrical service by a private utility company was recently addressed by the Supreme Court in *Jackson v. Metropolitan Edison Co.*[11] This case involved a challenge to the procedure employed by Metropolitan Edison—a privately owned Pennsylvania utility corporation holding a certificate of public convenience from the Pennsylvania Public Utilities Commission and thereby subject to extensive state regulation—for the termination of electric service to the plaintiff for nonpayment of her bill.[12] The plaintiff alleged that the failure of the company to afford notice, a hearing, and an opportunity to pay any amount due prior to termination violated the due process requirements of the fourteenth amendment. She argued that she was therefore entitled to damages and injunctive relief under the Civil Rights Act of 1871.[13]

Ms. Jackson buttressed her argument with the claim that the right to reasonably continuous electrical service was a "property right"[14] conferred upon her by a Pennsylvania statute providing: "Every public utility shall furnish and maintain adequate, efficient, safe and reasonable services and facilities. . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay."[15] Thus, the

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to indicate action by a particular level of government. Although it is important to note that federal action invokes the fifth amendment due process clause while state action triggers the fourteenth amendment, the Supreme Court has ruled that the guarantees of the two amendments are basically identical. Hibben v. Smith, 191 U.S. 310, 325 (1903). Additionally, the Court has applied the tests for finding state action and federal action interchangeably, frequently cross-referencing the two types of cases. *See generally* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1951). Therefore, a finding of governmental action on either the state or federal level, although invoking the due process clauses of different amendments, will have the same constitutional effect. *See also* Schatte v. International Alliance of Stage Employees, 70 F. Supp. 1008, 1010-11 (S.D. Cal.), *aff'd*, 165 F.2d 216 (9th Cir.), *cert. denied*, 334 U.S. 812 (1947); Bartlett Trust Co. v. Elliot, 30 F.2d 700, 701 (E.D. Mo. 1929), *aff'd*, 40 F.2d 351 (8th Cir. 1930); 16 AM. JUR. 2D *Constitutional Law* § 542 (1964); 16A C.J.S. *Constitutional Law* § 567 (1956).

[11] 419 U.S. 345 (1974).

[12] Ms. Jackson was two months delinquent on her electric bill and was informed by the company 4 days before the termination that her electric meter had been tampered with so as not to record the amount of electricity used.

[13] 42 U.S.C. § 1983 (1970). This statute provides damages and injunctive relief for violations inflicted "under color of any statute, ordinance, [or] regulation . . . of any State . . . ." *Id.*

[14] 419 U.S. at 348 n.2.

[15] PA. STAT. ANN. tit. 66, § 1171 (1950).

plaintiff contended Metropolitan Edison's termination of her service for nonpayment, an action permitted by the company's general tariff filed with the Pennsylvania Public Utilities Commission,[16] was state action depriving her of property without due process of law.[17]

The Court, applying the test developed in *Moose Lodge No. 107 v. Irvis*,[18] concluded that a sufficiently close nexus did not exist between the state of Pennsylvania and the challenged action of Metropolitan Edison to allow the actions of the utility to be fairly termed the actions of the state.[19] The Court determined that neither Metropolitan Edison's partial monopoly on furnishing electrical service, conditioned upon extensive state regulation, nor the inclusion of the termination procedure in the tariff filed with the Commission was sufficient to justify a finding of state action. Consequently, the utility's termination procedure was merely private action and not subject to the due process requirements of the fourteenth amendment.

The Court's mode of analysis in *Jackson* was "fundamentally sequential,"[20] considering numerous factors in isolation

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[16] PA. STAT. ANN. tit. 66, § 1142 (1959) requires every public utility to file a tariff with the Public Utilities Commission showing all rates established by the utility. There is no requirement that the tariff include the procedure for initiation or termination of service. However, Metropolitan Edison did include a provision in its tariff which stated: "Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in the case of non-payment of bill. . . ." 419 U.S. at 346 n.1. The Commission never subjected this provision to any hearing or other scrutiny. *Id.* at 354.

[17] The Court decided this case on state action grounds and did not decide whether the right to continued electrical service constituted "property" for purposes of the fourteenth amendment. *Id.* at 359. An argument can be made that the property right sought to be protected lies in the contract between the plaintiff and the utility company for the provision of electrical service. Valid contracts have been held to constitute property rights under the fifth amendment, *see, e.g.*, Lynch v. United States, 292 U.S. 571 (1934), and the fourteenth amendment, *see, e.g.*, Superior Water, Light & Power Co. v. City of Superior, 263 U.S. 125 (1923); Boston Elevated Ry. v. Commonwealth, 39 N.E.2d 87 (Mass. 1942). For a general discussion of this problem *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Shelton, *The Shutoff of Utility Service for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745 (1971); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *The Duty of a Public Utility to Render Adequate Service*, 62 COLUM. L. REV. 312 (1962).

[18] 407 U.S. 163 (1972).

[19] 419 U.S. at 351, 358-59.

[20] *Id.* at 363 (Douglas, J., dissenting).

and dismissing each as *individually* insufficient to support a finding of state action. Attention was never focused on the impact of these factors as a whole. This method marked a sharp departure from the analytical approach developed by the Court in *Burton v. Wilmington Parking Authority*,[21] which required that all relevant facts and circumstances be weighed in the aggregate to determine if their total impact was sufficient to constitute state action.[22]

Because the *Jackson* decision appears to effectively undermine the viability of the "aggregate" approach,[23] this investigation into the presence of government action in the termination procedures of TVA-supplied Kentucky utilities will utilize the sequential method. The arguments presented by Ms. Jackson and the manner in which the Court responded provide an excellent framework for this analysis.

A. *"Affected With the Public Interest"*

The argument was presented in *Jackson* that the concept of state action should be expanded to include the conduct of all businesses "affected with the public interest."[24] The Court refused to so expand the state action concept, quoting *Nebbia v. New York*[25] for its rationale:

> It is clear that there is no closed class or category of businesses affected with a public interest . . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that

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[21] 365 U.S. 715 (1961).

[22] *Id.* at 722-26. *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[23] This "aggregate" approach had been utilized in several of the cases involving challenges to utility termination procedures. *See, e.g.*, Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972).

[24] 419 U.S. at 353.

[25] 291 U.S. 502, 536 (1934).

> they are not susceptible of definition and form an unsatisfactory test . . . .[26]

The Court also observed: "The argument has been impliedly rejected by this Court on a number of occasions."[27] Thus, given the Supreme Court's reaction to this concept in *Jackson*, it seems clear that the "affected with a public interest" argument has been thoroughly discredited.

B. *State Supported Monopoly Status*

Ms. Jackson's first substantive claim was that Metropolitan Edison's state-granted monopoly status justified a finding of state action in its termination procedure. The Court dismissed this assertion, pointing out that neither Metropolitan's certificate to operate in Pennsylvania nor any state statute mentioned a monopoly status,[28] and that the Court had previously disclaimed reliance upon monopoly status in order to find state action.[29]

The majority's position in *Jackson* makes it doubtful that a utility's conduct in Kentucky would constitute state action, based solely upon the monopolistic status of its operations. However, Justice Marshall's dissent in *Jackson* attacked the majority's conclusion that governmental regulation did not contribute to Metropolitan's monopoly.[30] He questioned whether electric companies would be free from competition were it not for the government's prohibition of high profit margins and pressure for state ownership. These two governmental policies, which Marshall viewed as insuring the utility's continued monopoly status, are clearly manifested in the Tennessee Valley Authority Act,[31] which expressly encourages governmental ownership of utilities[32] and requires that electrical resale

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[26] 419 U.S. at 353.

[27] *Id.* at 354 n.9.

[28] *Id.* at 351 n.8.

[29] *Id.* at 352, *citing* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

[30] 419 U.S. at 366-68. (Marshall, J., dissenting).

[31] 16 U.S.C. § 831 (1970).

[32] 16 U.S.C. § 831-i (1970), which provides: "[I]n the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations . . . ."

rates be determined by the TVA Board of Directors.[33] In view of the explicit nature of these policies and the close relationship between the Kentucky utility companies in question and TVA, the utilities' monopoly status could possibly lead to a finding of state action.

C. *Public Function*

The plaintiff next contended that, due to the Pennsylvania statutory requirement that public utilities furnish electric service on a reasonably continuous basis,[34] Metropolitan Edison performed an essential public function and that its actions were therefore equivalent to those of the state.[35] Speaking for the Court, Justice Rehnquist responded that the power delegated to the defendant was not one traditionally the responsibility of the sovereign.[36] Although the Pennsylvania statute imposed a duty to provide continuous service upon Metropolitan, it imposed no duty upon the state to provide such service. In support of its rejection of this argument, the opinion cited a Pennsylvania case decided prior to the turn of the century which also rejected the claim that the furnishing of utility service is a state function,[37] apparently ignoring the possibility that the scope of acts which constitute a public function might have expanded in the intervening 75 years.

The public function argument would be much more likely to meet with success against a utility company which purchases its power from the Tennessee Valley Authority. The TVA Act evidences congressional recognition of a public responsibility to provide electric service. Stating that its purpose is to encourage domestic use of electricity by providing it at low

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[33] 16 U.S.C. § 831-k (1970) provides: "[The Board] shall require that any resale of such electric power . . . be made . . . at prices that shall not exceed a schedule fixed by the board . . . ."

[34] PA. STAT. ANN. tit. 66, § 1171 (1959). For the exact wording of the statute, *see* text accompanying note 15 *supra*.

[35] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). The public function argument has been successful in a number of cases which deal with powers more traditionally reserved to the state. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (municipal park); Terry v. Adams, 345 U.S. 461 (1953)(election); Marsh v. Alabama, 326 U.S. 501 (1946)(company town).

[36] 419 U.S. at 353.

[37] Bailey v. City of Philadelphia, 39 A. 494 (Pa. 1898).

cost,[38] the statute authorizes the TVA Board of Directors to include in a contract for the sale of power to a private company any terms and conditions deemed necessary to achieve that purpose.[39] In addition, the Board is authorized to cancel any contract with a private company if that power is needed to supply the demands of government-owned electric systems.[40] Thus, a strong argument could be made that a private utility supplied by TVA is involved in a broad governmental scheme designed to perform a necessary public function, and that its actions are so entwined with governmental policies that they constitute state action.[41]

D. *State Authorization of the Termination Procedure*

Ms. Jackson also asserted that state action should be found because Pennsylvania specifically authorized and approved the procedure used by Metropolitan Edison.[42] This claim was based on the fact that the utility filed its general tariff, containing the termination of service procedure, with the Pennsylvania Public Utilities Commission.[43] The Court found that the sole relation of the Commission with this specific procedure was Metropolitan Edison's filing of the tariff and the Commission's lack of opposition to it.[44] The Court distinguished the circumstances in *Public Utilities Commission v. Pollak*,[45] in which the Capital Transit Company's piping of music into buses was found to be state action, on the ground that the District of Columbia's Public Utilities Commission commenced its *own* investigation of the music, and ruled it to be "not inconsistent with public convenience."[46] In *Jackson* the

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[38] 16 U.S.C. § 831-j (1970).

[39] 16 U.S.C. § 831-i (1970), which provides: "[T]he Board is authorized to include in any contract for the sale of power such terms and conditions . . . as in its judgment may be necessary or desirable for carrying out the purposes of this chapter . . . ."

[40] *Id.*

[41] Evans v. Newton, 382 U.S. 296, 299 (1966). While this case does not deal specifically with utility companies, the test stated therein has been applied in a broad range of state action cases.

[42] 419 U.S. at 354.

[43] For a discussion of the tariff and the filing requirements, *see* note 16 *supra*.

[44] 419 U.S. at 355.

[45] 343 U.S. 451 (1952).

[46] *Re* Capital Transit Co., 81 P.U.R. (n.s.) 122, 126 (1950).

Pennsylvania Commission placed no such imprimatur upon the procedure. The majority concluded that unless a utility's practice is *ordered* by a state agency, it is *not* approved or initiated by the agency and, therefore, is not state action.[47]

This issue presents the strongest basis for distinguishing *Jackson* from an action that might be brought in Kentucky against a private utility which purchases its power from the TVA. In contrast to the role of the Pennsylvania Public Utilities Commission, the Public Service Commission of Kentucky prescribes specific regulations governing the requisite justification and procedure for the termination of utility service:

> A utility shall not be required to furnish service to any . . . customer when such . . . customer is indebted to the utility for service furnished until such . . . customer shall have paid such indebtedness.[48]
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> . . . .
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> However no utility shall discontinue service to any customer for non-payment of bills (including delayed charges) without first having made a reasonable effort to induce the customer to pay the same.[49]

In addition, the Kentucky Public Service Commission Regulations explicitly state that a utility may discontinue service for nonpayment upon 48 hours notice.[50] Since all privately owned utilities in Kentucky are required to conform to these regulations,[51] the procedure which a Kentucky utility company must follow to terminate service is not merely authorized but prescribed by the state. Under the *Jackson* test, this relationship between the state and the utility would require that the procedure be classified as state action.

E. *"Symbiotic Relationship"*

The final argument advanced in *Jackson* relied upon *Burton v. Wilmington Parking Authority*,[52] in which the Court

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[47] 419 U.S. at 357. *See* 807 KAR 2:010 § 11(2)(a) (1975).

[48] 807 KAR 2:010 § 11(1)(d) (1975).

[49] 807 KAR 2:010 § 11(2)(a) (1975).

[50] *Id.*

[51] KRS § 278.040 (1970).

[52] 365 U.S. 715, 722 (1961).

ruled that the actions of a private restaurant business operated in space rented in a municipal parking structure constituted state action since there was a "symbiotic relationship" between the business and the government. The Court based its finding of interdependence on several factors: (1) the building was dedicated to public use; (2) the cost of acquisition and operation was borne by the city, while the proceeds from rental and parking services were enjoyed by the municipality; (3) the leased area was not surplus state property, but physically and financially an integral part of the city's plan to operate the unit; (4) the parking facility and restaurant mutually benefited from the arrangement; and (5) the discrimination complained of contributed to the financial success of the restaurant, and therefore the parking structure.[53] The majority in *Jackson*, limiting *Burton* to cases involving lessees of public property, found that Metropolitan was privately owned, did not lease facilities from Pennsylvania, and was solely responsible for service to its customers. Therefore, Metropolitan was not in such a position of interdependence with the state that its actions constituted state action.

Despite the Court's reaction to this theory in *Jackson*, the argument could prove more successful in an action against a utility which purchases electricity from the Tennessee Valley Authority. The Court's limitation of the *Burton* doctrine to cases involving lessees of the government could be overcome in such a case in two ways. First, the private utility may actually be leasing transmission lines from TVA pursuant to statutory authorization.[54] Second, it can be argued that the ongoing character of any purchase of electricity more nearly resembles a lease than a sale and should therefore be interpreted as such.

If the Court's limited interpretation of *Burton* could be overcome, the probability of proving a symbiotic relationship would be good. The sale of electricity to private corporations is of mutual benefit to the government and the utility. The utility is permitted to purchase electricity being generated

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[53] *Id.*

[54] 16 U.S.C. § 831-k (1970) provides: "The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board . . . ."

from existing power plants and to sell that electricity in a market area which, in all likelihood, is lacking in any meaningful competitive force. The federal government, on the other hand, is able to profitably dispose of any excess power generated by its TVA electric plants, while maintaining broad control over the duration and terms of the sales contracts[55] as well as the price and manner of resale of the electricity to the consumer.[56] Additionally, private sales secure sufficiently high load factors and revenue returns for the TVA plants, thereby serving TVA's primary purpose of providing low cost electricity for domestic use.[57] These factors make it quite possible that the private utility company is acting on behalf of and in conjunction with the government to the extent that its activities will be deemed state action under the *Burton* doctrine.

F. *State Action Summary*

There are three separate factors which distinguish the circumstances in *Jackson* from an action brought against a private Kentucky utility which purchases its power from TVA. First, the provisions of the TVA Act indicate that the Authority's sale of power to a private utility and its eventual resale are part of an important "public function." Second, the Public Service Commission of Kentucky has regulations which, in effect, prescribe the termination of service procedure to be followed by a privately owned utility. Finally, the relationship between the utility and the government bears a much closer resemblance to the "symbiotic relationship" described in *Burton* than did the utility-government relationship in *Jackson*. The Court's rejection of the aggregate approach in *Jackson* necessitates that one of these factors must be sufficient, by itself, to justify a finding of state action. There remain, however, strong indications that an action brought in Kentucky, challenging the termination-of-service procedure of a privately owned utility which purchases its power from TVA would result in a finding of state action. It is therefore neces-

[55] 16 U.S.C. § 831-i (1970). *See* note 39 *supra*.
[56] 16 U.S.C. § 831-k (1970). *See* note 33 *supra*.
[57] 16 U.S.C. § 831-j (1970).

sary to examine the termination procedures of these utilities for violations of the amorphous concept of due process of law.

II. DUE PROCESS

The term "due process of law" is not amenable to precise definition. "[T]here is no table of weights and measures for ascertaining what constitutes due process."[58] For this reason, due process requirements vary in accordance with the particular facts of each case.[59] There are, however, certain minimum standards which may be gleaned from the cases. The affected parties are entitled to notification of the impending state action and an opportunity to be heard at a meaningful time and in a meaningful manner.[60]

Due to the failure of the Supreme Court to reach the due process question in *Jackson*, the Sixth Circuit's decision in *Palmer v. Columbia Gas, Inc.*[61] would govern any case challenging the termination of service procedures of a Kentucky utility on due process grounds. In *Palmer*, consumers of Columbia Gas of Ohio sought declaratory and injunctive relief from the statutorily authorized[62] procedure employed to terminate gas service. Under this procedure, a consumer who was two months in arrears would receive a "shut-off" notice stating the amount due and warning of impending termination. If the bill was not paid within 5 days after the mailing of this notice, service was terminated without further contact. The Sixth Circuit found this procedure to be in violation of due process.

The utility service termination procedure authorized by the Kentucky Public Service Commission is strikingly similar

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[58] Burns v. Wilson, 346 U.S. 137, 149 (1953).

[59] Due process is widely recognized as a flexible concept which depends upon a careful balancing of the private and public interests involved in each case. *See* Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Duby v. American College of Surgeons, 468 F.2d 364 (7th Cir. 1972).

[60] *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Baldwin v. Hale, 68 U.S. (8 Wall.) 223, 233 (1863).

[61] 479 F.2d 153 (6th Cir. 1973).

[62] OHIO REV. CODE ANN. § 4933.12 (Page 1954). The procedure employed by Columbia Gas was actually more liberal than necessary to comply with the statute. Although the utility terminated service 5 days after notice, the statute only requires a 24-hour notice period.

to that enjoined in *Palmer*. The only significant distinction lies in the timing of the notice. The Columbia Gas policy required termination 5 days after the notice was *mailed*, whereas the Kentucky regulations permit termination 48 hours after *receipt* of the notice by the customer.[63] Otherwise, the procedures are virtually identical. No provision exists in either scheme for a pretermination hearing conducted by an independent fact finder or for the continuance of electrical service until any dispute is settled. The only recourse available is court action. During the entire pendancy of any such litigation, the consumer would be denied service.[64]

The determinative factor in *Palmer* was the complete failure of the company to provide any established procedure for the resolution of disputes over the accuracy of the unpaid bill.[65] "The mere theoretical possibility of informal resolution cannot serve as a substitute for a mandatory procedural mechanism designed to prevent unjust deprivations of important property interests."[66] The court also noted that appeal through the courts did not provide a meaningful hearing because low-income consumers are both the most likely to have their service terminated and the least able to bear the expense of civil litigation.[67] On the basis of this reasoning, it seems probable that the termination-of-service procedure employed by a Kentucky utility, if it were almost indistinguishable from that of Columbia Gas, would also be declared insufficient to satisfy the constitutional requirements of due process of law.

Having determined that the minimum standards required by the Kentucky Public Service Commission's termination procedure may well violate due process, it is necessary to attempt to construct an acceptable procedure. The logical basis for this endeavor is the process approved by the Sixth Circuit in *Palmer*. The court affirmed the order of the district court[68] which prohibited the termination of service until a representa-

[63] 807 KAR 2:010 § 11(2)(a) (1975).

[64] Palmer v. Columbia Gas, Inc., 479 F.2d 153, 168 (6th Cir. 1975).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 169.

[68] Palmer v. Columbia Gas, Inc., 342 F. Supp. 241 (N.D. Ohio 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973).

tive of the company personally informed the consumer of the proposed termination and the recourse available.[69] If the consumer failed to contact the company within 24 hours, service could be terminated. If, however, the customer did respond within that time, no further action was permitted until a company manager investigated the claim and explained the company's position in detail. If the dispute continued, termination would be postponed for the litigation period upon the posting of adequate bond.[70]

Under *Palmer*, a Kentucky utility employing this procedure would unquestionably satisfy the requirements of due process.[71] Supreme Court decisions subsequent to *Palmer*,[72] however, have created uncertainty as to whether this procedure represents the minimum requirement.[73] It is possible that a less

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[69] Palmer v. Columbia Gas, Inc., 479 F.2d 153, 159-60 (6th Cir. 1973).

[70] An amount equal to that in dispute would be deemed an adequate bond if supported by good and sufficient surety. *Id.* at 160.

[71] *Cf.* North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S.Ct. 719 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[72] North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

[73] The Sixth Circuit's approval of the procedure outlined in the text was based upon a justifiable reliance on the Supreme Court's exposition of extensive due process requirements in Fuentes v. Shevin, 407 U.S. 67 (1972). Subsequent to *Palmer*, the Court reexamined the due process problem in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Commentators have been unable to discern the precise effect which the *Mitchell* decision will have on the principles announced in *Fuentes*. *See, e.g.*, Newton & Timmons, *Fuentes "Repossessed,"* 26 BAYLOR L. REV. 469 (1974); Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975); Weinberg, *Kentucky Law Survey, Commercial Law*, 63 KY. L.J. 727 (1974-75). Even the Supreme Court justices deciding the case were divided upon its effect. The majority opinion indicates that *Fuentes* will be unaffected because *Mitchell* is clearly distinguishable on its facts. Mitchell v. W.T. Grant Co., 416 U.S. 600, 615-18 (1975). The concurring opinion of Justice Powell states that *Mitchell* retains the *Fuentes* reasoning but withdraws from the full reach of that reasoning. 416 U.S. at 623. And finally, the dissenting opinion, endorsed by Justices Stewart, Douglas, and Marshall, states that *Fuentes* has been unequivocably overruled. 416 U.S. at 634. In view of such extreme confusion, it is impossible to do more than note that *Fuentes*, interpreting due process in connection with specific statutes and facts, required a hearing prior to sequestration of property and that *Mitchell* did not require such a hearing in a case involving different facts and statutes.

To add to the confusion, the same justices who decided *Mitchell* have recently ruled in North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S.Ct. 719 (1975), that, on the facts of that particular case, the opportunity for a hearing prior to attachment of property is necessary to satisfy due process. Against this backdrop, one can only specu-

elaborate procedure, one which eliminated the personal contact requirement and abbreviated the administrative hearing, would afford consumers due process of law.[74] Nevertheless, in the absence of any definitive guidelines from the Supreme Court, Kentucky utilities would be wise to adopt the procedure dictated by the Sixth Circuit and thus insulate themselves from due process attack.

III. CONCLUSION

The procedures employed by privately owned Kentucky utility companies purchasing electricity from the Tennessee Valley Authority for the termination of electrical service are vulnerable to attack on due process grounds. Because the factual context of such a case is readily distinguishable from that presented in *Jackson v. Metropolitan Edison Co.*,[75] the Supreme Court's determination of no state action cannot be considered binding. Utilizing the reasoning and the sequential mode of analysis advanced in *Jackson*, the activities of a TVA-supplied Kentucky electric company may be deemed state action on any one of three grounds; the performance of a public function, the prescription of the termination procedure by the Kentucky Public Service Commission, or the existence of a symbiotic relationship between the utility and TVA. Assuming that adequate state action exists to render the due process clauses of the fifth and fourteenth amendments applicable, it is possible to conclude that, based upon the Sixth Circuit's decision in *Palmer v. Columbia Gas, Inc.*,[76] the Kentucky ter-

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late on the minimum requirements for a utility's termination of service procedure. It must also be remembered that the due process requirements for termination of electrical service, specifically considered by the Sixth Circuit in *Palmer*, are not necessarily the same as the requirements in replevin and sequestration proceedings considered in *Fuentes* and *Mitchell*.

[74] In Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 653 (7th Cir. 1972) the Seventh Circuit rejected the *Palmer* court's ruling that mere notice of an unpaid balance is insufficient to satisfy the "due process" requirements for the termination of electrical service. The court in *Lucas* held that a customer is assumed to know of his recourse available either through the company or the judicial system, and that the omission of instruction to the customer as to how he can resolve his dispute is not a fatal defect in the notice. Criticizing *Lucas, see* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355, 392-95 (1973).

[75] 419 U.S. 345 (1974).

[76] 479 F.2d 153 (6th Cir. 1973).

mination procedure authorized by the Public Service Commission violates due process. The absence of any established procedure for the pretermination resolution of disputes is fatal.

Based upon the probability of finding a due process violation, it is recommended that the Kentucky Public Service Commission develop a termination procedure similar to that ordered by the court in *Palmer*. Such a process would effectively serve the interests of the consumer by reducing mistaken and unjustified terminations and by preventing unnecessary hardship during the period required to settle any disagreement. "[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[77]

Dale W. Bruckner

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[77] Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

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