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PUBLIC UTILITIES AND STATE ACTION: THE BEGINNING OF CONSTITUTIONAL RESTRAINTS

BY ROGER S. HAYDOCK*

Ihrke v. Northern States Power Co. represents the first case in which a federal court of appeals found sufficient state action to hold a privately owned public utility to constitutional restraints. Specifically, the court found that in threatening to terminate utility services to subscribers, a privately owned public utility acted within "color of state law" for purposes of 42 U.S.C. section 1983. Mr. Haydock, the attorney of record who successfully argued the Ihrke position in this decision, advances in the following article a number of arguments which are designed to demonstrate that all privately owned public utility companies should be held subject to the principles of state action.

It is our job to see to it that you are given a chance to live. If utilities will help, it is our job — our duty — to provide them.

We believe a public utility has great public obligations.

We want to build brighter lives for all of us.

— A Public Utility Advertisement

UTILITY subscribers have attempted to hold utility companies to their stated obligations and responsibilities.¹ Consumers in many states have questioned the propriety of rate increases sought by utility companies.² Subscribers in other states have appeared before numerous governmental public utility commissions calling for the revision of rules regulating utilities. National welfare rights organizations have organized local opposition to utility operations which discriminate against the

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¹ Senator Lee Metcalf and Vic Reinemer in their book *OVERCHARGE* (1967) describe in detail the practices of public utilities and offer a blistering attack on the failure of utility companies to live up to their public obligations.

² See *In re Tuscon Gas & Elec. Co.*, 5 CLEARINGHOUSE REV. 769 (Apr. 1972); *In re Public Serv. Co.*, 3 CLEARINGHOUSE REV. 206 (Dec. 1969); *Consumers Educ. & Protective Ass'n v. Philadelphia Elec. Co.*, 3 CLEARINGHOUSE REV. 206 (Dec. 1969).

poor.³ Environmental groups have demanded that utility companies preserve and protect natural resources which are now being so heavily exploited.

Amidst all these challenges, the utility companies have emerged relatively unscathed and continue to operate in the ways of the past.⁴ While consumers have petitioned courts and administrative agencies for redress of grievances allegedly caused by utilities, such forums have been slow to respond. However, recently within 3 months of one another, two federal circuit courts and three federal district courts ruled on the question of whether certain collection practices of privately owned utility companies constituted state action. Three courts held in the affirmative; two held in the negative.

State action, the constitutional issue before these courts, concerns the safeguards guaranteed by the Constitution and the laws of the United States which prohibit the deprivation of individual rights by those who act under governmental authority, sanction, or direction.⁵ To recover in such an action, the complaining party must show that (1) the actions of the party complained of constitute governmental or state action and that (2) such actions violate certain of an individual's rights, privileges, or immunities as defined by the Constitution. The successful application of this formula, as accomplished in three of the above decisions, greatly enhances the consumer's ability to challenge the operations and activities of privately owned public service companies in a judicial forum. To that end this article specifically focuses on the first of the two elements of the constitutional equation by demonstrating that the actions of privately owned public utility companies constitute governmental or state action. This focus establishes a basis for suits asserting that constitutional rights — such as due process and equal protection — should be applied to restrain utility companies.

In demonstrating that the actions of privately owned utilities constitute state action, the first part of this article will briefly analyze the five recent decisions mentioned above. Part II will then present five separate areas of analysis, each of which

³ See, e.g., *Carbondale W.R.O. v. Central Ill. Pub. Serv. Co.*, 5 *CLEARINGHOUSE REV.* 333 (Oct. 1971).

⁴ While this article will later argue that the government has subjected utility corporations to heavy regulation, such regulatory commissions have not included representatives of consumer groups, minority organizations, or environmental groups. Often such regulation has served and advanced the needs of the utility companies themselves, largely ignoring the public trust.

⁵ U.S. CONST. amend. XIV; 42 U.S.C. § 1983 (1970).

is sufficient in itself to demonstrate that privately owned public utilities are subject to state action concepts.

I. RECENT DECISIONS

A. *The Ihrke Decision*

In *Ihrke v. Northern States Power Co.*,⁶ the Eighth Circuit Court of Appeals found that this privately owned public utility, in threatening to terminate gas and electric services to a subscriber, acted within color of state law for purposes of 42 U.S.C. section 1983. Northern States Power (Northern) threatened to terminate utility services to the Ihrkes for failure to pay a past bill and a utility security deposit. The Ihrkes disputed paying this bill and deposit and, on behalf of a class of subscribers, sought judicial relief by way of a declaratory judgment and an injunction, alleging that the collection practices of Northern violated their due process rights. The Ihrkes alleged that Northern routinely terminated gas and electric services without affording subscribers timely notice and an opportunity to be heard in opposition to such termination.

After granting the Ihrkes an initial temporary restraining order, the federal district court found that Northern had no constitutional obligation because the utility company was simply a private corporation going about the business of selling utility services. The Eighth Circuit reversed, holding it "abundantly clear" that Northern's activities constituted state action. After reviewing the extensive regulatory scheme within which the utility operated, the Eighth Circuit found Northern to be so entwined with governmental control as to render the public utility a state actor:

Federal courts have generally recognized private conduct as "color of law" or "state action" when it performs a "public" function and is subjected to "public" regulation.⁷

B. *The Palmer Decision*

The day before the Eighth Circuit decided *Ihrke*, the federal district court in *Palmer v. Columbia Gas Co.*⁸ held similarly that the privately owned public utility acted under color of law in terminating services to utility subscribers without notice or hearing. Ohio regulated this and other similar utilities by a myriad of state statutes and through the jurisdiction of the Ohio Public Utilities Commission. After noting the monopolistic

⁶ 459 F.2d 566 (8th Cir. 1972), *vacated as moot*, 41 U.S.L.W. 3182 (Oct. 10, 1972).

⁷ *Id.* at 569.

⁸ 342 F. Supp. 241 (N.D. Ohio 1972).

status of the Columbia Gas Company and the specific statutes authorizing the utility to terminate gas service for alleged non-payment of a bill, the court held:

Clearly these statutes, particularly the latter one, show that the governmental relations with the defendant are far different and far greater than the mere provisions for enfranchisement of ordinary business enterprises. The state's thumb is indeed heavy upon the scales

. . . .
When the defendant's collectors enter upon private property to carry out the procedures necessary to shut off a customer's gas, they are acting in a governmental capacity, and exercising the police power of the state⁹

C. *The Stanford Decision*

Following the lead of the *Ihrke* and *Palmer* courts, the federal district court in *Stanford v. Gas Service Co.*,¹⁰ held a privately owned public utility to be existing and operating under color of state law. The court relied on several factors for its conclusion: the "extreme regulation" by the State of Kansas over the gas company's right to and method of business, the "complete monopoly" enjoyed by the company in furnishing an "essential commodity," and the "public function" performed by the company in the "public interest." These activities, the court concluded, lost any "private character" and consequently subjected this utility to constitutional restraints.¹¹

D. *The Jackson Decision*

In a departure from the three previous decisions, the district court in *Jackson v. Metropolitan Edison Co.* held that a privately owned public utility did not act under color of law in terminating utility services to a subscriber.¹² The court adopted the utility company's argument that in order for state action to exist the state must be involved not simply with the institution whose activity is alleged to have inflicted the injury, but that the state must be involved with the activity that caused the injury. This state action concept has not been ar-

⁹ *Id.* at 245-46.

¹⁰ 346 F. Supp. 717 (D. Kan. 1972).

¹¹ *Id.* at 722.

¹² 348 F. Supp. 954 (M.D. Pa. 1972). The court did not consider the state's indirect involvement with the utility's collection practices, which could affect the state action question. See *United States v. Guest*, 383 U.S. 745, 750 (1965). States, including Pennsylvania, do not require utility companies to file tariffs for frivolous reasons, but rather to oversee the operation of the companies and regulate activities taken under those tariffs. Upon accepting such tariffs, a state deems the tariff to be reasonable and places a governmental imprimatur on such rules. A state does not accept responsibility for the filing of unreasonable tariffs, but would require the utility to modify such tariffs and make them reasonable. The court in *Jackson* did not consider these involvements of the State of Pennsylvania.

culated in any previous Supreme Court decision, and its narrow application stands in conflict with many Supreme Court decisions expanding state action. The predominant thrust of the decisions will be discussed in the second part of this article.

E. *The Lucas Decision*

In a case with a result similar to that in *Jackson*, the Seventh Circuit in *Lucas v. Wisconsin Electric Power Co.*¹³ held that this privately owned public utility did not operate under color of law in threatening to terminate services to the plaintiff subscriber. The Seventh Circuit in several previous decisions involving similar activities of public utilities found state action absent. Not surprisingly perhaps, the court reaffirmed those decisions.¹⁴

However, that portion of the *Lucas* opinion which concerned itself with state action failed to present a complete, convincing argument and disregarded the similarities in the above three cases which supported a finding of state action. Specifically, the decision largely ignored the facts of the case, disregarded the history of public utilities, failed to consider their public function and service to the public interest, and summarily dismissed their monopolistic status.¹⁵ Because state action decisions turn primarily on such facts as the above,¹⁶ the court's failure to deal with these vital circumstances casts suspicion on the validity of this decision.¹⁷

In its footnotes, used primarily to distinguish other state action cases, the court concerned itself with the recent decision of *Moose Lodge No. 107 v. Irvis*.¹⁸ The court improperly relied on this decision to support its holding. Justice Rehnquist's majority opinion in *Moose Lodge* found no state action be-

¹³ 466 F.2d 638 (7th Cir. 1972).

¹⁴ In *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir.), cert. denied, 396 U.S. 846 (1969), the Seventh Circuit found no state action in the conduct of a privately owned public utility where that company terminated commercial telephone service to a subscriber. The court found that the telephone company had only filed its own regulations with the state and that the state did not benefit from, encourage, request, or cooperate in the suspension of service. Subsequently, in *Particular Cleaners, Inc. v. Commonwealth Edison Co.*, 457 F.2d 189 (7th Cir. 1972), the court again found the state not sufficiently involved in the utility company's practice of charging security deposits to convert such conduct into state action. Though a regulation issued by the Illinois Commerce Commission specifically permitted the company to charge a security deposit, the court held that the regulation did not enlarge the company's right in the absence of statute or regulation to charge deposits, but rather limited such deposits to reasonable amounts.

¹⁵ 466 F.2d at 641-44.

¹⁶ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961), quoted in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

¹⁷ See 466 F.2d at 641-44.

¹⁸ 407 U.S. 163 (1972).

cause: (1) the private club was not open to the public, (2) the club did not serve a public function, (3) the lodge did not have a monopoly on liquor licenses, and (4) the Pennsylvania Liquor Control Board did not establish or enforce the discriminatory club policies. In *Lucas*, on the other hand, each and every one of these criteria were fulfilled: the privately owned public utility (1) served the public, (2) performed a public or governmental function, (3) had a monopoly and (4) was subject to governmental regulations to establish and enforce its policies. *Moose Lodge* sets down criteria defining lack of state action. At the other end of the spectrum, direct action by the government constitutes the most obvious example of state action. Privately owned public utilities do not resemble the state action concepts espoused in *Moose Lodge* but rather closely resemble the function, interests, and authority of a governmental unit.¹⁹

F. *The Lucas Dissent*

The dissenting opinion in *Lucas* analyzed the facts and applied the principles of state action as found in the *Ihrke*, *Palmer*, and *Stanford* decisions.²⁰ Judge Sprecher in his dissent began with the historical common law distinction between a private business and a public utility concluding that, at the time of the enactment of the fourteenth amendment and the Civil Rights Act of 1871, "pervasive regulation by the state was limited to the natural monopolies, public utilities which enjoyed extensive public privileges and to which citizens were compelled to

¹⁹ In fact, with regard to public utility cases, *Moose Lodge* stands as precedent for declaring such privately owned utilities subject to constitutional requirements due to inherent state action. The Court in *Moose Lodge* did find color of law in the club's compliance with a state regulation reading: "Every club licensee shall adhere to all of the provisions of its Constitution and By-laws." *Id.* at 181. The private club in discriminating against blacks followed its by-laws. The Court concluded that action taken under such by-laws, action which was in turn sanctioned by the state through this requirement, constituted state action.

The above liquor regulation closely resembles state regulations promulgated by public utility commissions or enacted by state legislatures requiring utility companies to adhere to their practices as set out in their filed tariffs. These tariffs, for instance, detailing such things as collections operations, resemble the by-laws of the *Moose Lodge* and, accordingly, the enforcement of such tariffs by the public utility constitutes state action under the holding in *Moose Lodge*.

²⁰ State action within the scope of the fourteenth amendment to the United States Constitution bears the identical meaning with "color of state law" under 42 U.S.C. § 1983 (1970) and 18 U.S.C. § 242 (1970). *United States v. Price*, 383 U.S. 787, 794 n.7 (1965). The Court therein cited as support: *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 630 (6th Cir. 1964); *Simpkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *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).

resort."²¹ Judge Sprecher then listed in detail the extensive governmental, statutory, administrative, and municipal supervision of Wisconsin Electric and concluded that the company enjoyed a "state-bestowed, state-protected and state-regulated natural monopoly . . ."²² These factors, added to the performance by the company of a "public function," rendered the company a "thoroughly state-integrated government-substitute . . ."²³

II. THE PRIVATELY OWNED PUBLIC UTILITY AS STATE ACTOR

The United States Supreme Court has repeatedly recognized the principle that each state action case must be considered on its own facts and circumstances. The Court has stated:

Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.²⁴

In conformity with this general test, the remainder of this article individually analyzes five separate areas pertaining to utilities and demonstrates that any one of these areas sufficiently subjects privately owned public utilities to state action limitations. These areas include:

- A. action under governmental authority,
- B. action subject to governmental regulation,
- C. performance of a governmental function,
- D. direct financial benefit to the government, and
- E. monopolistic status.²⁵

²¹ 466 F.2d at 661.

²² 466 F.2d at 663. The court voted 6-2 to affirm the district court judgment in favor of the utility company. C.J. Swygert joined in the dissent with J. Sprecher.

²³ 466 F.2d at 665.

²⁴ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961), *quoted in* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

²⁵ Judge Kerner, in a concurring opinion in *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624, 628 (7th Cir. 1969), suggested seven characteristics peculiar to a public utility that may be indicative of state action:

[I]t may be possible to demonstrate that a privately-owned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether 1) the entity is subject to close regulation by a statutorily-created body (such as the Illinois Commerce Commission), 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. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show color of law in some cases and

A. Governmental Authority

The Supreme Court has held that state action occurs where private individuals take action under the authority given them by the state. In *Steele v. Louisville & Nashville Railway Co.*²⁶ the Court held that a labor organization operating under the authority of a federal statute as an exclusive bargaining representative acted as a state actor in representing employees of a particular craft. In a subsequent union case, *American Communications Association v. Douds*, the Court reaffirmed the "authority" doctrine:

But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself.²⁷

Further, in *Nixon v. Condon*,²⁸ the Court declared that private individuals clothed by statute with power ordinarily reserved for the state (the determination of qualification for voters) acted as "representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to this action."²⁹

Actions taken by municipalities and other political subdivisions, including the enactment of ordinances or promulgation of orders or regulations, constitute state action.³⁰ In *Boman*

that nothing less than all may be required in other cases.

Each case will depend on its facts.

The Eighth Circuit in *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 569 (8th Cir. 1972), considered the above formula and found state action after measuring the extent of governmental involvement in the following seven areas. (1) the City of St. Paul's granting to Northern an exclusive franchise to furnish gas and electric utility services; (2) the City's permission allowing Northern to use all public property to provide such necessary services; (3) the payment by Northern to the City of 5% of Northern's St. Paul gross earnings in consideration; (4) the City Council's right to review, revise, or reject the operating procedures, rate changes, schedules, contracts, agreements, rules, and regulations of Northern; (5) the City Council's explicit right to review, revise, or reject the collection and termination policies of Northern; (6) Northern's required filing with the City of schedules, contracts, agreements, rules, regulations, and financial statements; and (7) the dependence of Northern upon the City for prior approval of many of its operations in the City.

²⁶ 323 U.S. 192 (1944).

²⁷ 339 U.S. 382, 401 (1950).

²⁸ 286 U.S. 73 (1932).

²⁹ *Id.* at 89. In a subsequent voter discrimination case, *Smith v. Allwright*, 321 U.S. 649 (1944), the Court also found requisite governmental authority constituting state action where a political primary operating pursuant to a state statutory system directed the selection of party officers and the election procedures.

³⁰ *Avery v. Midland Cty.*, 390 U.S. 474, 479-80 (1968); *Robinson v. Florida*, 378 U.S. 153, 156-57 (1965).

v. Birmingham Transit Co.,³¹ an ordinance of the City of Birmingham permitted the privately owned public transit company to issue regulations for bus seating. The plaintiffs sought an injunction against the enforcement of the transit company's regulation ordering segregated seating. The court found that the transit company's action taken pursuant to the city's ordinance constituted state action. In *Kissinger v. New York Transit Authority*,³² a private advertising company operating under authority derived from the municipally owned transit authority which, in turn, was created and regulated under a state statute, refused to accept an anti-war advertisement. The court traced the line of governmental authority and found color of law in such refusal.

In the *Palmer* case, the State of Ohio enacted statutes which authorized utility companies to terminate services to subscribers for nonpayment of bills and specified the manner and time of such terminations. The court quoted the language from *American Communications Association v. Douds*, adding:

For whatever the reason, the Ohio Legislature in its infinite wisdom decided to bestow upon the gas company a right to terminate the furnishing of gas to those customers who refused to make payment. Action brought pursuant to that statute is action under color of state law.³³

These cases, which have found state action because of the governmental authority granted, are directly analogous to utility companies which find themselves subject to a myriad of statutes and rules directed toward regulating their operations.³⁴ Specifically, in the United States the right to engage in the public utility business, unlike most other business, exists only with the permission of public authority. Such public authority may be conveyed, depending upon the state, by (1) charter, (2) license (permit), (3) certificates of convenience and necessity, or (4) franchise. Utility companies in most states must not only obtain a charter of incorporation to do business in the state (or a corporate authorization to do business) but must also obtain a charter as a public service corporation. This latter charter subjects the utility company to various restrictions and imposes duties different from those of an ordinary business corporation. In addition, various state agencies of a particular state

³¹ 280 F.2d 531 (5th Cir. 1960).

³² 274 F. Supp. 438 (S.D.N.Y. 1967).

³³ 342 F. Supp. 241, 245 n.2 (N.D. Ohio 1972).

³⁴ See, e.g., OHIO REV. CODE ANN. tit. 49 (Page 1954), as amended, (Supp. 1971); WIS. STAT. ANN. ch. 196 (West 1957), as amended, (Supp. 1972-73).

may be empowered to grant licenses and permits to utility companies which allow the companies to use certain state land, to have access to certain highways, and to otherwise utilize public property. Further, some states grant certificates of convenience and necessity which allow utility companies to monopolize the furnishing of services in a geographic area. Finally, those municipalities which regulate utilities grant franchises by ordinance or by contract which allow the utilities to operate a monopoly within the city and to use the public streets and thoroughfares to that end. Regardless of the type of governmental regulation employed, utility companies operate monopolies under governmental authority, subject to the rules of various state and local departments and agencies.

The statutes and regulations conferring governmental authority on public utilities also give rise to three additional factors indicative of state action. First, such legislative and administrative enactments cause the utility companies involved to become so "entwined"³⁵ with the governmental powers and policies as to become a "joint participant"³⁶ or an "agent"³⁷ of the state. In effect, the states, in bestowing upon these utility companies the powers, privileges, and responsibilities of the government, make the utilities instrumentalities of the state for the purpose of furnishing services to the public.³⁸

³⁵ *Evans v. Newton*, 382 U.S. 296, 299 (1966).

³⁶ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). The Court reaffirmed this "joint participant" factor several years later in *United States v. Price*, 383 U.S. 787, 794 (1965), holding:

Private persons jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

The Court further elaborated on the necessary extent of the state's participation in a companion case, *United States v. Guest*, 383 U.S. 745, 755-56 (1965), stating:

[T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.

³⁷ *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958). This agency consideration differs from traditional master-servant law as the Court noted in *Nixon v. Condon*, 286 U.S. 73, 89 (1932):

The test is not one whether the . . . [defendants] are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent . . . that the great restraints of the Constitution set limits to their action.

³⁸ These benefits establish that a private lessee of governmental property operating a public facility acts as an instrumentality of the state and, thus, under color of law. Earlier federal cases first articulated these doctrines. In *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956),

Second, these same statutes and regulations “foster” and “encourage” the specific activities of the utility company. In *Moose Lodge* the Court noted that the regulations there did not foster or encourage the racially discriminatory policies of the private club.³⁹ But, specific regulations delineating a private utility’s policies, conduct, and relations with consumers clearly promote such actions by the government’s express sanction of such activities.

Third, these governmental enactments confer on private utilities several of the police powers of the state. Specifically, the government expressly permits private utilities to use public land and to trespass or enter private land in carrying out their function of providing services. The exercise of this extraordinary privilege — the entering of the lands and dwelling of a consumer at will — dramatically portrays the governmental power possessed by utility companies. Judge Sprecher in his dissent in *Lucas* recognized that the utility company’s use of this power clearly constitutes state action.⁴⁰ And Judge Young relied on this factor in *Palmer*.⁴¹

In summary, these statutes and regulations governing the utility company’s furnishing of services to consumers will turn such resultant conduct into state action.⁴²

cert. denied, 353 U.S. 924 (1957), the court held that a lessee acted as an agent for the state in operating a restaurant open to the public located in the city’s courthouse and constructed with public funds. In *Department of Conservation & Dev. v. Tate*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956), the federal court found state action in Discriminatory acts by a privately owned bathing facility which leased shoreline on a seashore owned by the state. And in *City of Greensboro v. Simpkins*, 246 F.2d 425 (4th Cir. 1957), the Fourth Circuit found state action where a lessee of a golf course owned and constructed by the city discriminated on the basis of race. In addition, state action has been found where private concerns significantly participated or became involved in state owned property. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (restaurant leased from municipal parking authority and located in authority’s parking garage); *Muir v. Louisville Park Theat. (Ass’n)*, 347 U.S. 971 (1954) (private lessee of city-owned amphitheatre); *Buchanan v. Warley*, 245 U.S. 60 (1917) (racial zoning laws); *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964) (motel on land purchased from housing authority in redevelopment project promoted with public funds).

³⁹ 407 U.S. at 176-77.

⁴⁰ 466 F.2d at 664.

⁴¹ 342 F. Supp. at 246.

⁴² Four Supreme Court cases offer closely analogous fact patterns where the Court found clear state action. The nature of the state action by utility companies is not significantly different than the nature of the state action found to exist in *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). In *Griffin* an arresting officer acting under the “authority of a deputy sheriff” enforced the private racial segregation policies of a public amusement park by taking a number of blacks into custody. A public utility acting under the authority of a state in enforcing its own policies (i.e., those of a privately owned public service corporation) parallels the extent of the state action in *Griffin*.

B. Governmental Regulation

In *Public Utility Commission v. Pollak*,⁴³ the Supreme Court held a privately owned public utility to be a state actor primarily because the conduct of this activity had been reviewed and approved by a governmental administrative body. In *Pollak* a private bus company piped radio programs into buses. Several commuters, complaining of first amendment abridgments, challenged the constitutionality of this conduct. While holding that no specific constitutional invasion resulted, the Court did conclude that governmental action existed:

We find . . . a sufficiently close relation between the Federal

The nature of public utility state action does not differ from *Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230, 231 (1956), in which the Court held that, where a state undertakes an obligation to enforce a private policy of constitutional deprivations, state action results (Girard College was maintained as a private segregated boys school by a board of directors, acting as trustees, as expressly authorized by an 1869 Pennsylvania statute). Most states undertake an obligation of expressly approving or reviewing, *sub silentio*, the policies of utility companies. Such undertaking may enforce a policy of constitutional deprivation based upon state action.

The extent of the governmental authority over utilities equals the state action quotient in *Peterson v. City of Greenville*, 373 U.S. 244 (1963). The Supreme Court found requisite state action where police officers arrested a group of blacks at a luncheon counter in a private restaurant. A city ordinance forbade desegregation. The Court stated:

When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing, or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The Kress management, in deciding to exclude Negroes, did precisely what the city law required.

Id. at 248.

All states have removed from utility companies any decision to deal or not to deal with certain subscribers by requiring the companies to deal with all subscribers without discrimination. States have effectively determined by charter, license, and regulation that utilities will operate in a certain manner. Thus, utilities have no choice but do precisely what state or municipal regulations require.

The Court in *Robinson v. Florida*, 378 U.S. 153 (1964), found state action where a state regulation requiring segregated restaurants was replaced by a regulation merely allowing a manager to remove any person whom he considered "detrimental" to serve. The regulation neither ordered segregation nor specifically approved of it. Looking past the form of the state action, the Court held:

While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races. . . . [W]e conclude that the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.

Id. at 156-57.

Many states leave certain decisions to utility companies — such decisions as collection practices, repair service, internal company policies, and others. That very leave granted to utilities by the states significantly involves the state in such actions.

⁴³ 343 U.S. 451 (1952).

Government and the radio service We do . . . recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.⁴⁴

The bus company's policies and conduct, expressly reviewed and sanctioned by a governmental agency, resulted in governmental action.⁴⁵

The regulatory scheme in *Pollak* exists in nearly all states. Public utility commissions have the power to review, approve, modify, or impose regulations and rules of conduct on utility companies, and in particular on conduct involving relations with consumers. The court in *Ihrke* noted that the regulatory body had the power to approve and revise Northern's regulations regarding collection practices.⁴⁶ In *Palmer* the court noted that the public utility commission, upon a complaint by a person, must hold a hearing and determine whether the challenged practice of the utility company is unreasonable.⁴⁷ In *Lucas*, the dissent noted that the Wisconsin Public Service Commission had held hearings in 1932 and had investigated collection practices.⁴⁸ These hearings, never referred to in the majority opinion, resulted in the issuance of rules and in the express approval of the very termination practices challenged in *Lucas*. The majority holding in *Lucas*, then, stands in direct conflict with the Supreme Court's decision in *Pollak*.

In addition, the actions taken by governmental regulatory commissions in reviewing and approving utilities' conduct and policies fall within the affirmative support factor sug-

⁴⁴ *Id.* at 462 (footnotes of the Court omitted).

⁴⁵ See *Bright v. Isenbarger*, 445 F.2d 412 (7th Cir. 1971), where the court found no state action because of insufficient state involvement with the operations of a private school. But the presence of a state statute requiring private schools to perform a certain act may lead to conduct stemming from that performance being deemed state action. *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970). *Bright*, and other school cases, have been used by courts to avoid finding state action in several similar fact situations, including public utility cases. *E.g.*, the majority opinion in *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 657 n.47 (7th Cir. 1972). But these cases have little precedential value to utility cases because: (1) the facts differ significantly, (2) private schools do not have a monopoly on education, and (3) the state has not reserved the power to control, approve, review, or modify school rules dealing with expulsion or disciplinary problems, or for that matter, many other problems.

⁴⁶ 459 F.2d at 570.

⁴⁷ 342 F. Supp. at 245.

⁴⁸ 466 F. 2d at 667.

gested by Justice Rehnquist's majority opinion in *Moose Lodge*.⁴⁹ While a utility company may prepare and file its own regulations with a utility commission, the commission's acceptance, review, or approval of those rules constitutes ratification and governmental sanction of conduct performed pursuant to those rules. Such affirmative support, under Justice Rehnquist's analysis, clearly renders such conduct state action.

This general regulatory scheme, held sufficient in the above cases to evidence state action, equally applies to every privately owned public utility company in the United States not only because each of these utilities operates under the regulation of an administrative agency, commonly a public utility commission,⁵⁰ but also because several other governmental entities, such as state legislatures, local governmental units, and the federal government, subject these utilities to regulation. The following paragraphs discuss local and federal government regulation of these types of utilities after briefly tracing the development of state regulation into the present-day public utility commissions with their resultant powers and jurisdictions. The discussion shows that the nature and extent of these regulations clearly subject privately owned public utility companies to the concept of state action.

Public control of utilities has focused principally upon state regulation by state legislatures. In the early part of this century, state legislatures enacted specific statutes which directly regulated the operations of utilities.⁵¹ Such regulation was necessary because of the unsavory conditions that developed in utility organization and management during the latter part of the 19th century. The states regarded the utility services furnished as basic to the health, safety, and welfare of the public and recognized a sovereign right to legislate with respect

⁴⁹ See 407 U.S. at 175-77; *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 656 (7th Cir. 1972).

⁵⁰ See, e.g., OHIO REV. CODE ANN. tit. 49 (Page 1954), as amended, (Supp. 1971); WIS. STAT. ANN. ch. 196 (West 1957), as amended, (Supp. 1972-73). Forty-six states have public service commissions with statewide jurisdictions over privately owned gas and electrical utilities. Those states that have other forms of regulatory control include: (1) Minnesota has delegated regulatory control over utilities to municipalities and other governmental units. MINN. STAT. ANN. §§ 412.331 to .391, 451.07, 454.041 to .042 (West 1958), as amended, (Supp. 1972-73); (2) In Nebraska, all electric utilities are owned by local governmental subdivisions; (3) South Dakota has authorized local towns and cities to regulate utility companies; (4) And in Texas, a state regulatory commission has jurisdiction only over wholesale rates charged by privately owned public utilities. SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS OF THE COMMITTEE ON GOVERNMENTAL OPERATIONS, STATE UTILITY COMMISSIONS, S. Doc. No. 56, 90th Cong., 1st Sess. (1967).

⁵¹ J. BAUER & P. COSTELLO, PUBLIC ORGANIZATION OF ELECTRIC POWER 37 (1949) [hereinafter cited as BAUER & COSTELLO].

to this public interest. Initial regulations attempted to place controls on the financial manipulation, franchise consolidation, excessive rates, and other abuses prevalent in the industry.⁵²

With the birth of administrative agencies and the growing complexity of utility regulation, state legislatures enacted general legislation creating public utility commissions with the power to promulgate detailed rules.⁵³ Forty-six states have public utility commissions regulating privately owned utilities.⁵⁴ Not all such commissions have the same powers or the same scope of jurisdiction. A commission, depending on the state, may have control over numerous utilities including electricity, gas, water, steam, telephone, telegraph, bus, rapid transit, motor carriers, pipelines, and railroad companies.⁵⁵ In addition, such commissions, again depending on the state, may have jurisdiction over many facets of the utilities' operations including: (1) certificates of convenience, (2) leasing rights, (3) mergers and consolidations, (4) reorganizations, (5) securities, (6) dividends, (7) budgets and expenditures, (8) loans, (9) major property additions, (10) customer relations, (11) service, (12) construction, and (13) reasonable and just rates enabling the utility to earn a fair return on the fair value of property used.⁵⁶ Further, such commissions through formalized procedures review the books and records of utility companies, investigate consumer complaints, grant informal and formal hearings, and make determinations, particularly on rates, which closely affect the practices of utility companies.⁵⁷

In addition to the administrative regulatory scheme on the state level, several states presently allow local governmental units to regulate privately owned public utilities. Municipalities within these states have the right, expressed in or implied from state constitutions and statutes, to grant franchises giving utilities the right to use the public streets and to attach to these franchises conditions regarding rates, services, and operations.⁵⁸ In some states, such municipal regulation takes the place of any state regulation; in other states, both the state and municipalities regulate specific operations of utility companies. Municipalities involved in a local regulatory scheme have in turn

⁵² *Id.*

⁵³ THE TWENTIETH CENTURY FUND, *ELECTRIC POWER AND GOVERNMENT POLICY* 52 (1948) [hereinafter cited as TWENTIETH CENTURY FUND].

⁵⁴ L. METCALF & V. REINEMER, *OVERCHARGE* 28 (1967).

⁵⁵ E. CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 407 (1950).

⁵⁶ TWENTIETH CENTURY FUND at 53-54, 254.

⁵⁷ *Id.* at 65-66.

⁵⁸ BAUER & COSTELLO at 34-35; TWENTIETH CENTURY FUND at 106-11.

established administrative commissions at the local level which operate in a fashion similar to state public utility commissions. In addition, many municipalities own and operate utility companies which furnish services, particularly water, to residents of the municipality.

Finally, the federal government controls various interstate practices of utility companies. The Federal Water Power Act of 1920 provides the federal government with jurisdiction over all power sites in navigable streams of the United States and otherwise authorizes the Federal Power Commission to develop and control water as a utility.⁵⁹ The Federal Power Act of 1935 provides the Federal Power Commission with jurisdiction over the transmission of electrical energy at wholesale prices in interstate commerce.⁶⁰ Similarly, the Natural Gas Act of 1938 provides the Commission with jurisdiction over the interstate transportation and sale of wholesale natural gas.⁶¹ The Public Utility Holding Company Act of 1935 delegates to the Securities and Exchange Commission powers over the public organization of utility companies which include registration, sale and purchase of securities and assets, restriction of inter-company loans, restriction of dividend payments, and prescription of accounting and record procedures.⁶² The Federal Power Commission's jurisdiction over electric and gas utilities includes ratemaking functions and activities, control over accounting and financial matters, control over the purchase and sale of properties, responsibility for the publication of reports concerning the power resources and needs of the country, responsibility for studying costs of plant construction and plant operation, and responsibility for distributing information to state and municipal utility commissions.⁶³

In summary, at least some aspects of the state, local, or federal regulations apply to every privately owned public utility, and it is these regulations which subject the utilities to state action concepts.

C. Governmental Function

The Supreme Court has held that a private organization which assumes operating, managing, or supplying a governmental function takes such action under color of law. In *Terry v. Abrams*,⁶⁴ the Court concluded that the delegation by the

⁵⁹ 16 U.S.C. §§ 791 to 825r (1970).

⁶⁰ *Id.* § 824.

⁶¹ 15 U.S.C. §§ 171 to 171w (1970).

⁶² 15 U.S.C. §§ 79 to 79z (1970).

⁶³ BAUER & COSTELLO at 45-47; TWENTIETH CENTURY FUND at 67, 73-76.

⁶⁴ 345 U.S. 461 (1953).

state of governmental powers (control of the electoral process for public officials) is the delegation of a state function and as such renders the private party's actions state action. Subsequently, the Court explicitly held in *Evans v. Newton*:

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.⁶⁵

And in the earlier case of *Marsh v. Alabama*,⁶⁶ the Court had established this doctrine by finding state action where the state merely permitted a private corporation to undertake the governmental function of operating a town and furnishing municipal services. The Court held that the town fulfilled governmental functions and therefore lost its identification as purely private property even though it was privately owned and controlled.

Several federal courts have also found state action in the nature of the function undertaken by private corporations.⁶⁷ In

⁶⁵ 382 U.S. 296, 299 (1966). In *Evans*, the City of Macon, Georgia operated a public park on a segregated basis pursuant to the terms of a will bequeathing the park to a trust. Subsequently, to continue these segregationist policies, the public trustees resigned and private trustees took over control of the park. The Supreme Court found that the private trustees' operation of the park still resulted in state action despite the fact that formal control had passed from the City's hands. The public function of the park and the past relationship of the City with the park rendered the acts of the private trustees state acts. The Court stated:

Mass recreation through the use of parks is plainly in the public domain. . . .

[W]e cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. *Id.* at 303.

The Court here found the operation of a city park to be a governmental function though the facilities of the park itself were not publicly owned, and did *not* provide necessities of life to the public as utility services do.

⁶⁶ 326 U.S. 501 (1946). The Court first extended the reach of *Marsh* to cover a denial of first amendment rights in a shopping center parking lot by analogizing the public character of such a lot to the municipal area in *Marsh*. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). But recently the Court retreated from the apparent positions established in *Marsh* and *Logan Valley* by limiting the free speech rights of demonstrators in a private shopping center to dissemination of material directly connected with the operation of the center itself or with one of the businesses in the center (and not to anti-war literature). *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

⁶⁷ Several other courts have found state action in two related public function areas. In *United States v. Barr*, 295 F. Supp. 889 (S.D.N.Y. 1969) and in *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), the courts found that private process servers who falsified affidavits of service (popularly called "sewer service") engaged in an inherently governmental function and acted with government authority pursuant to the state statute permitting them to act as substitute process servers. And in *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970), the court found state action where a private landlord seized a tenant's personal property pursuant to a state statute authorizing such enforcement of landlords' liens because such entry and summary seizure was inherently and historically a state function.

Boman v. Birmingham Transit Co.,⁶⁸ the city granted a bus franchise to a private bus concern. In declaring the existence of state action, the court stated:

The issuing of such a franchise by the City of Birmingham is a governmental function, controlled and authorized by the constitution of Alabama. . . .

It is, of course, fundamental that the justification for the grant by a state to a private corporation of a right or franchise to perform such a public utility service as furnishing transportation, gas, electricity, or the like, on the public streets of the city, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience. This is what differentiates the public utility which holds what may be called a "special franchise," from an ordinary business corporation which in common with all others is granted the privilege of operating in corporate form but does not have that special franchise of using state property for private gain to perform a public function.⁶⁹

In *Farmer v. Moses*, the court found the privately owned promoter of the New York World's Fair to be a state actor declaring: "[T]he New York World's Fair, although operated by a private corporation, is a matter of public concern, for the public good and for the general welfare of the state."⁷⁰

Judge Theis in *Stanford* found the Gas Service Company supplying an "essential commodity to the citizens" and "beyond question" performing "public functions."⁷¹ The dissent in *Lucas*, after tracing the development of public utility law from English history, concluded that utility companies clearly perform state-delegated functions.⁷² And the Eighth Circuit in *Ihrke* declared the issues before the court were not moot because such issues presented "recurring questions of public interest." The court's recognition of the public interest inherent in such cases offers further proof of the vital function such services provide.⁷³

⁶⁸ 280 F.2d 531 (5th Cir. 1960).

⁶⁹ *Id.* at 434-35. The Fifth Circuit reaffirmed the *Boman* proposition in two subsequent cases. In *Baldwin v. Morgan*, 287 F.2d 750, 755 (5th Cir. 1961), the court stated: "When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action . . ." And in *Hampton v. City of Jacksonville*, 304 F.2d 320, 322-23 (5th Cir. 1962), the court again stated: "We noted that when a state authorizes a city to grant a franchise for public transportation to a local bus or street car company, such transportation service is performed by the franchise holder as a service performed for the benefit of the people of the state. The private company is, to that extent, exercising a part of sovereignty in that it is performing a state function."

⁷⁰ 232 F. Supp. 154, 158 (S.D.N.Y. 1964).

⁷¹ *Stanford v. Gas Service Co.*, 346 F. Supp. 717, 722 (D. Kan. 1972).

⁷² 466 F.2d at 665.

⁷³ 459 F.2d at 571.

The following discussion demonstrates that public utility companies perform a governmental function because government delegates and regulates utility services; the furnishing of such services requires the exercise of governmental powers; and utility services, such as electricity, gas, and water, are necessities of life.⁷⁴

Utility services have historically been considered to be public and governmental functions. In medieval England, private guilds operated public services. The rules and operating regulations of these guilds were declared void by local courts if such were inconsistent with the public use. The feudal regime in England gradually replaced these guilds, and manorlords granted the first franchises to private individuals to supply public services. The royal courts of England overruled innkeepers and ferrymen because of the nature of their service to the public.⁷⁵ Against this backdrop, public service law began to evolve. Parliament in England began to regulate the rates of public service corporations which were granted monopolies in certain services. In addition, the English lawmakers and courts imposed certain duties and obligations on public service organizations: "The characteristic thing as now was the legal imposition of an affirmative duty of proper actions upon those who openly professed a public employment."⁷⁶

During the development of this country, colonial governments similarly granted franchises and regulated rates and operations of those performing a public function. Early courts recognized this function as governmental in nature:

Men set up systems of government in order to subserve certain public ends, and reach advantages that could not otherwise be made available. The state is clothed with the trust of answering these ends. It is not to be limited to the mere duty of governing the people by the exercise of its police power, but it has a higher duty, — to promote the educational interests of the people, encourage their industrial pursuits, develop its material resources, and foster its commercial interests, by providing all reasonable facilities demanded by a prudent regard for the growth, development, and general prosperity of a free people⁷⁷

In furtherance of these ends of government, states enacted statutes delegating to public service corporations the privilege

⁷⁴ B. WYMAN, PUBLIC SERVICE CORPORATIONS 4 (1911).

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ *City of Minneapolis v. Janney*, 86 Minn. 111, 116, 90 N.W. 312, 315 (1902) (court's citations omitted).

of furnishing utility services to the public.⁷⁸ In addition to such delegation, the states retained control over these companies through regulatory commissions and reserved the power to review, approve, or modify the policies and operations of such utilities.⁷⁹ Today, utility companies perform a governmental function because they must exercise governmental powers, delegated by the state, to provide their services. The governmental authority section of this article discussed at length the governmental powers bestowed upon utility companies by the state, such as the power of eminent domain, police powers, and the privilege of using public property. The very delegation of such powers can only be made to a public and not a private concern. "No business can be granted a privilege under our constitutional system unless public in character."⁸⁰ Utility companies have long been considered to be public and governmental in nature. Electric lighting is an example:

Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked. Corporations organized for the purpose of furnishing electric light to the public are quasi public corporations, and, under government control, must serve the public on terms and conditions common to all without discrimination. The same rule has been applied to corporations organized to supply the inhabitants of cities with natural gas for heating and lighting purposes. . . . The control of the state over the manner in which such companies shall deal with the public is implied.

. . . .

The generation of electrical power for distribution and sale to the general public on equal terms is a public enterprise, and property so used is devoted to a public use.⁸¹

Furthermore, the fact that the company may be privately owned does not remove it from the sphere of government control, governmental function, and public use. The United States Supreme Court established this proposition in *Olcott v. The Supervisors*:

Whether the use of the railroad is a public or private one depends no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public.⁸²

⁷⁸ See, e.g., WIS. STAT. ANN. §§ 196.49 to .50 (West 1957); MINN. STAT. ANN. § 300.03 (West 1969).

⁷⁹ See, e.g., OHIO REV. CODE ANN. tit. 49 (Page 1954), as amended, (Supp. 1971); WIS. STAT. ANN. ch. 195 (West 1957), as amended, (Supp. 1972-73).

⁸⁰ B. WYMAN, *supra* note 74, at 42.

⁸¹ Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 450-51, 107 N.W. 405, 413-14 (1906) (court's citations omitted).

⁸² 83 U.S. (16 Wall.) 678, 695 (1872).

Utility companies can also be said to perform a governmental function because utility services, such as electricity, gas, and water, are necessities of life. The court in *Palmer* recognized this:

The lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal. A sudden withdrawal of heating fuel can also result in severe damage to property, both real and personal. . . . [A] person can freeze to death or die of pneumonia much more quickly than he can starve to death.⁸³

And the court in *Stanford* concluded: "It is not open to question that food, clothing, and shelter are considered necessary to sustain life. . . . [U]nheated shelter affects life itself. . . . Nothing is more basic to the American system of values, indeed mankind, than the continued existence of life itself."⁸⁴ Utility services furnish consumers with heat, warm meals, refrigerated food, hot water, lights, gas supplies, electric current, and a habitable and decent home. Without such life generating and life sustaining services, urban man could not exist.

Additionally, if privately owned utility companies did not furnish these vital services, the government would have to furnish them. In fact, statutes in all states permit municipalities or other governmental subdivisions to own and operate a utility company.⁸⁵ In one state, the government owns and operates all electric utility services.⁸⁶ In other states, some governmentally owned utility departments furnish utility services to designated geographic areas. However, outside of those limited areas, privately owned public utilities assume the governmental role and provide services.

Thus, in all states, the government has allowed privately owned utility companies to perform governmental functions.⁸⁷

⁸³ 342 F. Supp. at 244.

⁸⁴ 346 F. Supp. at 719-20, 721.

⁸⁵ See, e.g., MINN. STAT. ANN. § 300.05 (West 1969); WIS. STAT. ANN. § 196.57 (West 1957).

⁸⁶ Nebraska. See NEB. REV. STAT. ch. 18, art. 4 (1970).

⁸⁷ These governmental functions may be services of a "public character," "inherently governmental" actions, or acts exercised as part of the "sovereign power" of the state. See respectively, the cases cited in notes 65, 67, and 69 *supra*.

Certain functions may be more related to governmental responsibilities than others, but nevertheless, a private party who assumes the operation of a public or governmental function, whether such function stems from an inherent power of the state, from its sovereignty, or from past historical connections, performs as a state actor in satisfying a public need or interest. In *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), the Court found that the private trustees of a library acted under the color of law because the city financed the library's budget and because the maintenance of the library, though not an essential function, was a proper and usual function of the state.

This creation goes far beyond the granting of a corporate charter. Through the delegation of police powers, the granting of the privilege of eminent domain, and the continual regulation and approval of utilities' operations, the states have created the utility companies as instrumentalities to carry on the utility functions of the government. For these privileges and for performing a governmental service, utilities in turn become subject to constitutional restraints through state action principles.

D. *Direct Financial Benefit to the Government*

The government financially benefits from the operations of public utilities. In addition to levying normal taxes, statutes in many states require each utility company to pay for the privilege of obtaining a monopoly and for the extensive use of public property.⁸⁸ These statutes require each utility to pay the state a certain percentage of its gross revenue earnings. Through such payments, governments receive many millions of dollars which ostensibly reimburse the state for the costs of the regulatory commission, its staff, its investigations, and its hearings. However, regulatory commissions rarely cost that much to operate. Thus, many states gain additional monies which are used as general revenue funds to defray other costs of government and to help balance the state budget.

This economic relationship between a state and a public utility has great significance for purposes of state action. The Supreme Court in *Burton v. Wilmington Parking Authority*⁸⁹ stated that the financial connections between a governmental agency and a private company are further indicia to state action.

[S]tate responsibility [has been] interpreted as necessarily following upon "state participation" through arrangement, management, funds, or property. . . .

. . . .

[T]he State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.⁹⁰

In *Burton*, the government owned parking authority relied, in part, on the lease income from a privately owned coffee shop. This financial arrangement benefited the parking authority and consequently further involved the state with private actions.

⁸⁸ ILL. ANN. STAT. ch. 111 2/3, § 7a.5 (Smith-Hurd 1966); St. Paul, Minn., Ordinances 11761, 11762, Jan. 1972. *But see* COLO. REV. STAT. ANN. § 115-2-14 (1963); WIS. STAT. ANN. § 196.85 (1957).

⁸⁹ 365 U.S. 715 (1961).

⁹⁰ *Id.* at 722, 725.

The Eighth Circuit in the *Ihrke* decision more directly relied on the financial relationship between the City of St. Paul and the Northern States Power Company. Under the municipal franchise, Northern was obligated to pay to the city 5 percent of the gross earnings it received in St. Paul.⁹¹ This amounted to several millions of dollars, but more importantly, constituted over 5 percent of total revenues raised for the city's budget. The city used the money collected to offset municipal expenses in lieu of raising revenue by way of additional taxes on the public. Northern thus contributed huge sums of money essential to the economic functioning of the city. The Eighth Circuit recognized this factor:

It is thus apparent that 5% of every dollar collected by Northern for gas and electricity sold in St. Paul is paid to the city. While the city does not participate in Northern's collection procedures, it does reserve the right to approve or even revise Northern's regulations relating thereto, and it is obviously the direct beneficiary of them.⁹²

Thus, because of the gross earnings fee payment, the city's financial benefit from Northern's operations in St. Paul further entwined the city with Northern's activities. Similar beneficial economic ties between the government and public utilities provide additional links between state action and allegedly private conduct.⁹³

E. Monopolistic Status

Many entities act under governmental authority and find some of their conduct regulated by public agencies. Other companies perform public functions and pay fees to the government for such privilege. What, then, conclusively brands utilities as state actors? Their monopolistic status in providing necessities

⁹¹ This is an obligation imposed by the city and is not in lieu of any sales or use tax imposed on businesses other than utilities.

⁹² 459 F.2d at 570.

⁹³ Federal courts have relied on financing arrangements to declare conduct taken by schools state action. In *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965), a group of blacks challenged Virginia's practice of awarding tuition grants to parents for reimbursement of their children's education in private schools. Though the schools were neither controlled by nor connected with the state, the court declared the practice unconstitutional because the state aid was the dominant method of financing segregated schools. And, in *Doe v. Hackler*, 316 F. Supp. 1144 (D.N.H. 1970), the court found state conduct in the actions of a private school which contracted with the governing bodies of five townships to educate high school aged children in exchange for tuition payments. The court declared that because of such financing the school acted as a governmental actor. The *Doe* case did not involve racial discrimination, but rather a student's right to wear long hair. And even where a state makes little or no financial contribution to an institution, the existence of official control by state officials will cause private school conduct to become state action. See *Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

of life. The operation of a monopoly by a utility will, even in "close" cases, render those operations governmental or state action. Monopolies have always been abhorred by our system of government.⁹⁴ Yet, most utilities operate as monopolies which do business only with the express permission of the government which continually regulates their practices. Governments license and franchise these monopolies as a *substitute* for direct governmental provision of the particular necessities. To assure these necessities, states have often permitted private utilities to monopolize a certain geographic area and have guaranteed such companies a "fair" rate of return in consideration.

Often, gas, electric, and water utilities operate natural monopolies. The scarcity of the natural resources, the limitations placed on discovering, producing, and distributing such services, and the large capital expenditures necessary to operate a utility result in the creation of this natural monopoly. Sometimes utilities gain a virtual monopoly in an area simply by being there first, by having the use of all the necessary public property, and by having invested huge sums of money in such things as poles, wires, conduits, and other utility apparatus. In addition, states have conferred a statutory monopoly upon utility companies. Upon accepting a franchise from the government, the utility also gains complete freedom from competition in a geographic area for a period of years.⁹⁵ Such statutes and franchises prohibit any other utility from supplying services to consumers in that area.

Such monopolistic statutes may impose tremendous hardships on consumers. Unlike any other choice for the purchase of necessities, such as food, clothing, and shelter, a consumer has no choice but to apply for and accept service from one utility company. States guarantee captive customers for the utility company. Hardships result particularly where the consumer disagrees or disputes billing practices, collection procedures, deposit requirements, or otherwise has poor relations with the utility.⁹⁶ Though validly disgruntled, the consumer has nowhere else to turn for such services.

⁹⁴ See O. POND, *LAW OF PUBLIC UTILITIES* (4th ed. rev. 1932); H. SPURR, *1 GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION* (1924); A. WEBBER, *PRINCIPLES OF PUBLIC UTILITY REGULATION* (1941); B. WYMAN, *SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS* (1911).

⁹⁵ See, e.g., WIS. STAT. ANN. § 196.495 (West Supp. 1972), *amending* WIS. STAT. ANN. § 196.495 (1957).

⁹⁶ In *Jackson v. Northern States Power Co.*, 343 F. Supp. 265 (D. Minn. 1972), the federal district court granted a preliminary injunction prohibiting the utility company from continuing to terminate service to five named indigent plaintiffs. The utility had terminated service to two subscribers who had disputed the amount of their bill; one of these

Courts have recognized the monopolistic characteristic of utility companies as an important element of state action. In *Ihrke*,⁹⁷ and in both the *Palmer*⁹⁸ and *Stanford*⁹⁹ decisions, the courts looked to the utility companies' monopolistic positions as a controlling state action factor. And the *Lucas* dissent, after reviewing the history of public utility law, concluded that the monopolistic characteristic isolates utility companies from all other types of private businesses and results in state action.¹⁰⁰ Furthermore, in *Moose Lodge*, both the majority and dissenting opinions of the Supreme Court stated that monopolistic status is a factor to be considered in finding state action.¹⁰¹

In addition, privately owned public utilities themselves have declared, at least for purposes of antitrust laws, that their conduct constitutes state action. This position has been adopted by the courts in deciding that antitrust laws do not apply to public utilities.¹⁰² The Fifth Circuit in *Gas Light Co. v. Georgia Power Co.* held that the practices of electric

parties (a family with six children) went without electricity for six weeks because they were not able to pay the alleged bill. The company also terminated service to two tenants who did not owe anything, but whose landlord failed to pay past accrued bills amounting to over \$400. And the utility threatened to terminate service to the fifth plaintiff, an epileptic woman, who was deaf in one ear, 90 percent blind, a mother of two children, pregnant with her third child, and recently deserted by her husband, for alleged nonpayment of a \$54 back bill. In the *Ihrke* case, the *Ihrkes* faced termination for their failure to pay a \$24 back bill and a \$100 security deposit without being afforded an opportunity to challenge the reasonableness of the deposit. In *Palmer*, the utility company's particularly arbitrary and grievous collection practices prompted the court to conclude: "The evidence as a whole revealed a rather shockingly callous and impersonal attitude upon the part of the defendant, which relied uncritically upon its computer, located in a distant city, and the far from infallible clerks who served it, and paid no attention to the notorious uncertainties of the postal service." 342 F. Supp. at 243.

In large metropolitan areas, many consumers find themselves at the mercy of utility collection agents who have the power to affect their lives like no other creditor has, save, perhaps, the Internal Revenue Service. For a further survey of the hardships inflicted on utility consumers, particularly the poor, see Note, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745 (1971); Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Customers*, 78 YALE L.J. 448 (1969).

⁹⁷ 459 F.2d at 570. The *Ihrke* court relied on a recent First Circuit decision involving state action and a private monopolistic situation. In *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972), the court found a trailer park sufficiently immersed in state activity because of a city ordinance granting that park a monopoly over trailer sites within the city.

⁹⁸ 342 F. Supp. at 245.

⁹⁹ 346 F. Supp. at 722.

¹⁰⁰ 466 F.2d at 663-65.

¹⁰¹ 407 U.S. at 177, 182.

¹⁰² In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act did not cover actions by governmental instrumentalities, but only individual private actions. Thus, any company that can show that its conduct constitutes state action remains immune from antitrust laws.

companies, which were alleged to be conspiracies to eliminate natural gas as a competitive source with electricity, were immune from antitrust attack.¹⁰³ Electric companies successfully argued this immunity and stated that though they were monopolies, their actions were "state actions" and thus properly anticompetitive. The Fifth Circuit concluded:

Defendants' [electric utilities'] conduct cannot be characterized as individual action when we consider the state's intimate involvement Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission.¹⁰⁴

And the Fourth Circuit, in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, declared that the offering of free underground electric service lines to new home builders in return for all electric installations did not violate antitrust "tie-in" prohibitions because such conduct by the utility companies constituted state action.¹⁰⁵ Accordingly, privately owned utility companies should not be allowed to be constitutional chameleons. The Fourth and Fifth Circuits' findings of state action in these cases should mirror a finding of state action in other cases which deal with privately owned public utilities.

In summary, privately owned public utilities operate monopolistic enterprises. The monopolies have sometimes arisen as natural monopolies and sometimes as statutory monopolies. In either instance, the government has become thoroughly entangled with the utilities in providing consumers with necessities of life. The logical conclusion that utility action is state action is virtually inevitable. The utility companies themselves have successfully used this argument—to promote their own self-interest. Accordingly, a utility with a monopolistic status must *consistently* be considered a state actor.

CONCLUSION

This article has argued that under any one of five concepts the conduct of privately owned public utilities constitutes state action. Specifically, such utilities act under governmental authority and statutes, find themselves extensively regulated by administrative agencies of the government, perform necessary governmental or public functions, provide direct financial benefits to the government, and operate monopolies replete with captive customers and guaranteed profits. These factors con-

¹⁰³ 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

¹⁰⁴ *Id.* at 1140.

¹⁰⁵ 438 F.2d 248 (4th Cir. 1971).

clusively show public utilities to be state actors. In turn, this showing more realistically renders privately owned public utilities subject to ultimate regulation through judicial action.¹⁰⁶

Now, subscribers who have been left out of the political process and who find no viable representation on public utility commissions will have a forum in which to voice their grievances. Perhaps subscribers will force such agencies to be more responsive to issues posed by modern urban life. Perhaps even the utility companies themselves will now be motivated to fulfill their obligations and responsibilities to the consuming public.

Several courts have held residential utility services to be "entitlements" afforded constitutional protections.¹⁰⁷ Without question, utility services such as gas, electricity, and water are necessities of life. Without such life generating and life sustaining "commodities" urban consumers could not maintain their life, liberty, or property.¹⁰⁸ Consumers will be able to protect such vital necessities by challenging, before impartial courts, the practices and policies of utility companies. Among the targets of such challenges are the allegedly private business decisions of utility companies, the propriety and need for rate increases to maintain high profits and salaries,¹⁰⁹ the unilateral imposition of deposit requirements not actually related to credit ratings,¹¹⁰ the self-serving collection practices of terminating services without affording the consumer timely notice or an opportunity to be heard,¹¹¹ a host of latent environmental is-

¹⁰⁶ Not all activities of a public utility will be brought under constitutional scrutiny. In *Martin v. Pacific Northwest Bell Tel. Co.*, 441 F.2d 1116 (9th Cir.), cert. denied, 404 U.S. 873 (1971), the court there found no state action in a challenge to a utility company's internal management operations. But, clearly, a utility's dealings with consumers involves activities always subject to review or approval by a regulatory commission if, in fact, not already sanctioned by that body.

¹⁰⁷ *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972); *Stanford v. Gas Serv. Co.*, 346 F. Supp. 717 (D. Kan. 1972); *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971).

¹⁰⁸ The Supreme Court has declared many similar rights, privileges, entitlements, and interests protected by constitutional due process and equal protection: welfare assistance (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), wages (*Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969)), reputation (*Wisconsin v. Constantineau*, 400 U.S. 433 (1971)), driving licenses (*Bell v. Burson*, 402 U.S. 535 (1971)), access to courts (*Boddie v. Connecticut*, 401 U.S. 371 (1971)), and the continued possession and use of personal property (*Fuentes v. Shevin*, 407 U.S. 67 (1972)).

¹⁰⁹ See consumer interventions in rate hearings cited in note 2 *supra*.

¹¹⁰ *See Washington Gas Light Co. v. District of Columbia Pub. Serv. Co.*, 5 CLEARINGHOUSE REV. 770 (Apr. 1972); *Parsons v. Central Ill. Pub. Serv. Co.*, 5 CLEARINGHOUSE REV. 333 (Oct. 1971); *Hall v. Central Ill. Pub. Serv. Co.*, 5 CLEARINGHOUSE REV. 333 (Oct. 1971).

¹¹¹ *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972); *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971); *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972); *Jackson v. Northern States*

sues, and a broad spectrum of arbitrary and capricious actions taken by utility companies.

Our constitutional system provides no haven for the exercise of arbitrary power by the government or its agents. Privately owned public utilities exert a great deal of influence on the day-to-day living conditions of this nation's citizens. Although the government has previously failed to effectively control the utilities' enormous power, perhaps consumers can now significantly augment that control through private causes of action in the courts. These consumers ask only that the courts declare what should have been obvious all along—since utilities perform such conclusively public functions, they must be held to state action standards and safeguard individual rights accordingly.

POSTSCRIPT

Subsequent to the completion of this article, two federal district courts rendered decisions on the public utility-state action issue. In *Bronson v. Consolidated Edison Co.*, Judge Tyler found state action declaring:

In the relevant legal sense, Con Ed is by no stretch of the imagination a purely private enterprise. The State of New York, by extensive statutory and regulatory scheme, has circumscribed almost every aspect of the utility's activities, and has, by the same means, granted it powers not available to a typical private concern.¹¹²

And in *Hattell v. Public Service Co.*,¹¹³ Judge Winner followed the lead of *Ihrke* and *Stanford* and held this public utility subject to state action concepts. In both cases, the courts sustained the claims of the plaintiff consumers seeking relief from certain collection and termination practices by the respective utility companies.

In addition, another recent federal court decision, *Lamb v. Hamblin*,¹¹⁴ found unequivocally that utility consumers have a constitutional right to be afforded notice and an impartial hearing prior to the termination of utility services. This decision represents one of the first cases which ensures the due process rights of consumers by ordering a utility (a municipal water department) to establish a hearing procedure.

Power Co., 343 F. Supp. 265 (D. Minn. 1972); *Stanford v. Gas Serv. Co.*, 346 F. Supp. 717 (D. Kan. 1972); *Andress v. Northwestern Bell Tel. Co.*, No. 3-72-185 (D. Minn. June 27, 1972); *Lamb v. Hamblin*, No. 3-72-115 (D. Minn. Nov. 30, 1972).

¹¹² Civil No. 72-3037 at 7 (S.D.N.Y. Oct. 30, 1972).

¹¹³ No. C-4206 (D. Colo. Nov. 7, 1972).

¹¹⁴ No. 3-72-115 (D. Minn. Nov. 30, 1972).