PROTECTIONS FOR WATER CUSTOMERS

New York's Utility Project Law Manual
6th Edition 2013

New York's Utility Project
P.O. Box 10787
Albany, NY 12201
1-877-669-2572

TABLE OF CONTENTS

PROTECTIONS FOR WATER CONSUMERS

INDEX

PROTECTIONS FOR WATER CONSUMERS

1. Introduction

The law governing the rights of water consumers depends upon the type of water supplier: municipal, and large or small water companies. Large private water companies are governed by the Public Service Law (PSL), and the Public Service Commission (PSC) has established certain protections for water consumers and certain duties for water providers.[1]

Municipally owned water suppliers are not governed by the Public Service Law. Municipal suppliers, nevertheless, must comply with the statutes which created them.[2] More importantly, municipal water consumers have certain constitutional rights which municipal water suppliers, as governmental entities, may not abridge. Advocates may expect an increased caseload in this

[1] A large private water company has gross annual revenues of over $250,000. PSL §50; 16 NYCRR §§14.1 and 14.2(a).

[2] For example, the supplier may be a public authority, created under and governed by the Public Authorities Law, and may have adopted rules and regulations with provisions similar to HEFPA (*e.g.*, Suffolk County Water Authority).

area, since, as water rates continue to increase, the number of clients with water-related problems can be expected to rise accordingly.[3]

2. Private Water Suppliers

2.1 Introduction

[3] Municipal water systems face the same problems which lead to rising costs as do privately owned water companies: aging plant, federal Safe Drinking Water Act compliance, pollution problems and overdrawn water supplies.

Public assistance recipients are entitled to a water or sewer allowance payment if they are responsible for paying it directly to the water service provider. However, the total of the recipient's rent and water service allowance may not exceed his or her maximum shelter benefit. 18 NYCRR §352.3(b). *See* 94 ADM-20, p. 11.

Privately owned water supply companies are governed by the PSL and are regulated by the Commission.[4] Initially, the Home Energy Fair Practices Act (HEFPA) did not cover water suppliers, but in 1986, HEFPA was amended to include water companies with gross annual revenues of at least $250,000.[5] Although smaller water companies are exempt from HEFPA, they still must comply with the requirements set out in 16 NYCRR Part 533,[6] which does not apply to residential customers covered by Part 14.[7] Additionally, small private water companies must comply with PSL §§116, 117 and 118 governing service terminations to multiple dwellings, customer security deposits, payment agencies, backbilling and the refund of overpayments.

---

[4] "[Article 4-B] shall apply to the sale, furnishing and distribution of water for domestic, commercial and public purposes, [excluding] bottled water." PSL §89-a.

According to PSC staff, the PSC regulates over 450 water companies. Some of the larger water utilities it regulates are:

County Knolls	N.Y. American (West. Co.)
Fisher's Island	N.Y. Water (Long Island)
Jamaica Water	Owego Water
Kiamesha Water	Seacliff Water
Long Island Water	Spring Valley
New Rochelle Water	South County

[5] PSL §50; 16 NYCRR Part 14.

[6] Notices of discontinuance and complaint procedures.

[7] 16 NYCRR §533.1.

2.2 Large Private Water Companies

Public Service Commission rules implement PSL §50, which extends HEFPA coverage to PSC regulated water companies, except to the small water companies. These rules are codified at 16 NYCRR Part 14, and generally parallel those for electric and gas service.

Applications. Large water companies must provide service, generally within five business days, to applicants unless there are amounts owing for service to a prior account in the applicant's name, or there are unpaid charges for which the applicant is "legally responsible," or the applicant fails to pay a properly requested security deposit.[8] If the applicant owes the utility for prior service, the applicant must either pay the balance owed, or enter into a deferred payment agreement, unless the amounts owed are disputed and the customer has paid all undisputed charges.[9] If the water utility accepts a service application but fails to provide service within five business days, and none of the exceptions which excuse delay pertains, it must pay the applicant $25 per day for each day service is not

[8] 16 NYCRR §14.3(a)(3).

[9] 16 NYCRR §14.3(a)(3).

supplied.[10]

An application for service may be made orally or in writing. However, the utility may require a written application only if service to the previous customer at the premises to be served was terminated for non-payment within the prior twelve months; the current account is subject to a final termination notice; there is evidence of meter tampering; the meter has advanced during the previous twelve months without a customer of record; or the application is made by a third party.[11]

[10] 16 NYCRR §14.3(d).

[11] 16 NYCRR §14.3(b).

Denial of application. If a utility denies an application for water service, due to the existence of an unpaid security deposit, unpaid prior bills or amounts for which the applicant is "legally responsible," it must so notify the applicant in writing within three business days of receipt of the completed application for service. Any application which is not denied within three business days is deemed to be accepted.[12] The notice of denial of an application must explicitly state the reason(s) for the denial, the steps the applicant must take to qualify for service, and the right to appeal the application denial to the PSC.[13]

Deferred payment agreements. Large water companies must offer a written deferred payment agreement (DPA) to a customer or applicant:

> at least 5 calendar days (8 if by mail) prior to a shut-off for nonpayment,
>
> when reconnection of service is requested after a shut-off for nonpayment,
>
> when payment of outstanding bills is a prerequisite to acceptance of a service application, or
>
> when it issues a backbill for more than $100 and the

[12] 16 NYCRR §14.3(c)(2).

[13] 16 NYCRR §14.3(c).

> customer's culpable conduct did not cause or contribute to the original underbilling.[14]

A DPA need not be offered to a seasonal or short-term customer, a customer who has broken an existing deferred payment agreement, or a customer the Commission determines has the resources to pay the unpaid charges.[15]

[14] 16 NYCRR §14.10(a)(1) and (2).

[15] 16 NYCRR §14.10(b).

The amount which can be included in a DPA is limited to the equivalent of two years' average billing, unless otherwise agreed to by the utility and the customer.[16] While the deferred payment agreement rules set out certain standard guidelines for DPA's (*e.g.*, downpayments of the larger of 20 percent or one month's average billing), the rules also explicitly state that the utility must negotiate in good faith in order to arrive at a DPA which the customer is able to pay, considering his or her financial circumstances,[17] and that payments may be as low as $10 per month, with no downpayment, if the customer's circumstances so warrant.[18]

If a customer defaults on a DPA, the utility must send a reminder notice notifying the customer that he or she must pay the amounts owing on the DPA within 20 days of the date payment was originally due, or a final termination notice will be sent.[19] If the customer can show a change in financial circumstances that makes the existing DPA unaffordable, a renegotiated DPA will

[16] 16 NYCRR §14.10(d).

[17] 16 NYCRR §14.10(a)(3).

[18] 16 NYCRR §14.10(c)(3).

[19] 16 NYCRR §14.10(f)(1).

be available. If the customer's circumstances have not changed, and the amount owing on the DPA is not paid within 20 days of the original due date, the DPA will be considered broken, and the utility may then terminate service, after giving the required termination notice.[20]

[20] 16 NYCRR §§14.10(f)(2) and 14.4.

Termination and notice. A water utility may terminate service for failure to pay charges for service used during the preceding twelve months. However, the utility must not terminate service to any person it knows receives public assistance, and payment for service is to be made directly by the department of social services (DSS).[21] Service may, for others, be terminated for failure to pay charges which are more than twelve months old if there was a billing dispute pending during the preceding twelve month period; if there was an excusable utility delay; if the customer's culpable conduct caused the delay in billing; or if changes are necessary to correct earlier issued estimated bills. Termination is also permitted for failure to pay amounts due:

under a deferred payment agreement,

for installation or equipment charges, or

for a required deposit.[22]

The utility must send the customer a final termination notice before it may terminate service. The notice must contain certain specific information, including

[21] PSL §89-b(3-c); 16 NYCRR §14.4(a)(2).

[22] 16 NYCRR §14.4(a)(1).

the total amount the customer must pay to avoid termination,

the procedures for bringing a complaint to the utility and the Commission,

a summary of the customer's HEFPA rights,

any reconnection charge that may be required if service is shut off, and

notice of the possibility of assistance from DSS if the customer is a public assistance recipient.[23]

[23] 16 NYCRR §14.4(b)(1).

The final notice of termination cannot be issued until at least 20 days from the payment due date.[24] The utility must then wait at least 18 days from the date the termination notice was mailed, or at least 15 days from the date the notice was personally served on the customer, before terminating service.[25] A utility may not terminate service on the basis of a "stale" termination notice; that is, the utility may not terminate service more than 60 days after issuance of a termination notice unless it issues a new termination notice or updates the original notice.[26]

The rules also address the utility's obligation to ensure rapid posting of payments, the acceptance of payment or entry into a deferred payment agreement at the time of termination, and the process for handling dishonored checks.[27] The utility

[24] 16 NYCRR §14.4(b)(2).

[25] 16 NYCRR §14.4(c). *Cf.* PSL §89-b(3-a).

[26] 16 NYCRR §14.4(c)(5).

[27] 16 NYCRR §14.4.

retains the power to suspend, curtail or disconnect service in certain situations involving

(a) tampering,

(b) after notice to the occupant when there is no customer of record, and

(c) emergencies.[28]

[28] 16 NYCRR §14.4(g).

Prohibited times. Termination of service is permitted only on Mondays through Thursdays, from 8:00 a.m. to 4:00 p.m., provided that day or the following day is not a public holiday, is not a day on which the utility's main business office is closed, and is not a day the offices of the Commission are closed.[29] Also, a water utility may not terminate service during the two week period encompassing Christmas and New Year's Day.[30]

Special termination protections. Special procedures must be employed for termination of service under circumstances involving (a) medical emergencies; (b) elderly, blind or disabled customers; and (c) heat related water service during the cold weather period. These procedures generally track the procedures required under HEFPA for gas and electric utilities.[31] For example, the utility must make a diligent effort to contact the

[29] 16 NYCRR §14.4(c)(3). *Cf.* PSL §89-b(3-b).

[30] 16 NYCRR §14.4(c)(7).

[31] 16 NYCRR §14.5. Before it may terminate service, the water utility must assure communication with the customer by making an onsite personal visit, if telephone contact is unsuccessful, and must take steps to overcome any language barrier. 16 NYCRR §14.5(a).

customer 72 hours before termination, try to arrange a payment plan, notify the local DSS before terminating service in some situations, and arrange for prompt post-termination follow-up in some cases.[32]

[32] 16 NYCRR §14.5(c)(2 and 3) (elderly, blind and disabled residents), and (b)(2 and 3) (cold weather and heat related water service).

Heat related water service is defined as "water service which is necessary for the on-going operation of a customer's primary heating system,"[33] and can include steam or hot water based systems which require the periodic, though not necessarily continuous, addition of water to operate. In addition, the rules allow a customer to designate a third party to receive copies of all termination or credit action notices that are sent to the customer.[34]

Multiple and two family dwellings. The HEFPA water regulations contain a set of requirements to be followed when service is to be terminated to a multiple dwelling,[35] or to a two

[33] 16 NYCRR §14.2(b)(15).

[34] 16 NYCRR §14.6.

[35] 16 NYCRR §14.7.

family dwelling,[36] where service is provided through one meter and is the responsibility of the landlord. The multiple dwelling rules[37] provide virtually identical procedures to those that are applicable to small water companies,[38] and to electric and gas utilities.

[36] 16 NYCRR §14.8.

[37] 16 NYCRR §14.7.

[38] PSL §116, and 16 NYCRR §533.8.

The utility must provide notice to the occupants of each unit of the multiple dwelling (by mail and posting on the premises) of the impending termination of service, in addition to providing notice to the customer of record and certain public officials.[39] The notice must state certain specified information, including notice of the occupants' right to pay the utility directly and deduct such payments from their rent pursuant to Real Property Law (RPL) §235-a.[40] In order to maintain service, occupants need pay only current charges to the utility. These are the charges for the billing period covered by the first bill rendered *on or after* the termination notice is posted.[41] If the occupants find they cannot reach an agreement with the utility to prevent termination, they may contact the PSC. The PSC may stay a threatened shut-off if it believes the occupants are making a good faith effort to arrange to pay current charges.[42]

Additional protections exist regarding the termination of

[39] 16 NYCRR §14.7(a)(1). Notice to the local public officials must be repeated between four and two business days before termination.

[40] 16 NYCRR §14.7(a).

[41] 16 NYCRR §14.2(b)(11). *See also* 16 NYCRR §14.7(b).

[42] 16 NYCRR §14.7(b)(2 and 3).

heat related water service to multiple dwellings during cold weather periods, such as the requirement that all notices be provided at least 30 days before termination.[43]

Somewhat simplified procedures are applicable in cases of two-family dwelling shut-offs, when the utility is aware (*i.e.*, a resident has so informed the utility) that the dwelling is a two-family dwelling served by one meter.[44] The notice requirements are basically the same as those for multiple dwellings, and the procedures for physical termination incorporate by reference some but not all of the procedures that are generally applicable under 16 NYCRR §14.4(c) and (d).

Reconnection. Barring circumstances outside the utility's control, a utility must reconnect service that has been disconnected for non-payment within 24 hours after:

> the customer has paid, or has entered into a deferred payment agreement for, the full amount of charges that

[43] 16 NYCRR §14.8(d)(1).

[44] 16 NYCRR §14.8.

> were the subject of the termination; or
>
> the utility is on notice that a serious impairment to health or safety will result from continued lack or water service (any doubt is to be resolved in favor of reconnection); or
>
> the Commission directs the utility to reconnect service.[45]

If the utility fails to reconnect service within 24 hours, and the failure to reconnect is not due to an excusable delay as determined by the Commission, the utility must pay the customer $25 for each day, or partial day, service is not restored. The penalty is increased to $50 for cases involving medical emergencies, elderly, blind or disabled customers, heat related service during the cold weather period, and cases of serious impairment to health or safety.[46]

Security deposits. A known recipient of public assistance, SSI or additional state payments may not be required to post a

[45] 16 NYCRR §14.9(a). *See also Matter of Goldman v. N.Y. Telephone*, 50 Misc.2d 309, 270 N.Y.S.2d 528 (Sup. Ct. Kings Co., 1966) (pre-HEFPA Article 78 proceeding requiring utility to reconnect telephone service following termination due to the criminal misconduct of a relative, not the customer's own misconduct).

[46] 16 NYCRR §14.9(c).

security deposit. Further, customers who are elderly, blind or disabled may be required to post a deposit only if they had service terminated for nonpayment in the preceding six months.[47]

[47] 16 NYCRR §14.11(a)(2).

Security deposits may be required only from customers who are seasonal, short-term or temporary customers; customers who are delinquent in payment (persons who made two or more consecutive late payments within a twelve month period); and customers who have had service terminated for nonpayment within the preceding six months.[48] Except for short-term, temporary and seasonal customers, the deposit can be paid in installments over an unspecified period, based on the financial circumstances criteria used to negotiate deferred payment agreements.[49]

Complaints. Among the complaint handling procedure requirements is the prohibition on termination of service for all amounts in dispute, during the pendency of a complaint before the utility and for 15 days after the resolution of the complaint by the utility.[50] Additionally, service cannot be terminated during the pendency of a complaint before the Commission, or for 15 days after resolution thereof, for failure to pay amounts in dispute. Customers must pay all undisputed charges during the pendency of

[48] 16 NYCRR §§14.11(a)(1) and 14.2(b)(13).

[49] 16 NYCRR §§14.11(a)(3) and 14.10(a)(3).

[50] 16 NYCRR §14.19.

a complaint, however, or service may be terminated.[51]

Miscellaneous. The HEFPA water rules also cover meter reading obligations, estimated bills and procedures where there is no ready access to the meter;[52] back bills;[53] late payment charges;[54] required contents of bills;[55] routine notification requirements;[56] emergency disconnection of water service;[57] and

[51] 16 NYCRR §14.19.

[52] 16 NYCRR §14.12.

[53] 16 NYCRR §14.13.

[54] 16 NYCRR §14.14.

[55] 16 NYCRR §14.15.

[56] 16 NYCRR §14.16.

[57] 16 NYCRR §14.17.

inspection of utility equipment.[58]

The HEFPA water rules make no provision for levelized billing plans, as the HEFPA statute would require (PSL §38), based on the Commission's finding that such billing plans are not "relevant" to water customers, in light of the need for conservation of water, and the conservation-inducing price signals associated with seasonal water price variations.

2.3 Small Private Water Companies

While not subject to HEFPA, small private water companies are governed by PSC regulations at 16 NYCRR Parts 500 - 585; Part 533 concerns termination and complaint procedures.

[58] 16 NYCRR §14.18.

Termination and notice. The disconnection rules require at least 15 days written notice (18 days if mailed) of a proposed termination of service, and require that the termination notice contain information on the procedures available for making a complaint to the water company. Water service may not be terminated on the weekend, holidays, or days when the water company offices are not open for business.[59]

[59] 16 NYCRR §533.3.

If the owner or landlord fails to pay bills for service and the entire multiple dwelling is scheduled for service termination, procedures analogous to the HEFPA multiple dwelling shut-off procedures apply. All *occupants* of a multiple dwelling scheduled for service termination must be mailed notices of the impending shut-off at least 18 days before the scheduled shut-off date.[60] In addition, notices must be posted in public areas of the multiple dwelling at least 15 days before the termination is scheduled to take place.[61] Water companies must continue service when the tenants of a multiple dwelling pay current charges for water service. "Current charges" are only those charges covered by the first bill issued *on or after* the notice of termination — occupants are not required to pay arrears for earlier billing periods that may appear on the bill.[62] Tenants who pay water charges directly to the utility, where the landlord failed to pay, are permitted to deduct such payments from their rent under RPL §235-a.

Security deposits. New customers can be required to provide

[60] PSL §116 and 16 NYCRR §533.8.

[61] 16 NYCRR §533.8(a)(3).

[62] 16 NYCRR §533.8(b) and (c).

a security deposit up to an amount equal to an estimated two months worth of service.[63] If the customer has not become delinquent in payment after the deposit has been held for a period of one year, the deposit must be returned to the customer (the rules do not define "delinquent" for deposits for water customers). Regardless of whether the customer is delinquent, the water company must provide the customer with interest on the deposit held (currently, 5.75% annually).[64]

[63] PSL §117; 16 NYCRR Part 510.

[64] 16 NYCRR §510.3; *N.Y.S. Register*, October 12, 1994, pages 55-56, and January 4, 1995, p. 49.

Bill adjustments. Small private water companies may not bill previously unbilled service or upwardly adjust a previously issued bill 24 months from the time service was rendered. (Note the contrast with HEFPA, which has a six month limit on issuing the first bill and a twelve month limit on bill upward adjustments).[65] The statute contains a general exception for cases where the customer's culpable conduct resulted in the need to issue a back bill or upwardly adjust a previously rendered bill.[66]

Bills may be paid to authorized payment agencies (as allowed under HEFPA). In addition, the Commission has authority to order refunds of past overcharges, and require that a customer be provided with a refund if he or she becomes eligible for a lower

[65] PSL §41(1) and (2).

[66] PSL §118(2).

rate because of a change in the character of service taken.[67]

[67] PSL §118(1) and (3).

Complaint procedures. The Commission's rules prohibit the termination of service, or the mailing of a termination notice, during the pendency of a complaint (whether to the company or the Commission), but the customer must pay any amounts that are not disputed.[68] If, after investigating a complaint, the company finds the complaint to be without merit, it must forestall the service termination an additional five days after personal service of its notice of determination of the complaint (eight days if mailed). It must also inform the customer of the Commission's complaint handling procedures.[69] The customer may avail himself of the Commission's procedures, and service may not be terminated during the *pendency* of the complaint at the Commission nor for 15 days after notice of the Commission's final resolution of the complaint.[70]

3. Municipal Water Utilities

3.1 Introduction

Most New York State residents are served by municipal water systems, operated by cities, towns, counties or villages. These

[68] 16 NYCRR §533.9(a).

[69] 16 NYCRR §533.9(b). See Complaint Handling Procedures.

[70] 16 NYCRR §533.9(c).

are not regulated by the Public Service Commission, and there is no independent regulatory body to which consumers can turn for help. The courts are the only remedy for municipal water consumers to obtain relief from unreasonable or arbitrary actions of municipal water systems, after appeal to the municipal water provider itself. Federal and State constitutional protections and principles of administrative law must be relied upon in challenging unreasonable or arbitrary acts and practices of municipal water providers. While establishing some minimum due process protections, constitutional challenges are not a complete substitute for comprehensive consumer service regulation.

Low-income tenants face a number of problems in obtaining and maintaining water service. Municipal water providers often fail to notify tenants of an impending shut-off, and sometimes demand that tenants pay the unpaid bill of the landlord or of a previous occupant before service is restored.[71] These types of problems have been successfully resolved through the federal courts (although actions in New York State courts are available as well), generally on constitutional grounds. A more peculiar

[71] *See Subin v. City of N.Y.*, 132 Misc. 426, 427, 229 N.Y.S.2d 628 (N.Y.C. Municipal Ct., 1928) ("Where a property owner is forced to pay a water tax by a threat to shut off the supply, it is a payment under compulsion," and may be recovered by the payor if wrongfully assessed), cited in *Monroe v. Niagara Mohawk Power Corp.*, 88 Misc.2d 876, 879, 388 N.Y.S.2d 1003 (Utica City Ct., 1976).

problem once faced by tenants on Long Island, and which may face tenants in some upstate areas, is the refusal of the municipal water supplier to accept applications for service from tenants under any circumstances, due to local rules limiting water service to building owners.

The balance of this section will discuss the various constitutional principles which have been relied upon in challenging municipal water system actions. This section is organized into three main sub-sections covering the most commonly encountered problems, namely, termination of service, denial of applications for service due to arrears, and refusal to accept applications from certain categories of customers.

4. Termination of Service

A frequently encountered problem in the low income community is the threat of termination of service due to arrears. Many times the customer of record and the water consumer threatened with the shut-off of service are the same individual. But it is also common that the consumer is a tenant in a building for which the landlord or building owner is responsible for the water service. Most courts have found that not only must a municipal water service customer be provided with notice of an impending shut-off and opportunity for a hearing, but also that a tenant

whose landlord has failed to make payments for water service is entitled to advance notice before water service is terminated.

The practices of a municipality, village, town or county that provides water service constitute "state action" under the Fourteenth Amendment,[72] and may be challenged in state or federal court through a §1983 action against the employees, officers or trustees of the municipal system if the acts and practices complained of deprive the water consumer of a constitutionally protected right.[73]

5. Protectable Property Interest

A customer, who has a right to municipal water service under contract or law, has a property interest right to continued service that is subject to the Due Process clause of the

[72] *Craft v. Memphis Light, Gas & Water*, 534 F.2d. 684, 687 (6th Cir. 1976), *aff'd on other grounds Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978); *Davis v. Weir*, 497 F. 2d 139, 143 (5th Cir. 1974); *Koger v. Guarino*, 412 F.Supp. 1375, 1383 (E.D. Pa. 1976), *aff'd* 549 F.2d 795 (3rd Cir. 1977).

[73] 42 USC §1983 reads, in pertinent part, as follows:

"Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons 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."

It is important to note that §1983 is a procedural or remedial statute and creates no substantive rights. Thus, §1983 provides a remedy only when a plaintiff can show a violation of a federal statutory or constitutional right. *See*, M. Schwartz and J. Kirklin, *Section 1983 Litigation* (New York: John Wiley & Sons, 1986), page 8.

Fourteenth Amendment.[74] Tenant consumers who are not customers of the municipal water system, thus have no contractual basis to claim a protectable property interest. Some courts have, nonetheless, found a statutory basis for their entitlement to water service, and thus a protectable property interest in the continuation of service.

[74] *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 11 (1978), *affirming* 534 F.2d 684 (6th Cir. 1976), and citing Tennessee State law as creating the property interest: "The availability of such local law remedies is evidence of the State's recognition of a protected interest." 436 U.S. at 11.

Accord DiMassimo v. City of Clearwater, 805 F.2d 1536, 1540 (11th Cir. 1986) ("we hold that the district court was correct in holding that pretermination notice to the tenant is necessary to prevent the City from destroying rights granted by state law.").

In *Koger v. Guarino*,[75] the District Court did not cite to specific statutory provisions but found a protectable property interest based upon a finding that "although the defendants are not constitutionally obligated to establish and maintain water service for the benefit of their citizens, once having done so, a user has a legitimate claim of entitlement to continued service absent sufficient cause for termination consistent with the procedural protections of the Due Process Clause." In effect, what the government chooses to give, it may not arbitrarily or unreasonably taken away.

The courts in both *Koger* and *Davis* found that the ultimate user had a protectable property interest to continued water service, requiring due process for tenant consumers whose landlords were the actual customers of record.[76] In an Oregon case, the federal district court held that because state law required landlords to supply water, the municipality's termination violated the tenants' right to due process of law because it

[75] 412 F.Supp. 1375, 1386 (E.D. Pa. 1976), *aff'd* 549 F.2d 795 (3rd Cir. 1977).

[76] *Accord Lamb v. Hamblin*, 57 F.R.D. 58 (D. Minn. 1972).

But cf. Sterling v. Village of Maywood, 579 F.2d. 1350 (7th Cir. 1978), *cert. den.* 440 U.S. 913 (1979), (no protectable property interest in the continuation of water service absent a right to service under statute or contract); and *Coughlan v. Starkey*, 845 F.2d 566, 570 (5th Cir. 1988) ("mere receipt of the water for several years could not unilaterally create a legitimate claim for entitlement," especially since the consumer did not apply or pay for water service).

deprived them of a statutory right to injunctive relief against the landlord.[77] Also, depending on the nature of the municipal water supplier (*e.g.*, town, village, city, county) there may be a specific statutory provision to support a claim of entitlement to water service.[78]

6. Extent of Due Process Requirements

Once the protected interest and right to due process are established, it is necessary to define the extent of the process

[77] *Turpen v. City of Corvallis*, 36 F.3d 978 (9th Cir. 1994).

[78] Both the Village Law (§11-1116, 11-1118) and the Town Law (§198(c)) permit the termination of water service only for failure to pay water charges or violation of duly adopted rules. These statutes are analogous to the provision of Tennessee decisional law relied upon by the Supreme Court in *Memphis Light v. Craft* in finding a protectable property interest to continued water service.

Rights to continued service may also be specifically set out in water authority charters or in the rules of the municipal supplier. Advocates should investigate those possibilities where no statutory provision exists.

due by the municipality, and whether such due process must be afforded prior to terminating service. The District Court in *Koger v. Guarino* made it clear that the potential loss of water service is so severe a loss that substantial due process must *precede* any termination of water service. The Court stated that:

> ... an urban home without water and sewage is not fit for human habitation. Indeed, water is an absolute necessity of life and we cannot envision any more serious individual consequences than those which flow from its deprivation.[79]

In discussing the loss of utility service in general, the U.S. Supreme Court stated that:

> ...[such] service is a necessity of modern life; indeed the discontinuance of water or heating for even short periods of time may threaten health and safety. ... Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.[80]

[79] *Koger v. Guarino, supra* at 1388.

[80] *Memphis Light v. Craft, supra* at 44-45.

The *Koger*, *Davis* and *Turpen* courts found that a pre-termination notice must be provided not only to the customer of record but must also be given to the water user. Thus, where a landlord's failure to pay precipitates a threatened shut-off, the municipal water provider must give pre-termination notice to the landlord *and* the tenant. Notice to both parties — the "customer" and the "consumer" — allows either to take whatever actions may be necessary to continue uninterrupted water service. Either the landlord can dispute, pay or agree to pay the bill, or the tenant can obtain service in his own right, take action against the landlord or take steps to mitigate the consequences of the impending shut-off.

In *Memphis Light v. Craft*, the Supreme Court required that there be a pre-termination hearing in cases involving threatened shut-off of utility service.[81] Rejecting the municipal utility's assertion that pre-termination injunctive relief was sufficient to protect consumers, the Court stated:

> Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or

[81] 436 U.S. 1, 21-22 (1978):

> In these circumstances, an informal administrative remedy ... constitutes the process that is `due.'
>
> Because of the failure to provide notice reasonably calculated to apprise [the customers] of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, [the municipal utility] deprived [the customers] of an interest in property without due process of law.

> bringing a lawsuit. An action in equity to halt an improper termination, because it is less likely to be pursued and less likely to be effective, even if pursued, will not provide the same assurance of accurate decision making as would an adequate administrative procedure.[82]

[82] *Memphis Light v. Craft, supra* at 21.

Although particular procedures have been found to be adequate or inadequate under particular circumstances,[83] no general rule has been enunciated regarding the precise form for a pre-termination hearing of water service.[84] At a minimum these decisions can be read to require adequate pre-termination notice of available procedures, which must at least provide a pre-termination meeting with an municipal water supply official who has the power to order continuation of service, adjust bills determined to be incorrect or otherwise remedy the situation.[85] A written response to a complaint must also be provided in order for the complainant to avail himself of any appeal process and judicial review.

A court has also indicated that there is little or no need for a pre-termination hearing for non-customer tenants (as contrasted with pre-termination notice which has been required for customers threatened with shut-off). The rationale is that

[83] *See*, e.g., *Memphis Light v. Craft, supra*; *Bronson v. Consol. Edison Co. of New York, Inc.*, 350 F.Supp. 443 (SDNY 1975); *Freeman v. Hayek*, 635 F.Supp. 178 (D. Minn. 1986). *Compare Limuel v. So. Union Gas Co.*, 378 F.Supp. 964, 969 (W.D. Tex. 1974) (six due process rights outlined) *with Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. den.* 409 U.S. 1114 (1973) (five day written notice is sufficient).

[84] While the District Court in *Palmer v. Columbia Gas*, 342 F. Supp. 241 (N.D. Ohio, 1972), *aff'd* 479 F.2d 153 (6th Cir. 1973), set out certain minimal requirements, including the requirements that an impartial company management official hear a complaint and that the response to a complaint be in writing, that case involved a *private* gas utility providing heating service. While gas heating service is analogous to water inasmuch as both services are essential to life, the *Palmer* decision is not dispositive as to due process requirements applicable to municipal water suppliers.

[85] *See Memphis Light v. Craft, supra* at 47.

there is no dispute between utility and customer as to the amount of the bill, but only a potential dispute between the landlord and tenant as to who must pay. A water company has no authority to resolve such disputes.

7. Denial of Applications for Service

7.1 Introduction

One of the more common problems encountered by low income water consumers is the refusal of the municipal water supplier to accept applications for service from tenants due to a third party's arrears owed at the premises. In some instances the arrears are owed by the landlord, while in other circumstances, arrears are owed by a previous occupant of the dwelling. The practice of municipal water suppliers of refusing applications for service due to the arrears of third parties may be challenged on equal protection grounds. The courts have held that such practices violate the Equal Protection clause.[86]

The most lenient test applied by the courts under the Equal Protection clause, the "rational basis" test, requires that classifications be reasonable, not arbitrary, and rationally

[86] *Cf. Sterling v. Village of Maywood,* 579 F.2d. 1350, 1356 (7th Cir. 1978), *cert. den.* 440 U.S. 913 (1979), ("[W]e conclude that defendants very well may have deprived plaintiff of a constitutionally protected entitlement to water service when they rejected summarily her efforts to reinstate her water service. She must be given an opportunity to prove her allegations.").

related to a legitimate governmental objective. A more stringent standard, the "compelling state interest" test, is applied if the classification itself is suspect (*e.g.*, it is based on race or religion), or if the right affected by the classification is a "fundamental right", defined as one explicitly provided for in the Constitution or necessarily implied from its provisions.

7.2 Refusal to Provide Service Based on Debts of Others

The most common instance of denial of service due to a third party's arrears is the refusal to provide water service to tenants because of the landlord's failure to pay a prior bill for service.[87] Such a refusal creates two classes of applicants: those whose address is encumbered with pre-existing debt that is not their own, and those whose residence is not so burdened.

[87] Of course, one person is no more responsible for paying another's water bill than the municipality is for paying the consumer's credit card bill.

The leading case on this issue is *Davis v. Weir*,[88] which challenged a municipal utility's refusal to provide service to the tenant, Willie Davis, unless he agreed to pay an outstanding bill owed by the landlord for service at Mr. Davis' address. He was current in his own rent, which included water charges, but his water was shut off without prior notice.

The U.S. Court of Appeals found the municipal utility's practice unconstitutional on equal protection grounds, stating

> that the Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass XIV Amendment muster under the traditional 'rational basis' analysis. Therefore, there is no need to decide whether the Constitution accords citizens a fundamental right to municipal water service.[89]

The Court went on to explain the lack of a rational basis for the municipal utility's practice:

> A collection scheme ... that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from

[88] 497 F.2d 139 (5th Cir. 1974), cited in *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 18 fn. 21 (1978).

[89] *Davis v. Weir, supra* at 144. *Cf. Ransom v. Marrazzo*, 848 F.2d 398 (3rd Cir. 1988) (involving only owners and non-tenant occupants taking control of property encumbered by a pre-existing debt and a lien therefore). The Court in *Ransom* specifically noted that it was not addressing the substantively different issue of tenants who are refused water service due to a pre-existing debt of a third party. *Ransom, supra* at 401. The Third Circuit disagreed with both the equal protection and substantive due process reasoning of a number of decisions cited herein, including *Davis*.

> innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence — water. 'The fact that a *third-party* may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between otherwise eligible applicants for water service.[90]

8. Roommates and Relatives

[90] *Davis v. Weir, supra* at 144-145 (5th Cir. 1974), quoting *Davis v. Weir*, 359 F.Supp. 1023, 1027 (N.D. Ga. 1971) (Emphasis in original, footnote omitted.)

Other instances of application denials because of another person's arrears involve arrears left unpaid by prior tenants unrelated to the service applicant, and arrears left by a related individual such as an ex-roommate or ex-spouse. The case of unrelated prior tenants is clear-cut and is analogous to the case of landlord arrears. The courts have less frequently faced situations involving former roommates or related individuals. There should be no legal distinction between one spouse not being liable for a municipal water bill in the other's name, and not being liable for a phone bill in the other spouse's name.[91]

The District Court in *Romanowski v. Gehl*[92] determined that the tenant was not liable for the bills of the roommate who was the customer of record at the time the bills were incurred and who had vacated the premises. The fact that the tenant had lived at the premises at the time the bills were incurred in the name of her roommate was found to have no bearing on the tenant's liability, since the roommate, not the tenant, had a contractual relationship with the water supplier. The court reasoned further that a roommate situation is not substantively different from

[91] *N.Y. Tel. Co. v. Teichner*, 69 Misc.2d 135, 329 N.Y.S.2d 689 (Dist. Ct. Suffolk Co., 1972).

[92] CIV-83-304E, W.D.N.Y., 1983.

that of a tenant whose landlord has incurred arrears at the residence. The tenant-applicant, like the roommate-applicant, benefited from the service while a third party incurred but did not pay bills for service. Just as the tenant cannot be held liable for the bills incurred by the landlord, neither should the roommate be held accountable for bills incurred by a former occupant, even though both the tenant and the roommate have benefited in some way from the service.

9. Refusal to Accept Applications

The validity of a municipal water supplier's refusal to accept applications from certain categories of individuals must be analyzed according to the resulting classifications it creates. For example, in several jurisdictions, municipal water authorities have established rules that do not permit tenants to apply for water service in their own names. Although subsequently resolved by legislation,[93] the Suffolk County Water Authority had adopted a rule which allowed only building owners to apply for water service, purportedly on the basis of historical problems with unpaid bills of tenants. Similar rules barring tenants from applying for water service exist in a number

[93] Public Authorities Law (PAL) §1078-a (Chapter 587, Laws of 1987).

of municipal water service areas. But, unlike the Suffolk County case, certain upstate municipal utilities operate pursuant to the Village or Town Law in which a lien is created on the property if water bills are unpaid, either by the owner or a tenant.

When a lien exists on the property, the refusal of the water supplier to accept tenant customers should fail the rational basis test. The supplier is protected against unpaid bills by a lien on the property, and can have no legitimate interest in refusing service to tenants.

While a rule limiting service to tenants even without the existence of a lien might fail under the rational basis test, the advocate would be far more likely to obtain a favorable decision from a court if the intermediate standard of review were used or if the rule were found to affect a fundamental right, thereby placing the rule and the classification it represents under the strict scrutiny standard.

The courts have delineated an intermediate test which requires that a classification "serve important governmental objectives" and be "substantially related to achievement of those objectives."[94] This intermediate standard has been applied when

[94] *Craig v. Boren*, 429 U.S. 190, 197 (1976).

a higher level of scrutiny than the "rational basis" test is deemed necessary under the particular circumstances, although no fundamental right is involved. In *Chatham v. Jackson*,[95] the U.S. Court of Appeals, Fifth Circuit, was faced with a challenge to a municipal utility's practice of terminating water service to a *landlord* based on the failure of a *tenant* to pay an overdue water bill. In addressing the equal protection arguments, the Court chose to employ an intermediate standard as a "more satisfactory alternative" to the lenient "rational basis" test or the strict scrutiny of the "compelling state interest" test. The Court upheld the City's practice, finding that a landlord financially benefits from the provision of water service to his property for which he can reasonably be held responsible.

[95] 613 F.2d. 73 (5th Cir. 1980).

Can a fundamental interest in municipal water service be established in order to obtain strict judicial scrutiny of municipal water system practices? Even if the right to routinely provided municipal services (such as police protection), may not be found to be a fundamental right,[96] it may be argued that a fundamental right is involved when a municipal water system refuses to accept applications from certain categories of individuals, because water is essential to life and good health. If applicable, the municipal water service provides monopoly service, the absence of an alternative supplier, should be noted. It may be argued that individuals have the fundamental right to contract to purchase essential water service, a necessity of life, from a governmental body which has taken for itself monopoly control over the provision of that service. .The existence of a fundamental right would require that the classification be substantially related to, and closely tailored to achieve, a compelling state interest in order to be upheld.

10. Substantive Due Process and Administrative Law

The right to substantive due process is the right to statutes and rules that have "some fair, just and reasonable

[96] *See*, e.g., *Mlikotin v. City of Los Angeles*, 643 F.2d 652 (9th Cir. 1981); *Reiff v. City of Philadelphia*, 471 F.Supp. 1262 (E.D. Pa. 1979).

connection" with "the promotion of the health, comfort, safety and welfare of society."[97] Substantive due process equates with administrative law principles prohibiting arbitrary and capricious acts by governmental bodies. Such a claim has the practical benefit of stating a claim under 42 USC §1983, with possible attorneys fees pursuant to 42 USC §1988.

In *Ingraham v. Wright*, the U.S. Court of Appeals, Fifth Circuit, set forth the test by which statutes and rules are to be measured in relation to substantive due process requirements:

> The plaintiffs' right to substantive due process is ... a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calculated to correct it.[98]

[97] *Patterson v. Carey*, 41 N.Y.2d. 714, 720 (1977).

[98] *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977), quoting *Sims v. Bd. of Ed.*, 329 F.Supp. 678, 684 (D.N.M. 1971).

In *Davis v. Weir* and *Koger v. Guarino*, discussed earlier, the courts found that the municipalities' requirement that tenants pay the landlords' debt also violated substantive due process because the municipality had no legitimate interest in collecting from one person the debts of another.[99] In addition, these courts found no rational relationship between the valid objective of collecting unpaid bills for service and the means to that objective, *i.e.*, requiring a non-liable third party — the tenant — to pay the landlord's bills.

It can be similarly argued that the refusal to provide water service to tenants, as was the case in Suffolk County, violates substantive due process requirements. The water authority in Suffolk had based its rule refusing water service to all but building owners on a desire to reduce uncollected bills. Since some tenants had in the past left unpaid water bills, the water authority reasoned, all tenants should be prohibited from obtaining service except through the auspices of their landlords. The refusal to serve all tenants because of the payment problems of a few is an overly broad response. The practice of excluding

[99] *Cf. Ransom v. Marrazzo*, 848 F.2d 398 (3rd Cir. 1988). *Contra DiMassimo v. City of Clearwater*, 805 F.2d 1536, 1541 (11th Cir. 1986) (court rejected *substantive* due process and equal protection arguments).

tenants as a class from municipal water services, like some zoning restrictions prohibiting sharing of living quarters by unrelated persons, can be characterized as "burning the house to roast the pig,"[100] the classification being so broad as to include far more tenants who would in fact pay service bills than tenants who would default.

Substantive due process and administrative law principles constitute viable grounds on which to challenge the substance of municipal utilities' rules governing water service. The constitutional requirement that such rules be fundamentally fair and neither arbitrary nor unreasonable should be included, whenever possible, in challenges to the acts and practices of municipalities.

11. Conclusion

Private water suppliers are governed by the Public Service Law and PSC rules. Larger private water companies are subject to the provisions of the Home Energy Fair Practices Act, and rules implementing HEFPA, found in 16 NYCRR Part 14. In addition to

[100] *McMinn v. Town of Oyster Bay*, 105 A.D.2d 46, 56, 482 N.Y.S.2d 773 (2nd Dept. 1984).

the protections of HEFPA, the Commission's complaint handling procedures apply to bill or service disputes between customers and water companies, and those procedures provide due process protections.

Municipal water systems, on the other hand, are not subject to regulatory oversight. Municipal utilities often provide inadequate notice, or no notice at all, prior to service termination, and may provide insufficient complaint and hearing procedures through which a customer may dispute a service bill. These inadequacies may be subject to constitutional challenge. Without the existence of a regulatory body governing the acts and practices of municipalities, a consumer's only recourse is to the courts, where a number of challenges to unreasonable or deficient practices and policies have proven successful.