

**PROTECTIONS FOR WATER CUSTOMERS**

*Public Utility Law Project of New York*

*8th Edition, December 2018*

**PROTECTIONS FOR WATER CUSTOMERS**

Public Utility Law Project Manual  
8th Edition 2018

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## PROTECTIONS FOR WATER CONSUMERS

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### 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” or “Commission”) has established certain protections for water consumers and certain duties for water providers.<sup>1</sup>

Municipally owned water suppliers are not governed by the Public Service Law. Municipal suppliers, nevertheless, must comply with the statutes which created them.<sup>2</sup> 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 area,<sup>3</sup> since as water rates continue to increase, the number of clients with water-related problems can be expected to rise accordingly.<sup>4</sup>

It is important for advocates to recognize that under the doctrine of primary jurisdiction<sup>5</sup>, consumers’ water complaints should be first brought to the attention of the NY PSC, if the

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

<sup>2</sup> 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).

<sup>3</sup> See, *e.g.*, *PILCHEN, v. CITY OF AUBURN*, 728 F.Supp.2d 192 (2010); and see, *WINSTON v. CITY OF SYRACUSE*, 205 F.Supp.3d 238 (2016).

<sup>4</sup> 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. See, generally, <http://liherald.com/stories/customers-say-new-york-american-water-is-all-wet,105962>; and see, <https://www.newsdeeply.com/water/articles/2018/02/27/californians-are-struggling-to-pay-for-rising-water-rates>.

<sup>5</sup> “The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. The doctrine’s central aim is to allocate initial decisionmaking responsibility between courts and agencies and to ensure that they do not work at cross-purposes.” *Youngja Huh v. Suez Water Westchester Inc.*, 16 Civ. 3240, at \*10 (S.D.N.Y. May 5, 2017).

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consumer's water utility is regulated by the PSC. For example, the PSC has the ability to resolve consumer disputes concerning water bills and can order abatements in certain cases where the customer's water meter is found inaccurate.<sup>6</sup>

## **2. Private Water Suppliers**

### **2.1 Introduction**

Privately owned water supply companies are governed by the PSL and are regulated by the Commission.<sup>7</sup> Since 1986, the Home Energy Fair Practices Act ("HEFPA") has protected consumers of privately owned water supply companies with gross annual revenues of at least \$250,000.<sup>8</sup> These rules are codified at 16 NYCRR Part 14, and generally parallel the customer service protections that apply for electric and gas service customers (explained in detail in PULP Manual Chapter 1).

HEFPA customer protections do not extend to customers of smaller water companies with less than \$250k in revenue per year. However, these smaller water companies still must comply with the requirements set out in the Public Service Commission's regulations 16

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<sup>6</sup> See, *Youngja Huh v. Suez Water Westchester Inc.*, 16 Civ. 3240 (SDNY May 5, 2017), a putative class action brought by residential customers against Suez Water alleging that under NY General Business Law Section 349, their water utility company, Suez Water, had engaged in deceptive business practices because their bill covering a three-month period was based on an incorrect tabulation of their water use. The residential plaintiffs had filed a complaint with the PSC, which provides for abatements of water bills in certain cases where the customer's water meter is found inaccurate, but the plaintiffs decided to file the civil suit instead of waiting for PSC resolution of their complaint. The Court dismissed the case to enable the plaintiffs to first pursue their claims before the NYPSC, and without prejudice to their future right to appeal any unfavorable decision by the PSC.

<sup>7</sup> The PSC regulates the rates and services of approximately 230 private water companies serving approximately 830,000 people across New York State. For a list of all the water utilities regulated by the PSC, visit the New York State Department of Public Service website here: <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/B01A5970C4E06CE785257687006F388E?OpenDocument> (last visited April 2018).

<sup>8</sup> PSL §50; 16 NYCRR Part 14.

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NYCRR Part 533,<sup>9</sup> concerning notices of discontinuance and complaint procedures.<sup>10</sup>

Additionally, small private water companies must comply with PSL §§116, 117 and 118 governing service terminations to multiple dwellings, customer security deposits, payment agencies, back-billing and the refund of overpayments.

### **2.2 Consumer Protections**

#### **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.<sup>11</sup> 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.<sup>12</sup> 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 pertain, the utility must pay the applicant \$25 per day for each day service is not supplied, unless the PSC determines that the utility had good cause for not providing service within the required time.<sup>13</sup>

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<sup>9</sup> Notices of discontinuance and complaint procedures.

<sup>10</sup> 16 NYCRR §533.1. All water companies must also follow all applicable statutes and regulations at § 225 of the Public Health Law and 10 NYCRR Part 5 subpart 5-1 et seq. relating to public water.

<sup>11</sup> 16 NYCRR §14.3(a)(3)(i)-(iii). Regulations also excuse the water utility from providing service to an applicant when prevented by labor strikes or other work stoppages, where precluded by consideration of public safety or by physical impediments (poor weather conditions, inability to gain access to premises, or incomplete construction of necessary facilities). 16 NYCRR § 14.4(a)(1)(i)-(iii).

<sup>12</sup> 16 NYCRR §14.3(a)(3).

<sup>13</sup> 16 NYCRR §14.3(d).

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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.<sup>14</sup>

### **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 that is not denied within three business days is deemed to be accepted.<sup>15</sup> 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.<sup>16</sup>

### **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;

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<sup>14</sup> 16 NYCRR §14.3(b)(2)(i)-(iv).

<sup>15</sup> 16 NYCRR §14.3(c)(2).

<sup>16</sup> 16 NYCRR §14.3(c)(3)(i)-(iii).

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- When payment of outstanding bills is a prerequisite to acceptance of a service application; or
- When they issue a back-bill for more than \$100 and the customer's culpable conduct did not cause or contribute to the original underbilling.<sup>17</sup>

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.<sup>18</sup>

The amount that can be included in a DPA is limited to the equivalent of two years' average usage, unless otherwise agreed to by the utility and the customer.<sup>19</sup> A DPA may require the customer to make a downpayment of up to 20 percent the amount due on the account, or the cost of one month's average usage, whichever is greater.<sup>20</sup> Or the DPA may require the customer to pay the balance in monthly installments up to the cost of one month's average usage or 1/10<sup>th</sup> the balance, whichever is greater.<sup>21</sup> In all cases, the water utility must negotiate in good faith with the customer in order to arrive at a DPA that the customer is able to pay, considering his or her financial circumstances,<sup>22</sup> and payments may be as low as \$10 per month, with no downpayment, if the customer's circumstances so warrant.<sup>23</sup>

If a customer defaults on a DPA, the utility must send a reminder notice at least eight calendar days before the day when a final termination notice will be sent notifying the customer

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<sup>17</sup> 16 NYCRR §14.10(a)(1) and (2).

<sup>18</sup> 16 NYCRR §14.10(b).

<sup>19</sup> 16 NYCRR §14.10(d).

<sup>20</sup> 16 NYCRR §14.10(d)(3)(i).

<sup>21</sup> 16 NYCRR §14.10(d)(3)(ii).

<sup>22</sup> 16 NYCRR §14.10(a)(3).

<sup>23</sup> 16 NYCRR §14.10(c)(3).

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that he or she must pay the amounts owed on the DPA within 20 days of the date payment was originally due, or a final termination notice will be sent.<sup>24</sup> If the customer can show a change in financial circumstances that makes the existing DPA unaffordable, a renegotiated DPA will be available.<sup>25</sup> 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.<sup>26</sup>

### **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).<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

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<sup>24</sup> 16 NYCRR §14.10(f)(1).

<sup>25</sup> 16 NYCRR §14.10(f)(1)(ii).

<sup>26</sup> 16 NYCRR §§14.10(f)(2) and 16 NYCRR §14.4.

<sup>27</sup> PSL §89-b(3-c); 16 NYCRR §14.4(a)(2).

<sup>28</sup> 16 NYCRR §14.4(a)(1)(i)-(ii)(a)-(d).

<sup>29</sup> 16 NYCRR §14.4(a)(1)(iii)-(v).



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The utility must send the customer a final termination notice before it may terminate service.<sup>30</sup>

The notice must contain certain specific information, including:

- 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.<sup>31</sup>

The final notice of termination cannot be issued until at least 20 days from the payment due date.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> The utility retains the power to suspend, curtail or disconnect service in certain situations involving:

- Tampering;

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<sup>30</sup> 16 NYCRR §14.4(b)(1).

<sup>31</sup> 16 NYCRR §14.4(b)(1).

<sup>32</sup> 16 NYCRR §14.4(b)(2).

<sup>33</sup> 16 NYCRR §14.4(c). Cf. PSL §89-b(3-a).

<sup>34</sup> 16 NYCRR §14.4(c)(5).

<sup>35</sup> 16 NYCRR §14.4.

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- After notice to the occupant when there is no customer of record; and
- Emergencies.<sup>36</sup>

### **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.<sup>37</sup> Also, a water utility may not terminate service during the two week period encompassing Christmas and New Year's Day.<sup>38</sup>

### **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.<sup>39</sup> In these cases, 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.<sup>40</sup> The utility must make a diligent effort to contact the 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.<sup>41</sup>

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<sup>36</sup> 16 NYCRR §14.4(g).

<sup>37</sup> 16 NYCRR §14.4(c)(3). Cf. PSL §89-b(3-b).

<sup>38</sup> 16 NYCRR §14.4(c)(7).

<sup>39</sup> 16 NYCRR §14.5.

<sup>40</sup> 16 NYCRR §14.5(a).

<sup>41</sup> 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).

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Heat related water service is defined as "water service which is necessary for the on-going operation of a customer's primary heating system,"<sup>42</sup> 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.<sup>43</sup>

### **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,<sup>44</sup> or to a two-family dwelling,<sup>45</sup> where service is provided through one meter and is the responsibility of the landlord. The multiple dwelling rules<sup>46</sup> provide virtually identical procedures to those that are applicable to small water companies,<sup>47</sup> and to electric and gas utilities.

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.<sup>48</sup> 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.<sup>49</sup> In order to maintain service, occupants need pay only current charges to the utility. These are the

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<sup>42</sup> 16 NYCRR §14.2(b)(15).

<sup>43</sup> 16 NYCRR §14.6.

<sup>44</sup> 16 NYCRR §14.7.

<sup>45</sup> 16 NYCRR §14.8.

<sup>46</sup> 16 NYCRR §14.7.

<sup>47</sup> PSL §116, and 16 NYCRR §533.8.

<sup>48</sup> 16 NYCRR §14.7(a)(1). Notice to the local public officials must be repeated between four and two business days before termination.

<sup>49</sup> 16 NYCRR §14.7(a).

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charges for the billing period covered by the first bill rendered *on or after* the termination notice is posted.<sup>50</sup> 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.<sup>51</sup>

Additional protections exist regarding the termination of 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.<sup>52</sup>

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.<sup>53</sup> 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:

- (1) the customer has paid, or has entered into a deferred payment agreement for, the full amount of charges that were the subject of the termination; or
- (2) the utility is on notice that a serious impairment to health or safety will result from continued lack of water service (any doubt is to be resolved in favor of reconnection); or

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<sup>50</sup> 16 NYCRR §14.2(b)(11). *See also*, 16 NYCRR §14.7(b).

<sup>51</sup> 16 NYCRR §14.7(b)(2 and 3).

<sup>52</sup> 16 NYCRR §14.8(d)(1).

<sup>53</sup> 16 NYCRR §14.8.

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(3) the Commission directs the utility to reconnect service.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup>

### **Security deposits**

A water utility may require a security deposit from a seasonal, short-term customer or temporary customer, from a delinquent customer (so long as it gives at least 20 days notice before its request for a deposit that the failure to make a specified payment before a specified date may result in a request for a deposit), or from a customer whose service was previously terminated for nonpayment during the preceding six months.<sup>57</sup> A water utility may not require a security deposit from a customer who is a recipient of public assistance, SSI or additional state payments.<sup>58</sup> 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.<sup>59</sup>

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<sup>54</sup> 16 NYCRR §14.9(a).

<sup>55</sup> 16 NYCRR §14.9(c)(ii).

<sup>56</sup> 16 NYCRR §14.9(c)(i).

<sup>57</sup> 16 NYCRR §14.11(a)(1).

<sup>58</sup> 16 NYCRR §14.11(a)(2).

<sup>59</sup> 16 NYCRR §14.11(a)(2).

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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.<sup>60</sup>

### **Complaints**

A water utility must establish a written procedure for the handling of customers' complaints to the utility in accordance with the Commission's rules and procedures.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Customers must pay all undisputed charges during the pendency of a complaint, however, or service may be terminated.<sup>64</sup>

### **Miscellaneous**

The HEFPA water rules also cover meter reading obligations, estimated bills and procedures where there is no ready access to the meter;<sup>65</sup> back bills;<sup>66</sup> late payment charges;<sup>67</sup>

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<sup>60</sup> 16 NYCRR §§14.11(a)(2)

<sup>61</sup> 16 NYCRR §14.19.

<sup>62</sup> 16 NYCRR §14.19.

<sup>63</sup> 16 NYCRR §12.

<sup>64</sup> 16 NYCRR §14.19 and 16 NYCRR §12.

<sup>65</sup> 16 NYCRR §14.12.

<sup>66</sup> 16 NYCRR §14.13.

<sup>67</sup> 16 NYCRR §14.14.

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required contents of bills;<sup>68</sup> routine notification requirements;<sup>69</sup> emergency disconnection of water service;<sup>70</sup> and inspection of utility equipment.<sup>71</sup>

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.<sup>72</sup>

### **2.3 Small Private Water Companies**

While not subject to HEFPA, small private water companies must adhere to the PSC regulations for waterworks corporations (16 NYCRR Parts 500 – 585).<sup>73</sup> Part 533 concerns termination and complaint procedures.

#### **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.<sup>74</sup>

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<sup>68</sup> 16 NYCRR §14.15.

<sup>69</sup> 16 NYCRR §14.16.

<sup>70</sup> 16 NYCRR §14.17.

<sup>71</sup> 16 NYCRR §14.18.

<sup>72</sup> From time to time the Commission has found levelized charges to be allowable but connected to unusual capital expenses and/or loans. See, 2006 N.Y. PUC LEXIS 434.

<sup>73</sup> As noted above in footnote 10 supra, such companies must also follow applicable portions of the public health law and regulations.

<sup>74</sup> 16 NYCRR §533.2.

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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. For example, 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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 of small private water companies can be required to provide a security deposit up to an amount equal to an estimated two months’ worth of service.<sup>78</sup> 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.<sup>79</sup> Regardless of whether the customer is delinquent, the water company must provide the customer with interest on the deposit held.<sup>80</sup>

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<sup>75</sup> PSL §116 and 16 NYCRR §533.8.

<sup>76</sup> 16 NYCRR §533.8(a)(3).

<sup>77</sup> 16 NYCRR §533.8(b) and (c).

<sup>78</sup> PSL §117; 16 NYCRR Part 510.

<sup>79</sup> 16 NYCRR Part 510.5.

<sup>80</sup> 16 NYCRR §510.3.



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### **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.<sup>81</sup> 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.<sup>82</sup>

Bills may be paid to authorized payment agencies (as allowed under HEFPA).<sup>83</sup> 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 rate because of a change in the character of service taken.<sup>84</sup>

### **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.<sup>85</sup> 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).<sup>86</sup> It must also inform the customer of the Commission's complaint handling procedures.<sup>87</sup> The customer may also avail himself of the Commission's procedures, and service may not be terminated during the *pendency* of the

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<sup>81</sup> PSL §118(2). (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. See PSL §41(1) and (2)).

<sup>82</sup> PSL §118(2).

<sup>83</sup> PSL §118(1).

<sup>84</sup> PSL §118(3)(a) and (b),.

<sup>85</sup> 16 NYCRR §533.9(a).

<sup>86</sup> 16 NYCRR §533.9(b).

<sup>87</sup> 16 NYCRR §533.9(b).

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complaint at the Commission nor for 15 days after notice of the Commission's final resolution of the complaint.<sup>88</sup>

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<sup>88</sup> 16 NYCRR §533.9(c).

### **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 systems 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.

Low-income tenants face a number of persistent problems in obtaining and maintaining water service, as is explained below.

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. 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, and most recently, in favor of the residential customer.<sup>89</sup> The problem of nonpayment could be perhaps be resolved more directly if local rules allowed water service in

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<sup>89</sup> See, *Winston v. City of Syracuse*, No. 17-1017 (2<sup>nd</sup> Circuit Court of Appeals, Apr. 11, 2018) affirming and reversing in part the judgment of the district court in *Winston v. City of Syracuse*, 205 F. Supp. 3d 238 (N.D.N.Y., Sept. 8, 2016). Syracuse residential tenants claimed constitutional rights had been violated by the City of Syracuse because the city shut off tenants' water service when landlords failed to pay their water bills. The federal appeals court held in the residents' favor and ordered that Syracuse's policy of requiring tenants to cover their landlords' unpaid water bills or risk losing service had no rational basis and violated the tenants' equal protection and due process rights.

the resident's name. However, many local ordinances governing water service do not permit tenants to open their own water accounts and this has been found to be constitutional.<sup>90</sup>

### **3.2 Case Law**

#### **Termination of Service**

A frequently encountered problem in the low-income community is the threat of termination of service due to arrears. Sometimes the customer of record and the water consumer threatened with the shut-off of service are the same individual. But it is more common that the consumer is a tenant in a building for which the landlord or building owner is responsible for the water service supplied by the municipality. If the latter is the case, then, residents can take heart in the fact that for over four decades, New York courts have consistently rejected municipal ordinances that require residential tenants without any legal obligation for a landlord's unpaid bill to pay that bill in order to retain or restore water service.<sup>91</sup> This means that a municipality cannot terminate water service to a residential customer as a means of attempting to recover money due from a delinquent landlord.

Additionally, courts have held that a municipality must give proper notice before terminating water service. In a 2010 federal case, *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192 (N.D.N.Y. Aug. 5, 2010),<sup>92</sup> a residential customer sought a declaration that the City of Auburn

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<sup>90</sup> In a recent federal appeals court decision, the court decided that the City of Syracuse's policy of allowing only landlords to open water accounts had a rational basis for treating property owners and tenants differently and therefore, was constitutional. The pertinent part reads: the "City rationally concluded that property ownership allows it to collect its unpaid bills more efficiently because the City can subject property owners, but not tenants, to liens. Moreover, the City may rationally conclude that water supply infrastructure in older, multi-dwelling buildings provides a valid reason to allow only property owners to open water accounts. Concluding otherwise could essentially require substantial reconstruction of apartment buildings throughout the City of Syracuse. *Winston v. City of Syracuse*, No. 17-1017-cv, 2018 U.S. App. LEXIS 9025, at \*15 (2d Cir. Apr. 11, 2018) affirming and reversing in part the judgment of the district court in *Winston v. City of Syracuse*, 205 F. Supp. 3d 238 (N.D.N.Y., Sept. 8, 2016).

<sup>91</sup> See, *Winston v. City of Syracuse* at p. \*20, citing to decisions from the Fifth, Sixth, Seventh and Ninth Circuits, all of which have held that municipalities cannot terminate water service of tenants due to unpaid water service bills that are the responsibility of delinquent landlords.

<sup>92</sup> See, *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192, 197-200 (N.D.N.Y. Aug. 5, 2010).

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violated her right to due process by terminating water service to her home without proper notice.

The service had been terminated due to an unpaid bill by her landlord and property owner.

Agreeing with earlier court precedent, and precedent from other jurisdictions, the federal court found that tenants do possess a protectable property interest in water service and therefore, the City of Auburn must provide proper notice of possible disconnection, including informing the residents of the property, in order to properly comply with procedural due process. The court also held that there was “no rational basis in the City’s act of requiring Pilchen to pay on her landlord’s delinquent account before reinstating her water service, a violation of the plaintiff’s right to substantive due process. Similarly, the lack of a rational basis for coercing the plaintiff to assume her landlord’s debt and the disparate treatment she received as a tenant were violations of her right to equal protection.” *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192, 204 (N.D.N.Y. 2010).

### **Refusal of Service Due to Unpaid Bill by Third Party**

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. Another common problem is municipalities’ practice of denying service to a tenant due to landlord’s or prior tenant’s failure to pay a prior bill for service.<sup>93</sup> The practice of municipal water suppliers of refusing service to tenants due to the arrears of third parties may be challenged on equal protection grounds. Courts have consistently held that municipalities cannot require a tenant to pay a prior landlord’s or tenant’s unpaid bills

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<sup>93</sup> See, 8 Loy. Consumer L. Rep. 63 (1995-1996), *City's Refusal to Provide Water Service Violates the Equal Protection Clause*.

as a condition of establishing water service.<sup>94</sup> The courts have held that such practices violate the Equal Protection clause.

#### **4. 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 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 other than the public health law, unless it is part of the governing administrative code of the municipality, or in the public authority's organic statute. The rules concerning water service will be outlined in municipal ordinances. 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 in federal and state court where a number of challenges to unreasonable or deficient practices and policies have proven successful.

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<sup>94</sup> See, *O'Neal v. City of Seattle*, 66 F. 3d 1064 (9<sup>th</sup> Cir. 1995).