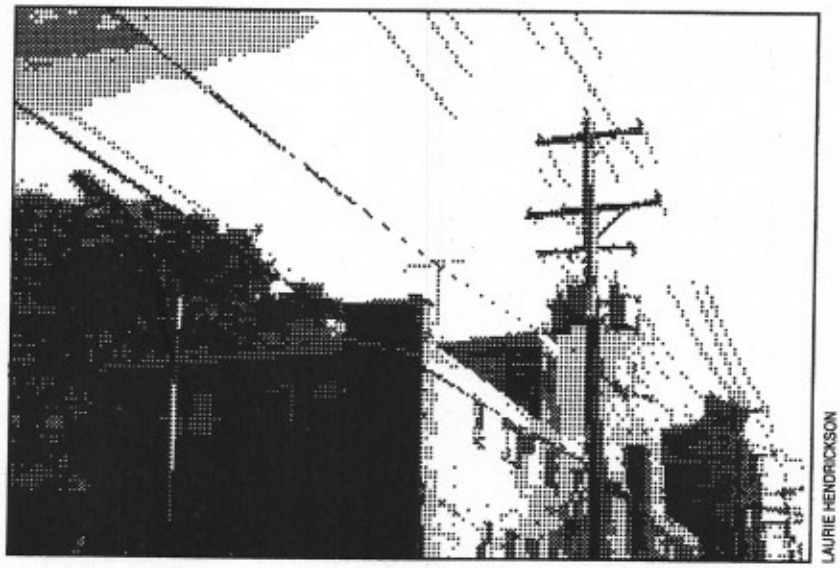
Tenants' Rights to Pretermination Notice in Cases of Landlords' Nonpayment of Utilities

y Roger Colton and Sara Morrissey

hat happens when a tenant pays for utility service as a part of the rent but the ndlord does not pay the utility company's bill? The answer to this question can ıve significant consequences for low-income households, given their reliance on ntal housing.

One part of the answer to this ques-ɔn has been settled law for years. A ility's efforts to hold a tenant financially ıble for the unpaid bills of a landlord is ɔth a due process and an equal protec-ɔn violation.[1] More generally, a utility, hen state action is involved, may not ıpose the debts of a third party on a :rson not contractually liable for those :bts.[2] The state action requirement obably limits the application of consti-tional doctrine to municipal utilities ıd possibly Rural Electric Cooperatives ECs). On one hand, a private inves-r–owned utility is not constrained by nstitutional restrictions because the actices of the company do not involve :ate action."[3] On the other hand, activ-



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Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (Clearinghouse No. 12,216); Davis v. Weir, 497 F.2d 139, 145 (1974) (Clearinghouse No. 5,162).

See generally Roger Colton, *Utility Service for Tenants of Delinquent Landlords*, 20 CLEARINGHOUSE REV. 554 (1986).

See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1978) (Clearinghouse No. 9,119). *See also* Comment, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817 (1975); Comment, *Constitutional Law—State-Action Termination of Electrical Service by Privately Owned Utility Does Not Constitute State Action for Purposes of the Fourteenth Amendment*, 24 EMORY L.J. 511 (1975); Comment, *Public Utilities and State Action: The Supreme Court Takes a Stand*, 24 CATH. UNIV. L. REV. 622 (1975); Comment, *Constitutional Law—Notices of Utility Shutoffs Need Not Meet Due Process Standards Where Rules Promulgated by the Iowa State Commerce Commission Do Not Create State Action by Utility Companies*, 33 DRAKE L. REV. 459 (1983–84).

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ity by municipal utilities unquestionably involves state action.[4] Arguably, activities by RECs do as well.[5]

This constitutional doctrine takes care of only part of the problem: determining who ultimately must pay the bill. This column, however, addresses a different question: to what extent, if at all, a tenant whose service is in the landlord's name is constitutionally entitled to pretermination notice if the landlord fails to pay the bill. Recent federal court decisions have held that such pretermination notice to tenants is constitutionally required.

I. Property Interests and Constitutional Protections

There can be little question today that utility customers have a property interest in utility service. According to the U.S. Supreme Court in *Memphis Light, Gas and Water Division v. Craft*, the right to continued utility service without interruption, except for "just cause," creates a property interest in the service.[6] The Supreme Court held:

> State law does not permit a public utility to terminate service "at will." [Memphis Light] and other public utilities in Tennessee are obligated to provide service "to all of the inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause," and may not terminate service except "for nonpayment of a just service bill." An aggrieved customer may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. The availability of such local-law remedies is evidence of the State's recognition of a protected interest. Although the customer's right to continued service is conditioned upon payment of the charges properly due, "[t]he Fourteenth Amendment's protection of "property" . . . has never been interpreted to safeguard only the rights of undisputed ownership." Because petitioners may terminate service only "for cause," respondents assert a "legitimate claim of entitlement" within the protection of the Due Process Clause.[7]

There can be little question today that utility customers have a property interest in utility service.

In the constitutional cases, courts acknowledge that utility service is considered an essential of life.[8] Courts continue, however, to make clear that the nature of the service has no impact on whether utility service is a "property interest" the deprivation

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[4] *See, e.g., Craft*, 436 U.S. at 1; *see also Davis*, 497 F.2d at 139.

[5] It has often been held that Rural Electric Cooperatives (RECs) are not merely not-for-profit corporations but instrumentalities of the federal government. *See, e.g.*, Rural Electrification Admin. v. Central La. Elec. Co., 354 F.2d 859 (5th Cir. 1966); Cass County Elec. Coop. v. World Properties, 249 N.W.2d 514 (N.D. 1976); Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672 (5th Cir. 1968); Salt River Project Agric. Improvement & Power Dist. v. Federal Power Comm'n, 391 F.2d 470 (D.C. Cir. 1968); compare these cases with Tex. v. Adams, 345 U.S. 461 (1953), and Smith v. Allwright, 321 U.S. 649 (1944). In the Alabama Power case, the Fifth Circuit held: "The Power Company would treat REA simply as a rival public utility . . . . (However), rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. So, too, in the Salt River decision, did the D.C. Circuit note that the Federal Power Commission concluded that Congress did not . . . intend RECs to be public utilities or, alternatively, even if the REA-financed cooperatives were public utilities under the Act, they were exempt from its coverage as instrumentalities of the Government. . . ." *Alabama Power Co.*, 394 F.2d at 672 (citations omitted).

[6] *Craft*, 436 U.S. at 1.

[7] *Id.* at 10.

[8] *See, e.g., id.* at 1; Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972) (Clearinghouse No. 7,322); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972) (Clearinghouse No. 8,514).

of which may not occur without due process requirements attaching. According to the Seventh Circuit, the question of whether utility service is an "absolute necessity of life" is "irrelevant to the question of whether there is an entitlement" subject to constitutional protection.[9] The Seventh Circuit continued, "[A]s the Supreme Court has made clear, it is the nature and not the weight or importance of the plaintiff's interest that determines whether a property interest exists."[10]

The disconnection of water service without prior notice to a tenant, when the landlord does not pay the utility bill, is unconstitutional, according to a recent Ninth Circuit decision.

Despite the strong language of the *Craft* decision and its progeny, the holding and reasoning assist only those low-income tenants who are also the customers of the utility. These tenants, in other words, not only receive the service but also are responsible for paying the bills for such service. The question presented here is what happens when the tenant receives the service but the landlord is the party who pays for it. The reasoning of *Craft* regarding the protection of property interests is still applicable if applied creatively.

II. Recent Decisions

A. Oregon

The disconnection of water service without prior notice to a tenant, when the landlord does not pay the utility bill, is unconstitutional, according to a recent Ninth Circuit decision.[11] The facts of *Turpen v. City of Corvallis* were undisputed, and the district court resolved the case on opposing motions for summary judgment. The Ninth Circuit affirmed the lower-court decision in favor of the tenant, who was represented by Oregon Legal Services.

Twice during 1990, the city of Corvallis, Oregon, deprived the plaintiffs and their son of water service without prior notification of any kind. When their landlord, who was responsible for the water bill, failed to pay the bill, the city terminated water service to the apartment complex where the plaintiffs resided. Had the plaintiffs received prior notice of the scheduled shutoff, they would have had the opportunity either to enforce state law remedies against their landlord or to make other arrangements.[12]

The plaintiffs challenged the city's water termination policy, under which tenants can lose water service without any prior notice simply because their landlords have not paid the water bill. The city's policy was to notify the subscriber, but not the actual user, of the water service of any potential water service disconnection. The plaintiffs in *Turpen* argued that disconnection without notice to tenants was a violation of the due process clause of the U.S. Constitution, and the court agreed. The key question was whether the plaintiffs enjoyed a constitutionally protected property interest.

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[9] Sterling v. Village of Maywood, 579 F.2d 1350 (7th Cir. 1978) (Clearinghouse No. 24,845).

[10] *Id.* at 1354.

[11] *See* Turpen v. City of Corvallis, 26 F.3d 978 (9th Cir. 1994) (Clearinghouse No. 48,046). Note, however, a split with the Eleventh Circuit on this issue in James v. St. Petersburg, Fla., 33 F.3d 1304 (11th Cir. 1994) (Clearinghouse No. 46,180), discussed in *Tenants Denied Right to Notice of Landlord's Utility Shut-Off*, 11 NCLC ENERGY & UTILITY UPDATE 2 (Dec. 1994).

[12] Oregon law requires a landlord to maintain dwelling units in habitable condition; a dwelling unit is uninhabitable under Oregon law if it "substantially lacks . . . [a] water supply." OR. REV. STAT. § 90.320(1)(c). Section 90.360(1) of the statute provides the tenant with a cause of action to recover damages and to obtain injunctive relief for any noncompliance with Section 90.320.

According to the federal court, the plaintiffs in *Turpen* have a constitutionally protected property interest because of their state-court right to enjoin a landlord from disconnecting their water service. Pursuant to *Logan v. Zimmerman Brush Company*, "a cause of action is a species of property protected by the Fourteenth Amendment."[13] Accordingly, the Ninth Circuit affirmed that "plaintiffs' state-law cause of action against their landlord under [OR. REV. STAT.] § 90.320 constituted such a property interest."[14] Therefore, the tenants had "a property right in a cause of action for injunctive relief against the landlord and had been deprived of this property interest without due process by the termination of service without notice."[15]

The Ninth Circuit relied upon a virtually identical case for support, *DiMassimo v. City of Clearwater*.[16] In this Florida case, tenants brought suit against the city of Clearwater, which provided utilities to customers. A Clearwater city ordinance provides that the only customers who may receive utilities are "owners whose land receives the benefit of those services or persons who have the owner's authority to request that utilities be provided to the premises and agree that the owner shall be responsible for the payment of charges."[17]

The city terminated the utility service to the tenants, at the request of the landlord, without notice to the tenants. The tenants' attempts to reconnect the utility service were frustrated because the tenants neither were landowners nor could they obtain the landlord's acknowledgment of responsibility for payment. The federal district court, affirmed by the Eleventh Circuit, found a legitimate claim of entitlement, a property interest, in the right to apply for an injunction under Florida's landlord-tenant law. Pretermination notice was necessary to prevent the city from destroying rights granted to the tenants by state law: the right to apply for an injunction.[18]

Oregon's landlord-tenant act provides similar protections, according to the *Turpen* court. Under the Oregon statute, a tenant may seek injunctive relief for any noncompliance with the rental agreement or if the landlord fails to keep the dwelling in a habitable condition. Under Oregon law, a dwelling unit is uninhabitable if the unit "substantially lacks" a water supply. Moreover, the lease called for the landlord to provide and pay for water service.

The *Turpen* court distinguished its holding from the holding in *Craft*.[19] In *Craft*, the Court found that the tenants had a state-protected right to the continuing water service. Quoting directly from state law, the Court found that the termination of water service could only be "for cause," a restriction that created a property interest in the water service. The *Turpen* decision differed. Under the *Turpen* theory, the essence of the due process challenge is that when a state statute provides that landlords must provide a water supply or be faced with an injunction, a protected interest, no entity may take away a tenant's legal right and entitlement to get an injunction prohibiting the landlord from taking away the tenant's water supply. Simply, leaving the tenant with the option, after the fact, to receive compensation is not enough. It is not the deprivation of water that gives rise to this action; it is the deprivation of plaintiffs' statutory right to an injunction.

The *Turpen* court resolved several further issues in favor of tenants. First, the court held that the fact that the tenants have a right to seek damages from the landlord does not detract from the due process protections accorded their right to obtain

[13] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
[14] *Turpen*, 26 F.3d at 978.
[15] *Id.* at 978.
[16] DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986) (Clearinghouse No. 39,771).
[17] *Id.* at 1537, citing Clearwater Code §§ 50.02.04 and 50.07.10.
[18] *But see* James, 33 F.3d at 1304, discussed in *Tenants Denied Right to Notice of Landlord's Utility Shut-Off, supra* note 11.
[19] *Craft*, 436 U.S. at 1.

injunctive relief to prevent the disconnection of service. "We agree that the tenant's right to seek injunctive relief prior to the termination of water service is separate from the right to seek damages or abatement. Use of the premises without interruption of water services can be secured only by an action for injunctive relief before that interruption occurs."[20] Second, the *Turpen* court rejected the city's claim that providing a pretermination notice to tenants would be unduly burdensome. "Whether notice is practicable under the circumstances is relevant to what process is due in a particular case, not to whether a due process right exists. Where, as here, the city has full knowledge of the addresses at which it intends to terminate water service, providing pretermination notice at those addresses (which is all plaintiffs are seeking) is not impracticable."[21]

B. Washington

The *Turpen* decision closely followed another recent decision in a case brought by Evergreen Legal Services in Seattle involving a tenant's right to notice. In *O'Neal v. City of Seattle*, plaintiff entered into an oral agreement with her landlord to live in a house within the city limits.[22] Under the rental agreement, plaintiff was responsible for payment of utilities. Plaintiff had not previously had a utility account in her name and, therefore, had never had a delinquent account with the city water department. Before the plaintiff entered into the rental agreement and without her knowledge, the department terminated water service to the home because previous tenants had failed to make payments on their delinquent account. Before the plaintiff moved in, however, a friend of the landlord's son turned the water back on without authorization from the department. There was no evidence, the court said, that plaintiff had any knowledge that water service had been wrongfully restored. When plaintiff called to arrange to have the account placed in her name, she was told that she must pay the entire outstanding bill prior to the connection of service.

The* O'Neal *court found that post-disconnection remedies do not supplant the due process requirements of a pre-termination notice.

The issue in *O'Neal* is not whether a tenant has a right to notice before an existing account can be disconnected. Instead, the issue is whether the water company's refusal to change the account to plaintiff's name, and denial of service without notice and an opportunity to be heard, violated due process requirements. In *O'Neal*, since the tenant did not currently have water service, she could not rely upon state law protecting against the disconnection of service without just cause as the basis of her property interest. Nonetheless, after stating the rule regarding the protection of property interests,[23] the court readily found that this difference was insubstantial.[24] "Here, the Court has no difficulty in concluding that plaintiff has a property interest

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[20] *Turpen*, 26 F.3d at 979.

[21] *Id.*, citing Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

[22] O'Neal v. City of Seattle, No. C93-366C (W.D. Wash. Nov. 10, 1993) (order on defendants summary judgment motion, at 24) (Clearinghouse No. 49,479).

[23] "It is elementary that the right to procedural due process does not exist in a vacuum. Rather, procedural due process protections under the Fourteenth Amendment extend only to 'interests' enjoying the stature of 'property' within the meaning of the Due Process Clause." *Craft*, 436 U.S. at 9. "Such property rights may be created by state law, either by statute, regulation, or case law." *O'Neal*, No. C93-366C (injunction, at 4).

[24] *See also* Lake v. City of Youngstown Div. of Water, No. 4:93CV2559, slip op. (N.D. Ohio July 14, 1994) (memorandum of opinion and order granting summary judgment on the issue of liability and injunctive relief in favor of the plaintiffs), discussed in *No Denial of Service for Third Party's Delinquent Bill at Same Address*, 11 NCLC ENERGY & UTILITY UPDATE 3 (Dec. 1994).

in continued water service. As provided in RCW § 80.28.110, a water company must provide service on demand absent a justification such as nonpayment."[25] Accordingly, the distinction between disconnecting existing service and refusing to connect new service will not generate a different due process result.[26]

Like *Turpen*, the Washington court in *O'Neal* found that postdisconnection remedies do not supplant the due process requirements of a pretermination notice. The city water department argued that the existence of an adequate state law remedy barred a procedural due process claim. The court responded:

> Contrary to defendants' argument, the Washington Residential Landlord Tenant Act does not provide adequate relief. Plaintiff's due process claim arises from the Department's failure to provide administrative procedures prior to refusing to open a new account in her name and removing the water meter because of the unpaid bills of the previous tenant. The RLTA, however, provides no such pretermination procedural safeguards, and thus provides no relief where, as here, the customer cannot afford to satisfy the outstanding bill and deduct the amount from future rent payments. While the RLTA may be read to create a cause of action against a landlord whose premises do not have running water, such a remedy comes only after shutoff. As such, the RLTA does not provide adequate pretermination relief to tenants such as Ms. O'Neal, and therefore does not bar her due process claim here.[27]

III. Conclusion

In sum, a tenant served by a utility for which state action can be claimed arguably is constitutionally entitled to notice prior to the disconnection of utility service even if the landlord rather than the tenant is the customer of the utility. While the cases discussed above relate to water service, results should not differ on the basis of whether the service is water, sewer, gas, or electricity.

Pretermination notice is necessary if the absence of such notice would deprive the tenant of a property right. Property rights are created by state law, which, in turn, can be set forth in statute, regulation, or case law. It is not merely the right to continued service that is the protected property right in these cases. A "cause of action" is a property right. Thus, if a tenant has a cause of action to seek an injunction against a landlord to prevent the loss of utility service, the disconnection of service without notice represents a deprivation of this property interest without procedural due process.

The courts have further held that the existence of a posttermination cause of action for damages against the landlord does not eliminate the need for pretermination notice. Moreover, denying a tenant connection to new service is no different from disconnecting existing service.

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[25] *See Lake*, No. 4:93CV2559.

[26] The court had held previously that "there is no legal or practical distinction between the Department refusing to commence water delivery to plaintiff and the situation presented in [a prior case involving the disconnection of service to an existing tenant] . . .," *O'Neal*, No. C93-366C (order on defendants summary judgment motion, at 7).

[27] *O'Neal*, Case No. C93-366C (injunction, at 7) (May 10, 1994).