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Technical Bulletins: MTAS Municipal Technical Report: Termination Procedures and the Due Process Clause as Applied to Municipal Utilities (Report No. 24)

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TERMINATION PROCEDURES AND
THE DUE PROCESS CLAUSE AS
APPLIED TO MUNICIPAL UTILITIES

By Frierson M. Graves, Jr.
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Memphis, Tennessee

Report No. 24
May 1980

Municipal Technical Advisory Service
Institute for Public Service
The University of Tennessee
in cooperation with the
Tennessee Municipal League

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PREFACE

This report includes a paper prepared by Frierson M. Graves, Jr., and exhibits of notices and procedures now being used by the Memphis Light, Gas and Water Division, growing out of a case that was decided by the U. S. Supreme Court in 1978. The principles and procedures outlined herein would seem to be excellent guidance for any municipal utility in dealing with the difficult matter of terminating service for non-payment.

Victor C. Hobday
Executive Director, MTAS

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operated in cooperation with the
Tennessee Municipal League

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TERMINATION PROCEDURES AND THE DUE PROCESS CLAUSE
AS APPLIED TO MUNICIPAL UTILITIES

Suit was brought by homeowners in Memphis, Tennessee, seeking declaratory and injunctive relief against the Memphis Light, Gas & Water Division and its Board of Commissioners for termination of the utility service without due process of law. Entitlement to continue utility service as a "property" interest protected by the Fourteenth Amendment and whether our termination procedures comported with due process were the issues. The United States Supreme Court granted certiorari to consider "this constitutional question of importance in the operation of municipal utilities throughout the nation." Many state courts and federal courts had decided that utility service was "property" requiring the due process safeguards of the Fourteenth Amendment prior to termination. The United States Supreme Court decided on May 1, 1978, Memphis LG&W v. Craft, 436 U.S. 1, 98 Sup.Ct. 1554, settling the issue that utility service is "property" requiring notice and the opportunity for a hearing to review disputed bills and rectify error. The United States Supreme Court stated that because of the failure to provide notice reasonably calculated to apprise the homeowner 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 Memphis Light, Gas & Water Division deprived the homeowner of an interest in property without due process of law.

Why Petition for Certiorari?

Since many state courts and most federal courts had determined that utility service was a property interest to which a homeowner had an entitlement requiring notice and a hearing, why did the Memphis Light, Gas & Water Division decide to petition for certiorari to the United States Supreme Court? The best answer may be found by reading the previous decision in the Sixth Circuit of Palmer v. Columbia Gas,

479 F.2d 153. The utility in that case was determined to be extremely callous in its treatment of customers. The procedures of the company were imperfect in theory and in practice and the court found significant and tragic mistakes were often made. The district courts provided for personal service of notice and a hearing by an employee in a management position. There were a number of other requirements in the Palmer case which we believed would not be mandated under our facts or under a proper determination of the law even if we lost the property question. We felt that our procedures could be distinguished from the Palmer case and in addition, we relied upon the language used by Justice Marshall in his dissent in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 Sup.Ct. 449. We believed any requirement for notice and hearing by the Supreme Court would be more moderate than the Palmer decision.

Property

Our argument to the court was that utilities may adopt reasonable rules and regulations and that a rule providing that utilities may be cut off for non-payment of services was a rule for the benefit of the utilities. The common law and the rule that most states have adopted allows a utility to terminate for non-payment as a self-help rule. The utility, in exercising its right of self-help or termination for non-payment, acts at its peril. If the utility is wrong, it may be enjoined, it may be sued for damages, or the customer may pay under protest and sue for a refund.

The Supreme Court determined that, while Tennessee followed the common law rule for termination of service for non-payment of an undisputed charge, state law does not permit a public utility to terminate service at will. The Supreme Court found that public utilities in Tennessee are obligated to provide service to all inhabitants without discrimination except for good and sufficient cause. This is the universal rule. Service may not be terminated except for non-payment of a just bill. Because service may be ter-

minated only for cause, the homeowner asserted a legitimate claim of entitlement within the protection of the due process clause and had satisfied the Fourteenth Amendment's requirement of deprivation of a property right.

Mail - Ordinary Vs. Certified

We have agreed in Memphis that any notice of termination would be sent by ordinary and not certified mail. Many cases have required certified mail. In fact, our district court suggested certified mail. The Division sent the notice by certified mail and charged the notice to the customer as permitted by the court. It further provided that, in the event no one was at home, the postman would deliver the mail as ordinary mail and so state on the receipt which would be maintained at the post office. The parties had agreed to this procedure and it worked well until the postal department determined that instead of filling out individual receipts, which allowed the postman to obtain overtime, one general form would be completed. The postal workers appealed through their union and it was determined that, in accordance with postal regulations, individual receipts must be completed and that the mail could not be left at the house but must be returned to the post office with a notice left for the homeowner as is customary for a certified or registered mail. We found from our experience that at least 50% of the people did not go to the post office to obtain their certified letters before termination. In fact, most people determined that certified letters were bad news and did not bother to go to the post office. We then discussed the matter with the plaintiffs while the suit was on appeal. We agreed to return to the use of sending final notices by ordinary mail and the court concurred in our agreement and entered an order.

I would respectfully suggest that, if you are faced with the requirement of certified mail, you make arrangements with the Post Office Department to ascertain how much of the certified mail is delivered. I

believe you will be able to convince the court that ordinary mail is the best method for delivery of your final notices. We send our final notices in an envelope rather than in a postcard-type bill to insure privacy.

Personal Service or Contact

Some public service commissions require that there be personal contact with an adult representative of the household to accept the final notice and, until served, there could be no termination. We have avoided the necessity for any personal contact. While such contact was required in Palmer v. Columbia Gas, 479 F.2d 153, it was not required in the Craft case. We do provide that the meter reader will attempt to contact the person to determine if the bill had been paid. If the person is not at home, the meter reader would still discontinue the electric service and leave a notice on the door advising what should be done to obtain the restoration of utility service. The meter reader was instructed that, in case of illness or if it was obvious the occupant was out-of-town and termination might create hardships, no termination would be made. Five days later all services would be terminated if no payment had been received. I would strongly suggest you resist any personal-type contact and suggest that the Supreme Court has not required such contact unless the conduct of the utility has been so extreme as to justify such a requirement.

Notice - Decision of the Court

"In essence, recipients of a cut off notice should be told where, during which hours of the day, and before whom, disputed bills appropriately may be considered."

89 S.Ct. at 1563 note 15.

The Supreme Court found our procedure, while adequate to apprise the Crafts of the threat of termination of service, was not reasonably calculated to

inform them of the availability of an opportunity to present their objections to their bills. Memphis had two enclosures or flyers with the final notice which happened to use different language. One flyer indicated you could discuss disputes with the credit office. The other, which probably went to the Crafts and to 40% of the customers generally who were served also by credit counseling stations, made no mention of a disputed claim. The court further emphasized in Note 15 that our notice is given to thousands of customers of various levels of education, experience, and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly of the availability of an opportunity to present their complaint.

Memphis corrected its notice to provide in all of the flyers that disputes could be heard by the credit and collection office. The court commented on the revised notice in Footnote 16 and stated:

"Petitioners have moved to clarify and regularize their notice procedure, and it is possible that the revised notice presently afforded may be entirely adequate."

The court then quotes from the notice in the footnote.

There is no requirement that the notice be delivered personally or that it be by registered or certified mail. The opinion indicates the notice was by regular mail and the Sixth Circuit held that such notice to one who merely had an undisputed bill met the requirements of due process. We concluded, therefore, that unless there are flagrant errors by the utility, ordinary mail would be sufficient for a final notice.

Notice - Procedure Adopted

The final notice, as additionally revised, is

printed both on the back of the final notice (See Page 18) and inserted as a flyer (See Page 16). We believe it sets out in clear language where, during which hours, and before whom disputed bills may be considered. It also provides information on our credit assistance.

We have concluded that the opinion by the Supreme Court will have very little, if any, effect upon our present system of notification and termination for non-payment of disputed or undisputed bills.

We suggest, however, that your utility must operate with good customer relation practices in order to sustain such a moderate final notice. The Supreme Court left open the situation where additional procedures may be appropriate. It stated that the magnitude of the number of complaints of overcharge would be a relevant factor in determining the appropriateness of more formal procedures than it approved in the Craft case. It stated the resolution of a disputed bill normally presents a limited factual issue susceptible of informal resolution. Relief such as suggested by the Sixth Circuit in Palmer v. Columbia Gas, 479 F.2d 153, was not required in our case by the Sixth Circuit and certainly not by the Supreme Court.

Hearing - Decision of the Court

Fundamental fairness, not simply considerations of courteous treatment of customers, requires a timely opportunity to meet with designated personnel who are duly authorized to review disputed bills and to correct any errors.

The court determined that the opportunity for a meeting with a responsible employee empowered to resolve the dispute could be afforded well in advance of the scheduled date of termination because Memphis provides at least a 30-day period between the mailing of the bill and the actual termination of service. No mention is made by the court that the final notice goes out shortly before termination. We have also placed a comment about disputes on the original bill

which is sent at least 30 days before actual termination.

Most importantly, the court pointed out that the hearing is structured and scheduled by the utility when the court said:

"The public utility enjoys a broad discretion in the scheduling and structuring of this hearing provided that the customer is afforded adequate time for effective presentation of his complaint prior to termination."

The court determined under circumstances in our case that an informal administrative remedy, along the lines suggested, constitutes the process that is "due."

Hearing - Procedures Adopted

The parties as shown by the agreement on notice and hearing have adopted a dispute and corrections procedure. We have determined that the procedure will be printed as a poster and posted in the main office lobby as well as in the credit and collection office (See Page 19). It is our opinion that the disputes and correction procedure will have minimal effect upon our normal credit and collection procedures.

The real question is what is a disputed bill? A person could complain that the bill is too high and this would be a dispute. The utility, however, has the right to structure and schedule the hearing. There is no requirement that termination be delayed by our procedure. The customer is given adequate warning and the Supreme Court has said that the utility "would retain the option to terminate service after affording this opportunity and concluding that the amount billed was justly due."

It was our determination that our credit and collection counselors would be the ones to have the authority to adjust disputes and make corrections.

They are presently trained to perform this function. If the credit counselor desires to refer the matter to his supervisor, then the supervisor or chief clerk will hear all of the evidence and render the final decision. The customer may also appeal to the supervisor, who is present and on duty at all times in the credit office. Presently, credit counselors do go to their supervisors with unusual cases and the supervisor is instructed to make any necessary decisions. He also may take the matter under advisement for further investigation.

It is the estimate both of our staff and of the plaintiff's counsel that the routine actions of the credit counselors will solve 99% of the questions which are either complaints on high bills easily solved or credit problems. It is only the unusual circumstances which, for good customer relations, we want to solve, as well as to equitably treat our customers. We agree with the Supreme Court that a public utility may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury.

Conclusion

It is always difficult to comment upon a case in which you were the "losing" party. We conclude, however, that the decision should have no material effect upon good credit and collection procedures and good termination procedures being used by a utility. We have made changes, but we believe that the changes will not add materially to any expense of the Division and hopefully will eliminate errors and customer dissatisfaction. Some of the changes were merely putting in written form the informal procedures being used by the Memphis Light, Gas & Water Division. Others were designating the credit visit as a conference or hearing. In addition, we provided for a written decision to be given to the person.

We believe that the Supreme Court has set forth minimal requirements for notice and a hearing. We

consider that the final notice and other procedures by mail will be sufficient to meet what the Supreme Court requires for notice. We further believe that the decision that the utility retains the option to terminate service, after affording the opportunity for the hearing and concluding that the amount billed was justly due, is beneficial to the utility, and that the court has clearly said that the structuring and scheduling of a hearing is in the broad discretion of the utility, provided the customer is given adequate time for effective presentation of his complaint.

We are pleased that the Supreme Court commented that our extended payment plan is a generous program allowing customers able to demonstrate financial hardship to pay a portion of the bill with the balance deferred. The court not only called this plan generous but an admirable credit procedure. We suggest that the adoption of an extended payment plan, level billing plan, and a first of the month payment plan for pensioners or welfare recipients, so that their bills coincide with the receipt of their check, would be beneficial programs which could be adopted and would help in sustaining a minimum notice and hearing procedure when your utility is preparing to terminate a utility service.

CITY OF MEMPHIS
CREDIT - COLLECTION DEPARTMENT
DELINQUENT CUT OFF POLICY

1. New customers

- A. Customers with less than one year's service and a one month's delinquent bill will receive a final notice and be disconnected, if amount past due is \$25.00 or greater.
- B. If a payment has not been made within 65 days and bill owing is \$5.00 or greater, a final notice will be mailed and be disconnected.

2. Good customers are those with service more than twelve months with no delinquent disconnects. This type of customer is allowed two months' bills to be delinquent before being sent a final notice. Once the final notice is printed, the bill must be paid in full to prevent a delinquent cut off.

Note: Due to the cost of cutting off services, the computer program will not print cut off tickets on accounts owing less than \$25.00. However, the customer should be encouraged to pay the bill in full to prevent a hardship on their next bill.

3. Bad paying customers are customers with one or more cut offs within the past twelve months, and previous year. They will receive a final notice after a one month's delinquency and service will be cut off if not paid. If more than one returned check and no cut offs, customer will receive final notice and be disconnected. (This type of customer must not be allowed to leave a balance less than \$25.00 without a proven hardship.)

4. Procedure for disconnection of service. The electric service is cut off approximately 10 work days after the final notice is mailed. The

E X H I B I T S

Account Investigator or Customer Service Representative is given the authority to leave service on for the following reasons:

- A. Payment in mail
- B. Death in family
- C. Illness
- D. Other conditions that would constitute hardship

In five working days an all service disconnect (DCO) is issued if the account remains unpaid. This order is executed by an Account Investigator or Customer Service Representative. All delinquent cut off orders are controlled by the Adjustment Department.

- 5. Method used to restore service. When the service is disconnected for nonpayment by either the Account Investigator or Customer Service Representative, a card is left with the customer, or hung on the door. This card when accompanied by the customer's bill may be paid at any of the approximate eighty collection agencies in the neighborhoods. (The agents are instructed not to collect a delinquent bill after a certain date, but the cut off card gives the agent the authority to collect the cut off bill in full.) The card instructs the customer to call the Division after the bill has been paid and a serviceman will reconnect their service when a paid receipt and identification is shown.
- 6. Reconnects same customer after disconnect for nonpayment, bad check or no identification
 - A. If the customer's TURN OFF DATE (One Service - All Service) and the TURN ON DATE (One Service - All Service) are the same, the charge will be \$15.00.

- B. If the customer's TURN OFF DATE (One Service - All Service) and the TURN ON DATE (One Service - All Service) are different, the charge will be \$10.00.

Example: If the customer is cut off (One Service - All Service) on 2-1-79 and calls on 2-2-79 for service to be reconnected 2-2-79 (Dispatched Order), the charge will be \$10.00.

There is also an additional deposit of \$7.50 billed to the customer's account each time the service is disconnected until the amount of deposit held equals three times the amount of an average month's utility bill.

- 7. Large delinquent commercial accounts. Notices are sent and if payment is not received or arrangements made by the customer, the service will be disconnected and additional deposit will be required.

MEMPHIS LIGHT, GAS AND WATER DIVISION
P. O. BOX 388
MEMPHIS, TENNESSEE 38145
PHONE NO. 523-0711

CUT-OFF NOTICE

Disputes and Corrections

YOUR BILL HAS NOT BEEN PAID. UNLESS YOU PAY YOUR BILL BY 5:00 P.M. ON THE DATE SHOWN, YOUR UTILITY SERVICE WILL BE CUT-OFF.

If this bill is not correct, you may have a hearing by going, before the cut-off date, to the Credit and Collections Department of MLG&W at 220 South Main Street at Beale Street or the north office at Watkins and Chelsea, between 8:30 a.m. and 5:00 p.m., Monday through Friday except on holidays. If you live in Millington, you may go to the Millington office.

You will have a hearing with a counselor and you can look at your relevant account records.

If you are not satisfied with the results of the hearing with the counselor, you may have a hearing with the chief clerk of the Credit and Collections Department.

CREDIT ASSISTANCE

If you are having difficulty paying your utility bill due to genuine hardship and would like to work out a mutually satisfactory agreement for payment, the Memphis Light, Gas and Water Division has trained, experienced credit counselors available.

If you desire to work out a payment plan, call 523-0711 or come to the Credit and Collections Department, 220 South Main Street at Beale Street or the Millington office between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, except on holidays.

IF YOU DO NOT UNDERSTAND THIS NOTICE OR NEED FURTHER ASSISTANCE, PLEASE CALL OUR INFORMATION CENTER AT 523-0711.

MEMPHIS LIGHT, GAS AND WATER DIV.

CUT-OFF NOTICE

PAYMENT MUST BE RECEIVED BY MAIL OR PAID AT ANY MLGW PAYING AGENT ON OR BEFORE THE LAST DAY TO PAY SHOWN BELOW.

1 1



033837

ACCORDING TO OUR RECORDS YOUR SERVICE BILL IS OVERDUE FOR PAYMENT. IF NOT PAID BY 5 P.M. ON THE DATE INDICATED, IT WILL BE NECESSARY TO TERMINATE THE SERVICE. SEE OTHER SIDE FOR CORRECTION OR DISPUTES OR CREDIT ASSISTANCE PROCEDURES.

LAST DAY TO PAY	ACCOUNT	AMOUNT DUE
MAR 25 80	6162548355	96.77

IF NOT PAID BY 5 P.M. THIS DATE SERVICE WILL BE DISCONNECTED

A RECONNECT CHARGE AND DEPOSIT WILL BE BILLED IF SERVICE IS RECONNECTED AFTER CUT-OFF IF PAID, PLEASE DISREGARD THIS NOTICE.

MEMPHIS LIGHT, GAS AND WATER DIVISION

P.O. BOX 388, MEMPHIS, TENN. 38145

PHONE 523-0711

INFORMATION CENTER

01 DE 0128 32.22-0 25.00

1 5



RETURN THIS STUB WITH PAYMENT

FINAL NOTICE

IF NOT PAID BY 5 P.M. THIS DATE SERVICE WILL BE DISCONNECTED.

LAST DAY TO PAY	ACCOUNT	AMOUNT DUE
MAR 25 80	6162548355	96.77
ACCOUNT	1123	DATE
6162548355	37400000	009677

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If this bill is not correct, you may have a hearing by going, before the cut-off date, to the Credit and Collections Department of MLG&W at 220 South Main Street at Beale Street or the north office at Watkins and Chelsea, between 8:30 a.m. and 5:00 p.m., Monday through Friday except on holidays. If you live in Millington, you may go to the Millington office.

You will have a hearing with a counselor and you can look at your relevant account records.

If you are not satisfied with the results of the hearing with the counselor, you may have a hearing with the chief clerk of the Credit and Collections Department.

(Printed in large type on 8 1/2" x 14" paper and posted in lobby of Memphis Light, Gas and Water Division and in Credit Department.)

DISPUTES AND CORRECTION PROCEDURES

1. If your bill is not correct or if you have a dispute concerning your bill, you are entitled to be heard. Contact may be made by phone, at 523-0711, to discuss the amount or correctness of your bill, or you may come to the MLGW main office at 220 South Main Street or the Millington Office.
2. If you want a hearing, go to the Credit and Collections Department of MLGW, BEFORE THE CUT-OFF DATE, at 220 South Main at Beale Street between 8:30 a.m. and 5:00 p.m., Monday through Friday, except on holidays. If you live in Millington, you may go to the Millington office. A prompt conference with a counselor will be held.
3. At your conference, you may inspect the relevant records regarding your account and present your position to the counselor.
4. Trained, experienced counselors are on duty to make adjustments or corrections to your account on disputed charges, when justified.
5. If you are not satisfied with the decision of the counselor, or if in unusual circumstances the counselor desires to refer the matter to the chief clerk, you are entitled to have your case heard by the chief clerk, who shall hear the evidence and render a final decision.
6. Someone must be on the premises to meet with the MLGW representative if it is necessary to come to your residence or business for meter investigations, switched meters, high consumption complaints, or other disputes.

7. No cut-off action will be taken until a final decision is reached. You will be notified in person at the conference with a copy of the final decision, or by telephone (with written confirmation), or mail, when a final decision is made.