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Constitutional Law -- Public Utilities -- The State Action and Due Process Doctrines -- Lucas v. Wisconsin Electric Power Co.

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CASE NOTES

Constitutional Law—Public Utilities—The State Action and Due Process Doctrines—*Lucas v. Wisconsin Electric Power Co.*[1]—The plaintiff, Alvin Lucas, was a customer of the defendant Wisconsin Electric Company (hereinafter the Electric Company). On December 23, 1969, the plaintiff allegedly paid his bill for the November-December period in cash at the defendant's offices but failed to obtain a stamped receipt. He continued to receive electric service and continued to make monthly payments even after moving to a new residence in January 1970. On July 1, 1970, the defendant notified the plaintiff that its records showed an arrearage for the November-December period and that if it was not settled within five days his services would be terminated. To prevent such termination, plaintiff Lucas commenced a class action[2] in federal district court under 42 U.S.C. § 1983[3] and immediately moved for a temporary restraining order.

The complaint alleged that (1) the action of the defendant utility company was action taken "under color of"[4] state law since it was taken pursuant to a rule of the Wisconsin Public Service Commission and in accordance with Company regulations which were approved by the Commission, and (2) termination of the plaintiff's service by the defendant company without prior adequate notice and an impartial hearing constituted deprivation of due process of law in violation of the Fourteenth Amendment.[5] The district court dismissed the complaint for failure to state a claim upon which relief could be granted and for failure to state a substantial federal question.[6] On appeal, the Court of Appeals for the Seventh Circuit reviewed the case en banc and HELD: (1) the electric utility's disconnection of service in accordance with the regulation of the State Public Service Commission is not action "under color of" state law within the meaning of section 1983, and (2) even assuming that the required state action did exist, where state remedies, both informal and judicial, are available, failure to provide an impartial hearing prior to termination of service does not violate the consumer's Fourteenth Amendment due process rights.

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[1] Civil No. 71-1113 (7th Cir., Aug. 2, 1972). Hereinafter all citations will be to the Slip Opinion.

[2] Lucas v. Wisconsin Electric Power Co., 322 F. Supp. 377 (E.D. Wis. 1970).

[3] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

[4] See 42 U.S.C. § 1983 (1970), quoted in note 3 supra.

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

[6] 322 F. Supp. at 341.

There has been a strong judicial trend in recent years toward expanding the area in which the requirements of procedural due process necessitate that a state, or one acting under color of its laws, give notice and an impartial hearing prior to the termination or suspension of any privileges, benefits, services, interests, or entitlements[7] which are alleged to be constitutional rights.[8] By denying the plaintiff's request for adequate notice and an impartial hearing before discontinuance of his electric service, the Seventh Circuit in *Lucas* has refused to introduce these procedural safeguards into the public utilities area.

The purpose of this casenote is to assess the Seventh Circuit's decision in *Lucas* in light of other recent court decisions in related areas of the law. This objective will best be realized by structuring the analysis in terms of two basic inquiries. The first will consider the soundness of the court's finding in *Lucas* that the conduct of the defendant electric company was not state action. The second question will be whether, assuming that there was such state action, the court erred in holding that the due process clause of the Fourteenth Amendment did not require an impartial hearing on the facts of the case.

I. State Action

The Seventh Circuit in *Lucas*, in finding no state action in the conduct of the Wisconsin Electric Power Company, regarded itself as bound by its decision in *Kadlec v. Illinois Bell Telephone Co.*,[9] a Seventh Circuit case decided in 1969. In that case the plaintiff brought an action under section 1983, in which he claimed that the action of the defendant telephone company in terminating his "Call-Pak" service[10] pursuant to regulations filed with state authorities violated his

[7] A statutory "entitlement" is a "property right" within the meaning of the due process clause of the Fourteenth Amendment. This was the position taken by the United States Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 262 (1970), in which the Court held that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them" and therefore were constitutionally protected. In Davis v. Weir, 328 F. Supp. 317, 321 (N.D. Ga. 1971), the court found that a consumer's interest in a continued supply of water, although not traditionally considered a "property right," was, nevertheless, an "entitlement" protected by the Fourteenth Amendment.

[8] See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (suspension of an operator's license pursuant to a state financial responsibility statute); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970) (revocation of parole); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) (eviction of tenants in public housing); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (expulsion of public school students); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (attachment of property); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (execution under innkeeper's statutory lien); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969) (failure to renew teacher's contract in public school system).

[9] 407 F.2d 624 (7th Cir.), cert. denied, 396 U.S. 846 (1969).

[10] A special telephone service provided for a flat fee instead of at a rate based upon the time and distance of the calls. Other telephone service of plaintiff was not discontinued by defendant. 407 F.2d at 625.

Fourteenth Amendment due process rights. The plaintiff cited cases with similar facts[11] in support of his contention that the telephone company acted under color of state law when it terminated his service. The court, however, in reference to these cases, stated: "In all of the cases cited where conduct under color of law was found to be present, there existed greater state involvement or control *than is alleged* in this case."[12] In *Kadlec*, the only state involvement in the activities of the defendant which was alleged by the plaintiff was the defendant's filing of its regulation with state authorities. Hence the court ruled that the complaint did not state sufficient facts upon which a finding of state action could be based.[13]

In a concurring opinion, Judge Kerner agreed with the majority "that the mere filing of regulations with a state does not convert private action under such regulations into action under color of state law."[14] He went on to add, however, that:

> [U]nder appropriate circumstances, it may be possible to demonstrate that a privately-owned publicly-regulated utility . . . has a sufficient nexus with or dependence on a state as to make some of its actions under color of law.[15]

Judge Kerner then cited a number of factors relevant in determining the existence of state action. Among them were the following: (1) whether or not the private entity is subject to close regulation by a state agency, (2) whether or not the regulations filed with the regulatory body must be approved to be effective, (3) whether or not the entity is given a total or partial monopoly by the regulatory body, (4) whether or not the regulatory body controls the rates charged and/or the services offered by the entity, and (5) whether or not the actions of the entity are subject to review by the regulatory body. Judge Kerner then pointed out that none of these issues was raised by the plaintiff's complaint in *Kadlec*. He stated:

> [A] complaint which relies on 42 U.S.C. § 1983 must affirmatively show that the acts complained of were done under color of law. The amended complaint before us lacks the specific allegations (as set forth above) which would show this necessary statutory element.[16]

When *Lucas* properly presented the Seventh Circuit with the issues that Judge Kerner had so explicitly outlined, the court lightly dismissed some of them as irrelevant and failed even to consider the others. Instead, the court declared—without giving any reason for so doing—

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[11] The court generally referred to these cases but did not specifically cite them.
[12] 407 F.2d at 627 (emphasis added).
[13] Id. at 626.
[14] Id. at 627.
[15] Id. at 628.
[16] Id.

that the variety of regulatory controls imposed on the defendant electric company by both the state legislature and by the Public Utilities Commission were "obviously insufficient to bring private conduct within the coverage of this federal statute."[17] The court then went on to hold that private conduct can be transformed into action "under color of state law" only where it receives significant support from the state,[18] that the only support relevant to the case was the granting by the state to the electric company of monopoly protection[19] and that "with respect to the issues presented in this litigation, the monopoly factor does not provide the necessary ingredient of added state support of private conduct—the termination of electric service—which will transform an issue of state regulatory policy into a federal civil rights case under § 1983."[20]

It is submitted that the majority in *Lucas* should not have given such short shrift to the issues set forth above by Judge Kerner in the *Kadlec* case, but rather should have examined them more closely to determine their applicability to the fact situation presented in *Lucas*. If they had done so they might well have reached a different conclusion on the question of state action and at any rate would have found the two cases distinguishable. That is, while the plaintiff's complaint in *Kadlec* did not permit the *Kadlec* court to reach the issues that Judge Kerner outlined, those issues were before the *Lucas* court. Furthermore, a persuasive argument can be made that a resolution of these questions would have indicated that the defendant electric company, in terminating service to the plaintiff, was acting under color of state law.

For example, it was assumed by the court in *Lucas* that the state's regulation of the Wisconsin Electric Power Company was "pervasive."[21] Any doubt regarding this point should be dispelled by an examination of the various statutes regulating the Company's activities cited in both the majority[22] and dissenting[23] opinions. Furthermore, all utilities in Wisconsin are required by law to file with the Commission all rules and regulations which in any way affect the service or product,[24] and such rules to be effective must be approved by the Commission.[25] Too, the *Lucas* court noted that the Public Service Commission expressly approved the Company's regulation concerning termination of service.[26] It was also admitted in *Lucas* that the defendant utility enjoys a monopoly in its particular area by operation of

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17 Lucas v. Wisconsin Electric Power Co., Slip Op. at 24. The federal statute referred to is 42 U.S.C. § 1983 (1970).

18 Lucas v. Wisconsin Electric Power Co., Slip Op. at 24-25.

19 Id. at 26.

20 Id. at 28-29.

21 Id. at 4 n.5.

22 Id. at 4.

23 Id. at 37-39 (dissenting opinion).

24 Wis. Stat. Ann. § 196.19(2) (1957).

25 Appellant's Brief at 5-6, Lucas v. Wisconsin Electric Power Co.

26 Lucas v. Wisconsin Electric Power Co., Slip Op. at 12.

law.[27] The rates charged[28] and the services offered[29] by the defendant utility were recognized by the court as subject to the most thorough control by the Wisconsin Public Service Commission.[30] Lastly, the actions of the utility, as the majority opinion in *Lucas* pointed out, are subject to review by the regulatory body of the Commission. In short, these facts make it apparent that the *Kadlec* and *Lucas* cases are clearly distinguishable, and it was by no means required that *Kadlec* be overruled in order for the court in *Lucas* to find state action in that case. It is submitted, therefore, that the court erred in finding the *Kadlec* decision applicable, on the issue of state action, to the facts in *Lucas*.

There is no set formula to determine what constitutes state action. Decisions in this area, therefore, have traditionally been made on a case by case basis.[31] The courts have defined action taken under color of state law in terms of "significant involvement"[32] of the state in the affairs and activities of the private individual or organization. They have usually found such involvement wherever "[t]he state has so far insinuated itself into a position of interdependence [with the otherwise private entity whose conduct is said to have violated the Fourteenth Amendment] that it must be recognized as a joint participant in the challenged activity . . . ."[33] Specifically, a quick survey shows that in enumerating the elements of state action, most courts have utilized one or more of the type of criteria suggested by Judge Kerner. In determining whether or not state action exists the courts have generally found it helpful to consider any one or more of the following criteria: (1) the *amount of assistance and support*,[34] financial or otherwise, which the state has rendered the individual or organization; (2) the *motive*[35] for giving such aid and support; (3) the *func-*

[27] Id. at 26, 37.

[28] Id. at 37-38. See also Wis. Stat. Ann. §§ 196.37, 196.03, 196.22, 196.60 (1957).

[29] Lucas v. Wisconsin Electric Power Co., Slip. Op. at 37-38. See also Wis. Stat. Ann. §§ 196.03, 196.20, 196.37 (1957).

[30] Lucas v. Wisconsin Electric Power Co., Slip Op. at 4 n.5.

[31] Cf. Comment, Eviction of State's Tenants Necessitates a Limited Hearing According to the State Action Doctrine of the Fourteenth Amendment, 21 Buffalo L. Rev. 524, 526 (1972): "The difficulty in formulating this definition [of state action] arose because each case differs in the degree of state involvement, thereby necessitating a determination of state action on a case by case basis."

[32] See, e.g., Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Bright v. Isenbarger, 314 F. Supp. 1382, 1395 (N.D. Ind. 1970).

[33] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[34] See, e.g., Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), discussed in text at notes 42, 44 infra; Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), discussed in text at notes 47, 48, 49, 54 infra; Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.) cert. denied, 326 U.S. 721 (1945), discussed in text at note 57 infra.

[35] See, e.g., Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), discussed in text at notes 57, 58 infra; Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964), discussed in text at notes 59, 60 infra.

tion,[36] public or private, performed by the individual or organization; (4) the *degree of control*[37] exercised by the state over the individual or organization; and (5) the *relationship*[38] between the state involvement and the activity that caused the injury complained of.

It is admitted that in testing for state action these criteria have hitherto been used in contexts different from that presented in *Lucas*. Nevertheless, it is submitted that the application of all these criteria to the facts of *Lucas* is the soundest way of determining whether or not there was state action in that case.[39]

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[36] See, e.g., Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), discussed in text at note 62 infra; Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

[37] See, e.g., Moose Lodge v. Irvis, 92 S. Ct. 1965 (1972), discussed in note 39 infra; Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), discussed in text at notes 75, 76, 77 infra; Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), discussed in text at note 78 infra; Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970) discussed in text at note 74 infra; Mitchell v. Boys Club, 157 F. Supp. 101 (D.D.C. 1957), discussed in text at notes 71, 72, 73 infra.

[38] See, e.g., Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), discussed in text at note 86 infra.

[39] In the recent case of Moose Lodge v. Irvis, 92 S. Ct. 1965 (1972), decided on June 12, 1972, the United States Supreme Court used much the same approach in determining whether or not the conduct of a private club in excluding a Negro guest constituted state action. The plaintiff in this case, a Negro guest of a white member of the defendant private club, was refused service by the defendant solely on account of his race. He thereupon brought an action in federal district court under 42 U.S.C. § 1983 seeking injunctive relief. The plaintiff claimed that because the Pennsylvania Liquor Board, an agent of the state, had issued the defendant a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was state action for the purposes of the equal protection clause of the Fourteenth Amendment. The district court found that the defendant's guest practices were discriminatory, agreed with the plaintiff that state action was present, and declared the liquor license invalid as long as the defendant continued its discriminatory practices. In finding state action the court relied heavily on what it believed to be the "pervasive" nature of the regulation of private clubs by the Pennsylvania Liquor Control Board.

On appeal the Supreme Court reversed, holding that the facts alleged and proved were insufficient to show state action. Id. at 1973. In addressing itself to the matter of regulation of the defendant's activities by the Liquor Control Board the Court said: "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." Id. While the Court assumed that the state's control over the defendant's activities was as extensive as the district court found it to be, it failed to find any relationship between such state involvement and the activity causing the injury, namely, the racial discrimination engaged in by the defendant.

The Court also found it significant that the defendant club was not a place of public accomodation, nor did it perform any type of public function. Id. at 1972. Specifically, the Court said:

> [T]he Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accomodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State.

Id.

In further discussing the issue of state action the Court noted that the defendant

A. *Assistance and Support*

In certain cases the courts have found state assistance rendered to private organizations sufficient in itself to qualify private action as state action.[40] This type of case, however, is limited to those instances in which the individual or organization is supported entirely, or almost entirely, by grants from the state. In most cases the matter of state assistance is not determinative of the issue of state action, but is considered one factor to be used by the court in reaching a decision.[41]

1. *The Grant of a Monopoly*

In *Lucas*, the fact that the state has granted the defendant a monopoly on the distribution of electric service in a certain area of the state would appear to be of prime significance in determining the matter of state assistance and support. Although the fact that a private entity enjoys a monopoly in its particular field does not automatically make its activity action under color of state law, it deserves consideration as a vital factor.

One case reflecting this idea is *Public Utilities Commission v. Pollak*.[42] In this case a group of disgruntled commuters brought suit against the defendant Public Utilities Commission alleging that the conduct of the Capital Transit Company, a public utility regulated by the Commission, violated their constitutional rights under the First and Fifth Amendments by broadcasting radio programs through loudspeakers in its streetcars and buses. The plaintiffs specifically contended that the radio programs so broadcast made it difficult for them to converse and communicate with one another and invaded their rights of privacy. At the time of suit the Capital Transit Company enjoyed a virtual monopoly of street railway and bus transportation in the District of Columbia. This monopoly, furthermore, was made possible by

club received no financial assistance from the state, id. at 1970, that the state had not conferred a monopoly on the defendant in the distribution of liquor within the state, id. at 1972, and that "there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination." Id. The only state-rendered assistance and support given to the defendant was in the form of a liquor license, and since there was no substantial connection between this and the defendant's racially discriminatory policies, such support, standing alone, was not sufficient to implicate the state in the discriminatory actions of the defendant. As the Court put it, it "has never [been] held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the entity receives any sort of benefit or service at all from the State. . . ." Id. at 1971.

Basing its decision on the foregoing factors, the Court held that the state had not sufficiently implicated itself in the discriminatory policies of the defendant so as to make these policies state action within the meaning of the Fourteenth Amendment. Id. at 1973.

[40] See, e.g., Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963).

[41] See, e.g., Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970); Mitchell v. Boys Club, 157 F. Supp. 101 (D.D.C. 1957).

[42] 343 U.S. 451 (1952).

a congressional statute[43] prohibiting the establishment of any competitive street railway or bus line without the issuance of a certificate by the Public Service Commission to the effect that such line was necessary for the convenience of the public. The Court in *Pollak* did find governmental action. Even though it declined to base its finding solely on the fact that the company had a federally authorized monopoly of street car transportation,[44] it is evident that this fact was a crucial element.

When in addition to a monopoly other elements of assistance are present, together with state control of the organization's activities, then the probability of a finding of state action is greatly increased. For instance, in *Washington Gas Light Co. v. Virginia Electric & Power Co.*,[45] the plaintiff brought an antitrust suit against the defendant electric company, which had a state-conferred monopoly on the distribution of electric service in its area. It charged the defendant with engaging in certain practices amounting to conspiracies to eliminate gas as an energy source competitive with electricity. The state agency involved was the State Corporation Commission (SCC), a regulatory arm of the state which had the authority to regulate the activities of the defendant electric company. In this respect, then, it played the same role as did the Illinois Commerce Commission in *Kadlec* and the Public Service Commission in *Lucas*. Although the SCC was aware of the defendant's activities, it had made no investigations of these activities, nor had it given any affirmative approval of the defendant's plans, and accordingly was less involved in the activity causing injury than were the state agencies in either *Kadlec* or *Lucas*. Nevertheless, the court found state action, holding the SCC's administrative silence equivalent to consent.[46]

In the similar case of *Gas Light Co. v. Georgia Power Co.*,[47] an antitrust suit was brought by a gas company against an electric company in which the plaintiff alleged that the defendant's rate schedules, together with certain of its practices involving distribution of electricity, were purposely aimed at driving the plaintiff out of business. As in *Washington Gas Light*, the defendant electric company had a monopoly on the distribution of electricity in its particular area. The issue presented was whether the activities complained of were the product of state action. The court found that the rates and practices under attack originated with the defendant utility. It also found that the Georgia Public Utility Commission, which was authorized and empowered to regulate electric utilities such as defendant, had approved the defendant's rates and practices. The court held that the Commission's *approval* meant that the particular rates and practices were the work

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[43] Id. at 454 n.1.
[44] Id. at 462.
[45] 438 F.2d 248 (4th Cir. 1971).
[46] Id. at 252.
[47] 440 F.2d 1135 (5th Cir. 1971), cert. denied, 92 S. Ct. 732 (1972).

products of the Commission.[48] In finding state action, the court emphasized that the defendant company enjoyed a monopoly status conferred upon it by the state.[49]

In applying the rationale of *Washington Gas Light Co.* and *Gas Light Co.* to the situation presented by *Lucas*, it is suggested that it would be unfair to permit a utility which enjoys a state-authorized monopoly to avoid prosecution under the antitrust laws on the grounds that its action is state action, while at the same time permitting the same utility, enjoying the same monopoly, to deny that its actions are state actions in a suit brought against it by a private individual. Thus it can be concluded that although the granting of a monopoly by the state to a private organization will not usually, by itself, be sufficient, in terms of assistance and support, to subject the actions of the latter to the requirements of the due process clause of the Fourteenth Amendment, such a monopoly, when it is granted in an area of vital public concern, and when it is coupled with other elements of control, is a significant factor in determining whether or not state action exists.

2. *State Approval*

Another way for the state to render significant assistance to a private entity is for it to enact statutes and, through its various agencies, to promulgate rules and regulations which encourage support of or approve a particular course of action taken by that entity. As the fact situation in *Lucas* shows, the state of Wisconsin had materially aided the electric company by enacting a regulation[50] empowering the Company to terminate the electric service of any consumer who fails to pay a bill without requiring a prior impartial hearing to determine the validity of the bill. The state had also approved rules promulgated by the Company setting out the procedure to be used for discontinuing service.[51] While it is true, as Judge Stevens pointed out in his majority opinion in *Lucas*, that section 113.13(4), together with the Commission's approval of the Company's rules relating to termination of service, does not expand the powers the Company would have had at common law,[52] this does not render the Commission's action insignifi-

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[48] Id. at 1140.

[49] Id.

[50] Wis. Adm. Code § 113.13 (1956): "(4) DISCONNECT RULE. (a) Service may be disconnected if a customer's current bill for service as defined in the utility's filed rules is not paid within a reasonable period set forth in said rules."

[51] Lucas v. Wisconsin Electric Power Co., Slip Op. at 5. The section of the electric company's rules, applicable to arrearages amounting to between $5 and $20, is as follows:

1. A written notice shall be sent to the customer, stating the amount the customer is in arrears, and notifying him that service will be disconnected if such arrears are not paid within five days.

2. If the arrears remain unpaid . . . service may be disconnected without further notice to the customer.

[52] The general rule as stated in 64 Am. Jur. 2d. *Public Utilities* § 62 (1972) indicates as follows:

It is the general rule . . . that either a private concern or a municipality furnish-

cant. It must be conceded that if the Commission had so desired it could have prevented the Company from terminating service on such short notice—five days—or from terminating at all before an impartial hearing was granted. The fact that the Commission did not do so is itself a matter of considerable benefit to the Company. Furthermore, the Commission's rule on termination, made effective by its approval of the Company's regulations regarding termination, acted as an official seal of approval for the Company's activities. This approval lent moral support, if nothing else, to the Company in carrying out its disconnect procedures. This was effectively pointed out in *Washington Gas Light*, in which the court found that the activities of the defendant electric company amounted to state action even though the Commission regulating the utility neither required, authorized, nor encouraged these activities. The court said:

> The argument [that the defendant's conduct is individual and not state action] is not without merit but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. *It is just as sensible to infer that silence means consent, i.e., approval.* Indeed, the latter inference seems the more likely one when we remember that even the gas company concedes that the SCC possessed adequate regulatory powers to stop VEPCO if it chose to do so . . . .[53]

In the *Gas Light Company* case, the court, in finding state action in the conduct of the defendant in offering free underground electric service lines to new home builders in return for all-electric installations, said:

> Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. 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.[54]

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ing a utility service to the public, such as gas, electricity or water, may prescribe and enforce a rule or regulation which provides for the shutting off of the service from a consumer who has defaulted in payment therefor. This right to cut off a consumer's service is frequently given by statute or charter, but the rule is the same even in the absence of legislative authority.

[53] Washington Gas Light Co. v. Virginia Electric Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (emphasis added).

[54] Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971). The state of Wisconsin has also aided the defendant by granting it the power of eminent domain (Wis. Stat. Ann. §§ 31.15, 32.02(5),(6) (1957)) and by authorizing it to enter private dwellings for certain limited purposes (Wis. Stat. Ann. § 196.171 (1957)). Since neither of these powers was exercised by the defendant in *Lucas* so as to impinge on the plaintiff's right to a continued supply of electricity, their significance on the question of state action is questionable.

The state in *Lucas* was involved in the process of terminating electric service to the consumer. Although it was the Company which enacted the five day notice rule, it was specifically authorized to do so by the Commission, and in the end it was the Commission which approved the rule, thereby making it effective.

By enacting and approving rules and regulations permitting the Company to disconnect a consumer's electric service, the state has substantially aided the Company and has done so in ways not made applicable to other private organizations. Thus it seems reasonable to contend that both by its grant of a monopoly to the Wisconsin Electric Power Company, and by its omnipresent regulation of operating procedures, the state has "significantly involved" itself, in terms of assistance and support, with the electric company in *Lucas*.

B. *Motive for Assistance and Function Performed*[55]

Where the state's purpose is not just to help the recipient entity in its own private capacity, but is also to enable the entity to perform a public function which the state would be obligated to perform if the entity did not do so, the courts find such a combination of factors indicative of state action.[56]

In *Kerr v. Enoch Pratt Free Library*,[57] the issue before the Fourth Circuit was whether or not the action of a privately endowed and managed library, in refusing to accept a qualified black applicant into its training programs, was state action. The court found that the library was almost totally dependent upon the city of Baltimore's voluntary appropriations, but did not rest its decision that there was state action on the mere fact of such assistance. The court's holding stressed the fact that the state's *purpose* for so assisting the defendant library was that the latter could perform an activity which has traditionally been considered a proper function of the state.[58] Similarly in *Lucas* the state's purpose in assisting the electric company was to enable the latter to perform the function of distributing electricity to the public—a function that, it is submitted, can be regarded as a municipal function. This same type of reasoning was used by a federal district court in *Farmer v. Moses*,[59] in finding state action in the refusal of the New York World's Fair Corporation (NYWFC), a private entity, to permit would-be picketers to picket on property leased to NYWFC by the city of New York. The court found that the city and state of New York had rendered considerable assistance and support to the NYWFC and, in commenting on the purpose for which such aid was given said:

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[55] Since these two criteria are so closely related they will be considered together for purposes of determining the existence or nonexistence of state action.

[56] See, e.g., Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945); Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964).

[57] 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945).

[58] 149 F.2d at 217.

[59] 232 F. Supp. 154 (S.D.N.Y. 1964).

> The Fair purposes . . . are to organize, construct, hold and operate a world's fair in the City of New York for the exclusively educational purposes of educating the peoples of the world as to the interdependence of nations and the need for universal peace. Educating the populace is a proper function of the state, and where the state creates separate instrumentalities to carry on its work, the latter may become subject to the constitutional restraints imposed upon the state itself.[60]

On the other hand, in some cases in which state assistance was found to be considerable, courts have refused to find state action because there was no "public purpose" in the state's grant.[61] A case in point is that of *Bright v. Isenbarger*.[62] This case involved a civil rights action brought by a student of a private parochial school against the principal of the school. The student claimed that the summary manner in which she was expelled for violation of a school disciplinary rule violated her rights to procedural due process. The primary issue in the case was whether or not the defendant principal was acting under color of state law in expelling the plaintiff. The federal district court found, among other things, that the state had given financial assistance to the defendant private school by means of tax exemptions. However, the court also found that a parochial school education is not a public function, and that therefore the state's purpose in aiding the school was *not* to enable the school to do a job traditionally thought to be in the domain of the public authority. The courts have similarly found a lack of public function in cases involving newspapers,[63] private clubs[64] and "[g]olf clubs, social centers, [and] luncheon clubs . . . ."[65]

A particular business or enterprise performs a public function if the goods or services it renders are of concern to the general public or any portion thereof—as distinguished from particular individuals—[66] if these goods or services are for the benefit and advantage of the public,[67] and if the public, as such, has an interest in the goods or services such that it has a legal right to their use which cannot be

[60] Id. at 158.

[61] See, e.g., Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970); Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

[62] 314 F. Supp. 1382 (N.D. Ind. 1970).

[63] E.g., Chicago Joint Board, Amal. Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970); Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971).

[64] E.g., Moose Lodge v. Irvis, 92 S. Ct. 1965 (1972).

[65] Evans v. Newton, 382 U.S. 296, 301-02 (1966).

[66] See, e.g., City of St. Louis v. Mississippi River Fuel Corp., 97 F.2d 726 (8th Cir. 1938); In re United States, 28 F. Supp. 758 (W.D.N.Y. 1939); McNeil v. City of Montague, 124 Cal. App. 2d 326, 268 P.2d 497 (Dist. Ct. App. 1954); City of Passaic v. State, 30 N.J. Super. 32, 103 A.2d 174 (Super. Ct. 1954).

[67] See, e.g., Montana Power Co. v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969); Mississippi River Fuel Corp. v. Illinois Commerce Comm'n, 1 Ill.2d 509, 116 N.E.2d 394 (1953).

denied or withdrawn at the will of the owner.[68] It is submitted that the distribution of electricity by the electric company in *Lucas* is a service which meets these requirements. It is a matter of concern and interest to the public in general, or at least to that portion of the public which chooses to use electric power as opposed to gas or coal, to light and heat its homes and places of business; it is a service which provides a great benefit and advantage to this sector of the public; and it is a service to which every member of the public located in the electric company's area of operation has a legal right.[69] It is submitted, therefore, that the distribution of electricity is a public function, and that the state's purpose in *Lucas*, in rendering aid and support to the electric company, was not just to help the company in its private capacity, but was to better enable the company to perform a public function of vital interest to all members of the community. The state could, if it so desired, take it upon itself to provide electricity to the public. If no private organization chose to perform this function, the state would have an obligation to do so. The state's motive, therefore, in assisting the Company is the type of motive the courts have required in finding state assistance to be a significant factor on the issue of state action. The courts have differed on the question of whether or not, in a particular case, a public utility's conduct constitutes state action. It is undisputed, however, that there is a much greater likelihood that a court will find state action where the defendant is engaged in performing a public function vital to the community than it will in a case where the defendant is a purely private organization acting solely on its own behalf. In *Lucas*, the defendant was not acting solely for its own private benefit, but in distributing electricity to the community at large was performing a service vital to the public. Therefore, a finding of state action would be a tenable conclusion.

C. *Control*

The degree of control exercised by the state over the activities of the private entity is also important in determining whether or not there is state action. By "control" is meant the power and authority of the state, through its agencies, to regulate such things as the ser-

[68] See, e.g., State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959); United States v. Certain Lands in the City of Louisville, 9 F. Supp. 137 (W.D. Ky. 1935); Superior Laundry & Towel Supply Co. v. City of Cincinnati, 10 Ohio Op. 2d 129, 168 N.E.2d 445 (1959).

[69] A public utility is obligated by the nature of its business to furnish its service or commodity to the general public, or to that part of the public which it has undertaken to serve, without discrimination. It must serve all who apply and it cannot arbitrarily select the persons for whom it will perform its service or furnish its commodity. See, e.g., People v. Forest Home Cemetery Co., 258 Ill. 36, 101 N.E. 219 (1913), appeal dismissed, 238 U.S. 606 (1914); Birmingham v. Rice Bros., 238 Iowa 410, 26 N.W.2d 39, cert. denied, 332 U.S. 768, rehearing denied, 332 U.S. 820 (1947); United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, cert. denied, 396 U.S. 116 (1969).

vice to be rendered, the type of equipment to be used in rendering such service, and the rates to be charged.[70] In *Mitchell v. Boys Club*,[71] the issue before the federal district court was whether or not the conduct of the defendant, a private charitable organization, in segregating its individual clubs, was state action. The court ruled that:

> Government control is the decisive factor in the determination of whether a corporation is public or private and governmental control of the club corporation does not exist. The club corporation, a private institution, acting on its own initiative and expressing its own will, may segregate its clubs without thereby offending . . . the Constitution.[72]

In this case the court found that over two-thirds of the adult members of the club were private citizens, that the principal officers of the club were all private citizens, that the club's executive committee was composed almost entirely of civilians, and that none of the club's employees was on either the city or state payroll.[73] It concluded that management and control of the club were in private and not public hands.

In the *Bright v. Isenbarger* case, the court said much the same thing. In addition to finding that the tax exemption granted the private school by the state was not sufficiently significant to make its conduct state action, the court also held that exercise of "some regulatory powers over the standard of education . . . does not implicate it generally in . . . policies [on] discipline."[74] Here the court based its holding on the fact that state regulation and control were not all-encompassing, but were limited to supervision of the quality of education, and then only in a general way.

In cases involving public utilities, however, the courts have been much quicker to find sufficient state control over the utility's activities, thereby qualifying the utility's conduct as state action. In *Pollak*,[75] for instance, the Court found state action not only because the transit company enjoyed a monopoly status and performed a public function, but primarily because the transit company was subject to considerable regulation by Congress. The Court found that the type of service rendered by the Company and the different kinds of equipment to be used by it were subject to regulation by the Public Utilities Commission of the District of Columbia,[76] as was the type of radio

[70] See, e.g., Public Utilities Comm'n v. Pollak, 343 U.S. 451, 454 (1952); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1136 (1971).

[71] 157 F. Supp. 101 (D.D.C. 1957).

[72] Id. at 108.

[73] Id. at 104.

[74] Bright v. Isenbarger, 314 F. Supp. 1382, 1394 (N.D. Ind. 1970), citing Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[75] Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).

[76] Id. at 454.

programs that the defendant was permitted to play over its loudspeakers. These examples of regulation were necessary elements in the court's finding of state action.[77] Likewise in the *Gas Light Company* case, the court found state action as a necessary result of the state's power of control over the defendant's activities. As the court pointed out: "Defendants' conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process."[78]

In *Lucas*, the Electric Company, in exchange for the monopoly market guaranteed it by the state, must submit to full and complete government supervision both by the state through the Public Service Commission and by the municipality which it serves. No utility may begin to operate unless and until it first obtains a certificate from the Public Service Commission authorizing it to do so.[79] The Commission has the power to regulate and supervise all activities of every public utility and may do all things necessary and convenient to make this power effective.[80] Every public utility is required by law to furnish the Commission with reports covering in detail every aspect of its business.[81] No utility may change its rates without the written approval of the Commission after hearing.[82] The Commission is given power to set up its own rules and regulations governing conduct of the public utilities,[83] and under this power the Commission has required all public utilities to conform to such rules and regulations.[84] While some of these requirements are of a type which are also made applicable to other privately owned corporations under the state's corporations laws, most of them are not; they apply only to public utilities. It cannot be denied that the rules and regulations promulgated by the state legislature, the Public Service Commission, and the cities and towns in which the electric company operates, when combined, provide an exhaustive and comprehensive system of regulation and control by various state agencies over the activities of the electric company. It is reasonable to deduce state involvement from this situation.

D. *Relationship Between State and Activity Causing Injury*

It is a general constitutional principle that in order for state action to be found in the conduct of a private entity, the state must be involved not simply with any activity of the entity alleged to have

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77 Id. at 462.
78 440 F.2d at 1140.
79 Wis. Stat. Ann. §§ 196.49, 196.50 (1957).
80 Id. § 196.02(1).
81 Id. § 196.12.
82 Id. § 196.20.
83 Id. § 195.01.
84 Wis. Adm. Code, ch. 6, § 113.01 (1956).

inflicted injury upon the plaintiff, but with the particular activity that caused the injury.[85] This principle was employed in *Bright v. Isenbarger*,[86] where the court never reached the constitutional issue of whether the summary manner in which the plaintiff was expelled from school for violation of a school disciplinary rule violated her rights to procedural due process, but disposed of the suit by finding that the principal's action was not action under color of state law. The court did find that the state was involved in the affairs of the school to the extent of its general supervision of the quality of education given at the school. However, it based its finding of no state action primarily on the fact that since the state did not interfere in the school's disciplinary process, the state was not involved in the activity that caused the injury, that is, the expulsion. Similarly, in the *Pollak* case the most convincing argument for the finding of state action was that the Commission—by ordering an investigation into the reasonableness of the transit company's broadcasts and then by dismissing the investigation —had directly involved the government in the specific activity causing the injury, namely, the continued broadcasting of offensive programs. It was the dismissal of the investigation which made it possible for the offensive programs to continue, thereby involving the state in the activity which was the subject of complaint.

In *Lucas* the particular conduct causing injury was the termination of plaintiff's electricity by the Electric Company. State involvement arises from a rule promulgated by the Commission permitting the Company to disconnect a customer's service for non-payment of a bill without providing for a hearing prior to such termination, and from the Commission's approval of a Company rule which provides for notice to the customer of his unpaid bill and for termination of service within five days in the event the bill is not paid before then. The question is whether or not these particular acts "significantly involve" the state in the Company's act of terminating a consumer's electric service so as to make the state a "joint participant" in the challenged activity. Although it is true that the state has not expanded the electric company's common law powers,[87] it would appear that once it chose to regulate and supervise the utilities in the all-encompassing manner in which it did, the common law was rendered inapplicable and the utility was required to look to state-enacted rules and regulations governing its conduct for authority to act. Here the particular rule was one that specifically enabled the defendant to terminate electric service but did not require defendant to hold a prior hearing to determine liability. The state could have required a prior hearing on the issue of the consumer's liability for a contested bill before permitting termination of service. Further, it could have required more in the

[85] See, e.g., Moose Lodge v. Irvis, 92 S. Ct. 1965 (1972); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[86] 314 F. Supp. 1382 (N.D. Ind. 1970).

[87] See description of utilities' common law powers at note 52 supra.

way of notice and could have extended the amount of time in which a consumer could pay a disputed bill before his electricity could be shut off. Instead, the Commission explicitly allowed the Company to specify its own rules of termination and then approved these company-made rules without modification.

It would appear that the situation in *Lucas* is quite analogous to that found in *Pollak*. In *Pollak* the court found that the action of the transit company in broadcasting a radio service, together with the action of the Commission in permitting such operation, amounted to sufficient governmental action.[88] Operating a radio service—like terminating electric service in *Lucas*—is something the transit company could lawfully do, absent a regulation to the contrary. The Commission in *Pollak* could have prohibited the company from so acting, but it refused to do so. By dismissing its investigation of the Company's broadcasting, the Commission permitted and actively approved the Company's conduct. The situation is the same in *Lucas*: the Commission could have prohibited the Electric Company from terminating on five days notice, but it refused to do so, and by enacting section 113.13(4) and by approving the Company's self-made rule on terminating procedures, it permitted and affirmatively approved and supported the Company's action. There seems to be no relevant distinction between *Lucas* and *Pollak* which would call for a different conclusion in each case.

The state of Wisconsin, by according preferential treatment to the defendant utility company, and by providing it with special benefits and assistance not made available to other private corporations, has induced the Company to perform a vital public function which otherwise would be a responsibility resting with the state. Not only does the state in this way avoid its responsibility to the general public, but it also proceeds, quite thoroughly, to control, regulate, and supervise practically every facet of the utility's operations in ways not applicable to other private entities. Under these circumstances it would be neither fair nor consistent to permit the state to absolve itself of all responsibility for actions taken by the utility in furtherance of a public objective in which the state has such a strong interest. This is especially true when, as here, the utility enjoys a state-conferred monopoly which makes it impossible for the dissatisfied consumer to obtain essential services elsewhere. The utility's actions, therefore, should be considered state action for Fourteenth Amendment purposes.

II. Due Process

Due process of law requires that a state treat an individual according to settled principles of fundamental fairness.[89] This often

[88] Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

[89] See Rochin v. California, 342 U.S. 165, 169 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

means that a state must grant an individual notice and an impartial hearing before terminating any privileges, benefits, interests or entitlements which are alleged to be his constitutional rights.[90] To determine whether, in a particular instance, notice and a prior hearing are required, it is necessary to answer the following questions: first, where the interest of the individual is a constitutionally protected right,[91] does the state provide an adequate remedy for redressing impairment of that right? Secondly, is the interest of the individual in preserving his rights unimpaired weightier than the government's interest in sustaining the challenged activity?

A. *Adequate State Remedy*

Where a state provides other adequate remedies for the deprivation of a constitutionally protected right, the failure of the state to provide an impartial hearing to determine the consumer's liability for a disputed bill prior to termination of service does not violate due process.[92] In *Lucas* the court found the following informal and judicial remedies to be adequate: (1) informal discussion between consumer and the utility, (2) utilization of the "good offices" of the Commission, (3) action in tort for damages, (4) suit in equity for injunction, and (5) payment under protest followed by a suit for refund.

In *Lucas* the court found that due process requires only that a fair hearing be granted before termination of benefits, and that the utility company, through its officers and other employees, could give the plaintiff such a prior fair hearing even though technically it could not be considered an impartial arbiter.[93] The courts have held, however, that where a constitutionally protected right is involved, not only must a prior hearing be given, but such hearing must be before an *impartial* decision-maker. In *Fuentes v. Shevin*,[94] the Supreme Court held that a prejudgment attachment of chattels under Pennsylvania and Florida replevin statutes was unconstitutional, and in determin-

[90] See cases cited in note 8 supra.

[91] The majority in *Lucas* expressly assumed that the right to continued electric service is a constitutionally protected right. Lucas v. Wisconsin Electric Power Co., Slip Op. at 11 n.13. In light of other recent court decisions in related areas of the law, it is highly unlikely that a court today would hold that this right is not constitutionally protected. For examples of such decisions see note 8 supra.

[92] See, e.g., Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); East Coast Lumber Terminal v. Town of Babylon, 174 F.2d 106 (2d Cir. 1949).

[93] Lucas v. Wisconsin Electric Power Co., Slip Op. at 20-21. In finding that an impartial arbiter was not necessary, the court relied on Perry v. Sindermann, 92 S. Ct. 2694 (1972); Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971); Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971). In all of these cases the right sought to be protected was the expectancy of future employment of nontenured teachers. Such a right, however, is not a right constitutionally protected by the due process clause of the Fourteenth Amendment. This being the case, it is understandable that an impartial hearing was not provided.

[94] 92 S. Ct. 1983 (1972).

ing what type of hearing was required by due process, said that there is no constitutionally acceptable substitute for a "neutral official" as decision-maker.[95] In *Goldberg v. Kelly*,[96] the Supreme Court held that due process requires prior notice and a hearing to determine whether or not welfare recipients are no longer eligible for welfare benefits, before such benefits could be terminated; and in addressing itself to the various elements required for a fair hearing, that Court found that "an impartial decision-maker is essential."[97] In several other cases this same rule has been propounded.[98] This being so, it is arguable that any hearing given by the Electric Company is inadequate, for a company which is allowed to pass judgment on its own case certainly can not be considered impartial.

Although it may be true, as the court in *Lucas* claims, that "the company's incentive to sell electricity to paying customers is at least as great as the desire to collect past due accounts,"[99] it does not necessarily follow that an official of the Company, when presented with a complaint, will try to settle it in a fair and even-handed way. The fact that the consumer's dependence on the utility provides it with an overwhelming advantage suggests the contrary conclusion. This is strikingly pointed out in *Wood v. City of Auburn*,[100] where the court, in enjoining the shutting off of water because of the alleged nonpayment of a water bill, said:

> The consumer, once taken on to the [water] system becomes dependent on that system for a prime necessity of business, comfort, health and even life. He must have the pure water daily and hourly. . . . He cannot wait for the water. He must surrender, and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money yet the customer must pay it again, and perhaps still again. He cannot resist lest he lose the water.[101]

Where, as in the present case, a consumer cannot purchase electricity elsewhere, he is forced to deal with the company, and if he has already paid his bill once, he must, nevertheless, "swallow his choking sense of injustice" and pay it again. He cannot resist lest he lose his electric

[95] Id. at 1996.

[96] 397 U.S. 254 (1970).

[97] Id. at 271.

[98] In Re Murchison, 349 U.S. 133, 136 (1955): "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome;" see also Richardson v. Wright, 92 S. Ct. 788 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

[99] Lucas v. Wisconsin Electric Power Co., Slip Op. at 18.

[100] 87 Me. 287, 32 A. 906 (1895).

[101] Id. at 292-93, 32 A. at 908.

service. The Company cannot be considered an impartial arbiter because it is a party to the claim in dispute. Consequently, it is submitted that discussion with representatives of the utility is not an adequate remedy.

Whether or not utilizing the "good offices" of the Wisconsin Public Service Commission is an adequate remedy presents a slightly different problem. Here the objection cannot be made that the Commission is incompetent to act as an impartial arbiter. The Commission does not have an interest in the outcome of the dispute. The problem, however, is the Commission's lack of power to provide an adjudication of the issue of the consumer's liability for the disputed bill. For example, the Commission allows formal complaints to be brought, in which the consumer is allowed to appear and present his case, only in those cases in which twenty-five or more private citizens join in the complaint.[102] The plaintiff in *Lucas* cannot avail himself of this remedy simply because it is doubtful that there are twenty-five potential plaintiffs at this time. Furthermore, in *McNeese v. Board of Education*[103] the Supreme Court expressed grave doubt as to whether this type of administrative remedy was constitutionally adequate. In *McNeese*, the state remedy in question was the Illinois School Code, which permitted petitioners to file a complaint alleging discrimination with the Superintendent of Schools—who would then be required to hold a hearing on the matter—only if the petitioners could first obtain the subscription of fifty residents or ten percent of the school district, whichever was less. The Court there said: "It is by no means clear that Illinois law provides the plaintiff with an administrative remedy sufficiently adequate to preclude resort to federal court."[104]

Furthermore, where a complaint is made to the Commission, and where the Commission investigates the consumer's claim and finds it meritorious, it cannot order the utility not to terminate service, but, under present rules, can only request that it not do so.[105] This remedy, then, must also be considered inadequate. The fact that disputes are sometimes resolved by mutual agreement as a result of the Commission's actions does not change the fact that there is no guarantee that a particular dispute will be solved in this manner.

The majority in *Lucas* also referred to an action in tort for damages as a judicial remedy open to the plaintiff. It would not seem, however, that this remedy could be considered adequate, for once the damage is done through termination of the consumer's electric service, no amount of damages rendered at a later time will rectify the situation or recompense the plaintiff for the harm he has already suffered. In *Fuentes v. Shevin*,[106] the Court said:

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102 Lucas v. Wisconsin Electric Power Co., Slip Op. at 5.

103 373 U.S. 668 (1963).

104 Id. at 674-75.

105 Brief for Appellee at 12, Lucas v. Wisconsin Electric Power Co., Slip Op.

106 92 S. Ct. 1983 (1972).

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that *it must be granted at a time when the deprivation can still be prevented.*... [N]o damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone."[107]

Traditionally, the reason for allowing suits for injunction in a case such as *Lucas* is the common belief that termination of electric service or other essential utilities causes irreparable injury that cannot be adequately compensated for at a later time in an action for damages. Viewed from this perspective, then, an action for damages must be considered inadequate.[108]

The remedy of payment under protest and suit for refund was a remedy which the courts began to apply to cases such as *Lucas* when they came to realize that there was a great inequality of bargaining power between utilities and consumers.[109] It is suggested that if this remedy ever was adequate it no longer is today. One objection is that the remedy of payment under protest followed by a suit for refund would require the consumer to part, at least temporarily, with an amount equal to the disputed bill. If the consumer is indigent he may not be able to do this and still be able to afford the necessities of day-to-day living. It is not just the permanent taking of property that is prohibited by the due process clause of the Fourteenth Amendment; temporary, nonfinal deprivations of property rights are also constitutionally prohibited.[110] A payment under protest, in reality, amounts to a temporary deprivation of property. As such, a requirement of such payment should receive the same type of treatment as the requirement of posting a security bond which, in certain other cases, has been struck down as unconstitutional. In *Fuentes v. Shevin*,[111] for example, the Supreme Court held constitutionally inadequate state statutes allowing one whose goods were replevied to recover them if, in return, he surrendered other property pending a final adjudication of the dispute. In *Bell v. Burson*,[112] the state regulations in question permitted an automobile operator involved in an accident to keep his license only

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107 Id. at 1994-95 (emphasis added).

108 See, e.g., Shelton, The Shutoff of Utility Services for Nonpayment: A Plight of the Poor, 46 Wash. L. Rev. 745 (1971); Atlanta v. McJenkin, 163 Ga. 131, 134-35, 135 S.E. 498, 499 (1926); City of Mansfield v. Humphreys Mfg. Co., 82 Ohio St. 216, 227, 92 N.E. 233, 236 (1910). But see Creel v. Piedmont Natural Coal Co., 254 N.C. 324, 118 S.E.2d 761 (1961).

109 See, e.g., Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253 (1947); Manhattan Milling Co. v. Manhattan Gas and Electric Co., 115 Kan. 712, 225 P. 86 (1924).

110 Fuentes v. Shevin, 92 S. Ct. 1983 (1972); Bell v. Burson, 402 U.S. 535 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

111 92 S. Ct. 1983 (1972).

112 402 U.S. 535 (1971).

if he first posted a security bond pending an ultimate determination as to his liability for the accident. As in *Fuentes*, the Supreme Court struck down the statutes declaring them to be violative of due process. The same result was reached in *Sniadach v. Family Finance Corp.*,[113] in which the laws under attack required one whose wages were garnished to obtain their release only after posting a security bond which was at least equal in amount to the wages in question. In all of these cases, the statutes requiring the posting of security—like the requirement of payment under protest before a suit for refund in *Lucas*—only temporarily deprived one of his property. The courts in each case, however, struck them down as being constitutionally inadequate. Since payment under protest amounts to the same thing as posting a security bond, there can be no valid reason for condemning the latter while upholding the former.

The majority in *Lucas*, in finding a suit for refund to be a constitutional and adequate remedy, relied on the fact that the use of the same or similar procedures has been upheld in cases involving disputes over the validity of taxes and rent.[114] These cases, however, are distinguishable. The particular rent case relied on by the court in *Lucas* was that of *Lindsey v. Normet*.[115] In this case the landlord brought a forcible entry and detainer action against his tenant in which he claimed the right of possession because of the tenant's failure to pay his rent. The tenant admitted that he had failed to pay past-due rent but claimed that he was freed from his obligation to do so due to the landlord's failure to fulfill his obligations to keep the premises in a habitable condition. The Court in this case upheld a state requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. In this case the tenant did not dispute the fact that he failed to pay past rent. In *Lucas*, however, the plaintiff made no such admission as to the past electric bill in question and instead claimed that he had paid each and every one. Furthermore, in *Lindsey* the security requirement was *not* meant to apply to past rent if the court should find it due. It was only meant to apply for rent which was *presently accruing* during continuation of the hearing the tenant was still in possession of the premises. No matter what obligations the landlord had failed to perform, the tenant was still currently receiving a benefit, namely his possessory interest in the premises. Furthermore the Court in *Lindsey* held that the state of Oregon, if it so desired, could treat the obligations of the tenant and those of the landlord as independent rather than dependent covenants.[116] This being so, the tenant's obligation to pay his full rent was in no way changed or modified by unlawful acts or omissions on

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[113] 395 U.S. 337 (1969).

[114] Lindsey v. Normet, 92 S. Ct. 862 (1972); see also Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[115] 92 S. Ct. 862 (1972).

[116] Id. at 871.

the landlord's part which diminish the value of the tenant's possessory interest.

Whereas in *Lindsey* the security bond was meant to be used only as payment for a benefit which the tenant was then receiving, in *Lucas* the "security"—that is, payment under protest—was to be used as payment of a past bill, and not as security for payment of present services rendered. The plaintiff in *Lucas* was perfectly willing to pay for present services rendered and had done so for quite a while prior to suit.[117] The tenant in *Lindsey* is getting something in return for the security he pays; this is not so in *Lucas*. Furthermore, as the *Lindsey* case pointed out, a tenant, in order to remain in possession of the premises, is not required to pay *back rent* (as opposed to *accruing* rent) until *after* it is proved, in a judicial proceeding, that he is obligated by law to do so. This is in accordance with the general rule that "he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof."[118] If the plaintiff in *Lucas*, however, were required to pay his disputed bill before he would be entitled to receive continued electric service, then he would be required to do so *before* it was ever proved that he had an obligation to do so. This would be in direct conflict with the general rule stated above. The *Lindsey* case, therefore, is not a valid authority for the proposition that a suit for refund is a constitutionally adequate remedy.

Nor does the case of *Great Lakes Dredge & Dock Co. v. Huffman*[119] lend support to the remedy of a suit for refund. In this case the court upheld a requirement that a taxpayer first pay a state tax under protest before he could sue for its return. The fact is that the requirement of payment under protest is limited to cases involving the payment of revenue to the government.[120] The purpose for this exception to the general rule is "to leave undisturbed the state's administration of its taxes." If a taxpayer could require the government to grant him a hearing prior to payment of disputed taxes, then the government would be unable to spend and otherwise distribute these funds effectively and efficiently for the benefit of the general public. This, then, would work to the disadvantage of the entire populace and not just to one individual or group. In all other cases, however, in which the payment of revenue to the government is not in issue, this same reasoning does not apply, and hence there is no need to extend the exception further. In sum, the *Huffman* case also fails to provide valid authority for holding that in *Lucas* payment under protest followed by a suit for refund is a constitutionally adequate remedy.

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117 Lucas v. Wisconsin Electric Power Co., Slip Op. at 3.

118 Wood v. Auburn, 87 Me. at 293, 32 A. at 908. See also Pabst Corp. v. City of Milwaukee, 193 Wis. 522, 527, 213 N.W. 888, 890 (1927).

119 319 U.S. 293 (1943).

120 Wood v. Auburn, 87 Me. at 293, 32 A. at 908; Pabst Corp. v. City of Milwaukee, 193 Wis. at 527, 213 N.W. at 890.

A suit for injunction also appears to be inadequate for many of the same reasons that make a suit for refund inadequate. Before one can bring a suit for injunction he must first post a bond at least equal in amount to the disputed claim. If he is a poor person, he may not be able to do so and still be able to afford other essentials for living. In comparing the requirement of posting a bond in order to bring an action with a prejudgment garnishment of one's wages, one author said:

> [T]he poor litigant has the alternative [to posting a bond] of failing to post a bond and thus forfeiting his legal rights. . . . [T]he property interest involved is the use of funds which may be needed to purchase the necessities of life. Rights are of little value without remedies. . . . The bond requirement, then, not only has a chilling effect on the litigant's right to bring or defend an action, but it can clearly deprive the litigant of needed funds before he has had an opportunity for a hearing.[121]

In short, the unequal battle between the utility and the consumer makes it inequitable to place the burden on the individual to initiate court action either in an action at law or in a suit in equity.[122] In all cases other than those concerning the payment of taxes, the one who asserts that something is due him, and not the one who denied the debt, should have the burden of judicial action and proof. Therefore it is submitted that all of the remedies available to the plaintiff, upon which the majority relied in *Lucas*, are legally inadequate.

B. *Balancing Test*

To determine whether or not the state must grant one an impartial hearing prior to depriving him of his constitutional rights, it is first necessary to weigh the individual's interest in obtaining such a hearing against the government's interest in taking summary action.[123] Not only will this balancing test determine whether or not a hearing is necessary, but, where it is determined to be necessary, it will also determine the nature and extent of the hearing required.[124]

In cases involving the deprivation of one's constitutional rights, it is a rare case in which the courts will find that the government's interest is weightier and that therefore a prior hearing is not required.

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[121] Note, 68 Mich. L. Rev. 986, 1007-08 (1970).

[122] Lucas v. Wisconsin Electric Power Co., Slip Op. at 49 (dissenting opinion).

[123] See, e.g., Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J. concurring); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[124] Note, supra note 121, at 995-96 n.51; Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967): "[T]o determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved."

Such cases are usually limited to situations in which the governmental interest involved is either the public health[125] or the national security.[126]

Where, however, the governmental interest is basically financial in nature, and where, furthermore, the individual's interest is in preserving his right to a necessity of life, the courts have consistently ruled in favor of the individual and have required an impartial hearing before terminating the individual's rights.[127] Continued electric service, for one who depends on it for heating, lighting, cooking and refrigeration, is essential to day-to-day living and affects the consumer's day-to-day sustenance. The governmental interests involved—to preserve fiscal integrity,[128] to prevent spurious claims,[129] and to see to it that

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[125] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 601 (1950). The Court weighed the governmental interest of preventing potential physical injury to the public from misbranded articles against injury to the purveyor of the articles resulting from temporary interference with its distribution, found the government's interest to be weightier, and held that an impartial hearing prior to temporary seizure of the goods was not constitutionally required. See Note, 19 DePaul L. Rev. 552, 564 (1970).

[126] Korematsu v. United States, 323 U.S. 214 (1944). The Court found that the interest of the federal government during World War II in preserving national security outweighed the interest of the individual plaintiff—an American citizen of Japanese descent—in being able to move about freely.

[127] Fuentes v. Shevin, 92 S. Ct. 1983, 1999 n.22 (1972): "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (the Court found that wages were a "specialized type of property" and that the interest of a wage-earner in receiving his wages outweighed the competing interests of both the state and the creditor); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (the court found that the right of a student to an education is a vital right "basic to civilized society" and that it outweighs the interest of the Board of Education in speedily processing such administrative matters); Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968), aff'd sub nom. Goldberg v. Kelly, 397 U.S. 254 (1970) (here the court found that the interest of the plaintiff welfare recipient not to be deprived of assistance was an "overpowering need" greatly outweighing the state's interest in protecting public funds). See Comment, The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in our Economic System," 66 Nw. U. L. Rev. 502, 506-507 (1971): "Courts are now refusing to allow the initial deprivation without prior notice and an opportunity to be heard where a withholding of property essential to day to day living is involved . . . and where the consequences of an erroneous preliminary decision is an infringement of liberty or a hardship affecting an innocent person's day to day sustenance. In this type of case, the balance, if any, should always be in favor of the individual's personal interests in receiving prior notice and an opportunity to be heard . . . ."

[128] In 1969 only 71 consumers with disputed claims—out of approximately 600,000 people serviced by Wisconsin Electric Power Company—went so far with their disputes as to contact either the Public Service Commission, the Better Business Bureau, a newspaper, or a public utility officer. Judge Sprecher, in his dissenting opinion, expresses the belief that if a hearing is required prior to termination of services, to determine the consumer's liability for a disputed bill, the number of people who will decide to take advantage of such a hearing will not increase all that much. Lucas v. Wisconsin Electric Power Co., Slip Op. at 52. If this is so, the cost to the government would not be nearly as much as it might at first appear.

[129] The problem of spurious claims might, to a certain extent, be avoided by re-

paying customers get service at as low a rate as possible—are all basically financial in nature. Consequently, it is submitted, the consumer's interest must be considered the weightier, and he must be granted an impartial hearing before being made to suffer the loss of his right to electric service.

The balancing of competing interests does not end here, for the type of hearing that is required must still be determined. It has been said that "the extent to which local government will experience financial and administrative problems and difficulties will depend largely on just what type of hearing must be held to satisfy minimum requirements of due process."[130] It is for this reason that minimum procedural due process requirements must reflect the balance between the government's interest in fiscal economy and administrative efficiency, and the individual's interest being affected by governmental action.[131] A formal hearing will substantially add to the government's expense and, quite naturally, will greatly increase the amount of time required to settle disputes. If such a hearing is not absolutely necessary, then, only an informal hearing should be provided. In *Goldberg v. Kelly*[132] the Supreme Court was of the opinion that "the pretermination hearing [prior to termination of welfare benefits] need not take the form of a judicial or quasi-judicial trial" and that an informal hearing would be sufficient to provide the essential elements of fairness.[133] In *Dixon v. Alabama State Board of Education*[134] the Fifth Circuit explicitly held that an informal hearing was all that was required to determine whether or not a student was guilty of misconduct and could therefore be expelled.[135] In other cases in which similar interests were involved, the courts, by implication, indicated that an informal hearing satisfied the requirements of fairness essential to due process.[136] Since the right to continued electricity does not differ in importance from the rights involved in the above cases, it would seem that an informal hearing would be a necessary and sufficient guarantee of procedural due process.[137]

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quiring that the consumer make a preliminary showing that his dispute with the utility is made by him in good faith, before allowing him to take advantage of prior hearing. See Fuentes v. Shevin, 92 S. Ct. 1983, 2002 n.33 (1972): "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing. . . ." Note, supra note 121, at 1009.

130 See Note, supra note 125, at 570.

131 Escalera v. New York City Housing Authority, 425 F.2d 853, 867 (2d Cir. 1970).

132 397 U.S. 254 (1970).

133 Id. at 266-67.

134 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

135 Id. at 159.

136 See, e.g., Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969).

137 It is suggested that the Public Utilities Commission, or any one of its individual members, is a suitable arbiter before whom such a hearing could be held. Unlike the utility company which is threatening to terminate service, the Commission, or one of

CONCLUSION

In *Lucas v. Wisconsin Electric Power Company*, the facts that the state of Wisconsin gave the Electric Company a great deal of assistance and support; that its motive in doing so was to enable the Company to perform what may be classified as a public function; that the Company did in fact perform a function vital to the community; that the state exercised great control over the Company's activities; and that the state specifically permitted the Company to terminate electric service for nonpayment of a disputed bill, when taken together, show "significant involvement" of the state in the affairs of the Company, make the state a "joint participant" in the Company's termination of the plaintiff's electric service, and thereby turn the Company's "private" action in discontinuing service into state action. In many states other than Wisconsin, these same factors can be found in the relationship between the state and its utilities. Accordingly, it is submitted that whenever a problem arises in any of these jurisdictions concerning termination of a vital service by a utility, the utility's action should be considered state action for Fourteenth Amendment purposes. Furthermore, since a service such as electricity is a vital service in all parts of the country, in all states due process should require that a prior impartial hearing be given before service is actually discontinued.

WILLIAM J. TUCKER

Uniform Commercial Code—Sections 1-201(19), 2-103(1)(b), 9-307(1)—Good Faith Requirement for Buyer in Ordinary Course—*Sherrock Brothers v. Commercial Credit Corporation*.[1]—Plaintiff Sherrock Brothers, an automobile dealer, purchased two new automobiles from Dover Motors, another dealer, which had a floor plan financing agreement for its vehicles with defendant, Commercial Credit Corporation. Pursuant to the sales agreement, plaintiff made payment to Dover but allowed Dover to retain possession of the two automobiles for several days in order that Dover might use these vehicles for display purposes. Dover agreed that it would then deliver the vehicles to Sherrock Brothers. Before Dover delivered the cars, however, Commercial discovered that Dover had been selling cars "out of trust."[2] Therefore, citing a provision in its security agreement with Dover

its members, has no interest in the outcome of the dispute, and hence could be relied on to conduct a fair hearing and render an impartial decision.

The question of precisely what elements of a fair hearing are necessary in order to satisfy due process requirements is open to some dispute. However, a consideration of these elements is beyond the scope of the present article.

[1] 290 A.2d 648 (Del. 1972).

[2] The term "out of trust" refers to the practice whereby a debtor under a secured transaction sells the goods subject to the security agreement to a third party and does not satisfy his financial obligation to his creditor. Sherrock Brothers v. Commercial Credit Corp., 277 A.2d 708, 709 (Del. Super. Ct. 1971).