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Constitutional Law-Utility Shutoffs-A Violation of Due Process Under Color of State Law?

Constitutional Law—Utility Shutoffs—A VIOLATION OF DUE PROCESS UNDER COLOR OF STATE LAW? *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241 (N.D. Ohio 1972).

Past judicial decisions concerning the right of a private[1] utility to terminate service for nonpayment of bills have consistently favored the utility.[2] Yet victims of shutoffs, whether poor[3] or merely outraged and inconvenienced,[4] continue to attack shutoff actions through the regulatory commis-

[1] This article deals primarily with the privately owned utility. For cases holding that an action of a publicly owned utility is under color of state law, see Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960) and Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).

[2] For a collection of cases, see 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, 255-56 nn. 115-21 (1969); 43 AM. JUR. *Public Utilities and Services* § 64 n.4 (1942); 73 C.J.S. *Public Utilities* § 6 nn.98 & 99 (1951); Annot., 112 A.L.R. 237 (1938); Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM L. REV. 326 n.90 (1962). *But cf.* Virginia Ry. & Power Co. v. House, 148 Va. 879, 139 S.E. 480 (1927), where a customer had not paid his bill when the utility collector appeared at the former's residence seeking payment. Although the customer could not immediately pay the collector, he sent the money later that morning to the company office. That afternoon the service was shut off for nonpayment. The court held the utility liable because the bill had been paid when service was discontinued.

[3] In Oklahoma Natural Gas Co. v. Young, 116 F.2d 720 (10th Cir. 1940), the court held that the utility owed the consumer no duty under the "humanitarian rule" to refrain from turning off her gas in cold weather. The consumer, sick in bed as a result of an automobile accident, could not pay her bill. Despite knowledge of the circumstances and the consumer's promise to pay as soon as she could contact her son, the utility discontinued her gas service. The court held the utility not liable despite the fact that the consumer had contracted pneumonia.

In Rock Cassell Gas Co. v. Kirk, 263 Ky. 149, 92 S.W.2d 10 (1936), although a customer's six month old son died of pneumonia after the gas was shut off for nonpayment, the utility was held not liable. Other decisions have held similarly that the right of the utility under contract to shut off service is paramount to the need of the consumer. *See generally* Annot., 132 A.L.R. 914 (1941).

[4] In Union Enterprises, Inc. v. Seattle, 77 Wash. 2d 190, 460 P.2d 285 (1969), the plaintiff alleged that "the City of Seattle Light Co. wrongfully and negligently disconnected all power to the vessel-restaurant known as 'Surfside 9,' causing a shutdown in electric pumps which were used to pump water from the bilge of the vessel, thereby, causing the vessel, together with the equipment and fixtures, to sink to the bottom of Lake Union where the same now lies in a partially submerged and permanently unusable condition." On July 15, 1966, a notice was sent to the restaurant to pay its past due bill by July 20; on July 21, the electricity was shut off. The court held that the utility "made an entirely legal use of a method, effective, inexorable and direct. . . ." *Id.* at —, 460 P.2d at 287.

sions,[5] legislation,[6] and the courts.[7] Their efforts have met with failure in all forums.

Anti-shutoff groups[8] have made a strong but unsuccessful effort to involve the federal courts, first through the equal protection clause of the

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[5] Only the District of Columbia Public Service Commission has announced a policy that is somewhat unfavorable to present shutoff practice:

> Termination should only take place after intensive efforts to effect collection without so doing. The collection of arrearages should not be tied to arbitrary time periods but should take into account the financial situation of the customer, his willingness to meet his obligation, and his record in living up to his undertakings.
>
> The first question which arises is whether it is just and reasonable to allow any termination of service for non-payment. We are fully aware of the hardship which such action can cause and we believe that its use should be a measure of last resort. We cannot, however, conclude that terminations should be prohibited. To do so would place the Company in the position of having to sell its product to all customers regardless of their credit experience. Doubtless, the great majority of the Company's customers would regard their obligations to the Company seriously and would refrain from taking advantage of its service. It would be naive, however, not to recognize that there would be those who do not give proper regard to their financial obligations and would exploit the Company's inability to refuse to provide its service and product further. We think that the properly exercised power to terminate service is entirely just and reasonable. *In re* Washington Gas Light Co. (D.C. Pub. Serv. Comm'n 1968), 1 CCH Pov. LAW REP. ¶ 9229 at 12, *as reported in* 46 Wash. L. Rev. 745, 763 nn.81 & 82 (1971).

In Virginia, the State Corporation Commission's Electrical Division receives consumer complaints about gas and electricity shutoffs. (Past complaints have involved only cases in which the customer and utility had disputed payment of the bill.) After receiving a complaint, the Electrical Division contacts the utility involved, and requests that service be continued or restored until the matter can be investigated. The utility normally complies. It is doubtful that a disputed payment claimant would be entitled to a hearing before the Commissioners, and a complaint of shutoff for mere nonpayment would be dismissed without investigation by the Electrical Division. Interview with C. Vaughn, Electrical Division, SCC, in Richmond, Virginia, Aug. 23, 1972.

[6] Only the state of Washington has passed legislation allowing reduced or state subsidized utility rates to indigent families. Shelton, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745, 766 n.95 (1971) [hereinafter cited as *Shelton*]. A few states authorize their welfare agencies to make direct payment to the utility for an indigent's bill. 1 CCH Pov. L. REP. ¶ 1515.73 (1972).

Few state legislatures have announced any specific policy concerning shutoff for nonpayment. The California, Virginia, Kansas, Maryland, Indiana, New Jersey, New York, and North Carolina Codes are silent on the subject. In Virginia, the SCC regulates shutoff procedures, deriving authority from VA. CODE ANN. § 56-247 (1966). *See* note 18 *infra*.

[7] *See* note 2 *supra*.

[8] These groups, largely poor peoples' organizations, view the payment of the utility bill as a major problem, because the resulting utility shutoffs contribute to slum conditions that in turn contribute to a high crime rate. Commission studies substantiate this theory. *Shelton, supra* note 6, at 747 n.5 (1971).

fourteenth amendment,[9] and more recently through the right to due process secured by the fifth and fourteenth amendments.[10] However, in the recent case of *Palmer v. Columbia Gas Co.*,[11] the District Court for northern Ohio, diverging from past reasoning,[12] declared that an Ohio gas utility's shutoff practices violated due process.[13] The court found a basis for jurisdiction in a provision of the Civil Rights Act[14] which makes illegal the deprivation of any rights under color of state law.[15] The right deprived was that of due process[16] owed the customer by the utility. The fact that the utility was granted a monopoly to operate by the laws of the state,[17] that the utility was regulated by a public commission,[18] and that the utility

[9] Lucas v. Wisconsin Elec. Power Co., 322 F. Supp. 337 (E.D. Wis. 1970). *See also Shelton, supra* note 6, at 767 n.97 (1971).

[10] Amendment V broadly states that "no person shall be deprived of . . . due process. . . ." Amendment XIV directly applies this inhibition on the states: "nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

[11] 342 F. Supp. 241 (N.D. Ohio 1972).

[12] Lucas v. Wisconsin Elec. Power Co., 41 U.S.L.W. 2087 (7th Cir. Aug. 2, 1972); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir. 1969), *cert. denied*, 396 U.S. 846 (1969); Taglianetti v. New England Tel. & Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). *But cf.* Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).

[13] "Thus there is no question of the entitlement involved. Neither is there any question that the defendant's shutoff procedures, especially when actually followed up by a shutoff, are clearly offensive to even the most elementary notion of what constitutes due process." Palmer v. Columbia Gas Co., 342 F. Supp. 241, 244 (N.D. Ohio 1972).

[14] Civil Rights Act, 42 U.S.C. § 1983 (1970).

[15] 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 an action at law, suit in equity, or other proper proceeding for redress. (Emphasis added.) *Id.*

[16] While the nature and limits of due process are constantly changing, the courts frequently note that:

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).

[17] OHIO REV. CODE ANN. § 4905.24 (1971) prevents duplication of one utility's service in an area by another utility so long as the first utility renders adequate service. The Utility Facilities Act grants separate territory to Virginia utilities. VA. CODE ANN. § 56-265.3 (1968).

[18] OHIO REV. CODE ANN. § 4905.04 (1969). VA. CODE ANN. § 56-247 (1966), states:

> If upon investigation it shall be found that any regulation, measurement, practice, act or service of any public utility complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of the law . . . , the Commission may substitute therefor such other regulations, measurements, practices, service or acts and make such other order respecting, and such change in, such regulations, measurements, practices, service or acts as shall be just and reasonable.

was empowered to shut off service for nonpayment by state statute,[19] all helped bring the utility's action under color of state law.[20]

Two major issues arise in *Palmer:* what does due process require before a utility can shut off service for nonpayment, and is a utility shutoff under color of state law? Concerning due process, the court held that three notices mailed to the customer over a period of two months and five days were not sufficient[21] because a potential shutoff victim is entitled to personal

[19] OHIO REV. CODE ANN. § 4933.12 (1969). Virginia has no equivalent statute.

The utility submits a disconnection policy to the state utility which may approve or disapprove it. Some courts point to the fact that the utility can draft its own shutoff regulations as evidence that the shutoff procedure is not under color of state law:

> Motivated by purely private economic interests and pursuant to its *own regulations,* Illinois Bell terminated plaintiff's Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefitted from, encouraged, requested or cooperated in this suspension of service. Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 626 (7th Cir. 1969), *cert. denied,* 396 U.S. 846 (1969).

The *Kadlec* position seems clearly erroneous. While the utility may offer proposals, the commission makes the final determination. A study of the utility tariffs on file with the Virginia SCC reveals almost total uniformity in shutoff procedure for Virginia's numerous gas and electric utilities. The Tariff submitted by the state's largest electrical utility, Virginia Electric and Power Company, is representative:

> TERMS AND CONDITIONS
> XVI DISCONTINUANCE OF THE SUPPLY OF ELECTRICITY
> (b) The Company reserves the right to discontinue furnishing electricity to a Customer, with 5 days written notice from the Company to the Customer, upon the occurrence of either one or both of the following events:
> (1) For nonpayment of past due bills, regardless of any amount of money on deposit with the Company.
> (2) For failure to comply with any of the Company's Terms and Conditions as filed with the Commission, or with any of the conditions or obligations of any agreement with the Company for the purchase of electricity.
> . . . .
> (e) Notice of discontinuance shall be considered to be given to a customer when copy of such notice is left with the Customer, or left at the premises where his bill is rendered, or posted in the United States mail addressed to the Customer's last post office address shown on the record of the Company.

A simple test to determine the existence of a principal-agent relationship is to look to the parties to see if they believe and act as if such a relationship does exist. While VEPCO officials do not view the utility as the agent of the SCC, they do believe that the SCC is responsible for its practices and procedures affecting the consumer. When called to defend its practices, the utility merely points to the appropriate SCC directive. Interview with R. L. Dale, Credit Manager, and A. B. Correll, Assistant Accounting Manager, VEPCO, in Richmond, Virginia, Aug. 24, 1972.

[20] In *Palmer,* a specific statute allowed shutoff for nonpayment. Does this make the court's ruling inapplicable to Virginia utilities that derive authority from SCC regulations promulgated in accordance with state statute? *See* note 18 *supra.* There seems to be no valid basis for distinguishing legislative authority granted in a one-step process from that granted by a two-step process.

[21] The procedure of the Ohio utility was to send a bill at the end of each month.

or actual notice.[22] Considering gas and electricity as basic necessities,[23] the court felt that customer needs transcend the rights of the utility secured by its form contract.[24] Likewise, the court condemned the utility's practice

If unpaid, a past due notice was sent with the next month's bill. Five days thereafter a shutoff notice was sent to the customer indicating he had four days to pay. At the end of the four days, if payment was not received, service was discontinued. Palmer v. Columbia Gas Co., 342 F. Supp. 241, 243 (N.D. Ohio 1972). VEPCO follows this procedure except that service is discontinued five days after the shutoff notice instead of four days. See VEPCO Tariff, *supra* note 19.

The *Palmer* court condemned the practice of estimating every other monthly bill by computer because these estimates were consistently low. Thus, when a meter was actually read the following month, a consumer's bill might be so high that were he on a limited budget he might be unable to pay. Palmer v. Columbia Gas Co., *supra* at 243. VEPCO also estimates every other monthly bill by computer. Officials believe the estimates are generally accurate, citing an abrupt change in the consumer's level of usage as responsible for most low estimates. Interview with R. L. Dale, Credit Manager, and A. B. Correll, Assistant Accounting Manager, VEPCO, in Richmond, Virginia, Aug. 24, 1972.

[22] The only notice required in Virginia is a letter mailed to the last address shown on the utility's records. See VEPCO Tariff, *supra* note 19. The *Palmer* court stated:

> The evidence also showed that when the collectors went out to shut off gas, they frequently did so without any announcement whatever to the consumer, even though the consumer was sitting right in his house, so that the first notice he would have of the shut-off was that his house got cold, or his kitchen range would not light.... 342 F. Supp. 241 at 243.

VEPCO officials state that if a customer is at home, the collector *may* "knock on the door"; if the customer pays, service continues. However, company policy *does not* require the collector to inform the customer or give him a final opportunity to pay. Whether this is done depends on the temperment of the collector, his work load and, perhaps, whether the customer notices the collector on the premises. *See* note 21 *supra*.

[23] Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972). *See generally Shelton, supra* note 6, at 746 n.3 (1971).

[24] Since most utilities are granted a monopoly on service in a given area, a consumer has no choice but to accept the terms of the utility's contract. Although ideally a consumer is protected from possible injustice by the presence of the public utility commission, note the terms to which a consumer must agree in order to obtain electricity from VEPCO:

> TERMS AND CONDITIONS
>
> XVI DISCONTINUANCE OF THE SUPPLY OF ELECTRICITY
>
> (d) The Company reserves the right to discontinue the supply of electricity under any of the above conditions irrespective of any claims of a customer pending against the Company, or any amounts of money on deposit with the Company as required by Section IX of these Terms and Conditions.
>
> . . . .
>
> (f) Whenever the supply of electricity is discontinued in accordance herewith, the Company shall not be liable for any damages, direct or indirect, that may result from such discontinuance. In all cases where the supply of electricity is discontinued by reason of violation by the customer of any of the provisions hereof or of any agreement with the Company for the purchase of electricity, there shall then become

of annually sending out over 120,000 notices threatening shutoff, while actually discontinuing service to only 6,000 customers.[25] Although the court may have mentioned this merely to substantiate its argument that the present shutoff practice is unfair, the implication inescapably arises that the court desired an end to the disparity between 120,000 notices and 6,000 shutoffs. To achieve this result, the utility would have to abandon the shutoff notice as a coercive means of collecting past due bills, and adopt the threat of legal action.[26]

> due and payable, in addition to the bills in default, an amount equal to the monthly minimum charge for the unexpired term of the agreement, not as a penalty, but in lieu of the income reasonably to be expected during the unexpired term of the agreement.

Paragraph (d), reserving the right to discontinue service irrespective of *any* claim pending against the utility, seems clearly illegal. "It is settled, however, that the right to discontinue service may not be used to coerce payment of an account if the customer challenges in good faith either its correctness or his liability for the amount charged." 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, 256 (1969); Annot., 112 A.L.R. 241 (1938); Note, 62 COLUM. L. REV. 312, 326 n.91 (1962); *cf.* Virginia Ry. & Power Co. v. House, 148 Va. 879, 139 S.E. 480 (1927). *Contra,* Lucas v. Wisconsin Elec. Power Co., 41 U.S.L.W. 2087 (7th Cir. Aug. 2, 1972).

In paragraph (f), the utility disclaims *all* liability for damages resulting from shutoff. Such practice, when by a private corporation utilizing a form contract, has been inhibited by the courts. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), *noted* in 75 A.L.R.2d 1 (1961); *see* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

That the SCC sanctions and enforces the disclaimer in paragraph (f) strengthens the argument that the utility action is under color of state law.

[25] Palmer v. Columbia Gas Co., 342 F. Supp. 241, 242-43 (N.D. Ohio 1972).

[26] Despite the important interpretation by the *Palmer* court in declaring that a shutoff arises under color of state law, the decision's effect would mean little to the poor consumer should the court intend only actual notice to satisfy the due process requirement. This would mean that the poor would have their service shut off after rather than before actual notice. However, the court views due process as requiring additionally an end to arbitrary action, and an end to the disparity between the number of notices sent and the number of shutoffs actually made:

> Mailing out a vast number of shut-off notices, only about four percent of which were followed up by actually taking the action threatened, making no attempt to give actual notice when so drastic an action was taken, and taking the action arbitrarily without giving the slightest opportunity to question or dispute it, even when it was unquestionably improper, are not the ingredients of due process. *Id.* at 244.

To end the disparity between the number of shutoff notices and actual shutoffs, the utility must either curtail the use of the shutoff or of the notice. The shutoff notice is a highly effective and coercive means of collecting money. Obviously, if the utility is required to take thousands of past due accounts to court for collection each month, the expense and time lost to the utility, the court system, and the paying customer would be prohibitive. Nevertheless, this is precisely the procedure private corporations must follow, and the *Palmer* court finds the extra-legal power the utility has in the shutoff notice unfair:

> When the defendant's collectors enter upon private property to carry out the

In considering whether the shutoff was made under color of state law, *Palmer* relied on *Public Utility Commissioners v. Pollak*,[27] in which the United States Supreme Court held that a District of Columbia transit company's decision to have piped-in music on its buses was in fact the decision of the federal government.[28] In coming to this conclusion, the *Pollak* court did not merely rely on the fact that the utility was a monopoly authorized by statute and regulated by a public commission, but emphasized that the appropriate public utility commission had intervened directly into the matter by holding a hearing that determined the ultimate rights of both the utility and the customer.[29] In contrast, the *Palmer* court emphasized only that the Ohio Utility Commission had the right to hold a hearing, and not that it did hold a hearing.[30] Thus, the *Palmer* decision would

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procedures necessary to shut off a customer's gas, they are acting in a governmental capacity, and exercising the police power of the state. The action is not analogous to a merchant telling a customer he can get no more merchandise until he has paid for what he has already had. It is the action of a sheriff or a constable executing a writ of replevin, or a writ of restitution, entering upon private premises to deprive a person thereon of his possession or his goods. *Id.* at 246.

If the utilities are forced to abandon the threat of shutoff in favor of the threat of service of process, the end result may be that the utility will have to obtain judgment against the delinquent consumer, and even seek garnishment or a judicial sale of the consumer's property before shutoff will be permitted. This puts the utility on a par with private corporations, and assures the consumer of a hearing on the merits of his case.

[27] 343 U.S. 451 (1952).

[28] *Id.* at 461-62.

[29] We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, 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. *Id.* at 462.

[30] "However, as the Supreme Court held in *Public Utilities Comm'n of District of Columbia v. Pollak*, . . . operation under regulatory supervision of the Public Utilities Commission is the key factor to be considered." Palmer v. Columbia Gas Co., 342 F. Supp. 241, 245 (N.D. Ohio 1972). *Palmer* does not mention an appeal from the Ohio Utility Commission, and the Ohio statute requires appeals from the Commission to go to the Ohio Supreme Court. OHIO REV. CODE ANN. § 4903.12 (1971). The crucial question is whether the Court of Appeals will view the failure of the *Palmer* court to emphasize the need for a Commission hearing as erroneous, or accept *Palmer* as a new trend.

not seem to follow the requirements outlined in *Pollak*,[31] and therefore might not withstand review. However, the *Palmer* court may have consciously gone beyond the scope of *Pollak*, because the line of argument set forth by the district court is constitutionally and legislatively sound.

Certainly, the *Palmer* decision standing alone does not establish a trend. But the committee reports and cases[32] showing the harsh results of allowing shutoff for nonpayment continue to grow, and faced with the taxpayer's dissatisfaction with welfare programs, anti-shutoff groups have turned to the only source of relief available—the federal courts. If the courts determine that gas and electricity are necessities, and shutoffs inhumane, then clearly a precedent and legal argument to the contrary will not protect the utilities.

Past case law is not in accord with the *Palmer* holding, but the argument based on the Civil Rights Act and the fifth and fourteenth amendments is impressive and sound. The right deprived is due process and it need not be asserted that the shutoff is state action, but that it is merely under color of state law. While *Palmer* goes beyond *Pollak* by not requiring a Commission hearing, is it valid to distinguish between the right to exercise a power and the actual exercise of the power, or to distinguish between the right to hold a hearing and actually holding one? In either situation the Commission control, influence and sanction is present, directly or indirectly.

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[31] The *Pollak* holding requires a Commission hearing in order to label the utility's action as under color of state law. The result would make all those actions on which the Commission has ruled state actions, and those actions taken without a hearing private actions. This seems clearly arbitrary. The practical solution is to require the shutoff victim to petition the Commission for a hearing after disconnection. Once the Commission reviews the shutoff, the groundwork is laid for further appeal alleging violation of due process under color of state law. But, can the consumer obtain a hearing before the Commission? OHIO REV. CODE ANN. § 4905.26 (1971) requires the Commission to hold a hearing upon any complaint by any person. Virginia has no comparable statute, and it is doubtful that a hearing would be granted to the consumer alleging shutoff for nonpayment. *See* note 5 *supra*. Further, it appears that the SCC intends to follow the holding in Lucas v. Wisconsin Elec. Power Co., 41 U.S.L.W. 2087 (7th Cir. Aug. 2, 1972), *noted in* National Ass'n of Regulatory Util. Comm'rs Bull. No. 33-1972, 18 (Aug. 14, 1972). *Lucas* held that the Wisconsin Public Service Commission was not required to hold a hearing prior to discontinuance of electric service for nonpayment of a disputed bill. *See* the discussion of VEPCO Tariff paragraph (d), note 24 *supra*. *Lucas* rejected the theories that (1) the utility acted under color of state law outlined in 42 U.S.C. § 1983 (1970); and (2) the utility's present shutoff procedure violated due process. The ramification of the *Lucas* holding is that with the Commission in the position to refuse to hold a hearing, there is no way the consumer can meet the hearing requirements of the *Pollak* decision needed to qualify the shutoff as under color of state law. Thus, unless the *Palmer* decision, which does not require a hearing by the Commission to label the shutoff as under color of state law, stands, the theory that shutoff is under color of law may never achieve prominence.

[32] *See* notes 3 & 4 *supra*.