THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

68915

Case No. 2009-CP-46-03360

ROBERT K. MARSHALL, Jr., and
DONNA CHAPMAN MARSHALL,
doing business as "Rock Hill Property Management",
a South Carolina general partnership, ... Appellants,

vs.

THE CITY OF ROCK HILL, SOUTH CAROLINA,
a municipal corporation,
CAREY F. SMITH, in his capacity as City Manager, and
LORI THOMAS,
in her capacity as Customer Services Manager . . . . . Respondents.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL

DO PUBLIC UTILITIES HAVE A DUTY TO PROVIDE SERVICE?

CAN SERVICE BE DENIED FOR A "COLLATERAL MATTER"?

IS AN UNRELATED CONTRACT A "COLLATERAL MATTER"?

WHAT IS THE EFFECT OF THE COMMON-LAW RULE ON COLLATERAL MATTERS?

CAN SERVICE BE DENIED DUE TO A THIRD PARTY'S DEBT?

CAN SERVICE BE DENIED DUE TO THE DEBT OF A FORMER OWNER OR OCCUPANT OF THE REAL PROPERTY?

CAN SERVICE BE DENIED DUE TO THE DEBT OF A ROOMMATE, SPOUSE OR FAMILY MEMBER?

STATEMENT OF THE CASE

Defendants SMITH and THOMAS are agents and employees by the Defendant CITY OF ROCK HILL (hereafter collectively "the CITY"). In or about June, 2009, the Appellants ROBERT K. MARSHALL, Jr. and DONNA CHAPMAN MARSHALL, doing business as "Rock Hill Property Management" (hereafter collectively "the MARSHALLS"), were contacted by one Charles Willis, who wished to rent a property managed by them within the CITY. Willis had a delinquent utility account of ca. $749.21 with the CITY. Willis contended the delinquency was incurred by a former roommate after Willis moved out of their former address.

With Willis, the Appellants attempted to negotiate a repayment schedule with the CITY. The terms demanded by the CITY were set at a level which Willis, who works at minimum wage, maintained he could not afford. The MARSHALLS then requested the CITY supply utilities at the above rental premises in their name or that of their company, with Willis as a tenant reimbursing them for service. The MARSHALLS indicated their willingness to all reasonable rules and regulations relating to a normal contract for providing such utility service.

There is no question of the good quality of the Appellants' credit standing or that of their company, nor does any cause (other than the policies of the CITY and its interpretations of CITY Ordinances) exist preventing such supply of utility service by the CITY to rental property managed by Appellants.

The CITY, by its agents, refused this request, citing policy and the City Ordinances. THOMAS, on behalf of the CITY, also asserted that supplying utility service to Willis under the circumstances above would result in Willis' past debt being charged to Appellants.

The facts set out above have been repeated at times in the past by the CITY and its agents employees with regard to other rental clients or potential rental clients of the Appellants. The

MARSHALLS have, as a result of the CITY's actions,lost potential tenants and rental income.

The MARSHALLS sued by filing of August 5, 2009. By Mr. MARSHALL's Affidavit of March 19, 2012, they claim damages of at least $5,652.00. In addition, they plead for punitive damages, injunctive relief and relief under 42 U.S.C. §§ 1983, 1988(b) and (c). The Defendants moved for summary judgment, which was granted by the Circuit Court by Order of April 9, 2012. This appeal followed.

FACTS

Defendants SMITH and THOMAS are agents and employees by the Defendant CITY OF ROCK HILL (hereafter collectively "the CITY"). In or about June, 2009, the Appellants ROBERT K. MARSHALL, Jr. and DONNA CHAPMAN MARSHALL, doing business as "Rock Hill Property Management" (hereafter collectively "the MARSHALLS"), were contacted by one Charles Willis, who wished to rent a property managed by them within the CITY. Willis had a delinquent utility account of ca. $749.21 with the CITY. Willis contended the delinquency was incurred by a former roommate after Willis moved out of their former address.

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ARGUMENT:

PUBLIC UTILITIES HAVE A COMMON-LAW DUTY TO SERVE

All public utilities - investor owned, municipal or cooperative - are subject to a common law duty to serve. [1] This Rule has been recognized by the South Carolina Supreme Court in *Gwynette* v. *Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960):

> The term 'affected with a public interest' is not susceptible of precise definition. In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 634, 67 L.Ed. 1103, the court classified businesses clothed with a public interest as follows: (1) those operating under a public grant of privileges *expressly or impliedly* imposing the affirmative duty of rendering a public service upon demand of *any member of the public, e.g. common carriers and public utilities*; (2) certain exceptional occupations which from the early days of the common law have been considered as affected with a public interest, e.g. those of operators of inns, cabs, and grist-mills; and (3) those which, though not public at their inception, may be fairly said to have been devoted by their owners to the public use.
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> [*Id.*, 237 S.C. At 25, 115 S.E.2d at 677; *emphasis added.*]

As stated in the precedent cited herein, utilities have, without exception, been recognized as having this public character and duty, without regard to their regulated status. They must provide service to any member of the public living within the utility's service area, who has applied for service and is willing to pay for the service and comply with the utility's rules[2] and regulations.[3]

1 *United Fuel Gas Co.* v. *R.R. Comm'n*, 278 U.S. 300, 49 S.Ct. 150,73 L.Ed. 390 (1929); *N.Y. EX REL. Woodhaven Gaslight Co.* v. *Pub. Serv. Comm.*, 269 U.S. 244, 46 S.Ct. 83,70 L.Ed. 255 (1925); *Allen's Creek Properties* v. Clearwater, 679 So.2d 1172 (Fla. 1996). As discussed in NATIONAL CONSUMER LAW CENTER, *Access to Utility Service* 3d Ed. (2006), Chapter 3.1 *et seq.*, three "types" of utility providers are referred to as public utilities: Private investor owned utility companies; municipal, or city, providers; and rural electric cooperatives (also known as electric membership corporations). Counsel for Appellants acknowledges out that almost all of the discussion in the earlier portion of this Brief is drawn from that source.

2 For regulated utilities, reasonable rules mean Commission approved rules governing application information, credit and deposits, timely payment, access rights, safety, etc.

3 27A AM.JUR.2D *Energy and Power Sources* § 199 (1996) (duty to serve); 27A AM.JUR.2D *Energy and Power Sources* § 385 (1996) (failure to furnish or delay in furnishing gas service). *See also Note* v. *City of Olympia*, 982 P.2d 659, 667 (Wash.App. 1999); *Overman* v.

The utility must render reasonable rates.[4]

In a natural monopoly, regulation is a necessary substitute for competition.[5] Because regulated utilities are not subject to competitive pressures, rates are set by legislatures and administrative communions, subject to court review. These regulations limit utilities to prices that are "just and reasonable."[6]

The duty to serve also prevents utilities from choosing to serve only those customers and areas which will enable them to realize a profit;[7] in contrast to unregulated commercial enterprises, they must also serve unprofitable segments of the market.

Utilities must also provide safe and adequate service to all of their customers.[8] In practical terms, this means that they must provide service twenty-four hours a day and must have the capacity to meet foreseeable increases in customer demand. Such increases would arise not only from periods of peak demand but also from predictable growth in the population of the community served and in the intensity of utility use.

In sum, "[t]he primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders."[9] The common law duty to serve "is one implied at common law and need not be expressed by statute, or contract, or in the charter of the public utility."[10] The

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Southwestern Bell Tel. Co., 675 S.W.2d 419, 424 (Mo.App. 1984) [emphasis added], *quoting* 73B C.J.S. *Public Utilities* § 8, 143-45 (1983), now found in § 7, at 283-284 (2004). For excellent discussions of the scope and ramifications of this duty, *see generally*, COMMENT, *Liability of Public Utility for Temporary Interruption of Service*, 1974 Wash. U. L. Q. 344, 346, n.10 (1974); Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277 (1928); Arterburn, *The Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411 (1927); Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Colum. L. Rev. 514 (1911). *See also* Rossi, *The Common Law Duty to Serve and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 Vand. Law Rev. 1233 (Oct. 1998); ANNOTATION, *Liability of Gas, Electric or Water Company for Delay in Commencing Service*, 97 A.L.R. 838, 839 (1935); 26 AM.JUR.2D *Electricity, Gas and Steam*, § 110 (1966) (delay in commencing electric service); 26 AM.JUR.2D *Electricity, Gas and Steam*, § 216 (1966) (delay in commencing gas service). Kahn, *The Economics of Regulation*, Vol. I: *Principles*, 1970, New York (John Wiley). *See also* Bonbright, Danielsen, & Kamerschen, *Principles of Public Utility Rates* (2d ed. 1988 Public Utilities Reports).

4 *See, e.g., Ariz. Corp. Comm'n* v. *Nicholson*, 497 P.2d 815,817 (Ariz. 1972) (citations omitted). *See also Carter* v. *Buckeye Rural Elec. Coop. Inc.*, 2001 WL 1681104 (S.D.Ohio 2001). *But see McGee* v. *E. Ohio Gas Co.*, 2002 WL 484480, at *8 (S.D. Ohio) (common law duty to serve now codified in Ohio Rev. Code § 4905).

5 Janice A. Beecher, Beecher Policy Research, Inc., *Economic Regulation of Water Utilities; A Primer* (Sept. 2001).

6 Charles E. Phillips, *The Regulation of Public Utilities*, at 119 (1993).

7 However, especially in rural areas, there are usually limitations on how far service must be extended from existing lines (line extensions) without an extra charge.

8 *N.Y. & Queens Gas Co.* v. *McCall*, 245 U.S. 345, 38 S.Ct. 122, 62 L.Ed. 337 (1917); *Van Holtern Group* v. *Elizabethtown Water Co.*, 577 A.2d 829 (N.J. 1990).

9 *United Gas Co.* v. *R.R. Comm'n*, 278 U.S. 300, 309, 49 S.Ct. 150, 73 L.Ed. 390 (1929).

10 64 AM.JUR.2D *Public Utilities* § 16 (1972) (citations omitted). The duty may well be incorporated into state statutes for regulated utilities, *see* COMMENT, *Liability of Public Utility*

common law duty to serve exists independently of federal legislation, state legislation, administrative regulation[11], or the charter of the public utility.[12]

It is the status of "public utility" that creates a corresponding responsibility to provide service for all who request service and are willing to pay for it.[13] As stated by one court, "such duties arise from the public nature of a utility, and statutes providing affirmatively therefor are merely *declaratory* of the common law."[*emphasis added*][14] Some public utilities are also common carriers, which must accept all applicants for service at reasonable, posted rates.[15]

The duty to serve is not absolute.[16] Utilities may deny service for good cause but may not

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for Temporary Interruption of Service, 1974 Wash. U. L. Q. 344, 345-46, n.9 (1974), but it exists at common law for those public utilities not covered by statute. The Indiana Supreme Court has noted: "when the state fails, or does not see fit, to regulate the rates and charges or services by legislation or by creating a commission for the purpose, the public, nevertheless, still has the basic right under the common law to be served in all particulars, without discrimination, and at a reasonable price." *Foltz* v. *Indianapolis,* 130 N.E.2d 650, 656 (Ind. 1955). *See also Montgomery Ward & Co.* v. *N. Pacific Terminal Co.,* 128 F.Supp. 475 (D.Or. 1953); *accord Messer* v. *S. Airways Sales Co.,* 245 Ala. 462, 17 So.2d 679 (Ala. 1944).

11 *See, e.g., Gibbs* v. *Consol. Gas Co. of Balt.,* 130 U.S. 396 (1889); *Messer* v. *S. Airways Sales Co.,* 245 Ala. 462, 17 So.2d 679, 681 (Ala. 1944); *Birmingham Ry., Light & Power Co.* v. *Littleton,* 201 Ala. 401, 77 So. 565, 569 (Ala. 1917); *Snell* v. *Clinton Elec. Light Co.,* 63 N.E. 1082 (Ill. 1902); *Austin View Civic Ass'n* v. *City of Palos Heights,* 405 N.E.2d 1256, 85 Ill.App.3d 89 (Ill.App. 1980) (municipality providing utility service is subject to common law duty to serve without unreasonable discrimination; plaintiffs alleging discrimination could state a claim for two causes of action, denial of equal protection and violation of common law duty; test to determine whether common law duty was violated was same standard applied to Independently Owned Utilities under Public Utility Act.); *Morehouse Natural Gas Co.* v. *La. Pub. Serv. Comm'n,* 140 So.2d 646 (La. 1962); *Southwest Gas Corp.* v. *Pub. Serv. Comm'n,* 474 P.2d 379 (Nev. 1970).

12 64 AM.JUR.2D *Public Utilities* § 16 (1972) (citations omitted). The duty may well be incorporated into state statutes for regulated utilities, *see* COMMENT, *Liability of Public Utility for Temporary Interruption of Service,* 1974 Wash. U. L. Q. 344, 345-46, n.9 (1974), but it exists at common law for those public utilities not covered by statute such as municipally owned utilities or cooperatives. The Indiana Supreme court has noted:

> when the state fails, or does not see fit, to regulate the rates and charges or services by legislation or by creating a commission for the purpose, the public, nevertheless, still has the basic right under the common law to be served in all particulars, without discrimination, and at a reasonable price.
> [*Foltz* v. *Indianapolis,* 130 N.E.2d 650, 656 (Ind. 1955).]

See also Montgomery Ward & Co. v. *N. Pacific Terminal Co.,* 128 F.Supp. 475 (D.Or. 1953); *accord Messer* v. *S. Airways Sales Co.,* 245 Ala. 462, 17 So.2d 679 (Ala. 1944).

13 *See, e.g., Denver Welfare Rights Org.* v. *Pub. Util. Comm'n,* 547 P.2d 239 (Colo. 1976) (interest of utility customer in the continuation of utility service is limited to his ability and willingness to assume financial responsibility for that service); *Ten Broek* v. *Miller,* 216 N.W. 385, 386 (Mich. 1927) ("Payment of proper charges for service supplied is a reasonable condition of the right to receive it," *citing* 20 C.J. 33); *accord Komisarek* v. *New England Tel. & Tel. Co.,* 282 A.2d 671 (N.H. 1971); *Miller* v. *Roswell Gas & Elec. Co.,* 166 P. 1177 (N.M. 1917); *Josephson* v. *Mountain Bell,* 576 P.2d 850 (Utah 1978).

act arbitrarily or engage in prohibited discrimination. In general, the same limits apply to a refusal to serve, to a termination of service, and to a refusal to reconnect service after termination.

UTILITY SERVICE CANNOT BE DENIED DUE TO A "COLLATERAL" MATTER

Public utilities occasionally seek to impose conditions on consumers requesting utility service that have nothing to do with the customer's present utility contract or account. Court decisions, as well as state utility regulations, are general accord in holding that a public utility cannot refuse to render the service which it is authorized by its charter to furnish, or impose service constraints, because of some collateral matter unrelated to that service.[17]

A collateral matter can generally be defined as a dispute which is the subject of a separate transaction, either between the utility and the consumer, or between the utility and some other person, which is distinct from, and irrelevant to, the utility's immediate duty to furnish a particular service. The definition of "collateral" will vary from state to state, however, and may raise difficult questions of the interaction of commission regulations and state common law. Collateral matters may include:

a) Non-payment of unrelated contracts with the utility;

b) Non-payment for services provided by a separate business run by the utility; or

c) Non-payment of another person's utility bill.

The common law rule against denying service because of collateral disputes is justified by the status of utilities - monopolies which provide essential services-as quasi-public entities, which hold a public franchise. The common law rule forbids utilities to coerce payment of separate and unrelated obligations by threatening to withhold the necessities of life from the prospective

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14 *Overman* v. *Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo.App. 1984) [*emphasis added*].

15 *E.g., U.S.* v. *Ross*, 713 F.2d 389 (8th Cir. 1983); *Beavers* v. *Fed. Ins. Co.*, 113 N.C.App. 254, 437 S.E.2d 881 (N.C.Ct.App.), *review denied*, 336 N.C. 602, 447 S.E.2d 384 (N.C. 1994); *Employers Mut. Co.* v. *Chicago and N. Western Transp. Co.*, 521 N.W.2d 692 (Iowa 1994) (*rehearing denied*).

16 *N. States Power Co.* v. *Nat'l Gas Co.*, 606 N.W2d 613 (Wis.App. 1999) (no enforceable duty to provide service to mobile home park where customers there satisfied with alternative service.).

17 64 AM.JUR.2D *Public Utilities* § 18 (1972); ANNOTATION, *Right of Municipality to Refuse Services Provided by it to a Resident for Failure of Resident to Pay for other Unrelated Services, 60* A.L.R.3d 714 (1974). *See, e.g., Dale* v. *City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (N.C. 1967) (when acting as an electric utility, a municipality (like a private company) may not refuse to provide service due to a "controversy unrelated to the service sought"); *Gas-Light Co. of Balt.* v. *Joseph Colliday*, 25 Md. 1 (1866) (when several contracts are made between the same parties for different pieces of property, each requiring its own meter, a failure to comply with any terms in one furnishes no excuse or grounds to the company to withhold service from another).

customer. Utilities must use the judicial process, as any other creditor would, to settle a dispute, and may not exploit their control over a necessity to punish the consumer for not acceding to their one-sided demands.[18]

AN UNRELATED CONTRACT IS A "COLLATERAL MATTER"

A utility, as a general rule, may not refuse to provide service based on a dispute arising out of a contract separate from the contract to provide the particular service in question. This question often arises when a utility denies service to a customer based on an old debt, such as an old utility bill from a prior residence, or a completely unrelated debt. At common law, a utility could not refuse to enter into a new contract for service because of an old debt, disputed or not, from some other place and time.[19] This rule has, however, been significantly modified by regulation in many states. Some commissions have applied this rule in their orders and regulations,[20] but at least thirty states (including South Carolina) explicitly permit some regulated

18 An example of a case in which the court would not allow the utility to engage in subtle coercion to circumvent the ordinary debt collection processes was *Elwell* v. *Atlanta Gas Light Co.*, 51 Ga.App. 919, 181 S.E. 599 (Ga.App. 1935) ("Justice and fair dealing," the court said, require that a public utility resort to the judicial process to enforce the claim, there being no grounds to allow a utility to be "both judge and jury" in a dispute).

19 *See* ANNOTATION: *Right of Public Utility to Deny Service at One Address Because of Failure to Pay for Past Service Rendered at Another,* 73 A.L.R3d 1292 n.3 (1976) (treats denial of service as encompassing both an initial refusal to render service upon application of the customer and a subsequent discontinuance of service which has been provided); *Lloyd* v. *Wash. Gas Light Co.*, 12 D.C. (1 Mackey) 331 (1881); *Berner* v. *Interstate Power Co.*, 57 N.W.2d 55 (Iowa 1953); *Gaslight Co. of Balt.* v. *Colliday,* 25 Md. 1 (1866); *Josephson* v. *Mountain Bell Tel. & Tel. Co.*, 576 P.2d 850 (Utah 1978) (telephone company may not disconnect an individual's home telephone for failure to pay accounts due on a business telephone). *But see Moore* v. *S. Bell,* 176 So.2d 558 (Fla. 1965) (plaintiff telephone subscriber failed to state a cause of action for exemplary damages against a telephone company for the disconnection of service, when it was alleged that plaintiff's home service was charged for a bill which the owner of business property sold by plaintiff failed to pay, that upon failure of the plaintiff to pay such bill his home telephone was disconnected, and that such disconnection was wrongful, willful and without probable cause);.*Soler* v. *Consol. Edison Co.*, 53 A.D.2d 558, 384 N.Y.S.2d 468 (N.Y. 1976), *app. dismissed,* 41 N.Y.2d 944, 394 N.Y.S.2d 640 (1977) (electric company was entitled to terminate service to a residence of a customer because of the customer's failure to make payment in full for electric services furnished to his sole proprietorship business).

20 These rules are often in the context of terminations, although the same principles apply to the initial right to service. *Komisarek* v. *New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971) (telephone company's tariff could not reasonably be construed to authorize the termination of a customer's existing service by reason of arrearages as to a discontinued line); *RE Rules and Regulations Governing the Disconnection of Utility Services*, 2 Pub.Util.Rep.4th 209 (Vt. 1973) (public utility company may not disconnect service solely upon a customer's failure to pay for merchandise, appliances, or special services, for concurrent service received at a different metering point, residence, or location or for a different class or type of utility service except in certain case involving off-peak usage of energy). *But see Rivera* v. *Consol. Edison Co. of N.Y., Inc.,* 17 Pub.Util.Rep.4th 238 (N.Y. 1976) (public utility, as a condition of continued service,

utilities to deny service, or at least to require deposits, if customers owe a debt for prior utility services to that company (or in some cases to other specified utilities).[21]

COMMON LAW RULE ON COLLATERAL MATTERS

A Municipal utility is not subject to the Regulations of the South Carolina Public Service Commission[22], and no other statutes apply to provide guidance. The CITY's actions are therefore subject to the common law and to the requirements of the United States and South Carolina Constitutions. The common law rationale is that at some point the debt becomes so "unrelated" to the current supply of utility service that utilities lose their right to a special method of collecting the debt. Courts have noted the coercive power of utilities as monopolies-and suppliers of life's necessities and tried to prevent abuses. The Georgia Supreme Court has reasoned:

> if in the case at bar the former claim was a past-due indebtedness and was incurred at some other place of residence and was a wholly separate transaction, it must be collected in the usual way in which debts are collectable .... The relations of the parties to each other (growing out of their past separate transactions) have no influence upon their rights and obligations in their present transaction. If the [utility] wishes to collect the old bill, it should resort to the usual judicial process in like manner as other creditors are required to do, and not coerce the [consumer] into paying the old bill by denying him gas.
> [*Elwell* v. *Atlanta Gas Light Co.*, 51 Ga.App. 919, 181 S.E. 599, 601 (Ga. App. 1935).]

The broad common law rule has been applied by some commissions and upheld by courts, although often in the context of service being terminated.[23] Because the old debts arose under

may require payment by a recipient of such service of unpaid bills, not only at the present address of such recipient but also at the former address of such recipient. However, the existence of a preexisting debt to a public utility for services rendered while an applicant for utility service was not on public assistance cannot serve as a bar for current service by an applicant who is currently receiving public assistance). Rules sometimes contain these prohibitions on denying service for this type of collateral matter. *See, e.g.*, 3 ALASKA ADMIN. CODE § 52.450(D(3) (utility may not disconnect for non-payment of bill related to another class of service at a different service location). *But see, e.g.*, TEX. ADMIN. CODE Tit. 16 § 25.23(a)(5), *Pub. Util. Comm'n of Tex. Substantive Rule* 25.23(a)(5) (service may be declined if applicant is indebted to *any* utility for the same kind of service) [*emphasis added*].

21 *DePass* v. *Broad River Power Co.*, 173 S.C. 387, 176 S.E. 325 (1934).

22 S.C. Public Service Commission Reg.s §§ 103-301 (electrical) and 103-701 (water).

23 *Komisarek* v. *New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971) (telephone company's tariff could not reasonably be construed to authorize the termination of a customer's existing service by reason of arrearages as to a discontinued line); *Josephson* v. *Mountain Bell Tel. & Tel. Co.*, 576 P.2d 850 (Utah 1978) (telephone company may not disconnect an individual's home telephone for failure to pay accounts due on a business telephone); *RE Rules & Regulations*

separate contracts and remedies, these debts may require judicial action to enforce collection. The Appellants acknowledge that this approach is not universal: many States' regulations define certain classes of old debts which may be grounds for refusal of service or imposition of a deposit. In South Carolina, the Public Service Commission allows those utilities under its oversight to refuse service if a non-paying previous occupant "shall benefit from such new service".[24] Even when the statute of limitations had run on the old debt, one court and commission allowed a utility company to deny service until the old debt had been paid.[25] There is, to Appellants' knowledge, no precedent allowing a utility to deny service to a credit-worthy landlord at a new address.

DENIAL OF SERVICE DUE TO THIRD PARTY'S DEBT

The CITY seeks to coerce payment of a debt with which the customer has no connection or requires as a condition of service that the customer pay the preexisting debt owed by a person who lived with the customer. The Appellants contend that in doing so, the utility violates the common law rule on "collateral matters". That is, a public utility is prohibited from refusing to render service because of some collateral matter not related to that service. In the absence of an

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Governing the Disconnection of Utility Services, 2 Pub.Util.Rep.4th 209 (VI. 1973) (public utility company may not disconnect service solely upon a customer's failure to pay for merchandise, appliances, or special services, for concurrent service received at a different metering point, residence, or location or for a different class or type of utility service except in certain case involving off-peak usage of energy). *But see Moore* v. *S. Bell*, 176 So.2d 558 (Fla. 1965) (plaintiff telephone subscriber failed to state a cause of action for exemplary damages against a telephone company for the disconnection of service, when it was alleged that plaintiffs home service was charged for a bill which the owner of business property sold by plaintiff failed to pay, that upon failure of the plaintiff to pay such bill his home telephone was disconnected, and that such disconnection was wrongful, willful and without probable cause); *Soler* v. *Consol. Edison Co.*, 53 A.D.2d 558, 384 N.Y.S.2d 468 (1976), *app. dismissed*, 41 N.Y.2d 944, 394 N.Y.S.2d 640 (1977) (electric company was entitled to terminate service to a residence of a customer because of the customer's failure to make payment in full for electric services furnished to his sole proprietorship business); *Rivera* v. *Consol. Edison Co.*, 17 Pub.Util.Rep.4th 238 (N.Y. 1976) (public utility, as a condition of continued service, may require payment by a recipient of such service of unpaid bills, not only at the present address of such recipient but also at the former address of such recipient. However, the existence of a preexisting debt to a public utility for services rendered while an applicant for utility service was not on public assistance cannot serve as a bar for current service by an applicant who is currently receiving public assistance).

24 24A S.C. Code Ann. Public Service Commission Reg.s 103-343 (electrical) and 103-736 (water); municipal utilities are excluded from the scope of these Regulations: 103-301 and 103-701.

25 *See Jackson* v. *Pub. Serv. Comm'n*, 590 A.2d 517 (DC 1991) (unpaid bill, although uncollectible could properly serve as basis for denial of service until paid, per utility tariff; no preemption by statute; statute of limitations applies to court actions on the contract, the tariff covers service, which is contingent on payment of outstanding bills; statute of limitations does not extinguish debt).

applicable and valid regulation, this situation will be governed by Constitutional considerations and State contract law, which forbids the imposition of implied contract or *quantum meruit* liability on one party when an express contract already exists with another,[26]

DEBT OF FORMER OWNER OR OCCUPANT OF REAL PROPERTY

A customer who moves into a home may not be denied utility service because the prior occupants or owners were in arrears for their utility bill. Many courts and commissions have ordered the utility to provide service in such a situation.[27] Denial of service to applicants who happen, by no

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26 *See, e.g.,Cal. Apartment Assoc.* v. *City of Stockton*, 80 Cal.App.4th 699 (2000) (court finds invalid a city ordinance that attempts to impose liability on landlord or subsequent tenant for the unpaid water, sewer, and refuse bills of a tenant).

27 *State EX REL.Gwynn* v. *Citizens' Telephone Co.*, 61 S.C. 83, 39 S.E. 257 (1901); *Price* v. *South Central Bell*, 294 Ala. 144, 313 So.2d 184 (Ala. 1975) (public utility company has no right to refuse service to a customer in order to compel that customer to pay the bill of a former subscriber, which it is not the duty of the customer to pay); *Alabama Water Co. v. Knowles*, 220 Ala. 61, 124 So. 96 (Ala. 1929) (court discusses rule as being generally recognized, that in the absence of a statute making a service charge a lien on the premises, a new customer cannot be denied service because some former customer is delinquent); *Yates* v. *White River Valley Elec. Co-op*, 414 S.W.2d 808 (Mo. 1967) (subject to certain exceptions, a public utility company may adopt and enforce, as a reasonable regulation for the conduct of its business, a rule that service will be discontinued because of default in payment but, in the absence of statutory or contractual authority, the company ordinarily has no right to cut off the customer's supply of gas or electricity for non-payment of arrears due from another occupant or owner); *McMenamin* v. *Evesham Municipal Util. Authority*, 104 N.J.Super. 161, 249 A.2d 21 (N.J. 1969), *aff'd*, 107 N.J.Super. 42, 256 A.2d 801 (N.J. 1969) (municipal utilities' authority could not exercise statutory right to shut off water service against plaintiffs, who were *bona fide* purchasers, when they had no actual notice of lien of authority for water and sewer services. In the absence of statutory or contractual basis or valid lien, general rule is municipality or private water company may not discontinue water service to a property to coerce owner into paying charges incurred by former owner); *Baylor* v. *Phila. Elec. Co.*, 61 Pa.Pub.Util.Comm'n 323, F8532525 (Pa. Apr. 17, 1986) (while a statute does not preclude the uncoerced and voluntary assumption of utility arrearage of another person, there is a clear prohibition against a utility pre-conditioning service to a new applicant upon payment for service previously furnished under an account in the name of a person other than the applicant).

Utility rules and regulations sometimes have this same protection built in. In Texas, for example, it is insufficient grounds to refuse service based on failure to pay the bill of a previous occupant of the premises, Tex. Admin. Code tit.· 16 § 25.23(c)(l), PUB. UTIL. COMM'N OF TEX. SUBSTANTIVE RULE 25.23(c)(l). *See also* 3 ALASKA ADMIN. CODE 52.450(f)(1) (utility may not disconnect for delinquency in payment for services rendered to prior customer at premises); *O'Neal* v. *City of Seattle*, 66 F.3d 1064 (9th Cir. 1995) (city policy of denying water service to tenant based on past tenant's unpaid bill violated equal protection: following *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974), *rejecting Ransom* v. *Marrazzo*, 848 F.2d 398 (3d Cir. 1988)); *IN RE Tarrant*, 190 B.R. 704 (Bankr. S.D.Ga. 1995); *Walton Elec. Membership Corp* v. *Snyder*, 226 Ga.App. 673, 487 S.E.2d 613 (Ga.App. 1997), *aff'd*, 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998) (electrical cooperative liable to member for damages, including possible punitive damages, for wrongful disconnection for debt of wife incurred on separate account before marriage); *Cascade Motor Hotel, Inc.* v. *City of Duluth*, 348 N.W.2d 84 (Minn. 1984) (arbitrary and unreasonable for

fault of their own, to be living in a place for which a third party has not paid the utility bill, has been construed by courts to be discriminatory and, when the utility's actions constitute State action (that is, where, as here, a municipality is involved), this discrimination can rise to the level of a violation of the Equal Protection Clause of the Fourteenth Amendment. As the Federal Fifth Circuit stated in *Davis* v. *Weir:*

> 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 other eligible applicants for water service." . . . The Department's actions offend not only equal protection of the law, but also due process.[28]

The Appellants acknowledge exceptions to this rule. In some States, municipal utilities may impose a lien against real property for unpaid charges, which would survive the transfer of the property.[29] Courts have varied in their treatment of rural electric cooperatives, which have occasionally been permitted to require new owners to take over the membership of former owners-along with their unpaid debts.[30] Neither of these exceptions apply in the present case.

DEBTS OWED IN LANDLORD-TENANT SITUATIONS

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municipal utility company to withhold service until new owner paid indebtedness of former owner).

28 *Davis* v. *Weir,* 497 F.2d 139 (5th Cir. 1974) *quoting Davis* v. *Weir,* 359 F.Supp. at 1027 (N.D.Ga. 1973). *Davis* was a civil rights action brought by tenant against a city water department because of the department's policy of terminating service to the house without notice to actual user, because of the landlord's refusal to pay the past-due bill. The court held that the city water department's discriminatory rejection of new applications for water service based on the financial obligations of third parties failed to pass 14th Amendment muster under the traditional "rational basis" analysis.

Although *Davis* involved a termination of service, the same reasoning should apply when an applicant first applies for utility service. *Lake* v. *City of Youngstown Div. of Water,* Case No. 4:93CV2559, slip op. (N.D.Ohio July 14, 1994) (when a municipal water company denied service solely on the basis of a preexisting water bill incurred by a third party at the same address, the plaintiffs had a successful equal protection claim. The court relied in part on *Davis* and rejected the municipal utility's arguments that the instant case should be distinguished from *Davis* because it involved an application for new service, rather than a termination).

29 *Ransom* v. *Marrazzo,* 848 F.2d 398 (3d Cir. 1988) (lien for prior occupants debt allowed, despite evidence of serious hardship in certain cases, *i.e.* an abused woman who moves back into home after abuser is jailed or subjected to restraining order.) *Compare State of Mo., EX REL. Imperial Util. Corp.* v. *Borgman,* 664 S.W.2d 215 (Mo. App. 1983) (no lien for sewer services, when no state statute authorized such a lien.).

30 *First Fed. Sav. & Loan Ass'n of Twin Falls* v. *E. End Mut. Elec. Co.,* 112 Idaho 762, 735 P.2d 1073 (Idaho 1987). *Contra Walton Elec. Membership Coop.* v. *Snyder,* 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998); *Granbois* v. *Big Horn County Elec. Coop.,* 986 P.2d 1097 (Mont. 1999). *See also St. John* v. *Missoula Elec. Coop., Inc.,* 282 Mont. 315, 938 P.2d 586 (Mont. 1997).

Sometimes denial of service has resulted from the default of a landlord, rather than the prior occupant. This pattern is the second common scenario. As a general rule, utilities have not been allowed to deny service in that situation.[31] This situation has also arisen when an apartment building has only one meter or connection serving several tenants, and the utility has tried to refuse (or disconnect) service to one tenant because of the arrears of another.[32] State regulations often prescribe in detail the protections for tenants in case of landlord delinquency. Typically, regulations and precedent have required that tenants be notified, either in person, or by conspicuous posting in common areas and, when possible, given the opportunity to take service in their own names without being required to pay the landlords' arrears. However, the Federal Fifth Circuit has held that a utility can deny service when the tables are turned and it is the landlord who is being refused (or losing) service for delinquent tenant bills.[33]

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31 *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974). *See also Ala. Water Co.* v. *Knowles*, 220 Ala. 61, 124 So. 96 (1929) (tenant in a group of residences all owned by one landlord to which water service had been furnished through a common meter, for which the landlord had customarily paid the bill and been reimbursed by tenants, was entitled to have her application for service honored--following the cutoff of supply upon the failure of the landlord to make application in a particular year; tenant cannot be denied service because his landlord may be in arrears, nor can payment of such arrears be required as a condition of such service); *La Nasa* v. *New Orleans Sewerage & Water Board*, 63 Pub.Util.Rep.3d 428, 184 So.2d 622 (La. 1966), *cert. denied*, 186 So.2d 158 (water board may not refuse water service to the owner of a building or his tenants until either of them pay an outstanding bill incurred by a former tenant); *Ginnings* v. *Meridian Waterworks Co.*, 100 Miss. 507, 56 So. 450 (1911) (lessee of a single room, and to which water had been shut off by the water company because of the failure of the lessor to pay rentals, was entitled, upon good faith application, assuming no fraudulent conduct on his part, to water service for his own use, without having to pay the landlord's arrears). *But see Birmingham Waterworks Co.* v. *Brooks*, 16 Ala.App. 209, 76 So. 515 (1917) (water company was under no duty to furnish a tenant with water through a joint service pipe, upon tender by him of the usual amount charged for the house he occupied, while at the same time the water company would be compelled to furnish the landlord (or another tenant), and the landlord was in arrears for water rent under his contract with the company), *cert. denied*, 76 So. 995.

32 *Jopling* v. *Bluefield Waterworks & Improv Co.*, 70 W.Va. 670, 74 S.E. 943 (1912) (when a water company contracted directly with a tenant occupying a ground floor of a building to supply him with water, charges had been made and the supply commenced, and another tenant, having taken up residency on the second floor of the same building, refused to pay water rent, whereupon the water company cut off the supply to the whole building, held that a water company rule reserving service to the owner was unreasonable, and the tenant on the ground floor was held entitled to supply without payment of rentals of the tenant on the second story). *But see Birmingham Waterworks Co.* v. *Edwards*, 16 Ala.App. 674, 81 So. 194 (1918) (tenant held liable for all charges and arrears for water furnished himself and another tenant through a common pipe, there being but one water connection and all the water furnished being used in common).

33 *Chatham* v. *Jackson*, 613 F.2d 73 (5th Cir. 1980) (city's practice of terminating water service to landlord when tenant's bills were delinquent did not violate substantive due process, since it was not arbitrary to coerce owner into paying for services that benefited his property. City's practice constituted a collection scheme that bore substantial relation to city's important and valid objective to remain financially sound through the collection of sums owed it for water services and therefore such practice did not violate landlord's equal protection rights). *See also Waldron*

In the third common situation, a utility refuses service to an applicant or seeks to disconnect service to a customer because that person is living with a third party who is currently in arrears for utility service. The third party might be a roommate or could be a family member. This situation often arises when an adult son or daughter must return to the parental home because of unemployment, illness or a failed marriage. In general, again, the rule agreed upon by most commissions is that the utility may not refuse to provide service to one person based on the delinquency of another and may not prevent a customer from living with an individual who has a delinquent utility bill.[34] In South Carolina, the Public Service Commission allows those utilities under its oversight to refuse service if a non-paying previous occupant "shall benefit from such new service".[35] In general, this will be permitted *if* the applicant resided with the delinquent customer at the time the debt was incurred *and* will continue to reside with him or her. These regulations have been seen to raise difficult questions concerning whether the legislature properly delegated to the respective Commission the power to abrogate the State's common law or

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v. *Int'l Water Co.*, 95 Vt. 135, 112 A. 219 (1921) (water company was required to accept tender of payment from some tenants, even though water rents remained uncollected from other tenants, and could not require the owner of the property to pay arrears, as well as current charges, as a condition of service, in the absence of a regulation authorized by statute permitting the company to hold the owner responsible). *Contra Monroe* v. *Niagara Mohawk Power Corp.*, 388 N.Y.S.2d 1003 (City Ct. of N.Y., Utica 1976) (when commercial tenant took service in own name and landlord advised utility to go ahead and terminate if tenant did not pay, landlord not liable.).

34 *Donovan* v. *Gen. Tel. Co.*, 19 Pub.Util.Rep.3d 49 (Cal. 1957) (telephone company cannot deny service because another member of the household is delinquent); *IN RE Tampa Elec. Co.*, 49 Pub.Util.Rep.4th 547 (Fla. P.S.C. 1982) (electric company can only hold the customer of record responsible for the customer's bill and cannot force another person, not legally responsible for the debt to pay that debt to obtain or continue service); *Walton Elec. Membership Corp.* v. *Snyder*, 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998), *aff'g* 226 Ga.App. 673, 487 S.E.2d 613 (Ga. App. 1997) (co-op acted tortiously and punitive damages could be awarded when co-op threatened to terminate service to member who married another member who was delinquent.); *Wright* v. *S. Bell Tel. & Tel. Co.*, 169 Ga.App. 454, 313 S.E.2d 150 (Ga.App. 1984) (termination of service to parents' home was wrongful when it was used to coerce them into paying son-in-law's debt); *Smith* v. *Tri-County Elec. Membership Corp.*, 689 S.W.2d 181 (Tenn.App. 1985) (electric company policy of denying service to a customer when anyone owing on an old bill planned to live in the residence was held unreasonable, arbitrary, and violation of due process.); *Boone* v. *Mountain Fuel Supply Co.*, Case No. 85-057-04, (Utah Sept. 4, 1985) (practice of denying natural gas service to a new contracting residential customer until the new customer pays the outstanding delinquent balance owed for prior service provided to the roommate of the new customer was held not to be permitted under a natural gas utility's tariff); *IN RE Black Hills Power & Light Co.*, Docket No. 9339, Sub 3 (Wyo. Nov. 27 1970) (utility services is supplied on an individual basis and cannot be refused because a member of customer's family is indebted to the company). *See also IN RE Brazil*, 21 B.R. 333 (Bankr. N.D.Ohio 1982) (ECOA violation to refuse gas service to wife unless husband, who owed arrears, moved out of house).

35 24A S.C. Code Public Service Commission Reg.s 103-343 (electrical) and 103-736 (water); municipal utilities are excluded from the scope of these Regulations: 103-301 and 103-701.

contract.

In the absence of a valid and applicable regulation, a utility's attempts to impose liability on third parties will be limited by the State's law of contract. One of the most basic doctrines of contract law is that no implied contract can exist with one party when an express contract regarding the same subject matter has been made with another party.[36] Thus, when an applicant enters into an express contract for service, through which the utility agrees to provide service and the applicant agrees to pay for the service provided, liability for that service cannot be imposed on a person not a party to the express contract,[37] such as a family member, roommate[38] or, as

36 *See, e.g.,Gantt* v. *Morgan*, 199 S.C. 138, 18 S.E.2d 672 (1942); *N.Y. Tel. Co.* v. *Teichner*, 69 Misc. 2d 135, 137, 329 N.Y.S.2d 689,692 (1972); *Vetco Concrete Co.* v. *Troy Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962); 17 C.J.S. *Contracts* § 6 (1999).

37 "Breach of contract cannot be made the basis of an action for damages against defendants *who* did *not execute it and who did nothing to assume its obligations." Gold* v. *Gibbons*, 178 Cal.App.2d 517, 3 Cal.Rptr. 117, 118 (1960) [*emphasis added*]; *accord, Trancik* v. *USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858 (Ct.App. 2003)

38 O'Neal v. City of Seattle, 66 F.3d 1064 (9th Cir. 1995) (city policy of denying water service to tenant based on past tenant's unpaid bill violated equal protection); *Sterling* v. *Village of Maywood*, 579 F.2d 1350, 1355 (7th Cir. 1978), *cert. denied*, 440 U.S. 913, 99mS.Ct. 1227, 59 L.Ed.2d 462 (1979); *Koger* v. *Guarino*, 412 F.Supp. 1375 (E.D.Pa. 1976) (utility "has no legitimate interest in collecting delinquent water bills from those who have no responsibility therefor"); *Price* v. *South Central Bell*, 294 Ala. 144, 313 So.2d 184 (1975) (public utility has no right to cut off service to customer in order to compel that customer to pay the bill of a former subscriber); *Donovan* v. *Gen. Tel. Co.*, 19 Pub.Util.Rep.3d 49 (Cal. 1957) (denial of service based on delinquent bill of another household member is unreasonable); *Re Tampa Elec. Co.*, 49 Pub.Util.Rep.4th 547 (Fla. 1982) (utility ordered to stop policy of discontinuing service for failure to settle prior indebtedness incurred by an agent or any family member); *Walton Elec. Membership Corp.* v. *Snyder*, 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998), *aff'g* 226 Ga.App. 673, 487 S.E.2d 13 (Ga. App. 1997) (co-op acted tortiously, and punitive damages could be awarded, when co-op threatened to terminate service to member who married another member who was delinquent.); *Wright* v. *S. Bell Tel. & Tel. Co.*, 169 Ga.App. 454, 313 S.E.2d 150 (1984) (married daughter moved back to parental home for a time after separating from husband, left behind unpaid phone bill in husband's name at former marital home; termination of service to parents home was wrongful, when it was used to coerce them into paying son-in-law's debt. Remanded to trial court to resolve factual questions, whether phone company's action was willful and whether recording stating that service had been terminated was defamatory.); *Vanderberg* v. *Kan. City Mo. Gas Co.*, 126 Mo.App. 600, 105 S.W. 17 (Ct.App. 1907) ("there is no more reason for compelling a married woman to pay her husband's debt, for the payment of which she is not legally bound, than there would be for compelling her to pay the debt of a stranger. The attempt made by defendant to coerce her into paying such debt was unreasonable and her failure to submit to such coercion afforded no lawful excuse for defendant's refusal to enter into a contract with her"); *Smith* v. *Tri-County Elec. Membership Corp.*, 689 S.W.2d 181 (Tenn.App. 1985) (electric company had a policy of denying service to a customer when anyone owing on an old bill planned to live in the residence establishing service. Utility agreed to begin service to Smith when he stated that Hix, who owed electric company on a delinquent account from a former residence, would not be living with him. After a warning, when a utility employee ascertained that Hix was living with the plaintiff, electric service was terminated "even though plaintiff contracted for the electric service, was using the service, was not delinquent, owed the defendant no bills for prior service at any location, and had no connection with the delinquent customer when her bills were incurred." Court concluded that the collection scheme was unreasonable,

here, a landlord. A similar argument will limit the application of quasi-contract, or *quantum meruit* liability.[39]

CONCLUSION

The CITY maintains in its e-mail of June 24, 2009 that it will extend utility service to the Appellants, but that:

> "before we can establish service for you at this location, if [the tenant] has any prior debts to the City of Rock Hill, those must be settled."[40]
> [*Emphasis added.*]

Based on the Record herein, the above-referenced "settling" of the debts in question means either their payment or the establishment of a payment schedule satisfactory to the CITY. To be plain, the CITY interprets, and invokes, Sections 29-2 and 29-31 of its Municipal Code to deny service to both Willis and to the MARSHALLS individually, in the absence of settling the third party

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arbitrary and violated both equal protection of the law and due process.); *Boone* v. *Mountain Fuel Supply Co.*, Case No. 85-057-04, (Utah Sept. 4, 1985) (practice of denying natural gas service to a new contracting residential customer until the new customer pays the outstanding delinquent balance owed for prior service provided to the roommate of the new customer was held not to be permitted under a natural gas utility's tariff); *RE Black Hills Power & Light Co.*, Docket No. 9339, Sub 3, (Wyo. Nov. 27 1970) (electric company was required to eliminate the provision of a proposed rule that service would not be supplied if "any member of his immediate family is indebted to the company for service previously supplied at the same or other premises," since utility services is supplied on an individual basis). *See also IN RE Brazil*, 21 B.R. 333 (Bankr. N.D.Ohio 1982) (ECOA violation to refuse gas service to wife unless husband, who owed arrears, moved out of house.); *Southwestern Bell Tel. Co.* v. *Bateman*, 223 Ark. 432, 266 S.W.2d 289 (1954) (service cannot be denied because husband owed the telephone company for a phone rental, but this fact may be considered by the company in determining the applicant's credit rating in so far as the rating would affect the amount of deposit required); *Granbois* v. *Big Horn County Elec. Coop.*, 986 P.2d 1097,296 Mont. 45 (Mont. 1999). *But see Escamilla* v. *So. Cal Edison Co.*, 56 C.P.U.C. 562,1994 WL 880663 (Cal.Pub.Util.Comm'n 1994) (roommates jointly and severally liable for electric bill regardless of who is listed as customer of record); *Tubbs* v. *La. Power & Light Co.*, 349 So.2d 994 (La.App.2d Cir. 1977) (when plaintiff never informed the defendant power company at the time he left his marital domicile that he no longer lived there and would not be responsible for services rendered at that address, the power company was not shown to have been aware of such facts, when the plaintiff was notified of past due balances incurred thereafter by his wife upon the opening of a new account and the company followed the Public Service Commission's rules in notifying the plaintiff that the service would be discontinued if the past due amount was not paid, the plaintiff could not recover against the power company for damages arising from the discontinuance of electric service for the short time upon such non-payment of such account).

39 *Bolen* v. *Paragon Plastics, Inc.*, 747 F.Supp. 103, 106-07 (D.Mass. 1990); *Lewis v. Holy Spirit Ass'n for the Unification of World Christianity*, 589 F.Supp. 10, 13 (D.Mass. 1983); *Cascadeh* v. *Magryta*, 225 N.W. 511, 247 Mich. 267 (Mich. 1929).

40 RECORD ON APPEAL, Deposition of ROBERT K. MARSHALL, JR., p.63, l.23 – p.64, l.4.; Deposition Ex. 2., 2d page.

debt owed at another location. The interpretation and application of the cited Municipal Ordinances is an unwarranted interference with the Appellants' personal right to contract with tenants. Under the modern analysis of such statutory enactments, the same can survive only if held to have a rational relationship to a legitimate interest of government.[41] Despite the high standard thus stated, the Appellants contend the desired and apparent intent of those portions of the Municipal Ordinances 29-2 and 29-31 in collecting past due debts cannot be demonstrated to have a rational relationship to the claimed right to interfere with the Appellants' rental of property on which they themselves will be responsible for the utilities. The Appellants are not the unpaid collection agents of the CITY, nor can they be made such. On the basis of the other precedent cited, the debt of Willis' roommate cannot be used to deny him service.

The Appellants would further point out that a strict application of the Ordinances in question effectively bars the Tenant Willis from legally residing within the CITY. This effect can only be characterized as overreaching and unreasonable.

The harm done to the Appellants, and their tenants and potential tenants, by the application or interpretation of the Municipal Ordinances referenced above renders the CITY and its agents liable in tort. As discussed above in the discussion of Constitutional rights and in the footnote below, once service is established in an area by a provider, the consumer has a Fourteenth Amendment due process right to that supply of service.[42] The CITY and its agents have deprived the Appellants, individually and through their actual and potential tenants, of that Federal and State right. Even assuming their right to demand payment for a third party debt from Willis or the MARSHALLS, the CITY has established no procedure to set payment schedules, and have provided for no review of a demanded payment schedule.[43] Precedent is clear that the Due Process clause requires that certain elements of fundamental fairness be present in the process leading to denial or termination of utility service. In this case, the determination of what repayment terms would be available to the potential tenant were left to the sole discretion of the

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41 *R.L. Jordan Company* v. *Boardman Petroleum*, 338 S.C. 475, __, 527 S.E.2d 763, 765 (2000), *citing* 2 Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW, § 15.4 (1992).

42 *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). *See also Koger* v. *Guarino*, 412 F.Supp. 1375, 1386 (E.D.Pa. 1976), *aff'd without op.*, 549 F,2d 795 (3d Cir. 1977). Note, however, that in certain limited situations, some Courts have found that Due Process does *not* apply. *See, e.g., Garcia* v. *Irizarny*, 829 F.Supp. 523, 529 (D. P.R. 1993), aff'd, 34 F.3d 117 (1st Cir. 1994) (court noted that the plaintiffs had no' property interest in the continued receipt of water services *for which they never contracted)* (emphasis added); *Village of Sterling* v. *Maywood*, 579 F,2d 1350, 1354 (7th Cir. 1978), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979) (court disagreed with *Koger, Davis,* and *Lamb* v. Hamblin, 57 F.R.D. 58 (D.Minn. 1972) that water service is a necessity and therefore an entitlement; rather, the court is not persuaded that the plaintiff, as a "mere water user, had a legitimate claim of entitlement to continued water service once the landlord requested termination of that service.").

43 RECORD ON APPEAL, Deposition of Lori Thomas, November 30, 2011, p.26, l.13 – p.29, l.11.

CITY's agent.[44]

The Appellants assert that the effect of the denial of due process to the potential tenant, the lack of consideration of his financial circumstances, and the CITY's application and interpretation of its Municipal Ordinances 29-2 and 29-31, create a situation where they have failed in their duty to supply service (both as to the Appellants and as to the potential tenant) and where the resulting damage to the Appellants by this failure is foreseeable. Under South Carolina precedent relating to damages recoverable in tort, this is sufficient to establish proximate cause for such damages to the Appellants and its recoverability.[45] The Appellants are entitled to have the Summary Judgment set aside as a matter of law.

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June 25, 2013

Rock Hill, South Carolina

44 RECORD ON APPEAL, Deposition of Lori Thomas, November 30, 2011, *id.*
45 *Bramlette* v. *Charter-Medical-Columbia*, 302 S.C. 68, 393 S.C. S.E.2d 914 (1990); *Hill* v. *York County Sheriff's Dept.*, 313 S.C. 303, 437 S.E.2d 179 (Ct.App. 1993), *cert. denied* (1994).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-03360

ROBERT K. MARSHALL, Jr., and
DONNA CHAPMAN MARSHALL,
doing business as "Rock Hill Property Management",
a South Carolina general partnership, ... Appellants,

vs.

THE CITY OF ROCK HILL, SOUTH CAROLINA,
a municipal corporation,
CAREY F. SMITH, in his capacity as City Manager, and
LORI THOMAS,
in her capacity as Customer Services Manager . . . . . Respondents.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

The Appellants propose the following be included in the Record on Appeal:

1. Order of the Honorable John C. Hayes, III, dated April 9, 2012 and filed April 18, 2012;
2. Order of the Honorable John C. Hayes, III, dated August 26, 2009 and filed August 28, 2009;

3. Complaint, with attachments, dated August 4, 2009 and filed August 5, 2009;
4. Answer dated September 18, 2009;

5. Memorandum on Plaintiffs' Motion for Temporary Injunction, dated August 25, 2009 and filed August 26, 2009;
6. Affidavit in Support of Motion for Temporary Injunction, dated August 25, 2009 and filed August 26, 2009;
7. Defendants' Return to Motion for Temporary Injunction, dated August 26, 2009;
8. Affidavit of Lori Thomas, with attachments, dated August 25, 2009;

9. Defendants' Motion for Summary Judgment dated February 29, 2012;
10. Memorandum in Support of Motion for Summary Judgment, dated March 22, 2012;
11. Memorandum in Opposition to Motion for Summary Judgment, dated March 21, 2012;
12. Affidavit of Robert K. Marshall, Jr. in Opposition to Motion for Summary Judgment, dated March 19, 2012;
13. Transcript of Hearing on Motion for Summary Judgment, March 22, 2012, p. 3, l.1 – p.27, l.15.

14. Deposition of Lori Thomas, November 30, 2011, p.3, l.17 – p.36, l.4;
15. Deposition of Robert K. Marshall, Jr., January 24, 2012, p. 3, l.18 – p.103, l.5;
16. Deposition of Donna Marshall, January 24, 2012, p.3,l.17 – p.16, l.14.;

17. Municipal Code of City of Rock Hill, Section 29-2 (Code 1981).

I certify that this designation contains no matter which is irrelevant to this appeal.

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Attorney for Appellants

June 25, 2013

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-03360

ROBERT K. MARSHALL, Jr., and
DONNA CHAPMAN MARSHALL,
doing business as "Rock Hill Property Management",
a South Carolina general partnership, ... Appellants,

vs.

THE CITY OF ROCK HILL, SOUTH CAROLINA,
a municipal corporation,
CAREY F. SMITH, in his capacity as City Manager, and
LORI THOMAS,
in her capacity as Customer Services Manager . . . . . Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellants and Designation of Matter to Be Included in the Record on Appeal, dated June 25, 2013, on the following counsel or persons of record:

Wm. Mark White
Jeremy D. Melville
Spencer & Spencer, PA
PO Box 790
Rock Hill, SC 29731

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out above; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 262, S.C.A.C.R.

June 25, 2013

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