

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

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SC Court of Appeals

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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Robert K. Marshall, Jr. and
Donna Chapman Marshall,

Plaintiffs,

v.

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

Defendant.

ORDER

C. A. No. 09-CP-46-03360

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

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This matter involves the authority of the City of Rock Hill (City) to regulate the provision of utilities to consumers. Particularly, Plaintiffs are challenging the City's authority to restrict or refuse service to a consumer who is delinquent on a past utility bill.

STATEMENT OF THE CASE

The City filed a motion for summary judgment on February 29, 2012. The motion was heard before this Court on Tuesday, March 20, 2011. Plaintiffs were represented by John Martin Foster, Esquire. The City was represented by Mark White, Esquire. Both Defendant and Plaintiffs filed memorandums in support of their positions on the issues.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. City of

plead sufficient facts to demonstrate plausibly that he was treated differently from others who were similarly situated and the unequal treatment was the result of discriminatory animus.” Equity In Athletics, Inc. v. Dep’t of Educ., 639 F.3d 91, 108 (4th Cir. 2011).

“If a classification does not (1) implicate a “fundamental right” or (2) draw upon suspect classifications such as race, religion or alienage, an ordinance must only be rationally related to a legitimate governmental purpose. Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995).

In the instant case, Plaintiffs have failed to plead or identify any fundamental right implicated by the ordinance. Plaintiffs allege a constitutional right to the unregulated provision of utilities to a delinquent consumer in order that Plaintiffs may rent their property to that delinquent consumer. Any right to the provision of utility services for commercial purposes, so far as such a right exists, is not a fundamental right guaranteed by either the United States Constitution or that of South Carolina.

As to the classification at issue in this case, the only class regulated by Sections 29-2 and 29-31 of the Code is the class of “consumers.” Section 29-31(a) of the Code provides that “Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered.” Furthermore, Section 29-31(e) provides that “the term family shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit.” Consumers are not a suspect class.

Furthermore, Plaintiffs are not consumers in this context. The consumer in the context of

pc #3

residence is the occupier of the residence: the end-user¹. In this case, the consumer is Mr. Willis, a tenant of a rental house owned by the Plaintiffs. Therefore, the Court finds that not only is there no suspect class, but Plaintiffs are not even among the class regulated by the ordinance.

Because there is no suspect class, the ordinance in question receives rational basis review. In Bibco Corp. v. City of Sumter, 332 S.C. 45, 52-53, 504 S.E.2d 112, 116 (1998), the South Carolina Supreme Court summarized rational basis review of a statute or ordinance under Equal Protection as three step analysis: (1) whether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears rational relationship to a legitimate government purpose or goal. In Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 819 (4th Cir. 1995), the Fourth Circuit explained that “[t]o prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that a state intended to discriminate.”

While Plaintiffs allege that the City has provided utilities to other property owners similarly situated, more is required than mere speculation. Plaintiffs must plead facts which, if proven, would entitle Plaintiffs to relief. There is nothing in either the pleadings or the record to indicate that Plaintiffs received disparate treatment. The ordinance in question is facially neutral and applies equally to persons seeking utilities

¹ Black's law dictionary defines "consumer" as "[a] person who buys goods or services for personal, family, or household use with no intention of resale; a natural person who uses products for personal rather than business purposes." Black's Law Dictionary, 7th Ed. P. 311.

Part A

for a delinquent consumer. The very purpose of the ordinance is to prevent consumers like Mr. Willis from circumventing past debts owed to the City. The ordinance was applied to Mr. Willis as it was intended and, presumably, as it is applied to other delinquent consumers.²

Based on the above, the Court finds that the ordinance is rationally related to a legitimate governmental purpose: the regulation of utilities. The City can regulate, within reason, to whom they will provide utility services. When a consumer is not entitled to the provision of services, the City has the right to not provide those services.

2. DUE PROCESS

Plaintiffs allege that the City's application of Sections 29-2 and 29-31 of the Municipal Code has deprived Plaintiffs of life, liberty, or property without due process of law. Where a plaintiff challenges a legislative act alleging a violation of Due Process, the following legal analysis applies:

The first step in this process is to determine whether the claimed violation involves one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be fundamental, it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. If the interest is determined not to be "fundamental" it is entitled only to the protection of rational-basis judicial review.

Hawkins v. Freeman, 195 F.3d 732, 739 (4th Cir. 1999) (internal citations omitted).

As stated above in the Court's Equal Protection analysis, Plaintiffs have failed to plead or identify any fundamental right. Plaintiffs allege a constitutional right to the

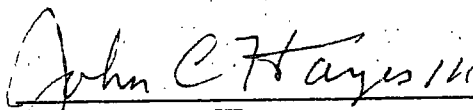
² Furthermore Mr. Willis is not a plaintiff in this action, and Plaintiffs, as owners of the rental property, cannot step into his shoes.

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provision of utilities to a delinquent consumer in order that Plaintiffs may rent their property to that delinquent consumer. No such right exists. Additionally, as plaintiffs are not consumers, the ordinance in question does not implicate any rights of Plaintiffs.

Because the Ordinance does not implicate a fundamental right, rational basis review is proper. As set forth in the Court's Equal Protection analysis, the ordinance is rationally related to a legitimate governmental purpose: the regulation of utilities. Therefore, Defendant's motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #6

April ^{9th} 2012
York, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Robert K. Marshall, Jr. and
Donna Chapman Marshall,

Plaintiffs,

v.

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,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT

Case No.: 2009-CP-46-3360

ORDER

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CLERK OF COURT
YORK COUNTY, SC

Plaintiffs have filed a Complaint as captioned above seeking injunctive and monetary relief against the Defendants. The basis for Plaintiffs' claim are The City of Rock Hill, South Carolina's (The City) policy regarding providing electrical service to former customer's/consumer's of said service who are delinquent in payment for past electrical services.

Here, a Mr. Willis wishes to lease a property owned by Plaintiffs. Mr. Willis cannot, according to City policy, be provided electricity until he has paid or made arrangements, acceptable to the City, to pay his delinquent account. Plaintiffs wish to rent to and Willis wishes to rent from Plaintiffs the property mentioned above.

Since the City will not extend to Mr. Willis electrical service, Plaintiffs' seek to obtain electrical services in their name at the property Willis seeks to rent. The City will not allow the Plaintiffs to obtain electrical services at the subject property since the occupant of said property is Mr. Willis who is delinquent in payment for previously provided electrical services.

jc #1

Before the court at this time is the Plaintiff's request for an Order, pending resolution of this case on its merits, requiring the City to allow Plaintiffs to contract with the City for electrical services for the property occupied by Mr. Willis. The City argues its policy, per Ordinance Article 11, Division 1, Sec 29-31, prohibits the sale of electricity to Plaintiffs due to Mr. Willis being the ultimate consumer of same and being delinquent in payment for electrical service.

Plaintiffs assert a right to injunctive relief from the City ruling pending the outcome of this lawsuit. Rule 65 of South Carolina Rule of Civil Procedure controls the granting by a court of injunctive relief. For a preliminary injunction to be granted, the party seeking injunctive relief must establish:

1. It would suffer irreparable harm if the injunction is not granted;
2. It will likely succeed in the litigation; and
3. There is an inadequate remedy at law. LeFurgy v. Long Cove Club Owners Ass'n, Inc., 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994).

"[T]he sole purpose of a temporary injunction is to preserve the status quo." MailSource, LLC v. M.A. Baileys Associates, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003). "The remedy of injunction is a drastic one." LeFurgy, supra.

Here the Plaintiffs seek not to maintain the status quo, but rather seek the opposite. Plaintiff's propose that the Court alter the status quo, negate a City ordinance, reverse a City policy and find, preliminarily, that the City ordinance/policy most probably is unconstitutional.

Here the Court finds the status quo is in fact to be maintained and to effect same Plaintiffs' request for temporary injunctive relief must be denied.

Additionally, as evidenced by the Complaint itself, Plaintiffs have an adequate remedy at law, i.e. the right to seek damages resulting to them by virtue of the City ordinance/policy. The

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Plaintiffs in their Complaint allege a right to actual damages based on the Fourth and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. §§ 1983 and 1988 (paragraph 41 of Plaintiffs' Complaint).

Plaintiffs' specifically allege the conduct they wish enjoined give rise to a right to "monetary damages" (paragraph 42 of Plaintiff's Complaint).

Plaintiff Robert K. Marshall, Jr. has filed an Affidavit in support of Plaintiff's motion. In paragraph 3 thereof, Affiant alleges a loss of income based on the City's ordinance/policy. For such damages Plaintiff's seek compensation in their Complaint. In the same paragraph, Affiant alleges a "potential" loss of tenants and rental income. At this stage this latter allegation is surmise and at best anticipatory. Paragraph 6 is to the same effect.

Paragraph 4 of the Affidavit is based entirely on hearsay and has no efficacy in an Affidavit. Paragraph 5 asserts certain individuals have been unable to rent from Plaintiffs, but does not assert that Plaintiffs were unable to rent the properties listed, but simply asserts they were unable to rent to particular tenants.

Paragraph 7 of the Affidavit asserts a possible loss of rental opportunities "in the future 'and assume[s]'" potential renters may not even seek to rent from them because of the City's ordinance/policy. While this also is speculative it is interesting to note that according to comments made at oral argument the current City ordinance/policy has been in effect for 16 years.¹ By way of Mr. Marshall's Affidavit only four opportunities for rental have been affected by the policy prior to the instant "Willis" situation. Three of the four are alleged to have occurred this calendar year. Sherika Reid's event is not assigned any date.

Assuming the four events set forth in the Affidavit and the "Willis" event resulted in loss of rental, and assuming this loss was the result of deprivation of Plaintiffs' rights as alleged in

¹ As with most, if not all, of the motions for temporary relief the court is faced with a sparse record.

gc HH 3

paragraph 41 of the Complaint, the Plaintiff have not been nor will they be irreparably harmed by the City's ordinance/policy and they can easily quantify the loss of rental income to them occasioned by the City ordinance/policy.

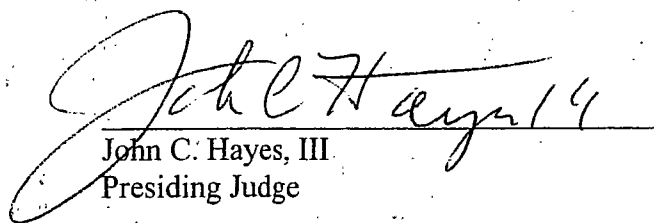
Keeping an eye on the ball, Plaintiff's Complaint only sets forth that in one instance has the complained of conduct occurred.² (See paragraphs 10, 11, 12, 16, and 32). Obviously, any loss of rent occasioned by this incident is easily quantifiable, and if the City's conduct gives rise to damages on behalf of Plaintiff same may be calculated and awarded in an action in law and the extraordinary relief effected by injunctive relief is unnecessary.

Based on the above, the Court finds it is unnecessary and also would be inappropriate to consider Plaintiff's likelihood of success on the merits of their claims. Plaintiff's claim should be resolved on its merits after full development of the record and a trial on the merits with their claim.

In sum, any harm occasioned to Plaintiff's by the City's ordinance/policy during the pendency of this action is not irreparable. Plaintiffs have, and allege, an adequate remedy at law and the status quo is maintained by the courts denial of Plaintiff's motion for injunctive relief.

Therefore, Plaintiff's motion for injunctive relief is denied.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

August 26, 2009
York, South Carolina

² Paragraphs 17 and 18 set forth a "repeated" course of conduct and actual loss of potential tenants and rentals. However, in his Affidavit, Robert K. Marshall sets forth no such prior conduct, i.e. the City's refusal to let Plaintiff's obtain electrical service for a delinquent renter nor any loss of income, but does allege an inability of certain potential renters to obtain electrical service due to delinquent accounts. The latter instances do not allege any attempt by Plaintiffs to obtain electrical services for the subject rental units. Paragraph 19 is not supported by the record at this time to any degree.

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STATE OF SOUTH CAROLINA]
COUNTY OF YORK]

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

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,

Defendants.

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C.C.C. & D.S.
YORK COUNTY, SC

COMPLAINT

C.A. No. 09-CP-46- 336 0

For their Complaint herein, the Plaintiffs allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs institute this action for injunctive relief, actual damages, punitive damages, and the costs of this action against Defendants for violation of civil rights and damages arising out of the City of Rock Hill's denial of utility service to them, and the City of Rock Hill's threat to hold them liable for the debts of unrelated third parties.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to Article V, Section 5 of the Constitution of the State of South Carolina, and to 42 U.S.C. Section 1983.

3. Plaintiffs ROBERT MARSHALL, Jr., and DONNA CLIPMAN MARSHALL are members of a general partnership doing business as a manager of rental properties within the corporate limits of the City of Rock Hill, under the name and style of "Rock Hill Property Management".

4. Defendant the CITY OF ROCK HILL (hereafter also "CITY") is a municipal corporation organized under the laws of the State of South Carolina and located within the boundaries of York County, South Carolina..

5. Defendant CAREY F. SMITH hereafter also "SMITH") is now or formerly employed as the City Manager for the CITY, and as such was an agent, servant or employee of the CITY charged with application, administration and interpretation of the ordinances and policies relating to the supply of, and billing for, those utility services offered by the CITY to its residents.

6. Defendant LORI THOMAS hereafter also "THOMAS") is now or formerly employed as the Customer Services Manager for the CITY and its utility department, and as such was an agent, servant or employee of the CITY charged with application and administration of the ordinances and policies relating to the supply of, and billing for, those utility services offered by the CITY to its residents.

FACTUAL ALLEGATIONS

7. The acts and omissions complained of herein occurred in the above-entitled judicial district.

8. At all times mentioned herein, Defendants SMITH and THOMAS were agents employed by the Defendant CITY OF ROCK HILL. Each and every act of Defendants SMITH and THOMAS set forth herein were done by them, not as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of South Carolina, and the CITY OF ROCK HILL, and by virtue of and under the authority of their office as agents and employees of the CITY OF ROCK HILL.

9. At all times mentioned herein, Defendants SMITH and THOMAS were acting as agents and employees of the CITY OF ROCK HILL with the knowledge, consent, and permission of the Defendant CITY OF ROCK HILL.

10. In or about June, 2000, the Plaintiffs were contacted by one Charles Willis, who wished to rent 1066 Cherokee Avenue, a property managed by their partnership within the corporate limits of the CITY. On knowledge and information, Willis has a delinquent utility account of ca. \$749.21 with the CITY OF ROCK HILL. On knowledge and information, Willis contends this delinquency was incurred by a former roommate after Willis moved out of their former address.

11. With Willis, the Plaintiffs 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.

12. After failing to obtain a workable repayment plan, Plaintiffs requested that the CITY supply utilities at the above rental premises in their or their company's name, with Willis as a tenant reimbursing them for service.

13. In making this request of the CITY, Plaintiffs stated or indicated their willingness to obey all reasonable rules and regulations relating to a normal contract for providing such utility service.

14. On knowledge and information, there is no question of the good quality of the Plaintiffs' 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 the supply of utility service by the CITY to rental property managed by Plaintiffs.

15. SMITH and THOMAS, on behalf of the CITY, have refused this request, citing policy and the City Ordinances. Copies of the e-mailed and mailed correspondence of SMITH and THOMAS evidencing these facts are attached hereto and incorporated herein.

16. THOMAS, on behalf of the CITY, has also asserted that supplying utility service to Willis under the circumstances above would result in Willis' past debt being charged to the Plaintiffs. Again, copies of THOMAS' e-mail correspondence with the ROBERT K. MARSHALL, Jr. are attached hereto and incorporated herein.

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

18. As a result of the CITY's actions, Plaintiffs have lost potential tenants and rental income.

19. On knowledge and information, other persons offering rentals within the corporate limits of the CITY have been allowed to contract for utility service in their own names and to charge their respective tenants with the cost of the same.

20. Plaintiffs have contacted the CITY and its agents, asserting the propriety of their requests, asserting the lack of violation of any CITY Ordinance thereby, and requests some legal justification for the actions of the CITY. All such contacts and requests have failed.

21. Plaintiffs anticipate the loss of rental income in the future by reason of the threatened continuation of the actions of Defendants as set out and referenced above.

22. Each of the Defendants acquiesced in the actions of the other Defendants by participating in the actions and policies of the others and failing to seek their prevention.

23. The actions and inaction of Defendants the CITY OF ROCK HILL, SMITH and THOMAS were done with the purpose and intent of depriving Plaintiffs of the property rights secured to them under the Fourth and Fourteenth Amendments to the United States Constitution, of its right not to be deprived of life, liberty or property without due process of law, and of its right to be accorded the equal protection of the laws, as guaranteed under the Fourteenth Amendment of the United States Constitution.

24. On knowledge and information, Defendant the CITY OF ROCK HILL, and specifically those of its agents, servants or employees who occupied supervisory positions over Defendants SMITH and THOMAS, maintained a number of policies and practices that contributed to the deprivations of Plaintiffs' rights, privileges and immunities.

25. On knowledge and information, Defendant CITY OF ROCK HILL, and specifically those of its agents, servants or employees who occupied supervisory positions over Defendants SMITH and THOMAS, failed to maintain policies and practices that would have prevented the deprivations of Plaintiffs' rights, privileges and immunities.

26. On knowledge and information, the said actions and inaction of the Defendants referenced herein had the purpose of depriving Plaintiffs, either directly or indirectly, of the equal protection of the laws, or of equal rights, privileges and immunities under the laws.

27. On knowledge and information, the said actions and inaction of the Defendants referenced herein had the effect of depriving Plaintiffs of their rights, privileges and immunities secured by the United States Constitution and the laws, and were in violation of 42 U.S.C. § 1983.

28. On knowledge and information, Defendant CITY OF ROCK HILL, and specifically those of its agents, servants or employees who occupied supervisory positions over Defendants SMITH

and THOMAS, are chargeable with having actual knowledge that Defendants SMITH and THOMAS caused the deprivation of constitutional rights complained of.

29. On knowledge and information, Defendant CITY OF ROCK HILL, and specifically those of its agents, servants or employees who occupied supervisory positions over Defendants SMITH and THOMAS, created a policy or custom under which the unconstitutional practices of Defendants occurred.

30. On knowledge and information, Defendant CITY OF ROCK HILL, and specifically those of its agents, servants or employees who occupied supervisory positions over Defendants SMITH and THOMAS, acted or failed to act in reckless disregard of Plaintiffs' constitutional rights.

INJUNCTIVE RELIEF

31. The Plaintiffs here allege and incorporate all allegations set out above not inconsistent herewith.

32. Defendants have refused utility service to Plaintiffs, and threatened Plaintiffs with liability for the past due account of Willis and/or other third persons, and sought, in general, to interfere with Plaintiffs' rental business and with their right to rent properties upon a basis acceptable to them.

33. Plaintiffs have demanded that Defendants cease and desist from the actions complained of above.

34. On knowledge and information, and based upon the statements of Defendants SMITH and THOMAS, as evidenced by their correspondence attached hereto and incorporated herein, there is a reasonable likelihood of the repetition of, or the continuation of the effects of, the past actions and inaction referenced above.

35. Plaintiffs have no adequate or speedy remedy at law, and this action for injunctive relief is the Plaintiffs' only means for securing adequate relief.

36. Plaintiffs have neither acted or threatened to act in any manner which would harm the right or ability of the CITY OF ROCK HILL to receive payments for utility service provided in the name of Plaintiffs or in that of their partnership.

37. On knowledge and information, immediate and irreparable injury, loss or damage will result to the Plaintiffs ROBERT K. MARSHALL, Jr. and DONNA CHAPMAN MARSHALL

by reason of the Defendant's threatened actions and inaction inasmuch as they may be deprived of their right to secure utility service to rental properties managed by them, deprived of renters by reason of those renters' inability to have utility service in rental property, and/or subjected to liability for the past bills of third parties to whom they have no contractual or legal responsibility.

38. On knowledge and information, the threatened actions and inaction of the Defendants will cause Plaintiffs to lose the quiet enjoyment of their respective interest in the rental property they manage.

39. On knowledge and information, the above-referenced immediate and irreparable injury, loss or damage is within the meaning of Rule 65(b), S.C.R.C.P., and will result to the Plaintiffs before the regular notice for the issuance of a temporary restraining order can be served and a hearing held thereon in the absence of an *Ex Parte* order restraining the Defendants from the actions and inaction threatened above.

40. Plaintiffs ROBERT K. MARSHALL, Jr. and DONNA CHAPMAN MARSHALL ask that this verified Complaint be accepted by this Court as their Affidavit for the purpose of the issuance of any order, *Ex Parte*, Temporary, *Pendente Lite* or permanent, restraining the acts complained of herein.

OTHER RELIEF

41. The causes of action set out or referenced herein arise under the United States Constitution, and particularly under the Fourth and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. §§ 1983 and 1988.

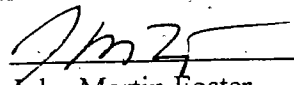
42. By reason of the aforesaid actions and inaction on the part of Defendants, Plaintiffs have sustained monetary damages.

43. The damages sustained by Plaintiffs from Defendants' actions and inaction arose and were brought about by, and proximately caused by, the intentional acts and inaction, gross negligence, recklessness, willfulness, wanton and malicious negligence, of Defendants as set out and referenced herein.

44. By reason of the actual and consequential damages sustained by Plaintiffs due to the intentional actions and inaction, gross negligence, maliciousness, willfulness and wantonness of Defendants, Plaintiffs seek the further award of punitive damages against Defendants.

WHEREFORE, Plaintiffs pray that this Court:

- A. Assume jurisdiction of this case;
- B. Accept this verified Complaint as their Affidavit for the purpose of the issuance of any order, *Ex Parte*, Temporary, *Pendente Lite* or permanent, restraining the acts complained of herein.
- C. Award Plaintiffs actual damages from Defendants to be established at trial;
- D. Award Plaintiffs their reasonable costs and expenses from Defendants;
- E. Award Plaintiffs exemplary and punitive damages from Defendants by reason of Defendants' grossly negligent, willful, wanton and malicious actions as set out and referenced above;
- F. Award Plaintiffs their reasonable attorneys fees and experts' costs, pursuant to 42 U.S.C. § 1988(b) and (c);
- G. Include a prayer for other relief which may be authorized for Plaintiff under other causes of action; and
- H. Award or allow such other and further relief as this Court deems just and proper.


John Martin Foster
SC Bar No. 2086
Attorney for Plaintiffs

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Post Office Box 106
Rock Hill, S.C. 29731-6106

August 4, 2009

Rock Hill, South Carolina

803 324-8100
803 324-8109: Fax
jmfooster@comporium.net

Subject: Fw: city problem
From: "Bob Marshall" <bob@bobmarshall.com>
Date: Mon, 20 Jul 2009 09:53:45 -0400
To: "John Martin Foster" <jmfoster@comporium.net>
X-Account-Key: account8
X-UIDL: 1186178886.7026
X-Mozilla-Status: 0001
X-Mozilla-Status2: 00400000
Return-Path: <bob@bobmarshall.com>
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X-AntiAbuse: This header was added to track abuse, please include it with any abuse report
X-AntiAbuse: Primary Hostname - flash.flashlink.net
X-AntiAbuse: Original Domain - comporium.net
X-AntiAbuse: Originator/Caller UID/GID - [47 12] / [47 12]
X-AntiAbuse: Sender Address Domain - bobmarshall.com
X-Junkmail-Info: EXTRA_MPART_TYPE,HTML_MESSAGE
X-Junkmail-Status: score=10/50, host=rg10.comporium.net
X-Junkmail-Whitelist: YES (Message was pre-scanned)

This is very interesting.

----- Original Message -----

From: LThomas@cityofrockhill.com

To: Bob Marshall

Cc: rkoterba@cityofrockhill.com ; ABunton@cityofrockhill.com

Sent: Monday, July 20, 2009 9:32 AM

Subject: Re: city problem

Mr. Marshall:

Addressing this particular instance, if you choose to put the utilities in your name and the full balance of the old debt is not satisfied prior to you and Mr. Willis having services connected, any remaining amount due on a payment arrangement for the old debt does become due on the account in whose name the service is listed. If the debt is satisfied in full prior to the establishment of the new service, there would be no liability except for current usage at the location.

Thanks,

Lori Thomas
Customer Services Manager
City of Rock Hill
PO Box 11706
Rock Hill, SC 29731-1706
Phone/803-329-7071
FAX/803-329-8759
lthomas@cityofrockhill.com

From: "Bob Marshall" <bob@bobmarshall.com>
To: <LThomas@cityofrockhill.com>
Date: 07/17/2009 01:56 PM
Subject: Re: city problem

So you are saying I would have to be responsible for Charles Willis or anyone else in the unit that owes the city a past due bill if I provide power?

----- Original Message -----

From: LThomas@cityofrockhill.com

To: bob@bobmarshall.com

Cc: rkoterba@cityofrockhill.com ; ABunton@cityofrockhill.com

Sent: Friday, July 17, 2009 10:28 AM

Subject: Fw: city problem

Mr. Marshall:

Ray Koterba asked that I follow up with you in reference to this issue with your tenant, Charles Willis. I am sorry that you feel that the payment arrangement that was proposed for Mr. Willis was harsh;

however, we do have certain policies as it relates to the establishment of new services and the terms by which we are able to satisfy those debts. As you know from all of our discussions, Sections 29-31 (a) thru (d) of the City Municipal Code refer specifically to payment for services and the terms by which we establish services to those owing past debts for utilities and all of those who reside in that home.

When you came to City Hall on June 30, 2009 with Mr. Willis, as per your request, I did respond in writing via e-mail as requested as I indicated I would on that date. I have attached a copy of that e-mail for your review. As stated in this e-mail, per City ordinance, once Mr. Willis has satisfactorily met his obligations to the City, we will be happy to provide service at the location in either of your names. This requirement is found in *Section 29-31(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter.*

As you stated with regard to the payment of a deposit, a \$300.00 deposit would be required to establish service and a minimum \$250.00 payment on the old debt. This would allow us to set up a formalized payment arrangement in the account holders name for the balance of Mr. Willis' debt. Policy requires that a minimum one-third initial payment be paid on any past due debt with the City for any citizen to set up a payment arrangement. In a further effort to resolve this issue, we would allow for three installment payments of \$166.41 to be made to satisfy the debt. These payments would be required in 30 day increments 30, 60 and 90 days following the initial payment to begin the payment arrangement. This would allow your tenant to seek assistance to satisfy this debt during that time. Unfortunately, the proposed \$50.00 payment is not a possibility as it only further increases the potential liability that the City may incur.

We do appreciate that you have a long standing history with the City of Rock Hill, and appreciate your input on these issues; however, we are obligated to make every effort to see that all of our customers are treated fairly and equitably while upholding the regulations stipulated in the municipal code.

Thank you again for your time and understanding.

Lori J. Thomas

Lori J. Thomas
Customer Services Manager
City of Rock Hill
P. O. Box 11706
Rock Hill, SC 29731
lthomas@cityofrockhill.com
Phone (803) 329-7071
Fax (803) 329-8759

Re: Fw: power with rent As a part of the service agreement, we require disclosure of those residing a

File Edit View Create Actions Tools Window Help

Open Home Lori Thomas - Mail AMI Conference Call Fw: city problem

New Reply Reply to All Forward Display More

 **Re: Fw: power with rent** As a part of the service agreement, we require d
Lori Thomas to: Bob Marshall
Cc: Patricia Moore, Anne Bunton

Mr. Marshall:

As per your request, again, I would like to thank you and Mr. Willis for coming into City Hall today to address your presence at his request until arrangements falling within the guidelines of the City policy are met to add in your or his name at this address.

Again, please express my thanks to Mr. Willis for coming in, and I appreciate your efforts as well.

If you have any further questions, please feel free to contact me.

Kind regards;

Lori Thomas

Lori Thomas
Customer Services Manager
City of Rock Hill
PO Box 11706
Rock Hill, SC 29731-1706
Phone/803-329-7071
FAX/803-329-8759
lthomas@cityofrockhill.com

"Bob Marshall" Can I get something from him so I can directly negotiate wi

From: "Bob Marshall" <rockhill@navacore.net>
To: <LThomas@cityofrockhill.com>
Date: 06/26/2009 01:18 PM

start Utility Manager PRO... Contact Us - WBTV.3 ...

From: "Bob Marshall" <bob@bobmarshall.com>
To: <rkoterba@ci.rock-hill.sc.us>

Date: 07/14/2009 12:56 PM
Subject: city problem

I hate to bother you with this, but this is going to force us to hire an attorney. No commission will take the complaint because all are forbidden to deal with a city.

I rented an apartment to an individual (Charles Willis) who then discovered he had a previous balance with the City of Rock Hill power and water department. He tried to work out a payment plan with the city, but the plan was too difficult. The city wanted \$250 on a bill in the amount of \$741 with the balance of \$491 in 30 days, and they also wanted a \$300 deposit to cut it on. Because of the harshness of their plan, I requested the power and water be placed in my name, and I would get the tenant to pay them \$50 a month until the old bill was paid. They refused me service because he would live there at my rental.

I have a good record with the city, good credit, and own the property in question. They said the Rock Hill City law said they could do this. I have read the city law and disagree. I believe I can have power in my name and give it away or include in the rent if I want to. When at the city trying to cut on the power, I asked to be turned down in writing and they refused. At this point it would be hard to even prove they turned me down. Even if the law is written correctly, I believe it is in error. I don't believe you can hold the debt of one person against another because of a non-marital relationship.

Within the last several months we have had tenants not allowed to have power and water because either a roommate or relative owed the city an old bill. I did not get involved in these except to refer them to free legal aid. I also believe the SC law trumps the city law. From 27-33-50, it is clear I can agree to provide utilities if I do so in writing. 27-39-60 says municipalities are restricted from regulating rents and 27-40-130 gives the jurisdiction to magistrate and judges not utility companies. I am sure there will be other laws and court ruling that affect this problem, but this is all I have found at this time. Below are excerpts of the laws I referenced above.

SECTION 27-33-50. Financial responsibility of tenant for utilities. Unless otherwise agreed in writing, a tenant has sole financial responsibility for gas, electric, water, sewerage, or garbage services provided to the premises the tenant leases, and a landlord is not liable for a tenant's account.

SECTION 27-39-60. Counties and municipal corporations restricted from regulating rent charged for certain dwellings. No county or municipal corporation may enact, maintain, or enforce any ordinance or resolution which would regulate in any way the amount of rent to be charged for privately owned, single family, or multiple unit residential, or commercial rental property. This section may not be construed as prohibiting any county or municipal corporation, or any authority created by a county or municipal corporation for that purpose, from regulating in any way property belonging to the county or municipal corporation or from entering into any agreements with private persons which regulate the amount of rent to be charged for rental properties.

SECTION 27-40-130. Jurisdiction and service of process. (a) The circuit courts and magistrate courts

of this State shall exercise concurrent jurisdiction over any landlord with respect to any conduct in this State governed by this chapter or with respect to any claim arising from a transaction subject to this chapter. In addition to any other method provided by rule or by statute, personal jurisdiction over a landlord may be acquired in a civil action or proceeding instituted in the court of common pleas or magistrate court by the service of process in the manner provided by this section.

Rock Hill City Code Sec. 29-31. Payment of bills; delinquency. (d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32. (e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830. (Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)

In my opinion a fair compensation would be:

To be allowed to have power cut on in my rental units and be able to rent them with utilities included as provided for in the SC Law. For the City of Rock Hill to be forbidden to collect or attempt to collect utility bills from individuals it had no contract with. For the city to be ordered to list all cases it had done this with and apologize and make restitution. Also, time is very important on the situation of the current tenant who has moved in and has no power.

Bob Marshall[attachment "WILLISPAYMENTPLAN.JPG" deleted by Lori Thomas/Rock-Hill]

No virus found in this incoming message.

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Version: 8.5.375 / Virus Database: 270.13.18/2243 - Release Date: 07/17/09 06:08:00

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.375 / Virus Database: 270.13.18/2243 - Release Date: 07/17/09 06:08:00



ROCK HILL

SOUTH CAROLINA

OFFICE OF THE CITY MANAGER

July 16, 2009

Mr. Robert Marshall, Jr.
P. O. Box 92
222 South Cherry Road
Rock Hill, SC 29731

RE: The State of South Carolina,
Department of Consumer Affairs
Complaint No. 09-03464/A3, Robert Marshall, Jr.

Dear Mr. Marshall:

Enclosed please find a copy of a complaint that was filed recently with the South Carolina Department of Consumer Affairs as well as a copy of a letter dated July 10, 2009 from this agency to the City of Rock Hill with a determination that this complaint falls under the jurisdiction of the City of Rock Hill.

As a municipality that provides utilities to its citizens, the City of Rock Hill is guided through this process by our municipal code and ordinances therein. These guidelines are in place in an effort to insure that all of our 34,000 plus customers are treated fairly and equitably in each instance. Additionally, each of our employees is given guidelines and procedures to follow daily to insure that they do what is in the best interest of all citizens as well as in keeping with our City Municipal Code.

When any citizen applies for utility service with the City of Rock Hill, they enter into a service agreement with the City. This agreement is a contractual credit agreement with the City of Rock Hill.

Section 29-31 (a) thru (d) of the City of Rock Hill municipal code specifically addresses terms of payment and gives the basis for resolution of issues regarding outstanding debts. This section of the municipal code is shown below.

CITY OF ROCK HILL

P.O. BOX 11706, ROCK HILL, SC 29731-1706
PHONE 803-329-7010 - FAX 803-329-7007

STATE OF SOUTH CAROLINA]

VERIFICATION

COUNTY OF YORK]

Personally appeared before me the undersigned, who, being duly sworn, deposes and says that he is one of the Plaintiffs in this civil action; that he has read the allegations of the preceding Complaint; and that the allegations of the Complaint are true of his own knowledge except those allegations made upon knowledge and information, and, as to them, he verily believes them to be true.

Robert K. Marshall, Jr.
Robert K. Marshall, Jr.

SWORN TO and subscribed before me
this day of August 4, 2009

Jim Z
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires 7/20/15

STATE OF SOUTH CAROLINA]

COUNTY OF YORK]

VERIFICATION

Personally appeared before me the undersigned, who, being duly sworn, deposes and says that she is one of the Plaintiffs in this civil action; that she has read the allegations of the preceding Complaint; and that the allegations of the Complaint are true of her own knowledge except those allegations made upon knowledge and information, and, as to them, she verily believes them to be true.

Donna Chapman Marshall
Donna Chapman Marshall

SWORN TO and subscribed before me
this day of August 4, 2009

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: 8/20/19

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. And)

Donna Chapman Marshall,)

Plaintiffs,)

vs.)

ANSWER

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,)

Defendants.)

(Jury Trial Demanded)

C.A. No. 09-CP-46-3360

Defendants, the City of Rock Hill (the "City"), Carey F. Smith ("Smith") in his capacity as City Manager, and Lori Thomas ("Thomas") in her capacity as Customer Services Manager (collectively, "Defendants"), answering in full the Complaint ("Complaint") against them, respectfully allege:

For a First Defense

1. As to the allegations contained in Paragraph 1 of the Complaint, Defendants admit that Plaintiffs commenced this action and seek damages. Except as expressly admitted, Defendants deny the allegations contained in said Paragraph and demand strict proof thereof.

2. The allegations contained in Paragraphs 2 and 41 of the Complaint set forth conclusions of law and, therefore, no answer

89621.2

SPENCER & SPENCER, P.A.

ATTORNEYS AT LAW

226 E. MAIN STREET

P.O. BOX 790

ROCK HILL, S.C. 29731

TEL. 803 / 327-7191

is required by Defendants. To the extent that a response is required to said Paragraphs, Defendants deny the allegations contained therein and demand strict proof thereof.

3. Defendants lack sufficient information with which to form a belief as to the allegations contained in Paragraphs 3, 14 and 17; therefore, Defendants deny these allegations and demand strict proof thereof.

4. As to the allegations contained in Paragraph 4 of the Complaint, Defendants admit that the City is a municipal corporation and political subdivision organized pursuant to the laws of the State of South Carolina and is located in York County, South Carolina. Except as expressly admitted, Defendants deny the allegations contained in said Paragraph and demand strict proof thereof.

5. As to the allegations contained in Paragraphs 5, 6, 8, 9 and 22, Defendants admit that Smith is employed by the City as its City Manager with duties as prescribed by City Council and City Ordinances, that Thomas is employed by the City as its Customer Services Manager with duties as prescribed by City Council and City Ordinances, and that in accordance with their employment Smith and Thomas have acted as representatives, officials and agents of the City. Except as expressly admitted, Defendants deny the allegations contained in said Paragraphs and demand strict proof thereof.

6. In responding to Paragraph 7 of the Complaint, Defendants admit that actions of Defendants with respect to this matter occurred in York County, South Carolina. Except as expressly admitted, Defendants deny the remaining allegations set forth in said Paragraph and demand strict proof thereof.

7. As to the allegations contained in Paragraph 10 of the Complaint, Defendants admit that Charles Willis ("Willis") contacted Plaintiffs in or about June 2009 to rent 1066 Cherokee Avenue (the "Property"), which is within the corporate limits of the City and that Willis had at the time and continues to have a delinquent utility account of \$749.21 with the City ("Delinquent Account"). In further responding to said allegations, the Delinquent Account was in Willis' name. Defendants lack sufficient information with which to form a belief as to the remaining allegations contained in said Paragraph; therefore, Defendants deny these allegations and demand proof thereof.

8. As to the allegations contained in Paragraph 11 of the Complaint, Defendants admits that the City attempted to work out the Delinquent Account and offered to allow Willis to repay the Delinquent Account on more than one payment schedule. Except as expressly admitted, Defendants the remaining allegations set forth in said Paragraph.

9. Responding to the allegations in Paragraph 12 of the Complaint, Defendants admits that Plaintiffs requested that the

City provide utilities for Willis at the Property in Plaintiffs' company name. Except as expressly admitted, Defendants deny the remaining allegations set forth in said Paragraph and demand strict proof thereof.

10. Defendants deny the allegations contained in Paragraphs 13, 16, 18, 19, 21, 23-30, 32, 35-39 and 42-44 and demand strict proof thereof.

11. As to the allegations contained in Paragraphs 15 and 34 of the Complaint, Defendants admit that the City applied controlling ordinances in its response to Plaintiffs and Willis as to utility service to the Property and that the City will apply its ordinances in the future. Except as expressly admitted, Defendants deny the remaining allegations set forth in said Paragraph and demand strict proof thereof.

12. As to the allegations contained in Paragraphs 20 and 33 of the Complaint, Defendants admit that Plaintiffs contacted the City, claimed the right to have utility service to the Property and insisted the City yield to their demands. Except as expressly admitted, Defendants deny the remaining allegations set forth in said Paragraphs and demand strict proof thereof.

13. As to Paragraph 31 of the Complaint, which realleges certain allegations, Defendants repeat and incorporate by reference their answers to the realleged paragraphs.

SPENCER & SPENCER, P.A.
ATTORNEYS AT LAW
226 E. MAIN STREET
P.O. BOX 790
ROCK HILL, S.C. 29731
TEL. 803 / 327-7191

14. Paragraph 40 of the Complaint does not assert a factual allegation against Defendants. To the extent a response is needed, Defendants deny the allegations and demands proof thereof.

15. Each and every allegation of the Complaint not specifically admitted herein is denied and strict proof is demanded thereof.

For a Second Defense

16. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

17. Plaintiffs' claims, in whole or in part, should be dismissed with prejudice pursuant to Rule 12(b)(6), SCRPC, for failure to set forth factual allegations against Defendants which give rise to a cognizable claim upon which relief may be granted.

For a Third Defense

18. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

19. Plaintiffs' claims, in whole or in part, are barred pursuant to the doctrine of sovereign immunity under the provisions of the U.S. CONST. amend. XI.

For a Fourth Defense

20. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

21. Plaintiffs' claims are governed by and subject to the terms, conditions and limitations of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq.

22. Plaintiffs may recover, if at all, only actual damages, and only upon the terms and conditions and subject to the limitations contained in the Act, as amended.

23. Defendants plead the terms, provisions, conditions and limitations of the Act as an absolute or pro tanto defense.

24. Specifically, Plaintiffs' claims, in whole or in part, are barred by one or more subsections contained in S.C. Code Ann. § 15-78-60.

For a Fifth Defense

25. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

26. Plaintiffs' claims for punitive damages are barred as against Defendants.

For a Sixth Defense

27. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

28. Plaintiffs' claims against Smith and Thomas are barred by the Tort Claims Act.

For a Seventh Defense

29. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

30. Plaintiffs' damages, if any, were caused by the acts or omissions of others not within the control of Defendants and these intervening acts or omissions bar any recovery by Plaintiffs from Defendants.

For an Eighth Defense

31. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

32. Plaintiffs' damages, if any, were caused by their own acts or omissions and these acts or omissions bar any recovery by Plaintiffs from Defendant.

For a Ninth Defense

33. Each and every allegation, admission and denial not inconsistent herewith is hereby incorporated and realleged as fully as if set forth verbatim herein.

34. Defendants acted in good faith and are protected by qualified immunity.

35. Accordingly, Plaintiffs' claims should be dismissed with prejudice.

Jury Trial Demand

36. City hereby demands a trial by jury of all legal issues raised in this matter.

WHEREFORE, Defendants ask that the Complaint be dismissed with prejudice, for an award of the costs of this action and for such other and further relief as the Court deems just and proper.

Rock Hill, S.C.

SPENCER & SPENCER, P.A.

Date: September 18, 2009

By: _____

W. Mark White
W. Chaplin Spencer, Jr.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
803/327-7191 - Telephone
803/327-3868 - Telecopy
markwhite@spencerfirm.com

ATTORNEYS FOR CITY OF ROCK HILL

SPENCER & SPENCER, P.A.

ATTORNEYS AT LAW

226 E. MAIN STREET

P.O. BOX 790

ROCK HILL, S.C. 29731

TEL. 803 / 327-7191

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. And)
Donna Chapman Marshall,)

Plaintiffs,)

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,)

Defendant.)

CERTIFICATE OF SERVICE

C.A. No. 09-CP-46-3360

I certify that the foregoing Answer has been served by depositing a copy in a United States Postal Service mail box, first class, postage-prepaid on the date and to the addressee shown below.

John Martin Foster
P.O. Box 106
Rock Hill, SC 29731

Rock Hill, S.C.

SPENCER & SPENCER, P.A.

Date: September 18, 2009

By: W. Chaplin Spencer, Jr.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
803/327-7191 - Telephone
803/327-3868 - Telecopy
chaplinspencer@spencerfirm.com

ATTORNEY FOR THE CITY OF ROCK
HILL

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

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,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

C.A. No. 09-CP-46-3360

JURISDICTION

This request for Preliminary Injunction arises from an action for damages and injunctive relief under 42 U.S.C. § 1983. In *Allen ET AL. v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the United States Supreme Court has made it clear that the State Courts have jurisdiction under this Federal Statute and the relief available thereunder:

As the Court has understood the history of the legislation, Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts. See *Mitchum v. Foster*, [407 U.S. 225] at 241. But in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. See *Monroe v. Pape*, [365 U.S. 167] at 183 ("The federal remedy is supplementary to the state remedy ...").

[Fn.14 See *Cromwell v. County of Sac*, 94 U.S. 351 (1877); F. James & G. Hazard, CIVIL PROCEDURE §§ 11.3, 11.16 (2D ED. 1977).]

The debates contain several references to the concurrent jurisdiction of the state courts over federal questions,

[Fn.15 *Triplett v. Lowell*, 297 U.S. 638 (1936), overruled by the Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,

402 U.S. 313 (1971); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912); F. James & G. Hazard, CIVIL PROCEDURE § 11.2 (2D ED. 1977); RESTATEMENT OF JUDGMENTS § 93 (1942); 1B J. Moore, FEDERAL PRACTICE ¶¶ 0.412 [1], 0.441 [3] (2D ED. 1974).]

and numerous suggestions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.

[Fn.16 Compare McCaskill, ACTIONS AND CAUSES OF ACTION, 34 Yale L.J. 614, 638 (1925) (defining "cause of action" as "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded"), with C. Clark, HANDBOOK ON THE LAW OF CODE PLEADING 84 (1928) (adopting "modern" rule expanding "cause of action" to include more than one "right"). See also 1 H. Herman, LAW OF ESTOPPEL AND RES JUDICATA §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); DEVELOPMENTS IN THE LAW -- RES JUDICATA, 65 Harv.L.Rev. 818, 826, 841-843 (1952).]

[449 U.S. at 99-100; paragraphing added.]

Thus, it is clear that this Court has jurisdiction to hear and dispose of this cause of action.

REQUIREMENTS FOR PRELIMINARY INJUNCTION

The leading case from the Fourth Federal Circuit governing preliminary injunctions is *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991). That case sets out the classic test for the grant of such relief:

The standard for preliminary injunctions is established in this Circuit by *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). Blackwelder clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction. See *L.J. BY AND THROUGH Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018, 109 S.Ct. 816, 102 L.Ed.2d 805 (1989). Four factors must be considered:

- (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
- (2) the likelihood of harm to the defendant if the requested relief is granted,
- (3) the likelihood that the plaintiff will succeed on the merits, and
- (4) the public interest.

Massinga, 838 F.2d at 120. The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the

balance "tips decidedly" in favor of the plaintiff, *see Merri Lynch*, 756 F.2d at 1054, a preliminary injunction will be granted if "the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Blackwelder*, 550 F.2d at 195; *see Todd by Todd v. Sorrell*, 841 F.2d 87, 88 n. 2 (4th Cir. 1988). As the balance tips away from the plaintiff, a stronger showing on the merits is required. *See Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980).

The above language, and test, of *Rum Creek* continues to be that followed by the Fourth Circuit. *Accord, Ciena Corp. v. Jarrard*, 203 F.3d 312 (4th Cir. 2000). The language and test are also those of Federal precedent countrywide.

LIKELIHOOD OF SUCCESS

The Plaintiffs Marshall argue that the practice of the City of Rock Hill in refusing them the ability to obtain utility service in their name on behalf, or involving, tenants with debts (or alleged debts) owing to the City is in violation of the Equal Protection Clause of the United States Constitution.

The Plaintiffs note that South Carolina has standing precedent on the duties of a utility supplier. In *DePass v. Broad River Power Co. ET AL.*, 173 S.C. 387, 176 S.E. 325 (1934) our Supreme Court stated:

It is true that a public service utility company, in the exercise of the franchises granted it, has certain rights and privileges not enjoyed by private enterprises. But it must be remembered that, as such utility, it is required to properly serve the public, and this duty or obligation it can neither neglect nor avoid. Nor can it choose its own customers, but must serve all who comply with its reasonable rules and regulations.
[173 S.C. at 405.]

There is also early South Carolina precedent backing the Plaintiffs' position. In deciding *Gaines v. Charleston Light & Water Co.*, 104 S.C. 136, 88 S.E. 378 (1914), the Supreme Court noted:

The whole transaction, then, shows that there were two houses supplied with water by the company from one service pipe with two mouths of exit, and that the company knew it and assented to it. These two tenants were then both subscribers to the service, by implied contracts. There was no contract, express or implied, betwixt the company and the landlord. The testimony negatives the conclusion that there was such a contract, and shows the contrary to it.
[*Id.* at 139.]

In short, our Court in *Gaines* premised its decision on the requirement of contractual relations to charge a person with responsibility for a utility bill.

The policy of this State is also opposed to the actions and policy of the City. S.C. Code Ann. § 27-33-50 (Law.Co-op.) states:

Financial responsibility of tenant for utilities.

(A) Unless otherwise agreed in writing, a tenant has sole financial responsibility for gas, electric, water, sewerage, or garbage services provided to the premises the tenant leases, and a landlord is not liable for a tenant's account.

(B) An entity or utility providing gas, electric, water, sewerage, or garbage services must not:

(1) require a landlord to execute an agreement to be responsible for all charges billed to premises leased by a tenant; or

(2) discontinue or refuse to provide services to the premises the tenant leases based on the fact that the landlord refused to execute an agreement to be responsible for all the charges billed to the tenant leasing that premises.

(C) This provision does not apply to a landlord whose property is a multi-unit building consisting of four or more residential units served by a master meter or single connection.

Thus South Carolina policy, as codified in the Code Section above, is that the landlord may not be made responsible for the tenant's bill by the utility supplier. He or she may, however, assume such responsibility by an agreement in writing. This Section is consistent with the position that the Plaintiffs advance.

The position advanced by the Plaintiffs is stated as the general rule by the commentators of AMERICAN JURISPRUDENCE 2D:

In the absence of a statute affecting his rights, the occupant of premises dependent upon a public service corporation for service, if otherwise entitled to such service, cannot be denied because he is the tenant and not the owner of the premises; nor can a property owner be made liable for charges incurred, even during his ownership, by an occupant of the property, as a condition of obtaining service for his premises.
[62 AM.JUR.2D *Public Utilities* § 46 (2002); footnotes omitted]

The controlling precedent under the Federal law and precedent is *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974). Counsel notes that while *Davis* has been discussed and distinguished under some circumstances (inapplicable to this action), it represents the ruling precedent on point, as will be shown by the discussion below.

In *Davis, supra*, the tenant was current in his utility payments. The City of Atlanta refused him service without prior notice due to landlord's defective plumbing repairs and that person's resulting bill. The Fifth Circuit in that case held, in relevant part:

The City's dispute over past due charges at Davis' apartment lies solely with his landlord. To require that Davis make this payment and attempt to recover it from the landlord amounts to nothing less than condemning Davis to pay the past debt of another before he is allowed to contract for water service.

[*Id.* at 145]

The Fifth Circuit in *Davis* went on to approve the lower District Court's grant of a preliminary injunction and the certification of a class action on the basis of the Equal Protection Clause. It quoted and approved the lower Court as follows:

'Under 'traditional' equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.' *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973). The Water Works urges that the practice of rejecting water service applications until all accrued debts at the premises have been extinguished facilitates collection of unpaid bills at multi-unit dwellings and preserves the City's municipal revenue bond rating. No one could doubt that the Department's methods are calculated to expedite the liquidation of unpaid bills. A collection scheme, however, that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence--water.

[Fn. 8 The District Court premised its constitutional inquiry on the proposition that 'water is an absolute necessity of life,' which the Water Department has undertaken to provide for its citizens.]

'The fact that a third-party may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between otherwise eligible applicants for water service.' *Davis v. Weir*, [359 F.Supp. 1023 (N.D.Ga. 1971)] at 1027. The Department's actions offend not only equal protection of the laws, but also due process. See *Bell v. Burson, supra*; cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972).

[*Id.* at 144-145.]

To restate: the Court in *Davis* recognized the existence of an Equal Protection claim, and approved the issuance of a preliminary injunction based thereon. It went on to approve the certification of a class action. *Id.*

The various Courts that have dealt with situations similar to that of *Davis* have followed its reasoning. In *O'Neal v. City of Seattle*, 66 F.3d 1064 (9th Cir. 1995), the Ninth Federal Circuit

dealt with that city's refusal to provide service to a new tenant based on a prior tenant's delinquent bill. The Ninth Circuit held, in relevant part:

Pursuing payment from the prior tenant and the landlord would be rationally related to the City's goal; refusing service to an unobligated new tenant is not. We conclude that the City's refusal to provide service to new tenants who would bear the responsibility for their own water usage is not rationally related to the City's interest in collecting debts for past water usage.

[Fn.4 The district court also concluded that in refusing to provide water service the City denied O'Neal due process. Because we affirm the district court's conclusions on equal protection grounds, we need not reach the alternative due process argument.]

[*Id.* at 1068.]

In short, the Ninth Circuit follows the Fifth Circuit in *Davis* in all relevant portions thereof.

In *Golden v. City of Columbus*, 404 F.3d 950 (6th Cir. 2004), the Sixth Federal Circuit dealt with that city's denial of water service to a tenant whose predecessor left delinquent account at the rental premises. The Sixth Circuit held, in relevant part:

The City submits that because the policy does not explicitly require tenants to pay their predecessors' debts, but instead imposes that obligation on landlords, it is constitutional. Whether the City's goal is that it be repaid by the person who owes the debt or by the tenant who is directly affected by its collection scheme is immaterial for constitutional purposes. Neither goal gives "the City license to pursue payment by refusing water service to an unrelated, unobligated third party, whether that third party be the new tenant or any other stranger to the prior service agreement." O'Neal, 66 F.3d at 1068.

[*Id.* at 962.]

Again, the Plaintiffs' position, as set forth in *Davis* and its accompanying precedent, is upheld.

In *Freeman v. Hayek*, 635 F.Supp. 178 (D.Minn. 1986), the Federal District Court dealt also with the consequences of a utility incurred by former tenant. That Court held, in relevant part:

The difficulty of delinquent bill collection does not, however, provide a sufficient basis for conditioning service to new customers upon the customer's payment of accounts incurred by prior residents. . . . The court concludes that defendants' policy to terminate service to certain customers based on the indebtedness of unrelated prior person, [*sic*] violates the Equal Protection Clause of the Fourteenth Amendment.

[*Id.* at 184]

Finally, the Court of Appeals for the State of Tennessee has dealt with facts even more closely resembling those in this action. In *Royce Smith v. Tri-County Electric*, 1985.TN.196, 689 S.W.2d 181 (Ct.App. 1985), Hix owed a past utility bill, and asked the utility supplier to put

service in the name of Smith. Tri-County Electric had a policy of refusing to supply electricity to an address if a person owing a delinquent bill lived at that address. The Tennessee Court concluded:

It is argued the rule under consideration is reasonably necessary to combat the so-called practice of rotation, *i.e.*, a customer contracts for electrical services, defaults on payment, and then enjoys the benefits of new electric service contracted by a friend or relative. The rule, as applied, encompassed a broader class of individuals than those who practice the rotation scheme. The rule denies an individual the right to contract for electrical service at any location in the area served by the defendant under all circumstances and relationships so long as another individual, who owes the defendant for electrical services, resides on the premises where electrical services are sought. The classification, we believe, is unreasonable and arbitrary. [Citation to *Davis v. Weir, supra*, omitted.]

[*Id.*, Para.[25]]

All cited precedent, and all known to counsel, supports the proposition that the distinction made by Rock Hill as a utility supplier is in violation of the Equal Protection Clause of the United States Constitution, and by implication, that of the South Carolina Constitution. Its imposition and enforcement are in violation of the Plaintiffs' rights. They are thus more than likely to succeed at the full trial of this matter and are entitled, on that basis, to the issuance of a preliminary injunction barring the enforcement of the said city policy.

LIKELIHOOD OF HARM TO THE DEFENDANTS

The harm to the City and its agents and employees is one: that they will be deprived, as to some persons, of the ability to force collection by means of the refusal of utility service. The *Davis* Courts found no resulting harm to the City and its collection scheme which could outweigh the other factors involved in the allowance of injunctive relief. The Plaintiffs contend that no such harm exists which can rise to that level.

IRREPARABLE HARM TO PLAINTIFFS

The Plaintiffs Marshall have submitted their Affidavit and verified Complaint in support of their request for preliminary injunction.

The essence of their argument is that they cannot quantify the damages resulting from the prevention of those potential tenants who might rent from them by the City. These persons may never apply. They may have multiple reasons for inability to rent, of which delinquent utility

bills are one factor alone, which cannot adequately be measured. They will often be persons unknown to the Plaintiffs. In short, there is no mechanism by which the damages caused by the City can be measured and reimbursed. Their true remedy is by equitable relief.

THE PUBLIC INTEREST

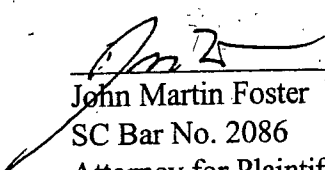
The cited language from *Davis*, *O'Neal* and *Freeman* Courts explicitly, and the other cited precedent implicitly, invoke the doctrine and the protection of the Equal Protection Clause of the Constitution of the United States, as set forth under the Fourteenth Amendment thereto. That Amendment provides, in relevant part:

SECTION. 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[*Id.*]

Under constitutional precedent, the States and their subdivisions are allowed to make legislative classifications if, and only if, that classification is rationally related to a legitimate governmental interest. The collection scheme of the City of Rock Hill is not, and cannot -- for all those reasons stated -- constitute a legitimate (or overriding) governmental interest.

The public interest in this action is to have the Equal Protection Clause and its attendant remedies enforced. The Plaintiffs should be granted a preliminary injunction.



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August 25, 2009

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA]
COUNTY OF YORK]

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

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,

Defendants.

AFFIDAVIT IN SUPPORT OF PRELIMINARY INJUNCTION

C.A. No. 09-CP-46-3360

Personally appeared before me the undersigned, who, being duly sworn, deposes and states as follows:

1. My name is Robert K. Marshall, Jr. With my wife, Donna Chapman Marshall, I run a rental management business that deals with three-hundred rental units within the city limits of Rock Hill. These units are within the area that is provided utility services (water, sewer and power) by the City of Rock Hill.
2. My wife and I have asked our lawyer to seek an injunction that will allow us to put utility service in our names and thus rent to persons who are unable to satisfy old utility debts owed (or claimed as owed) to the City of Rock Hill. I am told that I must show to the Court that there is a likelihood of irreparable harm to us if a preliminary injunction is denied.
3. As a result of what the City has done, and not done, as set out in our Complaint, we have lost tenants and potential tenants and rental income. On the basis of my experience of some 28 years in this business, and on the basis of the history of the three hundred rental units my wife and I manage, we will continue to lose potential tenants and rental income unless the City's policies are stopped. Poorer tenants and potential tenants will be placed in the same position as those

referenced in our Complaint, and will be unable to rent, and produce rental income, by reason of the City's actions.

4. Based on statements made by other landlords, and by the agents of the City, to me, other persons offering rentals within the corporate limits of the City have been allowed to contract for utility service in their own names and to charge their tenants with the cost of the same.

5. In addition to Mr. Willis, whose case is referenced in our verified Complaint, the following tenants or potential tenants have been unable to rent from us because of the policy complained of:

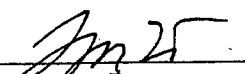
- a. Nakia Moffatt at 235 Whitgreen Street was forced to move in January, 2009. The City refused her power due to the debt of her roommate at a Pond Street address.
- b. Sherika Reid at 242 Whitgreen Street apparently moved because she was unable to obtain power. The Plaintiffs were forced to evict her belongings.
- c. Angel Joseph was refused power in May, 2009 because of a debt owed by her sister from 2005. Her deposit had to be returned to her.
- d. In June, 2009, Daryl Joseph, the brother of the person above, applied and was accepted, but could not rent due to the same situation set out above.

6. My wife and I anticipate the loss of rental income in the future because of the City's threatened continuation of its actions and policies which we are complaining of.

7. We believe it is impossible for us to quantify the number of tenants and potential tenants, with the resulting rental income, that our business will be deprived of in the future by reason of the City policies complained of. It is reasonable to assume that some persons will simply fail to apply to us for housing, or will go outside the area in which we manage rental units. In either event we will be deprived of our income.


Robert K. Marshall, Jr.

SWORN TO and subscribed before me
this day of August 25, 2009


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: 07/20/15

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. And
Donna Chapman Marshall,

Plaintiffs,

vs.

**RETURN TO MOTION FOR
TEMPORARY INJUNCTION**

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,

C.A. No. 09-CP-46-3360

Defendant.

Defendants the City of Rock Hill, Carey F. Smith, in his capacity as City Manager, and Lori Thomas, in her capacity as Customer Services Manager (collectively, "City") hereby submit the following in support of opposition to Plaintiffs' request for a temporary injunctive relief.

Introduction

Injunctive relief is not appropriate in this case. First, the injunctive relief sought will not preserve the status quo ante, but will alter it by Plaintiffs' own allegation. "The facts set out have been repeated at times in the past by the City and its agents and employees with regard to other rental clients or potential rental clients of the Plaintiffs." (Complaint, ¶17.) The ordinance in question dates back at least to 1993. The record

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shows that the status quo will be preserved by allowing the City to continue enforcement of its municipal ordinances. Thus, no drastic action by this court is necessary to preserve the status quo. Second, Plaintiffs do not face any irreparable harm. Any damages allegedly suffered by Plaintiffs is lost rents which can be compensated by money damages. Third, Plaintiffs are not likely to prevail on the merits given South Carolina law and persuasive cases from sister jurisdictions. Fourth, the balance of equities favors denial of the request for temporary injunction. Finally, Plaintiffs do not come close to satisfying the heightened threshold required to justify a court flexing its injunctive powers to strike a legislative enactment, much less within weeks of case commencement regarding a municipal ordinance that has been enforced for years.

Background

As with any utility provider, the City is burdened by unpaid utility bills after a utility customer relocates. The City has lost more than \$1 million from delinquent utility accounts over each of the last three years. (Aff. of Thomas, ¶3.) These losses impact the public fisc. (Aff. of Thomas, ¶3.) In order to mitigate uncollected accounts and the use of municipal utilities by persons that have failed to pay for utility services, the City passed an ordinance requiring delinquent customers to pay their prior account balances prior to receiving new utility service.

(Aff. of Thomas, ¶4.) Specifically, § 29-31(d) of the Code of Ordinances for the City of Rock Hill (hereinafter, "Utility Ordinance") provides that:

Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered.

"Family" is defined to include all persons living together in a dwelling unit. (Code of Ordinances, § 29-31(e).)

Plaintiffs attempted to rent the premises located at 1066 Cherokee Avenue ("Residence") to Charles Willis ("Willis"). (Aff. of Thomas, ¶10.) Willis requested that the City provide utility service to the Residence. (Aff. of Thomas, ¶11.) However, under the Utility Ordinance Willis could not get new service because of a delinquent utility account in the amount of \$749.21 from his prior residence located at 1125 Springdale Road in Rock Hill. (Aff. of Thomas, ¶12.) The City offered Willis payment plans for the past due amount in order to initiate service at the new Residence. (Aff. of Thomas, ¶¶13, 14.) Willis did not agree to any repayment plan. (Aff. of Thomas, ¶15.) Therefore, pursuant to the Utility Ordinance, the City denied service to Willis. (Aff. of Thomas, ¶15.)

To get around the Municipal Ordinance, Plaintiffs attempted to obtain utility service for Willis in their own name for the Residence. (Aff. of Thomas, ¶16.) The City indicated that in

order to provide utilities for Willis, even if in the name of Plaintiffs, Willis's past due utility debt would need to be paid in accordance with the Utility Ordinance. (Aff. of Thomas, ¶17.)

Plaintiffs filed this action claiming a violation of their civil rights. In addition, Plaintiffs seek to enjoin enforcement of the City's utility ordinance pending the outcome of this lawsuit.

Discussion

I. Temporary Restraining Orders and Temporary Injunctions

The applicable legal standards are problematic to Plaintiffs. "The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected." LeFurgy v. Long Cove Club Owners Ass'n, Inc., 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct.App.1994); Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law." Id. (citations omitted). "[T]he sole purpose of a temporary injunction is to preserve the status quo. . . ." MailSource, LLC v. M.A. Bailey & Associates, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct.App.2003) (citations omitted) (emphasis added). "Before

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granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Levine v. Spartanburg Regional Services Dist., Inc., 367 S.C. 458, 464, 626 S.E.2d 38 (Ct.App.2005). Thus, the keys are status quo, irreparable harm, balancing of the equities and likelihood of success on the merits. On each of these, the motion for injunctive relief is lacking.

A. Status Quo

The sole function of a temporary injunction is to maintain the status quo. MailSource, 356 S.C. at 368, 588 S.E.2d at 638. "[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation" County Council of Charleston v. Felkel, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) (quoted in MailSource, 356 S.C. at 368, 588 S.E.2d at 638.)

In this case, the condition of this controversy is the Utility Ordinance is in effect and being enforced. Plaintiffs' allegations confirm this fact. (Complaint, ¶17.) Thus, this request for injunctive relief fails in that it does not seek to preserve the status quo; rather, it seeks to alter the situation to a condition more to Plaintiffs' preference. Temporary

injunctive relief is not to serve this purpose. Rather, the plaintiff must demonstrate that the status quo has been threatened and an injunction is necessary to preserve the status quo pending final judgement. Plaintiffs have failed to identify or establish any irreparable harm.

B. Irreparable Harm; Inadequate Remedy at Law.

Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 455, 626 S.E.2d 34 (Ct.App.2005); citing Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). "The power of the court to grant an injunction is in equity. The court will reserve its equitable powers for situations when there is no adequate remedy at law." Strategic Resources Co., 367 S.C. at 544, 627 S.E.2d at 689.

Plaintiffs do not face irreparable harm as defined by any reported decision. A showing that the continued existence of an entire business is at risk without the injunction would be sufficient. See Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 455, fn.2, 626 S.E.2d 34 (Ct.App.2005). However, where a litigant has a remedy through enforcing and collecting a money judgment the grant of injunctive relief is not proper. Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct.App.2009).

Plaintiffs' damages, if any, are strikingly easy to quantify: loss of rental income. Plaintiffs have an adequate remedy at law through a judgment for money damages. Plaintiffs cannot claim that they will suffer irreparable harm if the Utility Ordinance is not enjoined temporarily given that the Utility Ordinance has been in effect for at least 16 years. It strains credulity for Plaintiffs to posit that after 16 years the City's enforcement of its ordinances suddenly has become an irreparable, destructive force in Plaintiffs' business such that immediate, summary injunction is necessary. Any such claim at this point is specious. Accordingly, an injunction is improper.

C. Balance of Equity

"In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case." Strategic Resources, 367 S.C. at 544, 627 S.E.2d at 689; Wynock v. Carroll, 289 S.C. 338, 340, 345 S.E.2d 503 (Ct.App.1986) (finding that the court must "take into consideration the relative inconvenience, hardship, or injury, which the parties will sustain by the granting or refusal of an injunction").

In this matter, the balance of the equities tilts decidedly to the City. Plaintiffs claim to be involved in 300 locations

within the City limits. (Affidavit in Support of Preliminary Injunction, ¶ 1.) The City serves approximately 95,000 people with utility service. (City of Rock Hill Website, Utilities Page.) The impact of any injunction would damage the City far in excess of any beneficial impact gained by Plaintiffs. Again, Plaintiffs are not reliant solely on equitable relief; the Complaint plainly sets forth their intent to recover money damages. Moreover, even if all things otherwise were equal, equity would favor the non-profit municipal corporation representing the interests of its citizens over a for-profit commercial going concern.

Moreover, the gravamen of Plaintiffs's claim is that they were unsuccessful in their attempt to circumvent the City's ordinance requiring payment of utility bills from past due accounts. Significantly, Plaintiffs do not allege that there is any tenant who is ready, willing and able to contract with them but for the Utility Ordinance. However, the City will suffer significant damage without the injunction as reflected by the magnitude of unpaid utility service each year. Without the Utility Ordinance the amount of such unpaid utility service will inexorably increase.

D. Success on the Merits.

Generally, analysis of the second prong necessary for injunctive relief, success on the merits, is truncated to a prima

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facie showing. However, in those rare cases where an enactment of a legislative body is being attacked on constitutional grounds, vitality is breathed into this prong and the movant must satisfy a heightened standard. "In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. However, when a plaintiff's prima facie case depends on an allegation that a statute is unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction." Curtis v. State, 345 S.C. 557, 576-577, 549 S.E.2d 591, 601 (2001) (citations omitted) (emphasis added).

In this matter, the City's enforcement of the Utility Ordinance is authorized by applicable statutes and South Carolina case law. Moreover, the Utility Ordinance is similar to enforcement provisions available to other utility providers under the Public Service Commission regulations. Finally, the City's enforcement of the Utility Ordinance does not violate any constitutional mandate.

1. No Violation of Constitutional Rights. Plaintiffs allege that the Utility Ordinance violates their due process and equal protection rights although Plaintiffs do not identify which protected right or protected class was violated through the City's enforcement of the Utility Ordinance.

(a). Due Process. "No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; S.C. Const. art. I, 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.' We have held that the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government. 'The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them.'" Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) (citations omitted).

"In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived

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of a cognizable property interest rooted in state law. The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property." Harbit v. City of Charleston, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct.App.2009) (citations omitted).

(b). **Equal Protection.** "Under the Equal Protection Clause of the Fourteenth Amendment, a state may not 'deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1; see S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). This clause requires that 'the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose.' It does not prohibit different treatment of people in different circumstances under the law. Instead, 'the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all

properties. The requirement that a delinquent customer make payment of unpaid invoices before such delinquent customer resumes utility service is rationally related to the City's desire to operate an efficient utility system for its citizens. Other municipal utility providers use similar payment requirements as set forth in the Utility Ordinance to collect on delinquent accounts. (Aff. of Thomas, ¶ 19.) Although the City is not governed by the Public Service Commission, the regulations of the PSC provide context and persuasive support. These regulations are substantially the same as the Utility Ordinance.

No electrical utility shall be required to furnish its service or to continue its service to any applicant who, at the time of such application, is indebted or any member of his household is indebted, under an undisputed bill to such electrical utility for service previously furnished such applicant or furnished any other member of the applicant's household. However, for the purposes of this regulation, the electrical utility may not consider any indebtedness which was incurred by the applicant or any member of his household more than six years prior to the time of application.

26 S.C.Code Ann.Reg. 103-342(k). Additionally, the "electrical utility may terminate a customer's service should the customer be in arrears on an account for service at another premise." 26 S.C.Code Ann.Reg. 103-342(l).¹

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¹ Similar provisions for water and sewer utilities are set forth at 26 S.C.Code Ann.Reg. 103-735(M), (N) and 26 S.C.Code Ann.Reg. 103-535(L), (M).

The Utility Ordinance is not disconnected from a legitimate public purpose. Rather, a reasonable hypothesis exists for the Utility Ordinance—obtaining unpaid utility accounts from the user of such service. See Sloan v. City of Conway, 347 S.C. 324, 331, 555 S.E.2d 684, 687 (2001) (rejecting claim (is unconstitutional disparate treatment where higher rates were charged to non-residents because Court found reasonable hypothesis in government's attempt to improve the condition of the public fisc.)

2. The Utility Ordinance is Valid.

In addition to not violating the Constitution, the Utility Ordinance is specifically authorized by State law. The authority to operate and regulate municipal utilities was succinctly set forth by the Supreme Court in Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425-426, 593 S.E.2d 462, 467 (2004) as follows:

'A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden of proving the invalidity of an ordinance is on the party attacking it. Determining whether an ordinance is valid is a two-step process. First, the Court must determine whether a municipality has the power to adopt the ordinance. If no power exists, the ordinance is invalid. Second, the Court must determine whether the ordinance is consistent with the Constitution and general laws of this state.

The Constitution provides, in pertinent part, that '[a]ny incorporated municipality may, upon a majority vote of the electors of such political subdivision who shall vote on the question, acquire by initial construction or purchase and may operate gas, water, sewer, electric, transportation or other public utility systems and plants.' S.C. Const. art. VIII, § 16. 'Each municipality of the State ... may enact

regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State . . . respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving the health, peace, order, and good government in it...." S.C.Code Ann. § 5-7-30. More specifically, 'any city or town may . . . [c]onstruct, purchase, operate and maintain waterworks and electric light works within or without, partially within and partially without, their corporate limits for the use and benefit of such city or town and the inhabitants thereof....' S.C.Code Ann. § 5-31-610.

See also Moody v. City of Orangeburg, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (citations omitted) (stating "Article VIII, Section 16 of the South Carolina Constitution specifically authorizes any municipality to own and operate electric utilities. The furnishing of electricity by a municipality is a governmental function, and discretionary decisions of municipalities will not be disturbed 'except in cases of fraud or clear abuse of power, or where unreasonable or capricious.'").

Section 5-7-30 cited above is commonly referred to as "Home Rule" and provides expansive powers to municipalities. "[B]y enacting the Home Rule Act, S.C.Code Ann. § 5-7-10, et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the

municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state." Williams v. Town of Hilton Head, 311 S.C.417, 422, 429 S.E.2d 802, 805 (1993).

As with any municipality, the City has "a broad grant of power to enact ordinances 'respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 554, 397 S.E.2d 662, 664 (1990) quoting S.C.Code Ann. § 5-7-30. Consequently, the City has the authority to adopt the Utility Ordinance.

3. Utility Ordinance is Consistent with Applicable Law.

Specifically, South Carolina law supports the City's denial of service to a former customer at a new location when that costumer has a delinquent account from a prior location.²

In De Pass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325 (1934), the Supreme Court ruled that a utility company may discontinue utility services for past due bills regardless of the

² By way of preface, it should be noted that courts have upheld the right to terminate utility service for nonpayment: See Gilbert v. Duke Power Co., 255 S.C. 495, 500, 179 S.E.2d 720, 722 (1971) (holding a "public service company has the right to discontinue its service to the customer upon the nonpayment by the customer of recent and just bills for the service furnished him, and has, also, the right to refuse a further supply of electricity until those bills are paid.")

address at which rendered. In De Pass, the customer applied for utility service at his residence but was refused service until he paid prior balance at two other locations. The service agreement in Depass provided that failure of the customer to pay invoices under the contract or any other contract permitted the utility company to terminate service. De Pass, 176 S.E. at 331. The Supreme Court held "[W]e see no real difference between the right of a utility company to discontinue service of a certain kind or type, on account of the consumer's failure to pay a past-due bill which is just and undisputed, and which the company has not allowed to become old or stale, and its right to refuse, for the same reason, to furnish at another place, and under a similar contract, upon demand of such customer, the same kind or type of service." Id.; see also Water Supply Bd. of City of Arab v. Williams, 302 So.2d 534, 536-37 (Ala.Civ.App.1974) ("The appellate courts of Alabama have long recognized the right of a water company to discontinue its service in order to coerce out of unwilling or laggard debtors the payment of its just demands. . . there appears to be no Alabama cases holding whether the water works can cut off the water from a consumer at one place to which it was supplied, under contract, for refusal of such consumer to pay a bill for water furnished him at another time and place under another contract. However, we can see no reason why such action could not be maintained and other jurisdictions so hold.").

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In this case, the Utility Ordinance requires payment of all past-due invoice from a prior location before connection of service to a new location. Code of Ordinances, § 29-31(d). In addition, a Service Agreement must be signed prior to commencement of service and Willis signed a Service Agreement with the City. (Aff. of Thomas, ¶¶ 7, 8.) The Service Agreement expressly provides that (i) the customer agrees to pay for all services; (ii) the City may discontinue service if the customer breaches the agreement; (iii) if service is disconnected for cause, the consumer agrees to pay all outstanding invoices for service to be restored; and (iv) the agreement is effective at the new address if the customer moves to another location. As in DePass, Willis has no right to utility service until his obligations are paid in full.

II. Plaintiffs' Reliance on 5th Circuit Case from 1974 is without Merit.

According to correspondence, Plaintiffs' lawsuit is premised upon Davis v. Weir, 497 F.2d 139 (5th Cir. 1974). However, the facts in Davis are materially distinct and subsequent cases citing Davis limit Davis to its facts.

In Davis, a tenant sued the city water department for its refusal to allow him to obtain service in his own name until his landlord's past due bill was paid. The court held "that the Department's discriminatory rejection of new applications for

water service based on the financial obligations of third parties fails to pass XIV Amendment muster under the traditional 'rational basis' analysis." Davis, 497 F.2d at 144. The Court of Appeals based its decision on the district court's opinion that "[t]he fact that a third party may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between otherwise eligible applicants for water service." Id.

As will be made plain by cases citing Davis, the decision in Davis flows from a tenant's inability to obtain utility service because of an unrelated landlord's debt. The City has not made such an attempt. Under the Utility Ordinance a utility customer cannot obtain utility service because utility services to such utility customer have become delinquent.

Similarly, the Fifth Circuit distinguished Davis in Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980). In Chatham, the issue before the court was "whether the city may terminate water service to a landlord when the tenant's bills are delinquent." Chatham, 613 F.2d at 75. In finding no fundamental right involved, the court stated "[w]e can imagine many valid reasons for the city's practice, and we do not find it arbitrary to coerce an owner into paying for services that benefitted his property." Chatham, 613 F.2d at 78. The court found "constitutional the City of Atlanta's policy of terminating water services to a property owner whose

tenant has become delinquent in paying its water bill." Chatham, 613 F.2d at 81. See also Ransom v. Marrazzo, 848 F.2d 398 (3rd Cir. 1988) (requiring that new occupants of location be responsible for prior utility services at that location); DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986) (requiring landlord acknowledgment and responsibility for tenant utility services); Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469 (6th Cir. 1992) (requiring landlord to satisfy past due services rendered to tenants prior to obtaining new service).

Plaintiffs contend Davis supports their position; however, Davis dealt with the case of a tenant being denied service for the unpaid bill of a landlord. Davis focused on the limited bargaining position and unfairness of requiring a tenant to pay for the landlord's debts. Instead, Plaintiffs' situation is more akin to Chatham where the City denied service to a landlord due to the unpaid bill of tenant. Moreover, the City has not used the Utility Ordinance to collect unpaid utility accounts from a landlord for a delinquent customer's prior utility debt. (Aff. of Thomas, ¶ 18.)

Thus, many jurisdictions allow imposition of a utility debt to the owner of the property or to new occupants. Both outcomes are significantly more attenuated than the Utility Ordinance which does not shift or expand liability beyond the actual users of the

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utility for which the debt was incurred. Therefore, the Utility Ordinance does not offend any constitutional rights of Plaintiffs. Based upon the foregoing, the City is authorized to deny service to Willis, regardless of who opens the account..

Conclusion

Based on the foregoing, the Court should deny the temporary restraining order preventing the City from enforcing its municipal ordinance.

Rock Hill, S.C.

Date: August 26, 2009

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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. And)
Donna Chapman Marshall,)

Plaintiffs,)

vs.)

AFFIDAVIT OF LORI THOMAS

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,)

C.A. No. 09-CP-46-3360

Defendant.)

PERSONALLY APPEARED before me Lori Thomas who, being duly sworn, deposes and says that:

1. Affiant is employed by the City of Rock Hill ("City") as the Customer Services Manager. Affiant has been employed by Rock Hill for more than two years.

2. In her capacity as Customer Services Manager she has personal knowledge of the matters contained herein.

3. Unpaid utility charges are a significant area of concern for the City and have a material impact on the public fisc amounting to over \$1 million of lost payments per year.

4. Consequently, the City has taken steps to collect these utility charges from those customers who used the City's utility

service but failed or refused to pay for the utility service ("delinquent customers").

5. The document attached to this Affidavit as **Exhibit A** is a genuine, correct and complete copy of Section 29-31 of the Rock Hill City Code ("Utility Ordinance").

6. The Utility Ordinance is an important means for the City to collect on unpaid utility accounts from the delinquent customers.

7. The City requires execution of the Customer Service Agreement prior to providing utility service.

8. The document attached to this Affidavit as **Exhibit B** is a genuine, correct and complete copy of the Customer Service Agreement signed by Charles Willis ("Willis") for 1125 Springdale Road, Unit 104, Rock Hill.

9. Willis resided at 1125 Springdale Road, incurred utility charges at 1125 Springdale Road and remitted payment for some utility charges at 1125 Springdale Road. However, Willis failed to pay utility charges in the amount of \$749.21.

10. Plaintiffs in the matter captioned above attempted to rent the premises located at 1066 Cherokee Avenue ("Residence") to Willis.

11. Willis requested that the City provide utility service to the Residence for him.

12. Under the Utility Ordinance, Willis could not get new utility service until payment of his delinquent utility account in the amount of \$749.21 from his prior residence at 1125 Springdale Road.

13. The City offered Willis a payment plan for the past due amount in order to initiate service at the Residence.

14. One payment plan proposed allowed for an initial payment of \$250.00 with three consecutive monthly installment payments of \$166.41.

15. Willis did not agree to the repayment terms and utility service was denied to Willis in accordance with the Utility Ordinance.

16. Plaintiffs then attempted to obtain utility service for Willis at the Residence in their own name.

17. However, under the Utility Ordinance in order to provide utilities for Willis, a delinquent customer, even if in the name of Plaintiffs, Willis would have to past his past due utility debt.

18. The Utility Ordinance is not intended to require third-parties to pay delinquent customer's unpaid utility charges and has not been used to effect such a result. Affiant is not aware of any occurrence where the City has collected unpaid utility charges from a landlord for a delinquent customer's prior utility debt.)

19. Upon information and belief, Affiant is informed that other municipal utility providers have enacted ordinances which are the same or similar to the Utility Ordinance.

Further, the Affiant sayeth naught.

Date: 8/25/09

Lori Thomas
Lori Thomas,
Customer Services Manager
City of Rock Hill

Sworn to before me this 25th
day of August, 2009.

Alivia M. Smith
Notary Public for South Carolina
My Commission Expires: 9/5/11

ARTICLE II. RATES, CHARGES AND BILLING**DIVISION 1. GENERALLY****Sec. 29-31. Payment of bills; delinquency.**

(a) Consumers of water, electricity, sewer service and all other services provided by the city shall pay without discount all bills rendered for such services not later than the 15th day following the rendition date, except that when the 15th day falls on Saturday, Sunday or a legal holiday, payment may be deferred until the next ensuing business day. On the sixth day thereafter, a three percent penalty will be added to the utility services account, which penalty shall be in addition to any other cost, expense or fee.

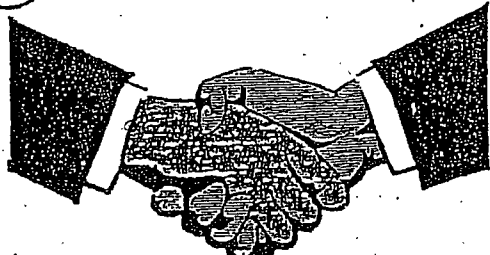
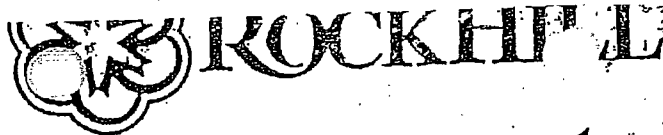
(b) For accounts that are past-due, a notice of disconnection is conspicuously displayed on the subsequent billing notice for that account. This notice details the date that payment must be received and the amount which must be paid to avoid disconnection of service.

(c) In some cases, the city employee will deliver a notice in lieu of the disconnection allowing an additional determined amount of time for a customer to satisfy the past-due balance prior to disconnection of service. Upon delivery of such notice, the same fee as set out in the schedule in appendix A shall apply to the account.

(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32.

(e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830.

(Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)



CUSTOMER SERVICE AGREEMENT

This agreement, when signed by the Consumer and by an authorized representative of the City of Rock Hill, shall become a contract under which the City of Rock Hill agrees to furnish Utility Services to the individual Consumer, and the Consumer agrees to receive and pay for said service in accordance with the Rate Schedule and the Service Regulations of the City of Rock Hill on file in the office of the City of Rock Hill, and as the same may be modified from time to time, which Rate Schedules and Service Regulations are hereby made a part of this contract as effectually as if fully set forth herein.

The Consumer must maintain a safe passageway for meter access by the City of Rock Hill. Additionally, the Consumer has the responsibility to keep the meter free from obstructions and to restrain pets or by removing obstacles that the City of Rock Hill might encounter at that property. Failure of the customer to provide free access may result in the termination of utility service until suitable access is provided. Bills may be rendered on the basis of estimated meter readings whenever the City of Rock Hill is unable to obtain a meter reading because of inaccessibility to the Consumer's premises, or for other reasons. In any case, consumption shall be estimated based upon the best information available.

The Consumer shall not interfere with, or alter the City of Rock Hill's meters, seals, or other property, or permit the same to be done by other than the City of Rock Hill's authorized agent or employee. Damage caused or permitted by the Consumer to said property shall be paid for by the Consumer. When unauthorized use of utility services is discovered, the City of Rock Hill may discontinue service and the Consumer shall be required to pay for the estimated unauthorized usage, the cost of investigation, reconnection, and any other loss resulting from the changing, tampering, or interfering with the meter, before service is restored.

The City will make all reasonable efforts to provide continuous and uninterrupted utility service, but cannot be liable for loss or damage (direct, consequential or otherwise) caused by any failure to supply electricity, water - sewer, or by an interruption, if it is due to any cause beyond the reasonable control of the City. The City cannot be held accountable for acts of God.

The Consumer who signs for service agrees to be responsible for receipt and payment of bills for these services. Failure to receive a monthly bill does not relieve Consumer of payment responsibility. If a bill is not received, the Consumer shall notify the City of Rock Hill before the past due date. Be it further agreed that should the Consumer move to an address other than the one given, the agreement shall be effective at the new address if the Consumer receives services from the City of Rock Hill. It is further understood that should the deposit be determined insufficient, the customer will make an additional deposit upon request from the City of Rock Hill not to exceed the two highest months utility bills.

This agreement shall continue indefinitely, unless otherwise provided, the same shall continue from month to month thereafter. The same may be terminated by either party after expiration of any fixed period initially specified, upon one working day notice to the other. It is further agreed that the City of Rock Hill reserves the right to discontinue services if the Consumer breaches this service agreement. If the service is disconnected for cause, the Consumer agrees to pay all outstanding bills and an applicable reconnection fee for service to be restored. The customer understands that the information furnished on this application will be verified and if determined inaccurate, will result in the termination of service without prior notice. The applicant understands that the City must take action and expend funds to comply with this request for service. By signing the application, the applicant signifies that he or she has the authority to request utility service at the location identified on the application. I attest that the information given on this contract is true and accurate to the best of my knowledge.



ROCK HILL

RESIDENTIAL SERVICE AGREEMENT

Name Charles Willis Date 10/21/04
Service Address 1125 #104 Springdale Rd - 3025298
Mailing Address _____ City _____ St _____
Account # 1598690 Electric ☒ Water _____ Sewer _____
Own _____ Rent ☒ If Rent, from whom:
Name Catawba Pointe City RH St SC
Address _____ Spouse Tihesher Griffith
Previous Service: Yes _____ No ☒ Roommate _____
Newcomer: Yes ☒ No _____ Employed McDonald's
From: CT-116 Locust ST RH SC Dave Lyle
DL#/Other CT/ID 147812538 Social Security # [REDACTED]
DOB 02/25/1974 Sex: M ☒ F _____ DL# /St _____
Social Security [REDACTED] Roommate _____
Home Ph# ND Employed _____
E-Mail Address _____

Life Support: Yes _____ No Type
Comments: Not field
Deposit Amt. \$ 150.00 Cut on date _____

By: Delecia A. De
Customer Service Representative

Charles Willis
Applicant's Signature

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Robert K. Marshall, Jr. and)
Donna Chapman Marshall,)

Plaintiff,)

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,)

Defendants.)

IN THE COURT OF COMMON PLEAS

INTERROGATORIES TO PLAINTIFFS

C.A. No. 09-CP-46-3360

TO: JOHN MARTIN FOSTER, ESQ., ATTORNEY FOR PLAINTIFFS

Defendant the City of Rock Hill ("City") hereby serves upon plaintiffs Robert K. Marshall, Jr. and Donna Chapman Marshall ("Plaintiffs"), the following interrogatories (the "Interrogatories") pursuant to Rules 26 and 33, SCRPC. Plaintiffs must respond to the Interrogatories within the time and in the manner prescribed by Rules 26 and 33, SCRPC, and serve a copy of the answers upon the undersigned.

INSTRUCTIONS

1. Each interrogatory must be answered separately, fully, under oath, and except as set forth below, without cross-reference to an answer to any other interrogatory. In any instance when the answer to an interrogatory is exactly the same as the answer to a previous interrogatory, the complete designation of the answer to

the previous interrogatory may be cited as a response to the subsequent interrogatory.

2. The answers to these Interrogatories must be made under oath and signed by the person(s) making them. Any objection must be signed by the attorney making the objection.

3. The Interrogatories shall be deemed to be continuing, in accordance with Rule 26(e), SCRPC. In particular, if you acquire or become aware of information pertinent to your answers to these Interrogatories after the service of your answers upon City, you must supplement or revise your answers to reflect the new information.

4. Subject to the limitations imposed by Rule 33(c), SCRPC, you have the option of allowing inspection or furnishing the original and all nonidentical copies of the relevant documents and records in lieu of identifying documents in your answers to these Interrogatories, provided you (a) specify which interrogatories are being answered in this manner and (b) identify each of the documents so supplied to show to which particular interrogatory it relates.

5. If any response relies upon a claim of privilege, exemption or confidentiality, whether in whole or in part, please state the following:

- (a) The nature of the privilege, exemption or confidentiality claim;
- (b) A general description of the nature of the matter withheld so as to identify the document (including, but

not limited to, the substance of the withheld information, name of author, date, and name of recipients);

- (c) The extent, if any, to which the information will be provided subject to the claim of privilege, exemption, or confidentiality; and
- (d) Whether you are willing to enter into a reasonable and necessary protective order setting forth those terms upon which you are willing to release any and all of the information otherwise claimed by you to be privileged, confidential or exempt from discovery.

DEFINITIONS

As used in these Interrogatories, the following words or terms shall have the definitions and meanings as set forth below. The word or term being defined is denoted by quotations.

1. "Document" means all items subject to discovery pursuant to Rule 34, SCRPC. Without limiting the generality of this definition, "document" includes all written, graphic, stored or recorded matter, however produced or reproduced, of every kind and description, including both original and nonidentical copies.

2. "Relate" or "relating to" means referring to, pertaining to, memorializing, constituting, embodying, evidencing, discussing, analyzing, reflecting, concerning, or having any logical or factual connection with the subject matter in question.

3. "Correspondence" means any letter, memorandum, telecopy, telegram, e-mail or other document which has been mailed, communicated, transmitted or otherwise passed from one person to another.

4. "Written statements" or "statements" means and includes:
- (a) A written statement signed or otherwise approved or adopted by the person making it; and
 - (b) A stenographic, mechanical, electronic or other type of recording or any transcript thereof which is prepared from information provided by a person.
5. "Person" means an individual, corporation, firm, partnership, venture, business, limited liability company or partnership, unincorporated association, subsidiary, joint venture; or a local, state or federal government or any department, agency, representative or agent thereof; or any other entity regardless of form.
6. "Identify" means as follows:
- (a) when used in reference to a natural person, to state his full name, present or last known home address and telephone number, present or last known business address and telephone number, and his present or last known position and business affiliation;
 - (b) when used in reference to a person other than a natural person, to state its full name and type of organization, the address and telephone number of its principal place of business and the jurisdiction and place of its incorporation or organization;
 - (c) when used with respect to an act, occurrence or conduct (hereinafter collectively called "act"), to describe the substance of the event constituting the act, state the date on which the act occurred, identify all persons participating in the act, identify all persons present when the act occurred, identify any documents which refer or relate to the act, and identify all persons having possession, custody or control of each such document;
 - (d) when used in reference to a document currently in your possession, to state a description of the type of document (e.g., letter, invoice, report), identification

of the author(s), date of writing, creation or publication, identification of each person(s) for whom the document was prepared and to whom it was delivered, mailed or otherwise received, the present custodian and current location of that document, and any other means of identifying it with sufficient particularity to meet the requirements for inclusion in a Request for Production of documents pursuant to Rule 34, SCRCP;

- (e) when used in reference to a document known to have existed but no longer existing, to state the information required in subpart (d) above as well as the document's last known custodian, and the date on which and the circumstances under which the document was lost, destroyed, or otherwise became unavailable;
- (f) with reference to a document once in your possession but no longer in your possession, to state the information required in subpart (d) above, the date on which and the circumstances under which the document was disposed of, destroyed, surrendered or otherwise left your possession, the identification of its present custodian and the location of such document; and
- (g) when used in reference to an oral communication, to state the date, identification of each person involved, the substance thereof, the method of such communication (e.g., in person, by telephone, etc.) and the identification of each document which refers or relates thereto.

7. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

8. The use of the singular form of any word includes the plural and vice versa and the use of the male gender includes the female and neuter gender.

9. Unless otherwise specified in a particular discovery request, "Plaintiff," "you," or "your" means and refers singularly

and collectively to plaintiffs Robert K. Marshall, Jr. and Donna Chapman Marshall; Rock Hill Property Management; and all persons acting on their respective behalf, including but not limited to partners, agents, representatives, employees, attorneys, administrators, heirs, executors, successors and assigns.

10. Unless otherwise specified in a particular discovery request, "City" means and refers to defendant the City of Rock Hill and all persons acting on its behalf, including but not limited to agents, managers, members, representatives, attorneys, employees and independent contractors.

11. "Defendants" means and refers to defendant City, Carey F. Smith, and Lori Thomas, and all persons acting on their respective behalf.

12. "Rock Hill Property Management" means and refers to Rock Hill Property Management, general partnership, and all persons acting on its behalf including agents, partners, managers, members, representatives, attorneys, employees, independent contractors, successors and assigns.

13. "Willis" means and refers to Charles Willis, who is referenced in the Complaint, and the agents, representatives, attorneys, heirs, executors, administrators, successors and assigns thereof.

14. The "Complaint" means and refers to the Complaint in the above-captioned action, designated C.A. No.: 09-CP-46-3360.

INTERROGATORIES

1. Identify all persons known or believed by you to have knowledge of any facts or circumstances of this lawsuit, and as to each, identify any written statements taken from such person and set forth a summary of the knowledge, information or facts known to or observed by such person.

2. Identify each person whom you expect to call as a fact witness in the trial of this matter, and as to each, identify and set forth the subject matter and facts on which you expect such witness to provide testimony.

3. Identify each person whom you expect to call as an expert witness at the trial of this case, and for each such expert provide the following:

- A. Identify all Documents which have been read, reviewed, considered, relied upon or prepared by the expert;
- B. Identify every field or area of expertise in which you expect to qualify the expert;
- C. Set forth and identify subject matter or issues on which the expert is expected to testify;
- D. State and identify all education, training and experience which qualifies the expert to provide opinion testimony for each subject matter and issue;
- E. State and identify the substance of the facts and opinions to which the expert is expected to testify; and
- F. Provide a summary of the grounds for each opinion.

9. Identify all actions by City that you contend were grossly negligent, willful, wanton, intentional, or malicious in this lawsuit.

10. Identify all incidents and occasions in which City failed to provide utility services to rental clients or potential rental clients of Plaintiffs and identify each of the subject rental clients or potential clients; the date or approximate date of each incident; the address and property location of each incident; a synopsis of the facts relating to each incident; and all communications with the City relating thereto.

11. Identify with specificity all monetary and other damages suffered by Plaintiffs which Plaintiffs are seeking to recover from City in this action.

12. Identify all incidents and occasions in which City has allowed a person to contract for utility services in their own name on behalf of a tenant, as alleged in Paragraph 19 of the Complaint, and as to each Identify the names of such persons and tenants; the date or approximate date of each incident; the address and property location to which each incident relates; a synopsis of the facts relating to each incident; and all communications with the City relating thereto.

SPENCER & SPENCER, P.A.

By: 

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ATTORNEYS FOR THE CITY OF ROCK
HILL

Rock Hill, South Carolina

Date: 1-18-2011

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

]]]

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff(s),

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,

Defendant(s).

ANSWERS TO INTERROGATORIES OF DEFENDANT

C.A. No. 09-CP-46-03360

Answers to Interrogatories to Plaintiffs, propounded by the Defendant The City of Rock Hill, South Carolina, pursuant to Rules 26 and 33, S.C.R.C.P., and served by mailing of January 18, 2011.

1. Identify all persons known or believed by you to have knowledge of any facts or circumstances of this lawsuit, and as to each, identify any written statements taken from such person and set forth a summary of the knowledge, information or facts known to or observed by such person.

Insofar as the form of the Interrogatory, or of any later Interrogatory, would require the Responding Parties to give information known to any party or parties other than themselves or any counsel other than that of the requesting party, the request is objected to as burdensome and overbroad.

Insofar as the form of the Interrogatory, or of any later Interrogatory, would require the Responding Parties to give information as to, or copies of, documents which represent or embody confidential communications between the Responding Parties and their counsel,

or which represent the work-product of Responding Parties' counsel, the same is objected to.

Preserving the objection(s) above, the following are provided:

Robert K. Marshall
c/o John Martin Foster
223 East Main Street, Suite 520
P. O. Box 106
Rock Hill, S. C. 29731-6106
803 324-8100

No written or recorded statement, other than the e-mails and correspondence referenced herein below and in the pleadings.

The only other documents which might constitute "written or recorded statements" which have been taken are the working notes of the counsel for the Plaintiff taken during his conversations with the witness; their production is hereby objected to, on the grounds stated above.

The person listed above is expected to testify to all factual matters relating to the transactions referenced in the Complaint, insofar as the same represent that person's personal knowledge or that of the person's business's regularly kept records.

Donna Marshall
c/o John Martin Foster
223 East Main Street, Suite 520
P. O. Box 106
Rock Hill, S. C. 29731-6106
803 324-8100

No written or recorded statement, other than the e-mails and correspondence referenced herein below and in the pleadings.

The only other documents which might constitute "written or recorded statements" which have been taken are the working notes of the counsel for the Plaintiff taken during his conversations with the witness; their production is hereby objected to, on the grounds stated above.

The person listed above is expected to testify to all factual matters relating to the transactions referenced in the Complaint, insofar as the same represent that person's personal knowledge or that of the person's business's regularly kept records.

Charles Willis
Address unknown
Presumed: Rock Hill, SC

No written or recorded statement.

The only other documents which might constitute "written or recorded statements" would be any applications or correspondence with the City of Rock Hill, copies of which have not been supplied to the Responding parties as of this date.

The person listed above is expected to testify to all factual matters relating to the transactions concerning himself and referenced in the Complaint, insofar as the same represent that person's personal knowledge or that of the Plaintiff or Defendant's business's regularly kept records.

Carey F. Smith,
City Manager for the City of Rock Hill
c/o Counsel for Defendants.
Presumed: Rock Hill, SC

No written or recorded statement, other than the e-mails and correspondence referenced herein below and in the pleadings.

The only other documents which might constitute "written or recorded statements" would be any correspondence or e-mails with or from the agents of the City of Rock Hill, copies of which have not been supplied to the Responding parties as of this date.

The person listed above is expected to testify to all factual matters relating to the transactions referenced in the Complaint, to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the Plaintiff or Defendant's business's regularly kept records.

Lori Thomas
Customer Services Manager
City of Rock Hill Utilities
c/o Counsel for Defendants.
Presumed: Rock Hill, SC

No written or recorded statement, other than the e-mails and correspondence referenced herein below and in the pleadings.

The only other documents which might constitute "written or recorded statements" would be any correspondence or e-mails with or from the agents of the City of Rock Hill, copies of which have not been supplied to the Responding parties as of this date.

The person listed above is expected to testify to all factual matters relating to the transactions referenced in the Complaint, to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the Plaintiff or Defendant's business's regularly kept records.

Unknown agents or employees
City of Rock Hill Utilities
c/o Counsel for Defendants.
Presumed: Rock Hill, SC

No written or recorded statement.

The only other documents which might constitute "written or recorded statements" would be any correspondence or e-mails with or from the agents of the City of Rock Hill, the Plaintiffs or other named witnesses or consumers, copies of which have not been supplied to the Responding parties as of this date.

The person(s) listed above is or are expected to testify to all factual matters relating to the transactions referenced in the Complaint, to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the Plaintiff or Defendant's business's regularly kept records.

Unknown agents or employees
The Latham Company
1420 Riverview Road
Rock Hill, SC
803 366-9421

No written or recorded statement, other than below-referenced e-mail.

The person(s) listed above is or are expected to testify to all factual matters relating to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the witness' Company's or Defendant's business's regularly kept records.

Unknown agents or employees
The Latham Company
1420 Riverview Road
Rock Hill, SC
803 366-9421

No written or recorded statement, other than below-referenced e-mail.

The person(s) listed above is or are expected to testify to all factual matters relating to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the witness' Company's or Defendant's business's regularly kept records.

Unknown agents or employees
Cobb House Apartments
366 East Main Street
Rock Hill, SC 29730
803 327-5612

No written or recorded statement, other than below-referenced web pages.

The person(s) listed above is or are expected to testify to all factual matters relating to the practice and policies of the City of Rock Hill and specifically of its utility department or division, insofar as the same represent that person's personal knowledge or that of the witness' Company's or Defendant's business's regularly kept records.

2. Identify each person whom you expect to call as a fact witness in the trial of this matter, and as to each, identify and set forth the subject matter and facts on which you expect such witness to provide testimony.

As of this time, the Plaintiffs expect to call all persons listed above as witnesses. This Interrogatory is answered in response to Interrogatory No. 1 above.

3. Identify each person whom you expect to call as an expert witness at the trial of this case, and for each such expert provide the following:

- A. Identify all Documents which have been read, reviewed, considered, relied upon or prepared by the expert;
- B. Identify every field or area of expertise in which you expect to qualify the expert;
- C. Set forth and identify subject matter or issues on which the expert is expected to testify;
- D. State and identify all education, training and experience which qualifies the expert to provide opinion testimony for each subject matter and issue;
- E. State and identify the substance opinions to which the expert testify; and of the facts and is expected to testify; and
- F. Provide a summary of the grounds for each opinion.

As of this time, the Plaintiffs do not expect to call any expert witness as to any fact in contention. In the event this should change, they will timely inform the Defendant.

4. Identify all Documents that relate to any claim, defense or issue in this lawsuit. This interrogatory includes, but is not limited to, memoranda, notes, contracts, correspondence, financial records, photographs, plats, sketches, drawings, surveys, appraisals, whatsoever, videotapes or prepared documents of any type whatsoever.

Printout of e-mails between Marshall and Thomas dated June 24 - June 30, 2009, and City utility record on Charles Willis (9 pages) printed out on 07/17/09;

Printout of e-mails between Marshall and Thomas dated July 17 - July 20, 2009, printed out on 07/20/09;

[Copies of the above have been supplied as attachments to the Complaint.]

E-mail to counsel showing Albright Realty ad relating to 311 Oakland, dated September 21, 2009;

E-mail to and from the Latham Company dated July 21 to July 23, 2009;

Web pages (4) of *www.CobbHouse.com*, printed June 1, 2011;

The Plaintiffs again reference records of the Defendant having relevance to this civil action and which have not been produced in response to discovery requests.

5. Identify each and every policy and practice of the City that you contend deprived Plaintiffs of any rights, privileges and immunities, directly or indirectly, in this matter.

The Plaintiffs have, on information and belief, adequately referenced and identified those deprivations in their Complaint.

6. Identify all ways in which you contend City failed to maintain policies and practices that contributed to the deprivation of Plaintiffs' rights, privileges and immunities, directly or indirectly, in this matter.

The Plaintiffs have, on information and belief, adequately referenced and identified those failures in regard to policies and practices in their Complaint.

7. Identify all actions or failures to act by City which you contend were In disregard of Plaintiffs' constitutional rights.

The Plaintiffs have, on information and belief, adequately referenced and identified those actions in disregard of their rights in their Complaint.

8. Identify and specifically set forth all occasions in which Plaintiffs were subjected to liability for past due bills of third parties as alleged in Paragraph 17 of the Complaint and Identify each of the third-parties for which you were liable; the date or approximate date of such incidents; the surrounding facts of each incident; and any communications with City relating thereto.

On information and belief, Paragraph 17 and the Complaint generally set forth incidents in which the City's refusal to fairly administer its obligation to supply utilities and to bill only the legally responsible parties thereon, resulted in the inability of potential tenants to rent, the loss of those tenants to the Plaintiffs and the Plaintiff's consequent loss of income. There is no claim in the Complaint that the Plaintiffs were personally made liable for past due bills of third parties. This Interrogatory has, therefore, no application to them.

9. Identify all actions by City that you contend were grossly negligent, willful, wanton, intentional, or malicious in this lawsuit.

The Plaintiffs have, on information and belief, adequately referenced and identified those actions in their Complaint. They would also respond that the City's enforcement and attempted enforcement of legal liability for utility service in the face of clear Federal precedent to the contrary, is action falling within the description of the Interrogatory above.

10. Identify all incidents and occasions in which City failed to provide utility services to rental clients or potential rental clients of Plaintiffs and identify each of the subject rental clients

or potential clients; the date or approximate date of each incident; the address and property location of each incident; a synopsis of the facts relating to each incident; and all communications with the City relating thereto.

The Plaintiffs have, on information and belief, adequately referenced and identified those failures to provide service, the tenants or potential tenants, the dates and addresses, the relevant facts and the communications thereon, in their Complaint.

Nakia Moffatt at 235 Whitgreen Street was forced to move in January, 2009. The City refused her power due to the debt of her roommate at a Pond Street address.

Sherika Reed at 242 Whitgreen Street apparently moved ca. early 2009 because she was unable to obtain power. The Plaintiffs were forced to evict her belongings.

Angel Joseph was refused power in May 2009 because of a debt owed by her sister in 2005. Her deposit had to be returned to her.

In June, 2009, Daryl Joseph, the brother of Angel Joseph referenced above, applied to the Plaintiffs and was accepted, but could not get utilities due to the same debt referenced above.

On knowledge and information, other potential tenants have been denied and thus prevented from renting. To the extent that any identifying information thereon exists, it will be supplied to the Defendant.

11. Identify with specificity all monetary and other damages suffered by Plaintiffs which Plaintiffs are seeking to recover from City in this action.

At present, the Plaintiffs' only mechanism to state their damages are to estimate the number of months their rental property or properties stayed vacant owing to the City's policies as referenced in the Complaint. At this time the Plaintiffs have vacant units that are costing them the potential income of \$5,940 per month. Their vacancy rate was more at the time of the disagreement which led to this civil action, but was not much greater. It is Plaintiffs' understanding and position that, were they allowed to offer utilities included, as their competition does, their vacancy rate would have changed to a great degree. Such a change by the City would have greatly increased their ability to fill their units considering the economic hardship that putting up a \$300 deposit with the city and \$300 with the gas company imposes on those potential tenants.

Because of the exclusion of the Plaintiffs from including utilities, they calculate that they could have lost as much as 24 months on 24 units which would result in a loss of about \$142,560.00 plus their costs and attorney fees in this action.

12. Identify all incidents and occasions in which City has allowed a person to contract for utility services in their own name on behalf of a tenant, as alleged in Paragraph 19 of the Complaint, and as to each identify the names of such persons and tenants; the date or approximate date of each incident; the address and property location to which each incident relates; a synopsis of the facts relating to each incident; and all communications with the City relating thereto.

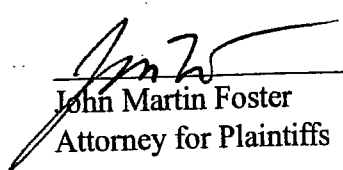
On knowledge and information, before May, 2011, Robert Nelson rented property located at 219 Johnston Street, owned by Peter Perrill and managed by Gray. The utilities other than gas are in the name of owner.

On knowledge and information, rental property owned by Blackmon Huckabee or his family was, at least prior to 2007, supplied by utilities in the owner's name.

On knowledge and information, the Cobb House and the Latham Company offer rentals with the utilities included.

The Albright Company offered commercial property at 311 Oakland in ca. September, 2009 with utilities included. On knowledge and information, the practice has continued as to other properties.

On knowledge and information, other landlords in the City supply utilities to the tenants without credit checks through the City as to old bills. The basis on which this is allowed, or on which the distinction is made between their allowed practice and the refusal to allow the Plaintiffs to do the same, is unknown.


John Martin Foster
Attorney for Plaintiffs

The Guardian Building
223 East Main Street, Suite 520

Rock Hill, S. C. 29730
.O. Box 106
Rock Hill, S. C. 29731-6106

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

June 1, 2011

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. and)
Donna Chapman Marshall d/b/a)
Rock Hill Property Management,)
a South Carolina General)
Partnership,)

Plaintiffs,)

vs.)

MOTION FOR SUMMARY JUDGMENT

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,)

Defendants.)

C.A. No. 09-CP-46-3360

PLEASE TAKE NOTICE that defendants City of Rock Hill, Carey F. Smith and Lori Thomas (collectively, "City") hereby move, at such time and place as is convenient to the Court and counsel, but no sooner than 10 days from the date of service of this Motion, for entry of an order granting summary judgment pursuant to Rule 56(b), SCRCF in favor of the City. In support of this Motion, the City submits as follows.

1. **Background.** On August 5, 2009 Plaintiffs Robert K. Marshall and Donna Chapman Marshall d/b/a Rock Hill Property Management (collectively, "Plaintiff") filed this action claiming a violation of its constitutional rights pursuant to 42 U.S.C. § 1983. The gravamen of Plaintiff's claim is that § 29-31 of the

Code of Ordinances for the City of Rock Hill (hereinafter, "Utility Ordinance") and the enforcement thereof have caused Plaintiff "to be deprived of life, liberty or property without due process of law, and of its right to be accorded the equal protection of the laws, as guaranteed under the Fourteenth Amendment of the United States Constitution." (Complaint, p. 4, ¶ 23). (A true and correct copy of the Utility Ordinance is attached hereto at Exhibit "A").

2. Summary Judgment. Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703 (1976). Summary judgment should be granted if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRPC. There are no genuine issues of material fact presented in this matter and the City is entitled to judgment dismissing the Complaint with prejudice.

3. Grounds for Motion. "Where a complaint is brought under 42 U.S.C. § 1983, two elements must be established before there can be recovery. First, the plaintiff must demonstrate that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must demonstrate that the defendant deprived him of this constitutional

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right under color of state law." Adickes v. S. H. Kress Co., 398 U.S. 144 (1970).

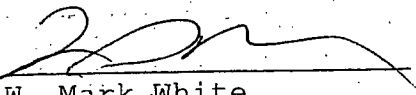
Even viewing all facts in a light most favorable to Plaintiff, Plaintiff's claims must fail as a matter of law. The record does not contain sufficient facts to support Plaintiff's claims against the City as a matter of law, and the Court should grant summary judgment in favor of the City as set forth herein.

4. Memorandum of Law and Affidavits. In support of this Motion, the City submits the attached true and correct copy of the Utility Ordinance at issue in this action. Prior to the hearing on this Motion, and in accordance with the South Carolina Rules of Civil Procedure, the City may file with the Court and serve upon Plaintiff reply affidavits, as well as other evidence and a memorandum in support of this Motion. At the hearing the City will make such arguments and offer such law as appears pertinent and dispositive at that time.

WHEREFORE, the City respectfully requests that the Court enter an order granting summary judgment in favor of the City and dismissing the Complaint with prejudice.

SPENCER & SPENCER, P.A.

February 29, 2012

By: 

W. Mark White
Jeremy D. Melville
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
803/327-7191 - Telephone
803/327-3868 - Telecopy

ATTORNEYS FOR CITY OF ROCK HILL

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99235.2

Page 4 of 4

ARTICLE II. RATES, CHARGES AND BILLING

DIVISION 1. GENERALLY

Sec. 29-31. Payment of bills; delinquency.

(a) Consumers of water, electricity, sewer service and all other services provided by the city shall pay without discount all bills rendered for such services not later than the 15th day following the rendition date, except that when the 15th day falls on Saturday, Sunday or a legal holiday, payment may be deferred until the next ensuing business day. On the sixth day thereafter, a three percent penalty will be added to the utility services account, which penalty shall be in addition to any other cost, expense or fee.

(b) For accounts that are past-due, a notice of disconnection is conspicuously displayed on the subsequent billing notice for that account. This notice details the date that payment must be received and the amount which must be paid to avoid disconnection of service.

(c) In some cases, the city employee will deliver a notice in lieu of the disconnection allowing an additional determined amount of time for a customer to satisfy the past-due balance prior to disconnection of service. Upon delivery of such notice, the same fee as set out in the schedule in appendix A shall apply to the account.

(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32.

(e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830.

(Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Robert K. Marshall, Jr. And
Donna Chapman Marshall,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS

CERTIFICATE OF SERVICE

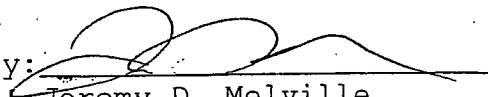
C.A. No. 09-CP-46-3360

I certify that the foregoing Motion for Summary Judgment has
been served by depositing a copy in a United States Postal Service
mail box, first class, postage-prepaid on the date and to the
addressee shown below.

John Martin Foster
223 East Main Street, Suite 520
P.O. Box 106
Rock Hill, SC 29731
Attorney for Plaintiffs

SPENCER & SPENCER, P.A.

February 29, 2012

By: 

Jeremy D. Melville
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
803/327-7191 - Telephone
803/327-3868 - Telecopy

ATTORNEYS FOR CITY OF ROCK
HILL

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Robert K. Marshall, Jr. and)
Donna Chapman Marshall, d/b/a)
Rock Hill Property Management,)
a South Carolina general)
partnership,)

Plaintiffs,)

vs.)

MEMORANDUM IN

**SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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,)

C.A. No. 09-CP-46-3360

Defendant.)

Defendants the City of Rock Hill, Carey F. Smith, in his capacity as City Manager, and Lori Thomas, in her capacity as Customer Services Manager (collectively, "City") hereby submit the following memorandum in support of its Motion for Summary Judgment ("Motion").

Background

As with any utility provider, the City is burdened by unpaid utility bills after a utility customer relocates. In order to mitigate uncollected accounts and the use of municipal utilities by persons who have failed to pay for utility services, the City passed an ordinance requiring delinquent consumers to pay the past

due account balances prior to receiving utility service at a new location. Specifically, § 29-31(d) of the Code of Ordinances for the City of Rock Hill (the "Ordinance") reads as follows:

Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered.

"Family" is defined to include all persons living together in a dwelling unit. (Code of Ordinances, § 29-31(e).)

The gravamen of the claim asserted by Plaintiffs is that the Ordinance has violated their constitutional rights. Plaintiffs generally allege that the City's actions "were done with the purpose and intent of depriving Plaintiff's of the property rights secured to them under the Fourth and Fourteenth Amendment to the United States Constitution, of its right not to be deprived of life, liberty or property without due process of law, and of its right to be accorded the equal protection of the laws. . . ." (Complaint, ¶ 23.) For the reasons set forth herein, the City is entitled to summary judgment as to Plaintiff's claims in this action.

Statement of Facts

Based on the records before the Court, the following facts are not in dispute in this action.

1. Unpaid utility charges are a significant area of concern for the City and have a material impact on the public fisc

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amounting to over \$1 million in lost payments per year. (Thomas Aff., ¶ 3.)

2. The Ordinance provides an important method for the City to collect delinquent utility charges from those customers who failed or refused to pay for the utility services. (Thomas Aff. ¶¶ 4, 6.)

3. The Ordinance is analogous to regulations of the Public Service Commission in South Carolina and statutes governing utility providers in North Carolina. (Thomas Aff. ¶ 19.)

4. At the time any person applies for utilities services with the City for a specific location, that person is required to fill out an application and Customer Service Agreement ("Service Agreement"). (Thomas Aff. ¶ 7.)

5. The Service Agreement requires that the applicant name all other persons residing at the location for which utilities are to be provided (collectively "Consumers"). (Thomas Dep., p. 16:9-12.)

6. The City searches its records for each of the designated Consumers to review for delinquencies. (Thomas Dep. p. 16:13-15.)

7. If a search reveals a Consumer has a payment delinquency from a previous location, that Consumer is required to pay the delinquency before being permitted to receive utilities at the new location. (Thomas Dep. p. 32:5-8.)

8. Plaintiffs are in the property management business. (Marshall Dep. p. 6:9.)

9. Charles Willis entered into a lease with Plaintiffs to rent the property located at 1066 Cherokee Avenue in Rock Hill, South Carolina ("Cherokee Property ") on or about May 29, 2009. (Marshall Dep. p. 15:9.)

10. Willis requested City utilities at the Cherokee Property. (Thomas Aff. ¶ 11.)

11. Willis had a past due utilities account with the City from his previous residence in the amount of \$749.21. (Thomas Aff. ¶9; Marshall Dep., p. 93:23 to p. 94:1.)

12. Pursuant to the Ordinance, Willis was required to enter into a payment plan to satisfy his delinquencies prior to obtaining utilities at his new location. (Thomas Aff. ¶ 12.)

13. Willis did not agree to a repayment plan to address his delinquency and Utility services were denied in accordance with the Ordinance. (Thomas Aff. ¶ 15.)

14. Subsequently Plaintiffs sought to circumvent the Ordinance by requesting that utilities be provided for Willis in the name of Plaintiffs (Thomas Aff. ¶ 16.)

15. Pursuant to the Ordinance Plaintiffs were advised that Willis would have to satisfy or agree to a payment plan to satisfy his delinquency prior to receiving utilities at the Cherokee Property. (Thomas Aff. ¶ 17.)

16. The City has never held or attempted to hold Plaintiffs liable for the past due account of Willis, or any other tenant or potential tenant of Plaintiffs. (Thomas Aff. ¶ 18; Plaintiffs' Responses to Interrogatories, No. 8.; Marshall Dep. p. 49:8-10.)

17. Willis ultimately satisfied his delinquency with the City and had utilities turned on at the Cherokee Property where he resided until approximately June 15, 2010. Plaintiffs evicted him for failure to pay rent. (Marshall Dep. p. 17:2-5.)

18. Many locations receiving utilities from the City are set up on a "master meter" system whereby the utilities to multiple dwelling units are supplied in the name of a common owner. (Thomas Dep. p. 14:21 to p. 15:1.)

19. All persons applying for initial utilities are required to disclose the Consumers to reside at the location, and service will be denied to the location if any Consumer has a delinquency from a prior location. (Thomas Dep. p. 16:16-24.)

20. Plaintiffs have identified only the following individuals as persons who were entitled to contract for City utility services in their own name on behalf of tenant (collectively "Plaintiffs' Competitors"): Robert Nelson, Peter Perrill, Blackmon Huckabee or his family; the Cobb House; Latham Company; and Albright Company (Responses to Int., p. 8, No. 12.)

21. The record is devoid of any evidence showing that Plaintiffs are or have been treated differently than Plaintiffs' Competitors or any other person with respect to the Ordinance.

Discussion

This lawsuit is brought solely under 42 U.S.C. § 1983 seeking relief for alleged violations of Plaintiffs' constitutional rights. As set forth by the Fourth Circuit: "The essential elements to be proved in any section 1983 action are (1) that the defendant was acting under color of state law in the actions complained of; and (2) that the defendant deprived Plaintiffs of a right, privilege or immunity secured by the Constitution or laws of the United States." Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988). "If there is no violation of a federal right, there is no basis for a section 1983 action" Id.

Based on the record before the Court, the City is entitled to judgment as matter of law on the grounds that there is no evidence that Plaintiffs have been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States."

I. Failure of Plaintiffs' Pleadings

The pleading rules of the South Carolina Rules of Civil Procedure require that Plaintiffs state "the facts showing that the pleader is entitled to relief." Rule 8, SCRPC. The courts have elucidated the pleading requirement by stating that

Plaintiffs are required to set forth the "ultimate facts" which if proven at trial would entitle the pleader to the relief sought. Stroud v. Riddle, 260 S.C. 99, 103, 194 S.E.2d 235, 237 (1973).¹

With respect to the two constitutional rights upon which this action is based, Due Process and Equal Protection, Plaintiffs have failed to plead or otherwise the specific rights, classifications and violations thereof which it contends are in violation of the federal constitution. In Hawkins v. Freeman, the Fourth Circuit stressed that the most important aspect of any Due Process claim is the nature and description of the right at issue. 195 F.3d 732, 747 (4th Cir. 1999). However, three years into the litigation of this case, the City is still forced to speculate as to specific right(s) at issue in this action.

Likewise, Plaintiffs have failed to plead or otherwise set forth the nature of the pertinent classification or discrimination allegedly entitling it to relief under Equal Protection analysis.² "In order to survive a motion to dismiss an equal protection claim, a plaintiff must plead sufficient facts to demonstrate plausibly that he was treated differently from others who were similarly situated and that the unequal treatment was the result

¹ As discussed by Professor Flanagan: "Code Pleading has two core concepts: First, each element of the cause of action must be alleged and a complaint that omits an element fails to state a claim. Second, the pleader must describe each element of the cause of action in terms of the facts of the case." James F. Flanagan, South Carolina Civil Procedure, 63 (2010).

² "A crucial step in the analysis of any equal protection issue is the identification of the pertinent class, i.e., exactly who is included in the group of persons allegedly being treated differently under similar circumstances without any rational basis." Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006)

of discriminatory animus." Equity In Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 108 (4th Cir. 2011); see also Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 819 (4th Cir. 1995) ("[T]he plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized.").

Consequently, Plaintiffs has failed to state a claim entitling them to relief under 42 U.S.C. § 1983.

B. Equal Protection

Even if the Court were to look beyond the failure of Plaintiffs' pleadings with respect to Plaintiffs' Equal Protection claim, the City is entitled to judgment as a matter of law on the grounds that the Ordinance does not discriminate between Plaintiffs and any similarly situated persons either facially or as applied to the facts of this case.

"Under the Equal Protection Clause of the Fourteenth Amendment, a state may not 'deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. If a classification does not (1) implicate a "fundamental right" or (2) draw upon suspect classifications such as race, religion or alienage, an ordinance must only be rationally related to a legitimate governmental purpose. Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995). "Thus, when social or economic legislation is involved,

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the states are permitted wide latitude in adopting classifications to further legitimate governmental purposes." Id.

Pursuant to the rational basis standard of review, the judicial branch grants legislative bodies substantial deference as explained by the South Carolina Supreme Court:

A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it. The Court must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue. Furthermore, the classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge. When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.

Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006).

The South Carolina Supreme Court has conveniently summarized rational basis review of a statute or ordinance under the Equal Protection Clause of the federal constitution as a three step analysis: "(1) [W]hether plaintiff was treated differently than others similarly situated; (2) whether defendant intentionally discriminated against plaintiff and had a rational basis for doing so; and (3) whether the discrimination/classification bears a rational relationship to a legitimate government purpose or goal."

Bibco Corp. v. City of Sumter, 332 S.C. 45, 52-53, 504 S.E.2d 112, 116 (1998).

A. No evidence showing Plaintiffs were treated differently than others similarly situated

The record in this case is devoid of any evidence of discrimination against Plaintiffs either on the face of the Ordinance or as applied to the facts of this case. As explained by the Fourth Circuit, the court must determine whether the statute at issue is patently discriminatory and if not whether there is a purposeful discrimination as to the Plaintiffs:

If the classification utilized is explicitly stated on the face of a statute or in the reasons given for its administration or enforcement, then the equal protection analysis requires us to determine whether an appropriate relationship exists between the legislative purpose and the classification adopted to achieve that purpose. On the other hand, if a classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized. And only if the use of a classification is thus established does the equal protection analysis proceed with the inquiry into whether the classification furthers a legitimate legislative purpose.

Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 819 (4th Cir. 1995). The Fourth Circuit explains further that "[t]o prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state intended to discriminate" Id. at 819.

The Court need go further than the first step of the Equal Protection analysis to determine that Plaintiffs' claims as to Equal Protection fail as a matter of law. The Ordinance itself is facially neutral and applies equally to all persons seeking utilities for a delinquent Consumer.

Moreover, the record lacks any evidence suggesting that the City has even *unintentionally* discriminated against Plaintiffs. The record indicates that the City requires all applicants for utilities to complete the Customer Service Agreement and disclose the Consumers to reside at the location. Regardless of the applicant, the Ordinance does not allow a delinquent Consumer to receive utilities at a new location before entering into a payment arrangement for the previous delinquency.

Further, the record in this case is devoid of evidence showing that any person, including Plaintiffs' Competitors, have been or would have been treated any differently than Plaintiffs were treated when Plaintiffs sought utilities for Mr. Willis at the Cherokee Property. Plaintiffs' claim of discriminate treatment is grounded solely on conjecture and speculation. (Robert Marshall Dep. p. 78:7-10; pp. 81:7 to 82:13.) Both Plaintiffs admitted that they have no information to suggest that any of Plaintiffs' Competitors were obviated of the requirements of the Ordinance or otherwise treated differently from Plaintiffs with respect to the Ordinance. (Robert Marshall Dep. pp. 89:7 to

90:1; Donna Marshall Dep. p. 7:3-8.) Because there is no evidence of discrimination on the face of the Ordinance or of intentional discrimination as to Plaintiffs, the City is entitled to judgment as a matter of law.

B. Any discrimination as to Plaintiffs or tenants passes muster under rational basis review

Based on the record it appears that the only potential discriminatory classifications that may be raised would relate to discrimination between consumers with utilities delinquencies and consumers without delinquencies. Any such argument is unavailing. First, Plaintiffs lack judicial standing to challenge the Ordinance on the basis of a classification to which they are not included. Second, even if the Court were to consider such an argument, the Ordinance is rationally related to a legitimate governmental purpose.³

Given this case invokes the lowest threshold of review (mere rationality), the governmental purpose need only be hypothetical to pass muster. The governmental purpose of the Ordinance easily exceeds this minimal standard. It is uncontraverted in the record that the purpose of the Ordinance is to reduce the net losses suffered by the City from utility consumer delinquencies. The rationale of the Ordinance is similarly manifest. Rather than forcing all utilities consumers or the general public fisc to

³ Plaintiffs have not pleaded or otherwise claimed in this litigation that the Ordinance implicates a fundamental right or utilizes a suspect classification.

cover unpaid delinquent utility accounts, the Ordinance focuses the burden on those individuals who are directly benefitted from the consumption of the utilities. See Sloan v. City of Conway, 347 S.C. 324, 331, 555 S.E.2d 684, 687 (2001) (rejecting claim of unconstitutional disparate treatment where higher rates were charged to non-residents because Court found reasonable hypothesis in government's attempt to improve the condition of the public fisc.) The Ordinance is, at a minimum, rationally related to the City's legitimate purposes and therefore is constitutional as a matter of law.⁴

1. The Ordinance is not an uncommon legislative action with respect to utility providers

Moreover, the method of collection utilized by the City pursuant to the Ordinance is analogous as those utilized by other utilities providers. (Thomas Aff. ¶ 19.) For example, the regulations promulgated the Public Service Commission provide context and persuasive support. These regulations are substantially the same as the Ordinance.

No electrical utility shall be required to furnish its service or to continue its service to any applicant who, at the time of such application, is indebted or any member of his household is indebted, under an

⁴ In addition to not violating the Constitution, the Ordinance is specifically authorized by State law. The authority for City to operate and regulate utilities is well-established. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 425-426, 593 S.E.2d 462, 467 (2004). Moreover, as with any municipality, the City has "a broad grant of power to enact ordinances 'respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities.'" Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 554, 397 S.E.2d 662, 664 (1990) quoting S.C.Code Ann. § 5-7-30.

undisputed bill to such electrical utility for service previously furnished such applicant or furnished any other member of the applicant's household. However, for the purposes of this regulation, the electrical utility may not consider any indebtedness which was incurred by the applicant or any member of his household more than six years prior to the time of application.

26 S.C.Code Ann.Reg. 103-342(k). Additionally, the regulations provide that the "electrical utility may terminate a consumer's service should the consumer be in arrears on an account for service at another premise." 26 S.C.Code Ann.Reg. 103-342(l).⁵

Likewise, North Carolina state statutes permit a City to "suspend or disconnect service to a consumer because of a past-due and unpaid balance for services incurred by another person who resides with the consumer [where] the consumer and the person were members of the same household at a different location when the unpaid balance for service was incurred" or "the person was a member of a consumer's current household at a different location when the unpaid balance for service was incurred." N.C. Gen. Stat. § 160A-314.

2. The Ordinance is consistent with South Carolina law

South Carolina law supports the City's denial of service to a former consumer at a new location when that consumer has a

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⁵ Similar provisions for water and sewer utilities are set forth at 26 S.C. Code Ann. Regs. 103-735(M), (N) and 26 S.C.Code Ann.Reg. 103-535(L), (M).

delinquent account from a prior location.⁶ In De Pass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325 (1934), the South Carolina Supreme Court ruled that a utility company may discontinue utility services for past due bills regardless of the address at which rendered. In De Pass, the consumer applied for utility service at his residence but was refused service until he paid a prior balance at two other locations. The service agreement in Depass provided that failure of the consumer to pay invoices under the contract or any other contract permitted the utility company to terminate service. De Pass, 176 S.E. at 331. The Supreme Court held "[W]e see no real difference between the right of a utility company to discontinue service of a certain kind or type, on account of the consumer's failure to pay a past-due bill which is just and undisputed, and which the company has not allowed to become old or stale, and its right to refuse, for the same reason, to furnish at another place, and under a similar contract, upon demand of such consumer, the same kind or type of service." Id.

In this case, the Ordinance requires a Consumer to pay all past-due amounts incurred at a prior location before connection of

⁶ By way of preface, it should be noted that courts have upheld the right to terminate utility service for nonpayment. See Gilbert v. Duke Power Co., 255 S.C. 495, 500, 179 S.E.2d 720, 722 (1971) (holding a "public service company has the right to discontinue its service to the consumer upon the nonpayment by the consumer of recent and just bills for the service furnished him, and has, also, the right to refuse a further supply of electricity until those bills are paid.").

service for such consumer at a new location. (Rock Hill Code of Ordinances, § 29-31(d).) In addition, a Service Agreement must be signed prior to commencement of service. Willis signed a Service Agreement with the City. (Aff. of Thomas, ¶¶ 7, 8.) The Service Agreement expressly provides that (i) the consumer agrees to pay for all services; (ii) the City may discontinue service if the consumer breaches the agreement; (iii) if service is disconnected for cause, the consumer agrees to pay all outstanding invoices for service to be restored; and (iv) the agreement is effective at the new address if the consumer moves to another location.

3. Plaintiffs' reliance on non-binding precedent is misplaced

During previous proceedings in this matter, Plaintiffs ventured to the non-precedential Fifth Circuit Court of Appeals for support of its position. Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974)., distinguished by Chatham v. Jackson, 613 F.2d 73, 80 (5th Cir. 1980). Notably, the Davis case has been distinguished and limited to its facts by the Fifth Circuit. Id., distinguished by Chatham v. Jackson, 613 F.2d 73, 80 (5th Cir. 1980). Critically, the facts of this matter are not aligned with the facts in Davis. Rather, the facts of this matter are similar to the facts of the Chatham decision, which expressly rejects the Davis holding in regards to these similar facts.

In Davis the issue presented was whether it was a violation of the Equal Protection Clause to prevent a tenant from obtaining water service at a location at which the landlord (or previous tenant) had an existing utility. The Davis plaintiffs contended that the ordinance discriminates between "applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges." Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974). The court held that the ordinance violate rational basis review because the tenants that were being denied utility service were completely unrelated to the delinquencies and the only connection was the location. The court concluded that "[a] collection scheme, however, that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor." Davis, at 144-45.

However, when the relative positions were reversed the Fifth Circuit rejected the Davis holding. In Chatham, the issue before the court was "whether the city may terminate water service to a landlord when the tenant's bills are delinquent." Chatham, 613 F.2d at 75. In finding no fundamental right involved, the court stated "[w]e can imagine many valid reasons for the city's practice, and we do not find it arbitrary to coerce an owner into paying for services that benefitted his property." Chatham, 613

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F.2d at 78. The court found "constitutional the City of Atlanta's policy of terminating water services to a property owner whose tenant has become delinquent in paying its water bill." Chatham, 613 F.2d at 81. See also Ransom v. Marrazzo, 848 F.2d 398(3rdCir.1988) (requiring that new occupants of location be responsible for prior utility services at that location); DiMassimo v. City of Clearwater, 805 F.2d 1536 (11thCir.1986) (requiring landlord acknowledgment and responsibility for tenant utility services); Mansfield Apartment Owners Association v. City of Mansfield, 988 F.2d 1469 (6thCir.1992) (requiring landlord to satisfy past due services rendered to tenants prior to obtaining new service).

The matters before this Court present less of a constitutional issue than was allowed by the Fifth Circuit in Chatham in that the scope and reach of the Ordinance is much less than the Atlanta ordinance being challenged in Chatham. Unlike Atlanta's ordinance, the Ordinance does not seek to hold the landlord liable for any tenant delinquency. Rather, liability under the Ordinance affects and follows only consumers with delinquencies. In this way, the Ordinance is more narrowly tailored to link the burden to the benefit in that only those consumers with delinquencies are affected. As will be made plain by cases citing Davis, the material linchpin of the Davis decision was that the tenant was unable to obtain utility service because

of an unrelated landlord's debt. This fact alone is sufficient to distinguish this case from Davis.

Moreover, many jurisdictions allow imposition of a utility debt to the owner of the property or to new occupants. Both outcomes are significantly more attenuated constitutionally than the Ordinance which does not shift or expand liability beyond the actual consumers of the utility for which the debt was incurred. Therefore, the Ordinance does not offend any constitutional rights of Plaintiffs.

III. Due Process Clause

As a second ground for alleging a deprivation of a federal right, Plaintiffs allege the Ordinance violates Plaintiffs' rights under the Due Process clause of the federal constitution: "No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1. Plaintiffs' claim fails as a matter of law as there is no evidence that any constitutionally protect property right or liberty interest is implicated and the Ordinance is rationally related to a legitimate governmental purpose.

Where a plaintiff challenges a legislative act alleging a violation of Due Process, as is the case with respect to the Ordinance, the following legal analysis applies:

The first step in this process is to determine whether the claimed violation involves one of those fundamental rights and liberties which are, objectively, deeply

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rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be 'fundamental' it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. If the interest is determined not to be "fundamental" it is entitled only to the protection of rational-basis judicial review.

Hawkins v. Freeman, 195 F.3d 732, 739 (4th Cir. 1999) (internal citations omitted).

The importance of describing the asserted right with specificity cannot be emphasized enough for the Court's analysis. As explained by the Fourth Circuit: "The first step in that fundamental-rights-based process is to make a careful description of the asserted liberty right or interest that avoids overgeneralization in the historical inquiry." Hawkins v. Freeman, 195 F.3d 732, 747 (4th Cir. 1999) (holding that plaintiff's description of fundamental right as one to "freedom from unjust incarceration" was overbroad and improper under the facts of the case). See also Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993) ("Substantive due process' analysis must begin with a careful description of the asserted right, for doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.").

Once properly and narrowly defined, if the right asserted by Plaintiffs is not a "fundamental right" "deeply rooted in this nation's history and tradition, the legislative act must only be rationally related to a legitimate governmental purpose." Washington v. Glucksberg, 521 U.S. 702, 722 (1997). As stated by the Supreme Court: "By establishing a threshold requirement-that a challenged state action implicate a fundamental right-before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case." Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

In this case, Plaintiffs have failed to plead or otherwise specify any right which they contend is being violated by the Ordinance. The record indicates that the only right which Plaintiffs may contend is being by the Ordinance is a right to rent property (Robert Marshall Dep. pp. 79:6 to 80:3; 93:5-11). From the record it appears to be Plaintiffs' position that they have a substantive right guaranteed by the federal constitution to obtain utilities from the City which cannot be conditioned or fettered. (Robert Marshall Dep. p. 78:15-19.)

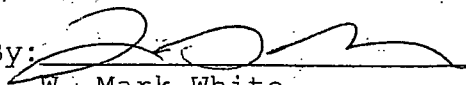
The federal constitution does not provide Plaintiffs with a substantive right to obtain utilities for commercial purposes. Even looking beyond the commercial nature of this case, the right to utilities in any context is not recognized as a substantive

right. Courts have held that the expectation of utility services "does not transform that expectation into a substantive guarantee against the state in any circumstance." Ransom v. Marrazzo, 848 F.2d 398, 412 (3d Cir. 1988) (holding that "[t]he provision of water and sewer services, whether by a municipality or by a private utility company, is not, however, a federally protected right."); see also Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1477 (6th Cir. 1993) (holding that "we reject the claim that conditioning the receipt of water service on the satisfaction of past due charges for services rendered to the applicant's residence raises the question of a substantive due process violation"); Chatham v. Jackson, 613 F.2d 73 (5th Cir. 1980) (holding that the City of Atlanta's practice of terminating water service to the landlord when the tenant's bills were delinquent did not violate substantive due process).

Because the Ordinance does not implicate a fundamental right, rational basis review is proper. As set forth in the equal protection argument above, the Ordinance is rationally related to a legitimate governmental purpose. Therefore as a matter of law, summary judgment should be granted in favor of City as to the Due Process claim.

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March 22nd, 2012

By: 

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

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IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff(s),

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,

Defendant(s).

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

C.A. No. 09-CP-46-03360

The Plaintiffs herein, by their counsel, submit their Memorandum and Affidavit as to Damages in response to the Plaintiff's Motion for Summary Judgment dated February 29, 2012.

The Common Law Duty to Serve

Due to the nature of the utility business, the law has determined that public utilities have a common law duty to serve,¹ regardless of the type of utility provider.² The fundamental common law "rule" requires a utility to serve on reasonable terms all those who desire the service

¹ 64 AM.JUR.2D *Public Utilities* § 16 (1972); see also *Mutual Association, Nonprofit Organization, Or Cooperative As Under Duty To Furnish Utilities Service*, 56 A.L.R.2d 413; *Damages For Failure To Furnish Water Service*, 108 A.L.R. 1174 (1937); *Damages Recoverable From Telephone Company For Failure To Furnish Or Interruption Of Service*, 23 A.L.R. 952; *Liability Of Gas, Electric, Or Water Company For Delay In Commencing Service*, 97 A.L.R. 838 (1935).

² As discussed in NATIONAL CONSUMER LAW CENTER, *Access to Utility Service* (1996), Chapter 1, 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). Deliverable fuels are not public utilities; *id.*, generally Ch. 2, *supra*. Counsel for Plaintiffs points out that almost all of the discussion in the earlier portion of this Memorandum is drawn *verbatim*, or nearly so, from that source.

it renders.³ 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), where it was stated:

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.

[*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.

If a member of the public has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of a utility to provide the service.⁴ A public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination, and at reasonable rates.⁵

As one court interpreting this duty stated:

"a public utility is obligated by the nature of its business to furnish service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination."⁶

³ 64 Am.Jur.2d *Public Utilities* § 21 (2002).

⁴ Anno., *Liability of Gas, Electric or Water Company for Delay in Commencing Service*, 97 A.L.R. 838, 839 (1935); see also 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).

⁵ See, e.g., *Arizona Corp. Comm'n v. Nicholson*, 497 P.2d 815, 817 (Ariz. 1972) (citations omitted).

⁶ *Overman v. 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).

In short, the common law requires a utility to make its services available to all members of the public to whom its public use and scope of operation extend, who apply for such service, and who comply with its reasonable rules and regulations.⁷

The common law duty to serve exists independently of federal or state legislation, or administrative regulation.⁸ This duty exists independently of statutes regulating the manner in which the utility conducts business or enters into contracts with municipalities or individuals.⁹ In other words, the duty of a public utility "is one implied at common law and need not be expressed by statute, or contract, or in the charter of the public utility."¹⁰ Although the common law duty exists independently from legislation, many states' statutes have incorporated these same principles.¹¹ In addition, the duty of a public utility to provide service is a concept which has been embraced by commissions and Courts interpreting statutory obligations of regulated investor-owned utilities,¹² as well as espoused by modern courts when reviewing rules of

7 For 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).

8 See, e.g., *Snell v. Clinton Elec. Light, Heat & Power Co.*, 63 N.E. 1082, 1083 (Ill. 1902).

"There is no statute regulating the manner under which electric light companies shall do business in this state. They are therefore, subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges."

9 See, e.g., *Gibbs v. Consol. Gas Co. of Baltimore*, 130 U.S. 396 (1888); *Messer v. Southern Airways Sales Co.*, 17 So.2d 679,681 (Ala. 1944); *Birmingham Railway, Light & Power Co. v. Littleton*, 77 So. 565, 569 (Ala. 1917); *Snell v. Clinton Elec. Light Co.*, 63 N.E. 1082 (Ill. 1902); *Morehouse Natural Gas Co. v. Louisiana Pub. Serv. Comm'n*, 140 So.2d 646 (La. 1962); *Southwest Gas Corp. v. Public Serv. Comm'n*, 474 P.2d 379 (Nev. 1970).

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 for Temporary Interruption of Service*, 1974 Wash.U.L.G. 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. Northern Pacific Terminal Co.*, 128 F.Supp. 475 (D.Or. 1953); accord, *Messer v. Southern Airways Sales Co.*, 17 So.2d 679 (Ala. 1944).

11 See, e.g., California Public Utility Code § 451 (every public utility has an obligation to furnish and maintain adequate, efficient, just, and reasonable service); Indiana Code § 8-1-2-4 (legal duty to provide reasonable adequate service).

12 See, e.g., *Everett v. Baltimore Gas & Elec.*, 513 A.2d 882 (Md. 1986) (utility has an affirmative duty to provide service to the public); *West Com Long Distance, Inc. v. Citizens Utility Co. of California*, 45 CPUC 263 (Cal. Aug. 11, 1992) (restating California statutory mandate that every public utility has an obligation to furnish and maintain "adequate, efficient, just, and reasonable service." Implicit in the granting of a certificate of public convenience and

municipal utilities.¹³

It is the status of "public utility" which creates a corresponding responsibility to provide service for all who request service and are willing to pay for it.¹⁴ 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."¹⁵ The duty is imposed because the utility is organized to do business affected with a public interest and holds itself out to the public as being willing to serve all members of the public.

Applicability of Common Law Principles in a Modern Regulatory Scheme

While the regulation of private investor-owned utilities has largely been taken over by comprehensive statutory and regulatory schemes, the regulation of municipal utility providers and rural electric cooperatives ("RECs") is a patchwork quilt of differing levels and types of supervision. Regardless of the existence of a statutorily created regulatory framework, however, the common law principle that customers have a right to service still applies to different types of

necessity is the duty of the utility to provide service); *RE Peoples Gas & Power Co.*, 138 PUR4th 320 (Ind. URC, Oct. 21, 1992) (gas company under a legal duty to provide reasonable adequate service pursuant to LC. § 8-1-2-4); *RE Telecommunications Regulation Within Michigan*, *RE AT&T Communications of Michigan, Inc.*, 116 PUR 4th 495 (Mich. PSC, Oct. 1, 1990) ("A person, co-partnership, or corporation doing a telephone business within this state is required to furnish reasonably adequate service and facilities for the use of its law by the public," citing to MCL 484.103(1)); *Gem Credit Corp. v. Consolidated Edison Co. of N.Y.*, 25 Misc. 2d 359, 35 PUR3d 522, 205 N.Y.S.2d 423 (1960) (electric company was obligated to serve an applicant, despite the company allegation that the application was a subterfuge to obtain service for another, where the evidence showed that the applicant had occupied the premises in question for seven years, had not previously had an account with the company, and had shown a willingness to pay its bills and post a deposit); *RE Carolina Power & Light Co.*, 94 PUR4th 353 (NCUe, Aug. 5, 1988) (public utilities in North Carolina have a legal duty to provide efficient service, citing to G.S. § 62-131(b)); *Monson v. National Fuel Gas Distrib. Corp.*, 58 Pa PUC 371 Z-8207989 (Pa. April 19, 1984) (commission found the utility violated its general duty to provide reasonable service).

¹³ *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (municipal utilities are required to provide certain minimum procedures to protect the right to service when this right is established by state statute or another source).

¹⁴ See, e.g., *Denver Welfare Rights Org. v. Public 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 Brock 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). See also NATIONAL CONSUMER LAW CENTER, *Access to Utility Service*, § 4.4, discussing the right to service as limited by ability to pay.

¹⁵ *Overman v. Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo. App. 1984).

utility providers.¹⁶

As discussed in NATIONAL CONSUMER LAW CENTER, *Access to Utility Service* (1996), § 3.2, the common law doctrine of right to service was intended to be independent from any statutory or administrative regulation—it is strictly a common law principle enforceable in the courts. Nonetheless, it is important to recognize that more recently state statutes and commission rules and regulations have articulated the same principle — that public utilities have a duty to provide service.¹⁷ Where relevant, commission rulings and regulations are included in the discussion below of the various aspects of the customer's right to service.

The Constitution as a Source of the Right to Service

The United States Constitution is another source of law which provides a customer the right to utility service under certain circumstances. This right to service arises in the context of terminations by municipal utilities.¹⁸ In examining whether a customer has the right to due process when a utility shuts off service, courts have discussed in broad terms whether the right to utility service is a constitutionally protected right. In some circumstances, courts have found that, as a federal court said, "a water user has a 'legitimate claim of entitlement' to continued water service which is a property interest to which the Due Process Clause of 14th Amendment applies."¹⁹ This is important for customers who receive their utility service from municipalities, as the Constitution may be another source of protection for the right to service.

¹⁶ "It is respectfully submitted that it is the duty of the courts to vitalize common law rights which have not been codified rather than eradicate them because they have not." *Stevenson v. Prairie Power Co-op*, 794 P.2d 620, 625 (Idaho 1990).

¹⁷ See, e.g., *Monson v. Nat'l Fuel Gas Distrib. Corp.*, 58 PaPUC 371 Z-8207989 (Pa. April 19, 1984) (commission found the utility violated its general duty to provide reasonable service); *Everett v. Baltimore Gas & EC.*, 513 A.2d 882 (Md. 1986) (utility has an affirmative duty to provide service to the public); *West Com Long Distance, Inc. v. Citizens Utility Co. of California*, 45 CPUC 263 (Cal. Aug. 11, 1992) (restating California statutory mandate that every public utility has an obligation to furnish and maintain "adequate, efficient, just, and reasonable" service. Implicit in the granting of a certificate of public convenience and necessity is the duty of the utility to provide service); *RE Peoples Gas & Power Co.*, 138 PUR4th 320 (Ind. URC, Oct. 21, 1992) (gas company under a legal duty to provide reasonable adequate service pursuant to Ind. Code § 8-1-2-4); *RE Telecommunications Regulation Within Michigan, RE AT&T Communications of Michigan, Inc.*, 116 PUR 4th 495 (Mich. PSC Oct. 1, 1990) ("A person, co-partnership, or corporation doing a telephone business within this state is required to furnish reasonably adequate service and facilities for the use of its law by the public," citing to MCL 484.103(1); *RE Carolina Power & Light Co.*, 94 PUR 4th 353, (NCU, Aug. 5, 1988) (public utilities in North Carolina have a legal duty to provide efficient service, citing to G.S. § 62-131(b)).

¹⁸ See NATIONAL CONSUMER LAW CENTER, *Access to Utility Service*, § 6.4, and FOOTNOTE 36, *infra*, for discussion of the protections customers are entitled to receive when a municipality terminates utility service.

Constraints on Utilities' Refusal to Provide Service

The right to service is not absolute. Utilities, in turn, have certain rights, for example, the right to be paid for the utility service. Nonetheless, utilities are constrained in the reasons they may cite for denial of service. In the following section, some of these constraints are discussed. It is important to realize that many of the constraints on the right to service are exactly the same constraints which exist on a utility's ability to terminate service, and on a customer's right to reconnection of service after termination.²⁰ Thus, on occasion, the cases cited may refer to disconnection of service rather than right to service; nonetheless, the same principles apply when a customer is first applying for utility service.

19 *Kroger v. Guarnieri*, 412 F.Supp. 1375, 1386 (E.D.Pa. 1976) (although the defendants are "not constitutionally obligated to establish and maintain water service for the benefit of their citizens, once having done so, a user has a legitimate claim to continued service absent sufficient cause for termination."). See also *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978) (claim of entitlement to a municipal utility's services which had been terminated for nonpayment of disputed bills implicated a property interest for the purpose of the 14th Amendment's due process clause where under applicable state law utility was not permitted to terminate service at will but only for cause); *Mansfield Apartment Owners Assoc. v. City of Mansfield*, 988 F.2d 1469, 1474 (6th Cir. 1988) ("It is well settled that the expectation of utility services rises to the level of 'a legitimate claim of entitlement' encompassed by the category of property interests protected by the due process clause," citing *Memphis Light, Gas & Water Division v. Craft*, *supra*); *Dedekind v. Rural District No. 5*, 229 Kan. 242, 623 P.2d 1324, 1328-29 (1981) ("The deprivation of water service is a deprivation of an interest which enjoys the statute of 'property' within the meaning of the 'due process' clauses of the Kansas and United States Constitutions." Furthermore, the court noted that the defendants even conceded that water service and other public utility services are considered to be 'entitlements' or property rights protected by the due process clause of the 14th Amendment.).

But see *James v. City of St. Petersburg*, 33 F.3d 1304 (11th Cir. 1994) (because neither tenant nor her landlord had complied with the city's requirements for initiating water service, including paying a deposit, tenant has no entitlement to water service sufficient to support her due process claim. As a mere user of water, there is no constitutionally protected property interest in continued service), distinguished from *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1986) (property interest entitling the group of tenants to due process was not the expectation of continued water service as mere users, but the right to prevent the landlord from obtaining a constructive eviction by disconnecting the city water service); but see also *Perez v. City of San Bruno*, 616 P.2d 1287, 1295, 168 Cal.Rptr. 114 (1980) ("right" to receive municipal water service should not be classified as a fundamental right therefore, in analyzing a denial of service, the court did not use strict scrutiny but rather decided to "limit the scope of our inquiry to the question whether the legislative scheme set forth in the statutes and ordinances we have considered bears a reasonable relationship to a proper legislative goal").

20 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.R. 3d 1292 n.3 (1976) (This annotation 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).

A Public Utility May Not Deny Service Based on a "Collateral" Matter

Courts and Regulatory Boards note that utilities occasionally seek to impose conditions upon 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 generally in accord in holding that a public utility cannot refuse to render the service which it is authorized by its charter, or by the law, to furnish, or impose service constraints, because of some collateral matter unrelated to that service.²¹

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. Specifically, matters held to be collateral include:

- Nonpayment of unrelated contracts with the utility;
- Nonpayment for services provided by a separate business run by the utility; and
- Nonpayment of another person's utility bill.²²

Underlying the common law doctrinal prohibition against utilities denying service because of collateral disputes is the recognition that utilities are "quasi-public" corporations empowered with monopoly status to provide essential services to citizens who provide, in effect, the public franchise. One theory is that the common law has recognized the fairness in a rule that does not tolerate the tactic of coercion present when a utility threatens to withhold the necessities of life from a consumer in order to collect on some other separate and distinct obligation. And, according to this theory, to prevent such coercion and injustice, the courts command the utility to use the judicial process, as any other corporation would, in order to settle a dispute, rather than

²¹ Anno., *Right of Public Utility Corporation to Refuse its Service Because of Collateral Matter Not Related to that Service*, 55 A.L.R. 771 (1928); Anno., *Right of Municipal Utility to Cutoff Water Supply for Nonpayment of Charges for Unrelated Service*, 26 AL.R. 1359 (1952); Anno., *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); 43 AM.JUR. *Public Utilities and Services* § 23 (1942). See, e.g." *Dale v. City of Morganton*, 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 Baltimore v. Joseph Colliday*, 25 Md. 1 (1866) (where 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).

²² See NATIONAL CONSUMER LAW CENTER, *Access to Utility Service*, Chapter 7 for discussion of denial of service for a third party's debt.

punish the consumer for not automatically acceding to its unscrutinized demands.²³ These different (and non-comprehensive) examples of what might be considered collateral matters are explored further below.

Unrelated Contract: Debts from Another Time and Place

A utility, as a general rule, may not refuse to provide service for disputes arising out of a contract separate from the contract to provide the particular service in question. This situation 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.²⁴ Commissions have also generally followed this rule in their orders and regulations.²⁹

Third Party's Debt

Sometimes a utility seeks to obtain payment from a customer for 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 lives with the customer. In doing so, the utility is probably violating the general common law rule²⁵ on "collateral matters," as described above,

23 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*, 181 S.E. 599 (Ga.Ct.App. 1935) ("Justice and fair dealing," the court said, require that a public utility resort to the judicial process to enforce the claim with there being no grounds to allow a utility to be "both judge and jury" in a dispute).

24 Anno., *Right of Public Utility To Discontinue or Refuse Service at One Address Because of Refusal To Pay for Past Service Rendered at Another*, 95 A.L.R. 556 (1935). *Lloyd v. Washington Gaslight Co.*, 331 D.C. (1 Mackey 1881); *Berner v. Interstate Power Co.*, 57 N.W.2d 55 (Iowa 1953); *Gas-Light Co. of Baltimore 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. Southern 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, where 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. Consolidated Edison Co.*, 53 A.D.2d 558, 384 N.Y.S.2d 468 (N.Y. 1976) (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).

25 Commissions have often followed the common law in this area. *IN RE Service Deposit and Termination Practice of Communication Utilities*, 34 PUR4th 512 (Idaho 1980) (telephone

that a public utility may not generally refuse to render service because of some collateral matter not related to that service.

Although the principles are similar, there are at least three common patterns in which this occurs. First is the situation where a customer moves into a new home and is denied utility service because the *prior* occupants or owners were in arrears for their utility bill. Many courts and commissions have not allowed the utility to deny service in such a situation.²⁶ Denial of service to applicants who happen, by no fault of their own, to be living in a place where a third party has not paid the bill, has been construed by courts to be discriminatory, and when the utility's actions constitutes state action (Le., a municipality), this discrimination can rise to the level of a violation of the Equal Protection Clause of the 14th Amendment. As the court 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 companies were not authorized to terminate service to a guarantor for the failure of the guarantor to pay a guaranteed utility bill); *RE: Regulations Governing Termination of Gas and Electric Service*, 71 PSC 452, Case No. 7413, Order No. 64486 (Md. October 29, 1980) (failure of a gas or electric customer to pay the bill of another customer may not constitute sufficient cause for the gas or electric company to terminate service to that customer).

²⁶ *Price v. South Central Bell Tel. Co.*, 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 Electric 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 nonpayment of arrears due from another occupant or owner); *McMenamin v. Evesham Municipal Utilities Authority*, 104 N.J. Super. 161, 240 A.2d 21 (N.J. 1969) (municipal utilities' authority could not exercise statutory right to shut off water service against plaintiffs, who were *bona fide* purchasers, where 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. Philadelphia Electric Co.*, 61 PaPUC 323, F8532525 (Pa. April 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, Rule 23.42(c)(I). See also 3 Alaska Admin. Code 54.450(f)(I) (utility may not disconnect for delinquency in payment for services rendered to prior customer at premises).

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.²⁷

The situation which lead to the *Davis* case actually involved a slightly different situation than a prior resident who did not pay the bill: in that instance, it was the landlord who was in arrears, and the tenant who was being denied service as a result. This pattern is also quite common, and generally utilities are not allowed to deny service in such a situation.²⁸ The situation has also arisen where an apartment building has only one joint service pipe, and the utility tries to refuse (or disconnect) service to one tenant because of the arrears of another.²⁹ At

²⁷ *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 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 Division of Water*, Case No. 4:93CV2559, slip op. (N.D.Ohio July 14, 1994) (where 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).

²⁸ *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974). See also *Alabama 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 PUR3d 428, 184 So. 2d 622 (La. 1966) (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 the water to which room 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).

²⁹ *Jopling v. Bluefield Waterworks & Improv Co.*, 70 W.Va. 670, 74 S.E. 943 (1912) (where 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

least one court has held that a utility *could* deny service when the tables are turned, and it is the *landlord* who is being refused (or having terminated) service for delinquent *tenant* bills.³⁰

The other common situation that arises is that a utility will refuse service to a customer because that customer is living with a third party who is currently in arrears for utility service. The third party is sometimes just a roommate, or even may be a family member. 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 that the utility may not prevent a customer from living with an individual who has a delinquent utility bill.³¹

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 (1919) (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).

30 *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 v. International 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).

31 *Donovan v. General Tel. Co.*, 19 PUR3d 49 (Cal. 1957) (for a telephone company to deny service to a member of a household, under an unwritten rule, until a delinquent bill of another member of the household has been paid is unreasonable since the policy would make persons, through no fault of their own, responsible for a bill over which they have no control); *RE. Tampa Electric Co.*, 49 PUR4th 547 (Fla. 1982) (electric company was directed to delete from its tariff a provision stating that it could refuse or discontinue service at any location of a family or business for failure to settle prior indebtedness incurred by an agent or any family member where the commission found that the company could only hold the customer of record responsible for the customer's bill and the company could protect itself from nonpayment by requiring deposit; if the deposit did not fully satisfy the arrearage, the company could sue the customer but it could not force another person, not legally responsible for the debt, to pay that debt to obtain or continue service); *Smith v. Tri-County Electric 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, 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

The courts and commissions have struggled more with the issue (not present here) of whether a utility should be allowed to deny service to a customer based on a third party's debt to the utility company, when the third party is the customer's spouse.³²

The Marshalls' Claims

Since the CITY has submitted a general Motion for Summary Judgment, this discussion is based upon the general tenor of questioning addressed to the Plaintiffs at their depositions. At that deposition, counsel for the CITY submitted Defendant THOMAS' e-mail of June 24, 2009 and questioned ROBERT MARSHALL as to it.³³

The CITY maintains in its e-mail, and presumably by its position today, that it will extend

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).

32 *Southwestern Tel. Co. v. Bateman*, 266 S.W.2d 289 (Ark. 1954) (telephone service cannot be denied to an applicant for the sole reason that her 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); *Vanderberg v. Kansas City Missouri Gas Co.*, 105 S.W. 17 (Mo. 1907) (where plaintiff refused to pay her husband's alleged prior debt, the utility refused to connect her service. The court declared that a utility must enter a contract with a consumer despite nonpayment of her spouse's prior utility bill; this court dealt with the issue of whether a wife should have to be responsible for the debt of her husband, and concluded: "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."). *See also Central Illinois Light v. Commerce Comm'n*, 562 N.E.2d 4 (Ill.App.Ct. 1990) (wives filed complaint against power company, challenging power company's refusal to provide utility service due to their failure to pay past due bills incurred by their former and estranged husbands, respectively. The Illinois Commerce Commission entered orders in favor of wives, and power company appealed. The Appellate Court held that gas and electricity service debts incurred by former and estranged husbands after separation from wives were not a "family expense" for which wives were liable under the Family Expense Act.).

But see Tubbs v. Louisiana Power & Light Co., 349 So. 2d 994 (La. 1977) (where 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, where 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 PSC'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 nonpayment of such account).

33 Deposition of ROBERT K. MARSHALL, JR., January 24, 2012, p.63, l.23 – p.64, l.4.; Deposition Exhibit 2.

utility service to the Plaintiffs, 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."³⁴

[Emphasis added.]

To Plaintiffs' knowledge, the above-referenced "settling" of the debts in question means either their payment or the establishment of a payment schedule satisfactory to the CITY.

The Plaintiffs presume that one basis for the Motion herein is that the CITY and its agents have not imposed a duty upon the Plaintiffs, but upon the actual or potential renter who is considered as in arrears with the CITY.

Claim in Contract

The Plaintiffs respond, first, that this interpretation of the CITY's ordinances is an unwarranted interference with the Plaintiffs' 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.³⁵ Despite the high standard thus stated, the Plaintiffs contend the desired and apparent intent of those portions of Rock Hill City 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 Plaintiffs' rental of property on which they themselves will be responsible for the utilities. The Plaintiffs are not the unpaid collection agents of the CITY, nor can they be made such.

The Plaintiffs reallege those grounds referenced in the discussion above as to their right to this end.

³⁴ Deposition of ROBERT K. MARSHALL, JR., p.63, l.23 – p.64, l.4.; Deposition Ex. 2., 2d page.

³⁵ *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).

Claim in Tort

The Plaintiffs respond, secondly, that the harm done to them, and their tenants and potential tenants by the interpretation and application of the City Ordinances set out above renders the CITY and its agents liable in tort. As discussed and indicated 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.³⁶ The CITY and its agents have deprived the Plaintiffs, individually and through their actual and potential tenants, of that Federal right. 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 CITY's agent.³⁷

Foreseeability in Tort

The Plaintiffs 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 interpretation and wording of its City Ordinances 29-2 and 29-31, create a situation where they have failed in their duty to supply service (both as to the Plaintiffs and as to the potential tenant) and where the resulting damage to the Plaintiffs by this failure is foreseeable. Under South Carolina precedent relating to

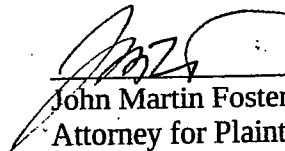
³⁶ *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). See also *Koger v. Guarino*, 412 F.Supp. 1375, 1386 (E.D.Pa. 1976), *aff'd without op.*, 549 F.2d 795 (3d Cir. 1977). Note, however, that in certain limited situations, some courts have found that Due Process does not apply. See, e.g., *Garcia v. Irizarry*, 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); *Sterling v. Maywood*, 579 F.2d 1350, 1354 (7th Cir. 1978), *cert. denied*, 440 U.S. 913 (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.").

³⁷ Deposition of Lori Thomas, November 30, 2011, p.24, l.20 – p.28, l.4.

damages recoverable in tort, this is sufficient to establish proximate cause for such damages to the Plaintiffs and its recoverability.³⁸

CONCLUSION

It is counsel's understanding that the facts in this action are undisputed. The Plaintiffs maintain that they have set out and documented legal bases to proceed with this action, and that the Defendant's Motion should be denied.


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March 21, 2012

Rock Hill, South Carolina

³⁸ *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).

STATE OF SOUTH CAROLINA

COUNTY OF YORK

]]]

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff(s),

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,

Defendant(s).

AFFIDAVIT IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

C.A. No. 09-CP-46-03360

Personally appeared before the undersigned ROBERT K. MARSHALL, Jr., who, being sworn, affirms and says:

1. He is one of the named Plaintiffs in the above-captioned and numbered civil action.
2. With his wife, DONNA CHAPMAN MARSHALL, he does business under the name of "Rock Hill Property Management", a business which rents residential properties to persons within the city limits of the CITY OF ROCK HILL.
3. The rent from properties owned by the Limited Liability Company set out for or by the Plaintiffs, as Robert/Robert/Donna, LLC, flows directly to the Plaintiffs. Other owners, including LLCs and a trust which the Plaintiffs' family members own, are charged a standard Ten (10%) fee for handling the rental properties.
4. He is familiar with the regularly kept records of "Rock Hill Property Management." This Affidavit is based upon those records and upon his own knowledge of the matters stated herein. All addresses listed below are managed by Rock Hill Property Management; those owned individually by the Plaintiff's LLC are indicated.

5. As stated in our verified Complaint, as a result of the Defendants' actions, the Plaintiffs' company lost \$1,715.00 in rent from Mr. Willis at 1066 Cherokee, owned by the Plaintiffs' LLC. This represents seven (7) months rent lost while his furniture sat in the apartment while he and I tried to have the utilities turned on.

6. As a result of the Defendants' actions, the Plaintiffs' company lost \$3,118.00 in potential rent, or \$311.80 in fees, from Ms. Angel Joseph for 1086 Cherokee, owned by a family LLC. At the time she applied to us for a rental, she was ca. 21 years old. I was informed by her that utilities could not be turned on in her name due to a past unpaid bill by her relative with whom she had lived. In my opinion, Ms. Joseph was too young to be held responsible for the utilities of her relative. I would also note that these utilities were incurred more than three years before the time when Ms. Joseph applied to us.

7. As a result of the Defendants' actions, the Plaintiffs' company lost \$2,115.00 in potential rent, or \$211.50 in fees, on Ms. Sherika Reid for 242 Whitgreen, owned by a family trust. Ms. Reid signed a lease for this unit on March 5th, 2009. She informed me that she was unable to work out a payment schedule with the CITY for a past due bill for which she was held responsible. This unit is still empty.

8. As a result of the Defendants' actions, the Plaintiffs' company lost \$1,350.00 in potential rents, or \$135.00 in potential fees, on Ms. Nakie Moffatt for 235 Whitgreen owned by a family trust. Ms. Moffatt signed a lease for this unit on November 12, 2008. She told us that she was unable to get power on because a roommate of hers from a different location had not paid a bill. She was not on the bill for these utilities and had no contractual obligation with the city. We lost six (6) months rent, after which someone rented this unit.

9. The above matters show lost income to the company. I can only estimate the number of renters the company could have rented to had the CITY acted differently.

10. I have examined the records of Rock Hill Property Management for letters written to or on behalf of potential tenants who never came back. On this basis, it is my understanding that the Company could have rented the following units or similar units in the same price range for a year:

1344 Amelia	3,180.00
1374 Amelia	3,180.00
344 Arnold	3,060.00
1338 Bose	3,540.00

1354 Bose	3,540.00	
927 Carolina Ext	2,340.00	
1160 Cherokee	4,740.00	
1139 Ellen	4,740.00	Robert/Robert/Donna, LLC
1163 Ellen	3,180.00	
921 Mt. Gallant	5,940.00	
567 Rabun	10,740.00	
316 Rich	2,700.00	
574 Clarinda	2,820.00	
<u>586 Clarinda</u>	<u>2,820.00</u>	
Subtotal: Potential Renters	\$ 56,520.00	

10. All property above, other than 1139 Ellen, is owned by third parties, and as to it, the Ten (10%) fee of the Plaintiffs' company would apply.

11. The above represents my best estimate of the damages suffered by Rock Hill Property Management.

Robert K. Marshall, Jr.
Robert K. Marshall, Jr.

SWORN TO and subscribed before me
on this 19th day of March, 2012.

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires: 07/20/2013

1 THE COURT: This is a motion for Summary Judgment.
2 I'm familiar with the file. I went back and looked at the
3 pleadings and also read my order regarding a TRO so I have
4 some basic knowledge of what we're dealing with. This is a
5 Motion for Summary Judgment on behalf of the defendants.

6 Mr. White, I'll let you proceed.

7 MR. WHITE: Thank you, Your Honor.

8 Your Honor, I believe it's uncontested in the record
9 that the City has a material problem of unpaid utilities.
10 It amounts to over a Million Dollars per year. The City I
11 believe it is also uncontested in the record that the City
12 implemented subject ordinance which has become an important
13 tool in mitigating these losses. The ordinance at issue
14 is 29-31 § D in it's operative form which states "that
15 service shall not be provided at a new location to any
16 consumer delinquent at a prior location. All members of a
17 family occupying the same household may be deemed consumers
18 for purposes of the section regardless of whose name the
19 service is registered."

20 That's because as AMIL revised the city ordinances
21 years ago in response to the fair housing act so that the
22 city ordinances would not be volatile to different people's
23 groups rights so that a family is not defined uniquely as
24 people related by blood or adoption. A family is defined
25 to be all persons living together in a dwelling unit up to

1 five. And so what the City was encountering is they would
2 just move the registration around to someone else's name
3 until they run out of people and they could migrate through
4 and quintuple -- quintuple their unpaid utilities.

5 The City is not blazing a trail here as it's cited in
6 the brief. The Public Service Commission has a regulation
7 found at 103-342 § K which provides and I quote "No
8 electric utility shall be required to furnish its services
9 or continue it's services to any applicant who at the time
10 of such applications is indebted or a member of his
11 household is indebted. Under the undisputed bill to such
12 electric utility for services previously furnished to such
13 applicants or furnishes to another members of the
14 applicants household."

15 The two - There's three levels of - I think - the
16 operative nature of this ordinance that are being
17 challenged Number one, the notion that someone can live in
18 a house that has an unpaid bill and be charged for it.
19 Although it's undisputed there is nothing in the record to
20 show that Mr. Willis is the subject person involved in this
21 didn't owe it. There is nothing in the record to show that
22 it was a disputed bill or that it wasn't his charge.

23 The other issue is - seemingly is that the fact that
24 the unpaid utility bill was from another location. And the
25 third would be that the renters in this case, the landlords

1 desire to be able to rent to whomever they choose in their
2 own name.

3 Notice that the PFC regulation at 103-342 K it deals
4 with two out of the three. It allows the - it allows
5 someone subject to the PFC which the City is not, it allows
6 them to not only not provide new service but allows them to
7 discontinue an existing service to an applicant who is not
8 only the applicants indebted but the applicant who was
9 furnished -- was a member of a household furnished of a
10 delinquency at another location.

11 Also in earlier in that section or I guess later -- I
12 guess that's an L instead of a 1. At 103-342 \$ L an
13 electrical utility and I quote "an electrical utility may
14 terminate a consumer's service should the consumer be in
15 arrears on account for service at another premises." So we
16 get the second issue.

17 The first issue is while Mr. Willis says well the
18 utility bill and other ones, even if it were in the record
19 wasn't his bill, he just lived there, which isn't in the
20 record, all the record shows is that he had an undisputed
21 bill that was unpaid from a prior location. The PFC all
22 the utilities under the AMBA of the PFC would be allowed to
23 do the same thing that the City did in this case.

24 Also in North Carolina there is a statute which allows
25 a city utility to suspend or disconnect service to a

1 consumer because of past due or unpaid balance for services
2 incurred by another person who resided with the consumer.
3 Again, we got the same notion. It doesn't matter who's
4 bill it is if you lie there you're the consumer and it's
5 going to follow you. Where the consumer and the person
6 were members of the same household at a different location
7 when the unpaid balance for service was incurred or is a
8 person was a member of the consumers current household at a
9 different location an unpaid balance for service is
10 incurred."

11 So again, both issues are addressed whether you're in
12 a city in North Carolina or you're under the PFC the city
13 ordinance would be consistent with both of those
14 jurisdictions. But of course the city has been granted
15 under home rule wide latitude to operate it's utility
16 systems. And I mention those merely so that we don't think
17 we're talking about a rather abnormal or unique feature of
18 the city code that you don't find elsewhere.

19 In South Carolina there's - first there is no case
20 that says - provides that a right to utility service is a
21 fundamental constitutional right. The right to terminate
22 --

23 THE COURT: Let me stop you just a minute.

24 The thrust of their complaint as I understand it is
25 not sort of where you're arguing now about what you do with

1 Mr. Willis. They believe they ought to have the right to
2 one of their rental properties and let's assume its in
3 their name although a rental property can be in somebody
4 else's name and be managed through a rental company - but
5 they want to say we ought to be able to go and have
6 electrical power delivered to this address in our name even
7 though we're not living there because we're gonna pay the
8 bill. I mean that's sort of what I understand the thrust
9 of their argument is but you - and also and I know it
10 wasn't substantiated earlier and I don't know whether we
11 can get into it now - they claim that the city is allowing
12 other people to do that. And so I really think - I mean
13 I'm listening to you but I don't think they've as I
14 understand the thrust is that Mr. Willis owes an electrical
15 bill then the city I don't think they contest the city has
16 every right not to provide him with the power.

17 Is that right, Mr. Foster? Is that --

18 MR. FOSTER: We do maintain that, that is not the
19 thrust yes, sir.

20 THE COURT: Okay.

21 MR. FOSTER: The thrust is on our behalf.

22 THE COURT: All right.

23 MR. WHITE: I believe part of the argument is a larger
24 one but to answer the Court's two questions, let me take
25 the second one first which is the shorter.

1 There is no facts in the record that anybody under the
2 circumstances of the Cherokee property of Mr. Willis and
3 the plaintiff's has received different treatment.

4 THE COURT: I note that in my earlier order.

5 MR. WHITE: There is --

6 THE COURT: I didn't know if something had changed
7 since then.

8 MR. WHITE: Nothing has changed. There is in the
9 testimony of Mr. Marshall he testified in the response to
10 the interrogatories they were ask "identify every person
11 you believe has received disparate treatment?". They
12 identified four or five locations which in the deposition
13 he admitted he didn't understand, he was not aware of the
14 circumstances. You know in a master meter situation there
15 is no city regulation that requires any notification of a
16 change in tenants.

17 If you have continuance service and the tenants come
18 and go, there is no requirement by the city that you come
19 in and say okay Mr. and Ms. Smith has left and now it's
20 John Harold McMillan. There is no requirement of that.
21 And so Mr. Marshall in his deposition testified honestly
22 that his situation was different in that he would cut off
23 service which would trigger the application process which
24 you have to write down who's going to live there. And he
25 testified again I think very honestly that he was not aware

1 of whether any of these other locations they listed in the
2 responses to interrogatories was in that situation which
3 had that notification requirement.

4 If you don't have an application, if he just left the
5 utilities on in his premises in his name, then the city
6 would never inquire; there's no city code, there's no city
7 ordinance that provides for the city inquiring of who the
8 change of tenants is which is the situation that he'd find
9 at the Cobb house and those places that have a master meter
10 and they just don't worry about it, they just pay the meter
11 all the time. Mr. Marshall testified that his places go
12 dark for a while so what he wanted to do was to cease so
13 he's not paying those little charges in periods in which
14 the property was not being let. And so he was - there is
15 no testimony in the record, there is no evidence in the
16 record that any of the people for whom they have identified
17 as receiving disparate treatment are actually in the same
18 situation, so the evidence never rose to that.

19 As to the first issue the notion that the -- I was
20 going to handle this in a certain order but to answer your
21 question --

22 THE COURT: Go ahead. I just - if you take your order
23 because I don't want to knock you out of your order, I just
24 was trying to get my arms around what the issue was.

25 MR. WHITE: To get your arms around that last one I

1 think - I thought they were challenging the whole and one
2 of our difficulties in this case is - I think Martin's
3 almost too smart for his own good. The complaint is such a
4 large document but it doesn't provide what I believe is
5 required to provide. When you start making constitutional
6 challenges you are required to say precisely, because, you
7 know, due process is such a big field of law that the
8 pleading requirement is that you plead precisely what is
9 the writing so that the defendant can identify it. Is it a
10 fundamental right, is it a mere rationality, so the
11 defendant is on notice of what it is being charged with
12 having violated.

13 This is a case challenging a city ordinance. This is
14 the third prong of government being ask to over rule the
15 second prong of government. This is a big deal and it is a
16 matter of significant moment and the complaint does not
17 even provide enough so that we have an understanding of
18 where the economic - excuse me, the equal protection is and
19 exactly under what sub-component is the due process.

20 But aside from that, what it really seeks to challenge
21 is, if you look at his notion is - the plaintiff's notion
22 is I should be able to rent my property to whomever I
23 choose. If I put the service in my name I should be able
24 to do whatever I want with the property. That's not an
25 equal protection claim. That's not even a due process

1 claim. That's a takings claim. And under the regulatory
2 takings case the question is, has there been a substantive,
3 almost a mirrored complete economic declaration of rights
4 and in this case it doesn't come anywhere near close to
5 that. But if you look at it, the Marshall's don't have
6 standing to fight the battle for Willis. The question then
7 becomes what constitutional protective rights do they have?
8 And again there's no fundamental right to utilities ever
9 found in the Fourth Circuit or in South Carolina.

10 Here there is not a battle over equal protection or
11 due process. What they're really arguing about is the
12 taking. And the notion that they can't quite get their
13 hands around is they are not allowed by law, there's no
14 expectation in South Carolina or the United States that you
15 when you buy a piece of property you receive every bundle,
16 every stick in the bundle so that you can maximize every
17 dollar of that property as possible. Even if that were
18 true, they didn't plead to taking and there's no guarantee
19 in the constitution of an unfettered - that anybody would
20 be unfettered by government regulation to always pursue the
21 most profitable use of property. And the cases are legion
22 that state - that state action has to be so substantial as
23 to almost deprive all economic use from the property for it
24 to be a regulatory taking.

25 And just to highlight it, in Page 79 through 80, again

1 testifying rather forthrightly, I thought Mr. Marshall
2 testified that it's his belief that it is his
3 constitutional right to rent to anybody he chooses so long
4 as that person is not wanted for murder. When ask "Do you
5 think you can rent to anybody" he said "well not if they're
6 wanted for murder but other than that yes."

7 But look, let's just step back and look. You can't
8 rent property in a certain zoning district and create it
9 into a multifamily housing. All the RS districts require
10 one dwelling per parcel. You would have to subdivide the
11 property to have two dwellings per parcel and there has
12 been a lot of cases before this court where someone put of
13 a garage apartment and then the county came in or the city
14 came in and said well you can't put a full kitchen or a
15 full bath, you can't rent to people - more than five people
16 that are unrelated, you can't have a FRAT house or a
17 sorority house in certain zoning districts. You can have
18 them in other zoning districts but it may be much more
19 profitable to have a fraternity house like the one there on
20 Charlotte. That was probably a more profitable venture
21 than what they have now although they lost their zoning and
22 now they can't have that. Also you can't take a house and
23 reconstruct it into a dormitory style housing so that all
24 the rooms are used up for beds with a kitchen and thus
25 instead of renting it to five people you rent it to twenty.

1 You can't reconfigure properties into duplexes or
2 quadplexes or create multifamily within certain zoning
3 districts. Notice you can't even rent to certain people in
4 certain locations. If the plaintiff's had a house within a
5 certain zone of a school or a church, there are certain
6 people with a criminal history that they cannot rent to
7 because the person couldn't rent. The same thing here.
8 Mr. Willis, they could rent to Mr. Willis but Mr. Willis
9 had to do something or Mr. Willis had an impediment to
10 renting that property. So too with someone who has a
11 certain criminal record if the house was located within a
12 certain proximity of a school.

13 In other words government has the right to place
14 certain regulation on the economic use of property so long
15 as they don't deprive it of substantially all that right.
16 That's really what this case is about. Because the case
17 has never been about - there is nothing in the record that
18 ever provides the Marshall's were not allowed to cut the
19 lights on, on that property. It's not a case about the
20 city would not provide the Marshall's utilities, the city
21 would. The problem was the Marshall's were trying to rent
22 their property, were trying to get the lights cut on in
23 violation of an ordinance which was targeting delinquency
24 of Mr. Willis. And the city is allowed if it were in a PFC
25 situation, it is allowed if it were in North Carolina and

1 is allowed under the home rule in the State of South
2 Carolina to create a situation where Mr. Willis cannot leap
3 frog throughout the city leaving delinquency wherever he
4 is. And it's interesting to note Mr. Willis eventually
5 did, since that hearing, he did rent the property and did
6 move in. It's also interesting to note that he left owing
7 everybody more money.

8 The court will note that in Gilbert versus Duke Power,
9 the Court stated that the public service company has a
10 right to discontinue service upon nonpayment of by a
11 consumer of recent and just bills furnished to him. And
12 has also the right to refuse further supply of electricity
13 until those bills are paid. That was the City's right
14 visa vie Mr. Willis. Denial as to a different location was
15 handled in the De Pass versus Broad River. There the Court
16 stated that - the Supreme Court held "we see no real
17 difference between the right of the utility company to
18 discontinue service of a certain kind or type on an account
19 of consumers failure to pay a past due bill which is just
20 and undisputed in which the company has not allowed to
21 become over stated and for the same reason to refuse to
22 furnish at another place under similar contract upon demand
23 of such consumer."

24 So the City was within it's rights to say Mr. Willis
25 you cannot get service until you make arrangements for your

1, old service. That I think is clear. So then the question
2 becomes well can the Marshall's come in and say well "we're
3 gonna put it in our name" and they write in there that
4 they're going to put Mr. Willis into that location. And
5 there is no constitutional right, there is no equal
6 protection challenge, and there is no due process which is
7 the only two things in the complaint which is violated by
8 the city providing that they cannot do so. And again, it
9 has to be noted there is no claim and there is no fact that
10 the city was not going to cut on utilities at that property
11 to the Marshall's for any circumstance. Just like if you
12 had a piece of property and you wanted to build two
13 dwellings on it and the city won't give you a building
14 permit and you say well I can't build on my property. No,
15 you got to comply with the lawful rules. You can build a
16 single family dwelling on that property you just can't
17 build two.

18 I'll note for the Court that many jurisdictions allow
19 a greater right to collect than the city is trying to
20 exercise here. Now the city is making no attempt to make a
21 landlord pay for the debts of a tenant. A lot of
22 jurisdictions allow that. A lot of jurisdictions take the
23 position that a landlord benefits from the tenants
24 occupancy, and thus somehow some lien arises that the
25 landlord is responsible for against his property when the

1 tenant doesn't pay the utility bill. The City is not
2 making that argument. I believe it has come out through
3 discovery, the written discovery and through the deposition
4 that the Marshall's do not contend that the City tried to
5 make them pay for Willis's debt.

6 So, if you look at other jurisdictions that go the
7 next step, all the city is saying is the debt follows the
8 individual who used the utilities. Other jurisdictions
9 have gone farther and say that the debt not only follows
10 that person but it is the landlord's responsibility. And
11 the third, second, Third Circuit you have Ransom versus
12 Maseuro requiring new occupants of a location be
13 responsible for prior utility services. The Eleventh
14 Circuit Demosso versus Clearwater requiring landlord
15 acknowledge responsibility for utility, tenant utility
16 services. The Sixth Circuit Mansfield Apartment Owner's,
17 due process, no person shall be deprived of life, liberty
18 of property.

19 There are a number of jurisdictions that find that a
20 utility service is not a property right under the Fourth
21 Amendment. Excuse me, the Fourteenth Amendment. Again the
22 question here is not whether the plaintiff could have
23 obtained any service but that they couldn't obtain the
24 service in a manner that they select free of any government
25 regulation. There is no fundamental right of the provision

1 of water and sewer service whether by municipality or by
2 private utility is not a federally protected right, that's
3 the Third Circuit. We reject the claim that conditioning
4 the receipt of water service on the satisfaction of past
5 due charges rendered raises the question of substantive due
6 process. That's the Sixth Circuit.

7 And then there's the Chatham Case, Chatham versus
8 Jackson. That's a Fifth Circuit Case. The best case that
9 I've seen that the plaintiff's have argued is a Fifth
10 Circuit case - Davies. In that case the rolls were
11 reversed. The tenant was being dunned with the utility
12 bill of a prior tenant or of the landlord and the court
13 said no, no, no, you can't do that, that's a equal
14 protection violation. And there were some other issues
15 that aren't involved here. The Fifth Circuit handed down
16 that decision.

17 The Fifth Circuit then handed down a number of
18 decisions including the Chatham decision which
19 distinguished the Davies and limited it to it's holding and
20 to it's facts. Jackson and Chatham was the opposite. Then
21 you had - it was following the tenant - and the court
22 stated "Atlanta's practice of terminating water service to
23 the landlord when the tenant billed at another place under
24 a similar contract had no constitutional issue." So there
25 you had a tenant who had a delinquency somewhere else and

1 he moved to this new one and the landlord was being charged
2 with that bill from the other location. And the court said
3 there is no constitutional issue there.

4 That is not what the city is trying to do. Of course
5 when you start looking at due process you try to look at
6 what's the standard. Certainly there is no fundamental
7 right so if there is an issue it's a mere rationality. Is
8 the government action related to - is the government
9 classifications or the government action related to the
10 government aim. Here the government aim is most narrowly
11 tailored as it can possibly be. The person to whom
12 created, used the utilities and did not pay for them, it
13 follows that person within the city and that person alone.
14 The landlord is not responsible for the debt, all it is, is
15 the landlord cannot circumvent it by violating it by
16 allowing Mr. Willis to serve under his name because Mr.
17 Willis is the consumer according to the language of the
18 statute. Oh excuse me, the ordinance.

19 And so it is no different than a myriad of other ways
20 in which a landlord is fettered, constitutionally fettered,
21 from maximizing the yield from a parcel due to a legitimate
22 government regulation. For these reasons summary judgment
23 is appropriate because there is really no question of fact
24 about these issues. The only question is, is there due
25 process claim or is there equal protection claimed? Equal

1 protection claim has fallen because there is no evidence of
2 any disparate treatment. The due process falls because of
3 a number of reasons. Number one: There is no property
4 right being taken. And Number Two: And finally what this
5 really is, this is a claim about a regulatory taking. That
6 hasn't been pled. But also it doesn't rise to the
7 substantial level of economic loss such that a Fifth
8 Amendment would be brought into it. Thank you.

9 THE COURT: Mr. Foster.

10 MR. FOSTER: Thank you, Your Honor.

11 Your Honor, first of all just to take care of
12 bookkeeping. Mr. White has referenced what it is and is
13 not the record. Has the Court received the depositions?

14 THE COURT: No. I don't have the depositions. I don't
15 know. I may have some excerpts attached somewhere but I do
16 not have the depositions.

17 MR. FOSTER: I have Ms. Thomas's deposition and I
18 assume that I can hand Mr. Marshall's and Ms. Marshall.

19 (DEPOSITIONS HANDED UP TO THE COURT.)

20 MR. FOSTER: Secondly, sir, I believe Ms. Foster has
21 handed you my brief as well?

22 THE COURT: I have it yes.

23 MR. FOSTER: Okay. Well, sir, let me say up front
24 without any false modesty, I'm not going to say much that's
25 not in my brief. And my brief doesn't say much though I

1 haven't cribbed shamelessly from a national consumer law
2 center on utilities. I can be interrupted or told that I
3 need not go forward if the Court so wishes but I will try
4 to summarize.

5 THE COURT; Okay.

6 MR. FOSTER: First of all let me try to deal with some
7 of the issues that Mr. White and I have as I presume a
8 difference on factually.

9 Mr. White maintains that nothing has been identified
10 to show a different treatment. I don't believe that's the
11 case. In Ms. Thomas's deposition and I am finding this
12 roughly from Page 9, Line 16 through 15, Line 17. There is
13 my colloquy with her about my characterization, do you know
14 about this property? Do you know about that property?
15 Some she acknowledges that the landlord is paying the
16 utilities. A great many of them she says I don't know.
17 Now let me say because I don't wish to be unfair, I don't
18 believe there was any further discovery on that disclosed
19 to me. If I am incorrect I am incorrect but those issues
20 were at least raised.

21 Your Honor, to at least summarize where we are on this
22 matter I will try to be brief unless the Court wishes
23 otherwise. The right to utilities is a common law right.
24 It is the same thing as this court or Justice Toal saying
25 to counsel or myself you are going to go try a case, you're

1 a lawyer that's what you do. That is the background of
2 utilities. It is common law.

3 Mr. White argues that there is no basis to what we're
4 arguing in constitutional law. Well in due process we have
5 cited that. There are decisions that take the position
6 that once the utility exist - this is in our brief - that
7 the depravation of that right by either termination or
8 refusal to supply, is in fact a constitutional right that
9 the failure to acknowledge them is a matter of due process.

10 Now, what do we have in this case? Your Honor rightly
11 goes into the point which we believe is the strongest. The
12 strongest is they are telling Mr. Marshall and his wife who
13 they can rent to. Well, in my research as I understand it,
14 in order to do this the Supreme Court, our Supreme Court,
15 has rightly in my opinion adopted the modern rule about
16 what a government can or can't do. And the idea basically
17 is, is there a rational relationship, I suppose now days we
18 say nexus, between the desired end and the statutory
19 result. Well, we are taking the position that in this case
20 there is not. There is nothing by way of anything other
21 than shall I say assumption and political judgment to say
22 if we deprive the person who owes a utility bill from us
23 from the right to live in Rock Hill as a renter, that will
24 increase our income.

25 We would argue first of all and I suppose on the top

1 that that is not justified, there is no social logical
2 basis of studies to show that it's true. It is political
3 judgment and no more than that. I would go a little
4 further. I think that when our Supreme Court decided, if I
5 remember correctly this - and I will find it but we've
6 cited it in here - is the 2000 case of R. L. Jordan Company
7 versus Boardman Petroleum, cited on page 13 of our case,
8 when they cite the idea of this rational connection I would
9 argue to the court that a rational connection has to be
10 more than simply, can we find a logical connection between
11 X and Y? To go very heavy with the Court, some of our
12 citizens would argue that if you kidnap a sixteen year old
13 out of Afghanistan and send him to Guantanamo and slap him
14 around or worse, he will eventually give you stuff that you
15 have to have - information. I would argue to this Court
16 that the concept of rational connection has to include the
17 notion of what we consider to be legal, even I would argue
18 what we consider to be decent. In this case the City is
19 saying that we are going to tell Mr. and Ms. Marshall and
20 the companies which are largely I understand those of their
21 family, who they can rent to.

22 And the language that in fact he was questioned about
23 and that is attached to his - to his deposition as the
24 second exhibit reads the magic words "before we can
25 establish service for you at this locations" - they're

1 discussing the case that started the matter - "if Mr.
2 Willis" - I believe I put in the tenant, "has any prior
3 debts those must be settled."

4 Our argument first is that there is no legal basis
5 upon which they can make that distinction. Mr. White has
6 argued eloquently about the effects of the cases of this
7 country. We have cited everyone that we can find. I
8 believe I can state to this Court generically - generally,
9 pardon me, that that is not the law in this country. I
10 would grant the fact that I have the same situation as Mr.
11 White and Mr. Mellwood, South Carolina has not ruled on
12 these matters except in general terms, that I can find.

13 I would argue to the court that even if we look at
14 this matter as being derivative of Mr. Willis's rights or
15 the rights of potential tenants, we have the right and we
16 have stated a cause of action. And that is because in the
17 language of tort and approximate cause if they say, we are
18 going to restrict the rights of a potential tenant to go
19 out and rent in this city because of past debts, that is
20 going to have an impact and has an impact which we have
21 alleged upon the potential landlord and to that extent is
22 foreseeable and within the end the approximate cause.

23 Beyond that --

24 THE COURT: You arguing this is a tort claim?

25 MR. MARTIN: I'm arguing - I'm arguing, sir, that --

1 here's where I'm coming from. It could be a tort claim but
2 here's where I'm coming from on that. Whether it be tort
3 or not, the argument here is, when the City applies, makes
4 and applies its statutes and it has the effect that we're
5 arguing, in that event is the damage to Mr. Marshall, the
6 people in his position foreseeable. And if I may, sir,
7 that once again stopping for housekeeping.

8 Does the Court have copies of the Rock Hill
9 Ordinances?

10 THE COURT: Well I don't have them all but I believe
11 the one in question is attached to something because I saw
12 it earlier but I don't have them all.

13 MR. WHITE: I believe it's attached to the affidavit.

14 THE COURT: You can hand one up just to be safe.

15 MR. FOSTER: Here's the copy of both of those that we
16 have cited.

17 THE COURT: Okay.

18 MR. MARTIN: Which I believe is relevant.

19 THE COURT: Okay.

20 MR. MARTIN: Your Honor, I am being very general. We
21 rely upon the documents and the precedence stated in our
22 brief which I'm sure Your Honor will look at carefully.
23 Unless the Court has any questions at this point I have
24 nothing further now.

25 THE COURT: Okay. All right. I'll be glad to take

1 it.-- Any followup, Mr. White? I'm am going to take this
2 under advisement.

3 MR. WHITE: I just have one quick comment.

4 I recognize that perhaps Mr. Marshall on the city
5 counsel he would have voted a certain way as to perhaps Mr.
6 Foster would, perhaps the Court would, perhaps I would vote
7 a different way, but I would just highlight for the Court
8 the standard here is a tough one for a plaintiff and equal
9 protection and the mere rationality reviewed - and I'm
10 quoting from Sloan versus South Carolina Board of Physical
11 Examiners on Page 9. I won't quote the whole thing but the
12 first part. "A legislature enactment will be sustained
13 against constitutional attack if there is any reasonable
14 hypothesis." The City doesn't have any burden of proof to
15 come in and show that this process is working.

16 The question is, is there any reasonable hypothesis to
17 support it? The Court must give great difference to the
18 legislative bodies classification divisions because it
19 presumably debated it and waived it." Not that it actually
20 did but it presumable did. And then on Page 12 with
21 respect to the second form which is due process. "If
22 government purpose need only be hypothetical to pass
23 muster, so the City doesn't have any burdens of proof here.
24 The burden of proof is on the plaintiff to show that he is
25 either in some sort of fundamental class and thus there's

1 strict scrutiny in which case some burdens could show, but
2 there's no argument about that. Mr. Foster correctly
3 stated that this is an mere rationality standard. In a
4 mere rationality standard flowing from an unambiguous is
5 much lower so then it's just a question of is there any
6 connection, any hypothesis, is there any hypothetical
7 connection which connect the governmental action from the
8 restriction. And in this case the City has targeted the
9 most narrowly that it can, so that the delinquent consumer
10 has to make plans to deal with his delinquency before it
11 receives, he or she receives any source service somewhere
12 else which is allowed under the expressed holdings of our
13 Supreme Court; which is allowed under the DFC which is
14 allowed under sister jurisdiction of North Carolina. So
15 for these reasons the City ask that the court go ahead and
16 issue an order for summary judgment.

17 And to the extent the court would like, there is a lot
18 of foreign law, there is a lot of law just looking through
19 Mr. Foster's fine brief, there is a lot in there that deals
20 with cases that are very different. There is a lot of law
21 that I saw in there that deals with - there is a dispute
22 over the debt. And again that's a whole different world
23 than this. A dispute over a utility debt there is all
24 kinds of due process rights that can flow because there
25 used to be utilities where the judge and the jury, they cut

1 you off and they didn't give you any source of, any
2 recourse about them. This is - There is no question in
3 this case about whether there is a dispute over the debt
4 and so there is some issues that may be aren't highlighted
5 to the degree the city would want in some of the authority
6 so if the Court would like after looking at it, if the
7 court would, you know, would wish we could prepare a return
8 to it. Excuse me, a reply memorandum maybe with highlights
9 on those if the Court were to find that beneficial.

10 Thank you.

11 THE COURT: In looking at the complaint, and you all
12 have been working with it a lot longer than I have, you ask
13 for an injunctive relief and then you ask for actual
14 damages.

15 MR. FOSTER: Yes, sir.

16 THE COURT: All right. I'll take it under advisement.

17 MR. WHITE: Thank you, Your Honor.

18 THE COURT: I believe that does it for the day.

19 -- END OF TRANSCRIPT OF RECORD --
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

ROBERT K. MARSHALL, JR.,)
AND DONNA CHAPMAN)
MARSHALL, DOING BUSINESS)
AS "ROCK HILL PROPERTY)
MANAGEMENT", A SOUTH)
CAROLINA GENERAL)
PARTNERSHIP,)

PLAINTIFFS,)

-VS-) C.A. NO. 09-CP-46-03360

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 SERVICE)
MANAGER,)

DEFENDANTS.)

DEPOSITION OF LORI THOMAS

ROCK HILL, SOUTH CAROLINA

NOVEMBER 30, 2011

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

Page 3

1 Deposition of Lori Thomas, taken before me, Shirley
2 Dallas-Gerrald, CVR-CM, a Notary Public for the State of
3 South Carolina, in the law offices of Spencer and
4 Spencer, Rock Hill, South Carolina, commencing at 10:05
5 A.M., on November 30, 2011, in accordance with the South
6 Carolina Rules of Civil Procedure.

7 It was stipulated by and between Counsel for the
8 Plaintiff(s) and Counsel for the Defendant(s) that this
9 deposition is taken for any purpose allowed under the
10 South Carolina Rules of Civil Procedure.

11 That the signing of the transcript of deposition
12 by the witness is reserved.

13 * * * * *

14 Lori Thomas, first being duly sworn, deposes and says as
15 follows:

16 Examination: (By Mr. Foster)

17 Q Ma'am, would you state your name for the record?

18 A Lori Thomas.

19 Mr. Foster - Let me get some things in
20 with permission. For the record, a copy
21 of the Notice of Deposition, a copy of the
22 Subpoena, incorrectly stating the place of
23 the deposition, and a copy of the Amended
24 Subpoena. Off the record.

25 Whereupon - A discussion was held off the

Page 2

Appearances: For the Plaintiffs -
J. Martin Foster, Esquire
Attorney at Law
Rock Hill
South Carolina

For the Defendant -

Mark White, Esquire
Jeremy Melville, Esquire
Spencer and Spencer
Attorneys at Law
Rock Hill, South Carolina

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To Mayor and Council with
attachment Page 24

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1 record which was not reported.
2 Whereupon - Documents marked Deposition
3 Exhibit 1, Deposition Exhibit 2 and Deposition
4 Exhibit 3.

5 Q Ms. Thomas, I presume that Mr. White or Mr.
6 Melville have gone through what a deposition is
7 with you. Having said that, and not even waiting
8 for an answer, there are things that the deposing
9 attorney usually goes through in every deposition.
10 I want to go through those with you now.

11 Ma'am, for the record, I'm going to ask you
12 a series of questions about the matters involved
13 in this lawsuit. This reporter is going to take
14 down your answers. If at any time you don't
15 understand the question, I have to expect you to
16 tell me that, and I will repeat it or rephrase it
17 or do my best to communicate with you.

18 If you answer a question, I have to assume
19 you understood it. Is that statement understood
20 to you, ma'am?

21 A Yes.

22 Q You understand this deposition is going to be
23 transcribed by the reporter. Everything that is
24 said here today will be recorded. At any trial
25 or hearing, all the testimony you give is going

1 to be available in a booklet form. If at that
2 time, I ask you the same questions then that I ask
3 you today, and if your answers are different from
4 those today, you could be expected to be asked to
5 explain the difference. Is that understood?

6 A Yes.

7 Q Thank you. Your testimony today is under oath
8 just like you're in a court of law. You have sworn
9 to tell the truth and, obviously, you know if you
10 don't do that for any reason - I say this to every
11 deponent - there would be consequences. Do you
12 understand that?

13 A Yes.

14 Q Thank you. State your full name please.

15 A Lori James Thomas.

16 Q Ma'am, were are you employed?

17 A The City of Rock Hill.

18 Q In what position are you employed?

19 A I'm the Customer Services Manager in the Finance
20 Department.

21 Q Ma'am, it is my understanding that pursuant to
22 our Notice of Deposition under 30-B-6 Rules, you
23 have been designated as the party to answer
24 questions as to the matters stated therein.

25 A Yes.

1 Q Thank you, ma'am. Can you briefly tell me what
2 your duties are in your position with the City
3 of Rock Hill?

4 A I'm responsible for central collections as well as
5 customer service, billing services and various
6 other and sundry things for the City.

7 Q One thing also I need to say to you, a further
8 statement about the deposition. Given the English
9 language, I'm going to ask you a series of
10 questions that have to do with your knowledge and
11 your actions. By that, of course, because you are
12 a designated party, it's my understanding that we
13 are talking about you, the person who is sitting
14 here at the table and, also, you as the person
15 who has knowledge of the City's actions or
16 knowledge. At any point that you don't know
17 something but feel you can derive that knowledge
18 from further access to the City records or further
19 access to their documents, you need to tell me
20 that; is that understood?

21 A Yes, but that would be at the discretion of my
22 attorney and my superiors.

23 Q Everything here, subject to the rules, ma'am,
24 we will agree is at the discretion of your
25 attorney. Ma'am, let me ask you to identify

1 this. Is that your Affidavit from the hearing
2 we had back in 2009 in this matter?

3 Whereupon - Document marked as Deposition
4 Exhibit 4.

5 A (No response)

6 Q Ma'am, to summarize, and if I summarize badly
7 I'm relying upon you to correct me here. Based
8 on your Affidavit and what I understand from
9 this case, the Marshalls or the plaintiffs here,
10 couldn't place the utilities at what I believe is
11 1125, Number 104, Springdale in their name for
12 the benefit of a tenant or potential tenant.
13 Would that be a true statement?

14 A No, sir, that's not.

15 Q Correct me.

16 A The address that you mentioned is not a property
17 belonging to the Marshalls.

18 Q Then let me back up and say if I've misread it,
19 at a property belonging to the Marshalls on
20 which Mr. Charles Willis, I believe, was the
21 potential or actual tenant.

22 A Could you ask the question again please.

23 Q I'm trying to establish that what we're here to
24 talk about in terms of facts is that at some
25 point in 2009 a Mr. Charles Willis was a tenant or

1 potential tenant of the Marshalls. Mr. Marshall
2 rightly corrects his attorney and tells me that the
3 address was 1066 Cherokee. That the Marshalls were
4 not allowed to turn on the utilities at that
5 location in their name.

6 Mr. Melville - Object to the form.

7 Mr. Foster - That means you still have to
8 answer, ma'am, if you can.

9 A I'm not certain that that's a question that I
10 could answer.

11 Q Well, ma'am, let me look at your Affidavit. If
12 you will follow along with me. I'm not attempting
13 to ask you anything tricky at this stage. I hope
14 at no stage. On page 3 of 4 under paragraph
15 16 and 17, plaintiffs, that's the Marshalls,
16 then attempted to obtain utility service for
17 Willis at the residence in their own name. Number
18 17 reads, however, under the Utility Ordinance,
19 in order to provide utilities for Willis, a
20 delinquent customer, even if in the name of
21 plaintiffs, Willis would have to pay his past
22 due utility debt.

23 Ma'am, I am correctly stating it that the
24 Marshalls attempted to have the utilities turned
25 on at that address for a potential tenant, and

1 they were refused; is that true?

2 A For the specific tenant, Willis, that is true.

3 Q Am I correct stating as I read your Affidavit and

4 understand the situation, that the reason this was

5 disallowed was because Mr. Willis was, in fact, a

6 delinquent customer?

7 A That is correct.

8 Q And, in fact, ma'am, if I understand correctly,

9 your statements in your Affidavit, that is the

10 term used under Section 29-31-D of the City

11 Code dealing with consumer delinquents. I have

12 a copy of the Code. Please show that to

13 counsel if there's any question that that's what

14 it is. I ran it off yesterday.

15 A That is correct.

16 Q Ma'am, I understand your Affidavit and your

17 position to be that the reason for this refusal

18 to allow the Marshalls to have utilities at that

19 address for that person or that would benefit that

20 person, is that because he was there and using ---

21 because he would be there and using the utilities,

22 and that would be in violation of the Code section

23 we've mentioned.

24 A Yes, sir.

25 Q To your knowledge, are there landlords to whom

1 people.

2 A Okay.

3 Q Ma'am, there is a landlord, or has been in

4 Rock Hill, by the name of Joseph L. Huckabee,

5 who has property at 315 Park Avenue, to my

6 knowledge. Are utilities at that address in his

7 name?

8 A Not any longer.

9 Q When did that cease?

10 A At the end of his ownership.

11 Q When was that?

12 A I couldn't say specifically.

13 Q Give me a general idea, ma'am, if you know.

14 A Again, I couldn't say specifically, but I know

15 that they are not currently in his name.

16 Q Were they in his name five years ago?

17 A I couldn't say specifically, but that is a

18 probability.

19 Q Are they in the name of the current owner of

20 the property?

21 A Yes, they are.

22 Q Does the current owner of the property, to your

23 knowledge, rent that property?

24 A I don't know.

25 Q Does the City maintain records that would allow

1 the City of Rock Hill provides utility service,

2 who in turn rent residential property to tenants

3 where those landlords have the utilities in their

4 names?

5 A There is that potential.

6 Q Well, I'm asking about the fact rather than the

7 potential. Are there people in Rock Hill, serviced

8 by you -- Let me go back. Let's leave out whether

9 they are in Rock Hill.

10 Are there people to whom the City of Rock

11 Hill provides utility service, who in turn rent

12 residential property to third parties where the

13 utilities are in the name of the landlord?

14 A Again, there is that potential but without

15 specifics I could not say.

16 Q Ma'am, we had listed some specifics on the Notice,

17 and I believe also in Discovery Responses. Let

18 me hand you -- I should have said this earlier.

19 Counsel and yourself have been kind enough to

20 supply us with about three inches of paper relating

21 to the group of names that we've discussed and

22 the matters in this case. Let me hand those to

23 you without, I hope, putting them in, and ask you

24 to go through those, ma'am, or to use your

25 knowledge and tell me about certain specific

1 it to find that out?

2 A Not in a situation when there is only one meter

3 servicing the entire building.

4 Q This is, I believe, a multi unit building?

5 A It may be. I could not say.

6 Q Well, ma'am, we have supplied your counsel, I

7 believe, with some documents relating to that

8 address, which I will admit to you, ma'am, go

9 back for a quite a few years, to 1995. Let me

10 show you a copy, and I will hand a copy to your

11 counsel. For the record, this has already been

12 supplied.

13 Ma'am, I believe we can agree that that

14 correspondence is from the City of Rock Hill.

15 A It appears to be.

16 Q And, I believe I understand it correctly to say

17 that there are multiple rental units in that

18 property.

19 A Yes, but it is served by only one electric

20 meter.

21 Q That's correct. Well, it's correct according to

22 the document. That is, as I understand it, still

23 the case.

24 A There is only one electric meter at 315 Park

25 Avenue.

1 Q And, the utility services at that address,
2 if I'm understanding your answers correctly, are
3 in the name of the owner of the property.

4 A Yes.

5 Q Ma'am, there is a set of apartments, fairly
6 recently built, known as University Place at
7 610 Rose Street next to Winthrop University. Are
8 those units supplied utilities in the name of the
9 owner of the property?

10 A Yes.

11 Q And, I believe there is property owned now or
12 formerly by Mr. Peter Perrill at 219 Johnson
13 Street.

14 A I could not speak to that.

15 Q Why is that, ma'am?

16 A I don't have any knowledge of that property.

17 Q Is it possible for you to obtain documentation
18 that would allow you to answer that or supply an
19 answer to it?

20 A I could not answer that question. It would be up
21 to my superiors and my attorney.

22 Mr. Foster - Well, I don't wish to delay
23 matters here. We have inquired about it, and
24 I do think it's part of the deposition. I
25 believe, at least for that purpose, we may be

1 through one meter.

2 Q The Latham Company. This is a general question
3 rather than any address. Do they have rental
4 property in their name and supply utilities in
5 their name?

6 A Yes, sir, they do.

7 Q The Albright Company at 311 East Oakland.

8 A I couldn't answer that.

9 Q Can you tell me why, ma'am?

10 A I did not have that name.

11 Mr. Foster - Again, for the record, I believe
12 we've supplied it so possibly it is something
13 that can be supplied.

14 Q Would there be any reason, ma'am, that it could
15 not be looked up in your records?

16 A Again, it would be up to the discretion of my
17 attorney.

18 Q Obviously. To your knowledge and, again, I've
19 explained what that phrase means. Should I pause,
20 ma'am?

21 A No.

22 Q By the way, let me stop and say something. This
23 is not intended to be back handed. I should have
24 also added when we began, if you need to take
25 a break at any point just let us know.

1 leaving things open at the end of the day.
2 Let us move on, however.

3 Mr. Melville - Which one are you referring
4 to at this point?

5 Mr. Foster - Peter Perrill, 219 Johnson
6 Street.

7 Mr. Melville - There was no Peter Perrill
8 listed on this.

9 Mr. Foster - Let me look before I misstate
10 things.

11 Mr. Melville - There is a Gray and Perrill.

12 Mr. Foster - That is the same.

13 A There is no Gray and Perrill in our system.

14 Q Does that include past billing?

15 A Yes, sir, up until 2001.

16 Q You mean, I think, from 2001.

17 A Yes, sir.

18 Q Moving on, ma'am, the Cobb House at 366 East
19 Main Street. That is a rental property, I
20 believe.

21 A It is a master metered location, yes.

22 Q Which I presume to mean that the individual
23 apartments are supplied utilities which is billed
24 to the landlord.

25 A The building is entirely billed to one entity,

1 To your knowledge, ma'am, does the City
2 have a practice of checking to see if the occupants
3 or tenants of rented property, rented residential
4 property are what is designated as delinquent
5 consumers under Section 29-31, if I'm remembering
6 correctly?

7 A Yes.

8 Q What is that practice?

9 A When an individual applies for service with the
10 City of Rock Hill, their service agreement does
11 ask for the name of the consumer as well as any
12 additional members to be residing at the residence.
13 Those people's past histories with the City are
14 reviewed at that point in time. Additionally, we
15 run a credit check.

16 Q Well, I suppose my question also goes to, ma'am,
17 what about the situations where the landlord is
18 currently supplying the utilities? Are those
19 persons checked or potential renters checked or
20 actual renters checked to see if they are
21 delinquent consumers within the language of the
22 statute?

23 A If we have no knowledge of change in status at
24 a location, that would not be possible.

25 Q Now, let me move on. Is there a practice to check

1 to see if owners of commercial property are
 2 delinquent consumers within the meaning of the
 3 statute?
 4 A Yes.
 5 Q What is that practice?
 6 A Commercial customers are also checked at the time
 7 that they would apply for service with the City
 8 of Rock Hill.
 9 Q Again, ma'am, what would happen if commercial
 10 customers were renters, whose utility bills were in
 11 the name of the owner of the property?
 12 A If we have knowledge of a change at the time that
 13 the new tenant were to take occupancy, we, of
 14 course, would investigate.
 15 Q Has that ever happened, ma'am?
 16 A I could not say.
 17 Q Let me move back. Have you ever had a situation
 18 in which a landlord with an existing utility
 19 account was discovered to be supplying utilities
 20 under his or its name to a delinquent consumer?
 21 A Yes.
 22 Q Who was that, ma'am?
 23 A One recent incident was with a company called
 24 Soggy Paws.
 25 Q You better spell that for me.

1 A S-O-G-G-Y P-A-W-S.
 2 Q Okay. Who is the name of the landlord, ma'am?
 3 A I believe it was Nancy Smith.
 4 Q If you recall, ma'am, the name of the tenant.
 5 A Soggy Paws was the tenant.
 6 Q I assume that's d/b/a, or do you know?
 7 A I have no idea.
 8 Q And, Soggy Paws, that's S-O-G-G-Y?
 9 A Correct. As in wet.
 10 Q Was a delinquent consumer?
 11 A Yes.
 12 Q You were answering, I believe, the question
 13 whether you knew Soggy Paws was a delinquent
 14 consumer.
 15 A They were.
 16 Q And, I take it they were a delinquent consumer
 17 under that name.
 18 A They were.
 19 Q How long ago did this take place?
 20 A To my best recollection, about a year.
 21 Q How did it come to your attention - by you,
 22 again, I mean you or the city - that that was
 23 the case?
 24 A A staff member was doing regular meter reads.
 25 Q And, knew Soggy Paws, whoever that person was?

1 A Yes, from a recent disconnection at that location.
 2 Q If a delinquent consumer should move in with a
 3 family member who has an existing utility account
 4 with the City of Rock Hill, is it the practice of
 5 the City of Rock Hill to deal with that matter in
 6 some fashion?
 7 Mr. Melville - Object to the form.
 8 A Only to the extent that we have knowledge.
 9 Q And, if the City had knowledge, what would its
 10 practice be?
 11 A We would send a notification letter to the location
 12 that there was an outstanding issue for a resident
 13 at that location.
 14 Q To your knowledge, has that situation ever
 15 occurred?
 16 A Yes.
 17 Q So, a delinquent consumer, let me be sure we're
 18 talking the same thing, a delinquent consumer has
 19 moved in with a family member. The family
 20 member has an existing utility account. How often,
 21 to your knowledge, has that occurred?
 22 A I couldn't say specifically.
 23 Q More than once?
 24 A Yes.
 25 Q Can you give me an estimate of how many times?

1 A I would be amiss to try to guess.
 2 Q Well, I need to have an idea, ma'am. Would you say
 3 it's more than 10?
 4 A I would say less than 10 a year.
 5 Q Does the City have the ability, ma'am, do you have
 6 the ability to locate and identify those
 7 situations?
 8 A No.
 9 Q So, there is nothing in your records to indicate
 10 when those family members might have been contacted
 11 about a delinquent consumer.
 12 A Correct.
 13 Q Nothing in your database?
 14 A No, sir.
 15 Q Without trying to supply you with an answer, ma'am,
 16 would I be fair to say it would simply require you
 17 and your staff to use your institutional memory
 18 as to who those people were?
 19 A Correct. There would be notifications on the
 20 current location and account, but nothing that is
 21 stored in the database.
 22 Q Ma'am, in a situation like that, delinquent
 23 consumer, and I'm using the term, again, for
 24 29-31, moves in with a family member who has an
 25 existing account, what then is the position of

Page 21 1 the City as to the duty of the family member? 2 A If the family member still remains in good 3 status, there would be no action. 4 Q Going back to the example you told me about, 5 which I guess was a commercial example, Soggy 6 Paws, Ms. Nancy Smith, who is the landlord, what 7 alternatives were given to that landlord? 8 A That landlord was -- There were extenuating 9 circumstances with that. Service had been 10 connected unlawfully, so we actually removed the 11 meter. 12 Q So, in that event, it would be fair to say that 13 the utilities were not being sent in the name of 14 the landlord? 15 A Partially, they were. It was not full service. 16 Landlords are allowed something called temporary 17 service. 18 Q Were the temporary services notices in that case 19 being sent to the address of the landlord? 20 A Yes. 21 Q And, was that a different address than that 22 occupied by Soggy Paws? 23 A Yes, it was. 24 Q Were they being paid by the landlord? 25 A Only for the portions that they were being billed	Page 23 1 Q Ma'am, other than the code section that we've 2 been discussing, are the practices that you and 3 I have been talking about in this deposition 4 written down anyplace? 5 A We do have a disconnection policy. We do have 6 a policy on the terms of our disconnection. We 7 do have payment arrangement policies. 8 Q Are those in writing, ma'am? 9 A Yes. 10 Q Are these considered to be public information? 11 A Yes. 12 Q Let me go through that. Disconnection policies? 13 A Correct. 14 Q Payment collection policies? 15 A Payment arrangements. 16 Q Payment arrangement policies. Did I misunderstand? 17 Did you mention a third thing? 18 A Terms of disconnection. In other words, for 19 weather related issues. 20 Q Is that different than disconnection? 21 A It may be. All of that is in one document. 22 Q What size is the document, ma'am? 23 A It's actually been supplied. 24 Mr. Melville - Do you want a Bates Stamp 25 number on it? They're all Bates Stamped.
Page 22 1 for, not for all those being consumed. 2 Q Well, ma'am, the portions they were billed for were 3 what? Some utilities among others? 4 A The City bills for multiple utilities. 5 Q Right. 6 A Including electric, water, sewer, utilities. Under 7 a temporary status, not all utilities are billed. 8 If the location is occupied, of course, all are 9 being consumed, so they are being consumed 10 unlawfully. 11 Q Which utilities was the landlord, Ms. Smith, being 12 billed for? 13 A Water. 14 Q How long did Soggy Paws --- 15 A I'm sorry. Let me correct myself. I can't say 16 definitively. 17 Q You think it was water. It may have been other 18 things? 19 A Yes. 20 Q How long did Soggy Paws occupy those premises? 21 A I can't say. 22 Q I think you did indicate that Ms. Smith, or 23 apparently someone on her behalf, was paying for 24 limited bills? 25 A Correct.	Page 24 1 Mr. White - Off the record. 2 Whereupon - A recess was taken. 3 Q Continuing the deposition, from the mass of 4 documents, your attorneys have supplied me with 5 several pages which are headed by a letter or 6 memo, September 21, 2006. Can you go ahead and 7 identify those as the written regulations or 8 practice statements that we've been discussing? 9 A Yes, sir. 10 Q Thank you. Since I am seeing this for the first 11 time, can you point out to me in this document 12 quickly where the question of the treatment of 13 delinquent consumers, under circumstances such as 14 we have been discussing, as tenants or as 15 occupants, is discussed? 16 A No, sir. 17 Mr. Foster - Thank you. Let's mark that. 18 Whereupon - Document marked as Deposition 19 Exhibit 5. 20 Q Handing you back what is now Deposition Exhibit 21 5, is there a discussion in that document or a 22 written procedure in that document as to how 23 payment schedules and amounts are set up for 24 delinquent consumers? 25 A Yes.

1 **Q Can you point that out to me?**
 2 A Payment plan. This is specifically designed for
 3 individuals who actually have active accounts.
 4 **Q Is there, ma'am, a procedure or a practice set**
 5 **out in writing for delinquent consumers, who do**
 6 **not have active accounts?**
 7 A Specifically the ordinance.
 8 **Q The one we've been discussing?**
 9 A Correct.
 10 **Q Let me ask this. It may be obvious questions,**
 11 **but I need to go through this. What is the practice**
 12 **of the City as to setting the amounts and time of**
 13 **payment schedules on delinquent consumers?**
 14 A For delinquent consumers who do not have an active
 15 account, the ordinance specifies that we collect
 16 the outstanding debt prior to establishing
 17 service. In an ability to work with those
 18 consumers, we do allow payment arrangements under
 19 certain circumstances for those individuals to
 20 reconnect service.
 21 **Q Where, ma'am, in writing, if it is in writing,**
 22 **are those payment arrangements and circumstances**
 23 **set out?**
 24 A It's not in writing. We will generally, however,
 25 apply at the outside, the payment plan that we

1 would offer to an active account, but no more
 2 lenient.
 3 **Q Now, the payment plan you would offer to ---**
 4 **When you say, at the outside, what do you mean**
 5 **by that, ma'am?**
 6 A They would never be more generous than what
 7 we offer to an active account holder.
 8 **Q And, the active account holder is what you've**
 9 **identified as the written statements under**
 10 **payment plans, under page -- Marked City**
 11 **Docs, Marshall, 59?**
 12 A Correct.
 13 **Q Ma'am, either for a delinquent consumer with an**
 14 **active account or one without an active account, is**
 15 **it the practice of the City to take into account**
 16 **that consumer's income and budget?**
 17 A No.
 18 **Q Ma'am, I assume I understood correctly that as to**
 19 **a delinquent consumer without an active account,**
 20 **though you've tried to set out -- Though you've**
 21 **outlined for us the practice of your department,**
 22 **am I correct in assuming that those practices as**
 23 **to a delinquent consumer, without an active**
 24 **account, as to circumstances, is not written down**
 25 **anywhere?**

1 A Correct.
 2 **Q So, it would be accurate to say, ma'am, that it**
 3 **is the discretion of your -- Well, of the City, as**
 4 **to how and where they will be required to pay?**
 5 **Mr. Melville - Object to the form.**
 6 A I'm sorry. I'm going to need to ask you to repeat
 7 that.
 8 **Q What I'm getting at, ma'am, is simply, if it's**
 9 **not written down, it is at your discretion, the**
 10 **City's discretion as to how those delinquent**
 11 **consumers, the ones without active accounts, and**
 12 **what amounts those consumers have to pay.**
 13 A No.
 14 **Q Well, then, where would I look?**
 15 A My job is to collect the delinquent debt in
 16 accordance with the ordinance, but with no more
 17 discretion given to inactive accounts than to
 18 those with active accounts, in order to treat
 19 everyone equitably.
 20 **Q To perhaps be obvious, ma'am, you mentioned taking**
 21 **into account circumstances, at least for delinquent**
 22 **consumers without active accounts. We can agree,**
 23 **I trust from your answers, that those circumstances**
 24 **are not set out in statute.**
 25 A They are not set out in statute; however, we use

1 the parameters as set up by payment plans,
 2 parameters.
 3 **Q You look at no other circumstances?**
 4 A I can't think of any that we look to.
 5 **Q As I read the section that we've been referring**
 6 **to under payment plans in your regulation, again,**
 7 **Deposition Exhibit 5, this sets out a date for**
 8 **payments up to three months. Let me give you**
 9 **a copy.**
 10 **Mr. Foster - Off the record.**
 11 **(Off the record)**
 12 **Q Ma'am, going back to the section on payment**
 13 **plans, City docs, Marshall, 59, is the Bates**
 14 **Stamp, reading under the first bulleted paragraph,**
 15 **payment plans for delinquent accounts will be**
 16 **managed as follows: First one, a payment plan of**
 17 **up to three months may be offered consumers -**
 18 **pardon - customers, experiencing extraordinary**
 19 **circumstances. An extraordinary circumstance is**
 20 **broadly defined as a significant event or events**
 21 **affecting a consumers life and ability to pay.**
 22 **City customer service representatives will use**
 23 **their best judgment in applying the extraordinary**
 24 **circumstances determination and are expected to**
 25 **seek advice and confirmation from supervisory**

1 staff as needed. The representative granting
2 approval must enter appropriate account notes. Is
3 that an accurate reading, ma'am?

4 A Yes.

5 Q Is there any place where - and I'm quoting here -
6 extraordinary circumstance is defined, other than
7 set out in this document?

8 A No.

9 Q I assume that you would be supervisory staff.
10 Maybe you are the supervisory staff.

11 A Yes.

12 Q Thank you. The cover letter on Number 5 is in
13 the form of a memo or a letter to the mayor and
14 city council stating that you are writing pursuant
15 to state legislation. I assume this is still in
16 effect, to be obvious, since we are being handed
17 it today.

18 A Yes.

19 Q Ma'am, is this also submitted to any state
20 regulatory agencies?

21 A I don't know. I believe the cover letter says
22 that it was submitted to the Office of Regulatory
23 Staff in November of 2006.

24 Q To your knowledge, ma'am, were there any comments
25 received by the City from the Office of Regulatory

1 staff?

2 A I don't know. I wasn't with the City at that
3 time.

4 Q Ma'am, I assume if there were, they would be
5 among your staff's records?

6 A Correct.

7 Q This is an ignorant question, but that's never
8 stopped us from asking it. Is there any approval
9 or stamped copy received from the Office of
10 Regulatory Staff when these documents are
11 submitted?

12 A I don't know.

13 Q Again, ma'am, I assume if they were, that also
14 would be among your records.

15 A I couldn't say, but I would assume so.

16 Q Thank you. Again, I'm asking you to read this
17 with me. Your understanding of the section on
18 payment plans is that it deals with only persons
19 who have presently active utility accounts.

20 A Yes.

21 Q Though it may be applied in other circumstances,
22 such as where they do not have currently active
23 accounts.

24 A Yes.

25 Q At the risk of asking the same question, which is

1 not intended to harass you, to your
2 knowledge there is no mention in these regulations,
3 that are marked as Exhibit 5, of delinquent
4 customers who have no current account.

5 A No. We use the ordinance.

6 Q Other than the statute itself, does the City make
7 any attempt to publicize its practice of enforcing
8 the rule as to delinquent consumers against
9 landlords or family members allowing them the use
10 of services?

11 Mr. Melville - Object to the form.

12 A The ordinance is a published document.

13 Q Yes, ma'am. My question is, is there any other
14 attempt to publicize this practice?

15 A Not on a daily basis.

16 Q What about on any basis?

17 A I can't think of any.

18 Mr. Foster - Can we break for a moment?

19 Whereupon - A recess was taken.

20 Mr. Foster - We are back on the record.

21 Q (By Mr. Foster) I need to ask you about a practice,
22 what I understand is a practice of your department.
23 Ma'am, if you have a consumer or a potential
24 consumer who has been sharing space, as an
25 occupant or tenant, with a person. Let's say

1 the space in question, without going into whose
2 name it's in, has a bill owing. The tenant's,
3 roommates, lovers, whatever they are, part.
4 One comes to you or your staff asking for a new
5 account. Would that person be required to pay
6 the bill at the old address before the account
7 could be given?

8 A Yes.

9 Q Do I understand that to be the case without
10 regard to whether the account was in that person's
11 name or the other person's?

12 A Yes.

13 Q Is the amount of the bill available to the
14 applicant, in my hypothetical, if the account is
15 not in that person's name?

16 A If they are willing to pay the debt, we do make
17 that amount available to them.

18 Q So, if John has the bill in his name. His
19 roommate, Tom, and he can't get along. Tom
20 leaves, comes to your department, says I'm
21 moving someplace else. I need the utilities in
22 my name. In my hypothetical, Tom is going to
23 have to bring the account at the other address
24 up do speed?

25 A Yes.

Page 33 1 Q And, in that example, Tom is going to be supplied 2 with the amount of the bill? 3 A Yes. And, we make the efforts and required 4 calls to contact the account holder to let them 5 know that this information is to be shared. If 6 we are not able to make that contact, we would 7 allow - Once they agree to make payment, they 8 would be allowed the amount to be paid. 9 Q So, they would not be deprived of that amount 10 or that information because they are not the 11 named party? 12 A Once they agree to pay the debt, we would share 13 that amount with them. 14 Q Are you aware, ma'am, of any roommate or occupant 15 being denied that information because their name 16 was not on the account? 17 A Not personally. 18 Q Well, ma'am, again, not playing games, which I 19 don't think you are or I am. I need to know, 20 do you know of it or does your staff know of it, 21 does the City know of it? You are the designated 22 deponent. 23 A It is possible that a staff member may have said 24 that they would have to contact the account 25 holder to be able to release that information.	Page 35 1 household. I'm requesting those, and any 2 comments or stamped copies or approvals of 3 the Office of Regulatory Staff as to the 4 regulations, if they exist, and any 5 information as to 219 Johnston Street, 6 under whatever landlord. 7 Mr. Melville - Just to make sure, just so 8 we don't have any issues with the description 9 of what exactly it is, if we could just do 10 it in a formal manner. 11 Mr. Foster - Let's go off for a moment. 12 Whereupon - A recess was taken. 13 Mr. Foster - Back on. As I understand it, 14 Mr. Melville has requested me to state in 15 writing what I understand to be missing 16 documents. 17 Mr. Melville - Whatever the typical procedure 18 is, the rules of procedure. 19 Mr. Foster - I'm not sure there is a typical 20 procedure, but I defer to counsel on that. 21 I have no problem with putting it in writing 22 and getting it over to you. I will state, 23 I do believe this was a good faith attempt 24 to respond to our subpoenas, so I have no 25 problem in that regard. That would end it
Page 34 1 Q Is that the practice, ma'am? 2 A In keeping with Federal Credit Law, we do attempt 3 to contact the account holder prior to releasing 4 that information. 5 Q But, you would release it? 6 A Once the person agrees to pay the debt, yes. 7 Mr. Foster - I think those are my questions. 8 I had a few questions or comments about 9 items the lady testified to that are not 10 available today. Counsel, do you have 11 questions? 12 Mr. Melville - I have no questions. 13 Mr. Foster - Assuming that we're at the end, 14 I understand that we discussed documentation 15 on Soggy Paws, on the less than ten examples 16 of family members, the family members being 17 given notices as to delinquent consumers in 18 the household. 19 Mr. Melville - What was that again? 20 Mr. Foster - If I am stating correctly, 21 and I asked Ms. Thomas, I believe she 22 indicated there were possibly less than ten 23 examples, to her knowledge, of cases in 24 which family members were contacted by letter 25 when delinquent consumers moved into the	Page 36 1 on our part something unless there is 2 something counsel wants to add. 3 Mr. Melville - No questions. 4 Mr. Foster - Thank you, Ms. Thomas. 5 Whereupon - Deposition was concluded at 6 11:15 a.m.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff(s),

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,

Defendant(s).

NOTICE OF TAKING DEPOSITION
C.A. No. 09-CP-46-03360

TO: W. Mark White
Jeremy D. Melville
Spencer & Spencer, P.A.
226 E. Main Street
Post Office Box 790
Rock Hill, S.C. 29731

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 30, S.C.R.C.P., the undersigned, as Attorney for the Plaintiffs, will take the oral deposition of the following witness(es):

THE CITY OF ROCK HILL, SOUTH CAROLINA, by its designated officer(s),
director(s) or managing agent(s)

on the following date:

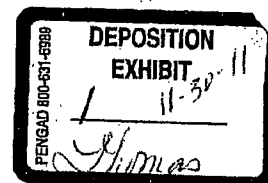
Wednesday, November 30th, 2011

at the following time:

10:00 A.M.

at the following location:

Offices of Spencer & Spencer, PA
226 East Main Street, Suite 200
Rock Hill, SC 29730



before a Notary Public, continuing from day to day, if necessary, until completed or at such other time thereafter as may be agreeable to counsel.

Pursuant to Rule 30(b)(6), S.C.R.C.P., the matters on which the witness is to be examined are as follows:

The existence, identification, and relation to the subject matter of this action, of all items produced in response to Plaintiffs' Request for Production of Documents and/or Things for Inspection and Copying dated and served by mailing of February 17, 2010, or referenced in that response;

The policies and procedures (whether written or not) and the practices of the CITY with regard to:

payment schedules or payment plans on past-due utility bills;
payment of utilities by a landlord for rental property;
placement of utilities on rental property in the landlord's name;
the liability of a person for a utility bill in the name of another person occupying the premises; and
the liability of a person for a utility bill in the name of another person.

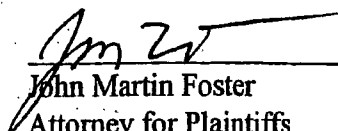
Dealings or communications between the Defendant CITY, its agents and employees, and the following persons or entities:

Robert K. Marshall, Jr.
Donna Chapman Marshall
Charles Willis
Nakia Moffatt
Sherika Reed
Angel Joseph
Daryl Joseph
The Cobb House
The Latham Company

Joseph L. Huckabee, Jr.
Gray and Perrill
Robert Nelson
Rock Hill Senior Properties, Inc.
University Place
Jerry W. and Cheryle G. Patterson

If attached hereto, Supoena(s) *duces tecum* will be served on the witness(es) named above and will direct the production of those materials indicated thereon.

This deposition is for the purpose of discovery or for use as evidence in the above action. You are invited to be present and participate in accordance with Rule 30, S.C.R.C.P.


John Martin Foster
Attorney for Plaintiffs
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, SC 29731-6106
803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

Rock Hill, South Carolina

November 7, 2011

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

Plaintiff(s),

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,

Defendant(s).

CERTIFICATE OF SERVICE

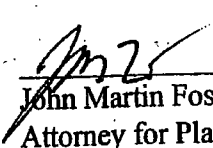
C.A. No. 09-CP-46-03360

The undersigned certifies that on the date below he has served the following pleadings or documents in the above-captioned and numbered civil action:

Notice of Taking Deposition, with attachments (if any); and
This Certificate of Service

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 below.

Wm. Mark White
Jeremy D. Melville
Spencer & Spencer, P.A.
226 E. Main Street
Post Office Box 790
Rock Hill, S.C. 29731


John Martin Foster
Attorney for Plaintiffs

223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, SC 29731-6106

Rock Hill, South Carolina

November 7, 2011

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

STATE OF SOUTH CAROLINA
ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF YORK

ROBERT K. MARSHALL, Jr., et al., vs. THE CITY OF ROCK HILL, et al.,	Plaintiffs, Defendants.	SUBPOENA IN A CIVIL CASE Case Number: 09-CP-46-03360 Pending in York County
--	--	--

TO: Defendant CITY OF ROCK HILL by its designated officer(s), director(s) or managing agent(s) on the Rule 30 deposition below

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

Place of Testimony	Courtroom Date and Time
--------------------	--------------------------------

☒ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

Place of Deposition Office of John Martin Foster 223 East Main Street, Suite 520 Rock Hill, S.C. 29730	Date and Time Wednesday, November 30th, 2011 10:00 A.M.
--	---

☒ YOU ARE COMMANDED to produce and permit inspection of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHED SCHEDULE

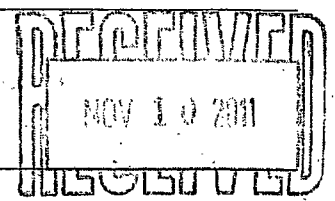
Place of Production Office of John Martin Foster 223 East Main Street, Suite 520 Rock Hill, S.C. 29730	Date and Time Wednesday, November 30th, 2011 10:00 A.M.
--	---

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises	Date and Time
----------	---------------

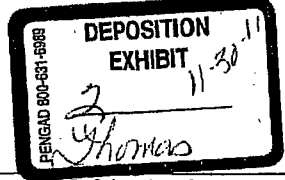
Any subpoenaed organization not a part to this suit is hereby directed pursuant to Rule 30(b)(6), South Carolina Rules of Civil procedure, to file a designation with the court specifying one or more officers, directors, or managing agents or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The person so designated shall testify as to matters known or reasonably available to the organization.

Issuing Officer's Name, Address and Phone Number
John Martin Foster Attorney for Plaintiffs
223 East Main Street PO Box 106, Rock Hill, SC 29731-6106
803 324-8100: Voice 803 324-8109: Fax



CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Issuing Officer's Signature and Title (Indicate if Attorney for Plaintiff or Defendant)
Attorney for Plaintiffs



Date: **November 7, 2011**

PROOF OF SERVICE

SERVED	Date <u>7-11</u>	FEEs AND MILE TENDERED TO WITNESS
	Place <u>276 E. Main St., Suite 300</u> <u>Rock Hill, SC 29730</u>	☒ YES ☐ NO Amount \$ <u>26.00</u>
Served On (Print Name) <u>Jeremy Melville</u>		Manner of Service <u>Personal</u>
Served By (Print Name) <u>Ronald Haile</u>		Title <u>Process Server</u>

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 11-7-11 Date
Ronald Haile Signature of Server
503 Woods Lane Address of Server
Rock Hill, SC 29730

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d):
 c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises shall not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance; or
- (ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place with the state in which the trial is held; or
- (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena:

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- (ii) requires the disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- (iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made in a sworn affidavit and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**SCHEDULE OF:
DOCUMENTS OR OBJECTS IN YOUR POSSESSION, CUSTODY OR CONTROL
AT THE PLACE, DATE AND TIME SPECIFIED FOR THE DEPOSITION
REFERENCED ON THE ACCOMPANYING *SUBPOENA DUCES TECUM***

The existence, identification, and relation to the subject matter of this action, of all items produced in response to Plaintiffs' Request for Production of Documents and/or Things for Inspection and Copying dated and served by mailing of February 17, 2010, or referenced in that response, a copy of which is attached hereto and incorporated herein;

The policies and procedures (whether written or not) and the practices of the CITY OF ROCK HILL with regard to:

payment schedules or payment plans on past-due utility bills;
payment of utilities by a landlord for rental property;
placement of utilities on rental property in the landlord's name;
the liability of a person for a utility bill in the name of another person occupying the premises; and
the liability of a person for a utility bill in the name of another person.

Dealings or communications between the Defendant CITY, its agents and employees, and the following persons or entities:

Robert K. Marshall, Jr.
Donna Chapman Marshall
Charles Willis
Nakia Moffatt
Sherika Reed
Angel Joseph
Daryl Joseph
The Cobb House
The Latham Company

Joseph L. Huckabee, Jr.
Gray and Perrill
Robert Nelson
Rock Hill Senior Properties, Inc.
University Place
Jerry W. and Cheryle G. Patterson

STATE OF SOUTH CAROLINA
ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF YORK

ROBERT K. MARSHALL, Jr., et al.,	Plaintiffs,	AMENDED SUBPOENA IN A CIVIL CASE Case Number: 09-CP-46-03360
THE CITY OF ROCK HILL, et al.,	Defendants.	Pending in York County

TO: Defendant CITY OF ROCK HILL by its designated officer(s), director(s) or managing agent(s) on the Rule 30 deposition below

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

Place of Testimony	Courtroom Date and Time
--------------------	--------------------------------

FILED - RECEIVED
2011 NOV -9 PM 2:40
DAVID HAMILTON
C. C. P. & SS
YORK COUNTY, SC

☒ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

Place of Deposition Office of Spencer & Spencer, PA 226 East Main Street, Suite 200 Rock Hill, S.C. 29730	Date and Time Wednesday, November 30th, 2011 10:00 A.M.
---	---

☒ YOU ARE COMMANDED to produce and permit inspection of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHED SCHEDULE

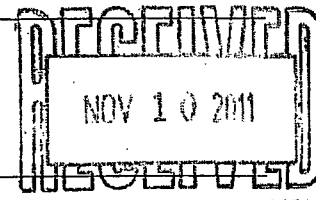
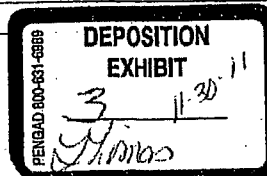
Place of Production Office of Spencer & Spencer, PA 226 East Main Street, Suite 200 Rock Hill, S.C. 29730	Date and Time Wednesday, November 30th, 2011 10:00 A.M.
---	---

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

Premises	Date and Time
----------	---------------

Any subpoenaed organization not a part to this suit is hereby directed pursuant to Rule 30(b)(6), South Carolina Rules of Civil procedure, to file a designation with the court specifying one or more officers, directors, or managing agents or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The person so designated shall testify as to matters known or reasonably available to the organization.

Issuing Officer's Name, Address and Phone Number
John Martin Foster Attorney for Plaintiffs
223 East Main Street PO Box 106, Rock Hill, SC 29731-6106
803 324-8100: Voice 803 324-8109: Fax



CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(e)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney for Plaintiffs

Issuing Officer's Signature and Title (Indicate if Attorney for Plaintiff or Defendant)

Date: **November 7, 2011**

PROOF OF SERVICE

SERVED	Date 11/8/11	FEES AND MILE TENDERED TO WITNESS ☒ YES ☐ NO Amount \$ 26.00
	Place 220 E Main St Rock Hill, SC 29730	
Served On (Print Name) Jeremy Melville		Manner of Service Personal
Served By (Print Name) Ronald Haile		Title Process Server

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 11/8/11 Date
Ronald Haile Signature of Server
220 E Main St Address of Server
Rock Hill, SC 29730

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d):
 c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises shall not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance; or
- (ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place with the state in which the trial is held; or
- (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena:

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information; or
- (ii) requires the disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or
- (iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to test the claim.

SCHEDULE OF:
DOCUMENTS OR OBJECTS IN YOUR POSSESSION, CUSTODY OR CONTROL
AT THE PLACE, DATE AND TIME SPECIFIED FOR THE DEPOSITION
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The Cobb House
The Latham Company

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Gray and Perrill
Robert Nelson
Rock Hill Senior Properties, Inc.
University Place
Jerry W. and Cheryle G. Patterson

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Robert K. Marshall, Jr. And)
Donna Chapman Marshall,)

Plaintiffs,)

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,)

Defendant.)

IN THE COURT OF COMMON PLEAS

AFFIDAVIT OF LORI THOMAS

C.A. No. 09-CP-46-3360

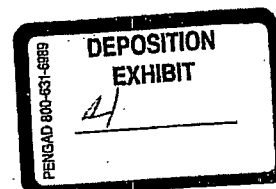
PERSONALLY APPEARED before me Lori Thomas who, being duly sworn, deposes and says that:

1. Affiant is employed by the City of Rock Hill ("City") as the Customer Services Manager. Affiant has been employed by Rock Hill for more than two years.

2. In her capacity as Customer Services Manager she has personal knowledge of the matters contained herein.

3. Unpaid utility charges are a significant area of concern for the City and have a material impact on the public fisc amounting to over \$1 million of lost payments per year.

4. Consequently, the City has taken steps to collect these utility charges from those customers who used the City's utility



service but failed or refused to pay for the utility service ("delinquent customers").

5. The document attached to this Affidavit as **Exhibit A** is a genuine, correct and complete copy of Section 29-31 of the Rock Hill City Code ("Utility Ordinance").

6. The Utility Ordinance is an important means for the City to collect on unpaid utility accounts from the delinquent customers.

7. The City requires execution of the Customer Service Agreement prior to providing utility service.

8. The document attached to this Affidavit as **Exhibit B** is a genuine, correct and complete copy of the Customer Service Agreement signed by Charles Willis ("Willis") for 1125 Springdale Road, Unit 104, Rock Hill.

9. Willis resided at 1125 Springdale Road, incurred utility charges at 1125 Springdale Road and remitted payment for some utility charges at 1125 Springdale Road. However, Willis failed to pay utility charges in the amount of \$749.21.

10. Plaintiffs in the matter captioned above attempted to rent the premises located at 1066 Cherokee Avenue ("Residence") to Willis.

11. Willis requested that the City provide utility service to the Residence for him.

12. Under the Utility Ordinance, Willis could not get new utility service until payment of his delinquent utility account in the amount of \$749.21 from his prior residence at 1125 Springdale Road.

13. The City offered Willis a payment plan for the past due amount in order to initiate service at the Residence.

14. One payment plan proposed allowed for an initial payment of \$250.00 with three consecutive monthly installment payments of \$166.41.

15. Willis did not agree to the repayment terms and utility service was denied to Willis in accordance with the Utility Ordinance.

16. Plaintiffs then attempted to obtain utility service for Willis at the Residence in their own name.

17. However, under the Utility Ordinance in order to provide utilities for Willis, a delinquent customer, even if in the name of Plaintiffs, Willis would have to pay his past due utility debt.

18. The Utility Ordinance is not intended to require third-parties to pay delinquent customer's unpaid utility charges and has not been used to effect such a result. Affiant is not aware of any occurrence where the City has collected unpaid utility charges from a landlord for a delinquent customer's prior utility debt.

19. Upon information and belief, Affiant is informed that other municipal utility providers have enacted ordinances which are the same or similar to the Utility Ordinance.

Further, the Affiant sayeth naught.

Date: 8/25/09

Lori Thomas
Lori Thomas,
Customer Services Manager
City of Rock Hill

Sworn to before me this 25th
day of August, 2009.

Alivia M. Smith
Notary Public for South Carolina
My Commission Expires: 9/5/11

ARTICLE II. RATES, CHARGES AND BILLING

DIVISION 1. GENERALLY

Sec. 29-31. Payment of bills; delinquency.

(a) Consumers of water, electricity, sewer service and all other services provided by the city shall pay without discount all bills rendered for such services not later than the 15th day following the rendition date, except that when the 15th day falls on Saturday, Sunday or a legal holiday, payment may be deferred until the next ensuing business day. On the sixth day thereafter, a three percent penalty will be added to the utility services account, which penalty shall be in addition to any other cost, expense or fee.

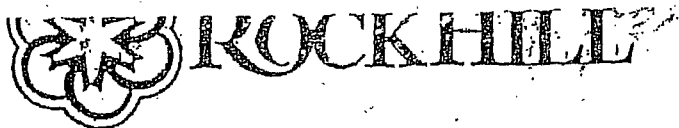
(b) For accounts that are past-due, a notice of disconnection is conspicuously displayed on the subsequent billing notice for that account. This notice details the date that payment must be received and the amount which must be paid to avoid disconnection of service.

(c) In some cases, the city employee will deliver a notice in lieu of the disconnection allowing an additional determined amount of time for a customer to satisfy the past-due balance prior to disconnection of service. Upon delivery of such notice, the same fee as set out in the schedule in appendix A shall apply to the account.

(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32.

(e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830.

(Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)

**CUSTOMER SERVICE AGREEMENT**

This agreement, when signed by the Consumer and by an authorized representative of the City of Rock Hill, shall become a contract under which the City of Rock Hill agrees to furnish Utility Services to the individual Consumer, and the Consumer agrees to receive and pay for said service in accordance with the Rate Schedule and the Service Regulations of the City of Rock Hill on file in the office of the City of Rock Hill, and as the same may be modified from time to time, which Rate Schedules and Service Regulations are hereby made a part of this contract as effectually as if fully set forth herein.

The Consumer must maintain a safe passageway for meter access by the City of Rock Hill. Additionally, the Consumer has the responsibility to keep the meter free from obstructions and to restrain pets or by removing obstacles that the City of Rock Hill might encounter at that property. Failure of the customer to provide free access may result in the termination of utility service until suitable access is provided. Bills may be rendered on the basis of estimated meter readings whenever the City of Rock Hill is unable to obtain a meter reading because of inaccessibility to the Consumer's premises, or for other reasons. In any case, consumption shall be estimated based upon the best information available.

The Consumer shall not interfere with, or alter the City of Rock Hill's meters, seals, or other property, or permit the same to be done by other than the City of Rock Hill's authorized agent or employee. Damage caused or permitted by the Consumer to said property shall be paid for by the Consumer. When unauthorized use of utility services is discovered, the City of Rock Hill may discontinue service and the Consumer shall be required to pay for the estimated unauthorized usage, the cost of investigation, reconnection, and any other loss resulting from the changing, tampering, or interfering with the meter, before service is restored.

The City will make all reasonable efforts to provide continuous and uninterrupted utility service, but cannot be liable for loss or damage (direct, consequential or otherwise) caused by any failure to supply electricity, water - sewer, or by an interruption, if it is due to any cause beyond the reasonable control of the City. The City cannot be held accountable for acts of God.

The Consumer who signs for service agrees to be responsible for receipt and payment of bills for these services. Failure to receive a monthly bill does not relieve Consumer of payment responsibility. If a bill is not received, the Consumer shall notify the City of Rock Hill before the past due date. Be it further agreed that should the Consumer move to an address other than the one given, the agreement shall be effective at the new address if the Consumer receives services from the City of Rock Hill. It is further understood that should the deposit be determined insufficient, the customer will make an additional deposit upon request from the City of Rock Hill not to exceed the two highest months utility bills.

This agreement shall continue indefinitely, unless otherwise provided, the same shall continue from month to month thereafter. The same may be terminated by either party after expiration of any fixed period initially specified, upon one working day notice to the other. It is further agreed that the City of Rock Hill reserves the right to discontinue services if the Consumer breaches this service agreement. If the service is disconnected for cause, the Consumer agrees to pay all outstanding bills and an applicable reconnection fee for service to be restored. The customer understands that the information furnished on this application will be verified and if determined inaccurate, will result in the termination of service without prior notice. The applicant understands that the City must take action and expend funds to comply with this request for service. By signing the application, the applicant signifies that he or she has the authority to request utility service at the location identified on the application. I attest that the information given on this contract is true and accurate to the best of my knowledge.



RESIDENTIAL SERVICE AGREEMENT

Name Charles Willis Date 10/21/04

Service Address 1125 #104 Springdale Rd - 3025298

Mailing Address _____ City _____ St _____

Account # 1598690 Electric ☒ Water _____ Sewer _____

Own _____ Rent ☒ If Rent, from whom:

Name Catawba Pointe

Address _____

Previous Service: Yes _____ No ☒

Newcomer: Yes ☒ No _____

From: CT-116 Locust St

DL#/Other CT/ID 147812538

DOB 02/25/1974 Sex: M ☒ F _____

Social Security # [REDACTED]

Home Ph# NO

E-Mail Address _____

Employed Ruby Tuesday

City RH St SC

Spouse Tinesher Griffith

Roommate _____

Employed McDonald's

RH SC Dave Lyle

Social Security # [REDACTED]

DL# /St _____

Roommate _____

Employed _____

Life Support : Yes _____ No _____ Type None

Comments: _____

Deposit Amt. \$ 150.00 Cut on date _____

By: Delecia A. DeG
Customer Service Representative

Charles Willis
Applicant's Signature



OFFICE OF THE CITY MANAGER

September 21, 2006

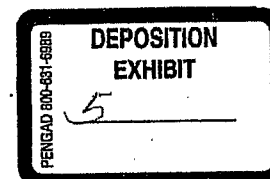
TO: Mayor and City Councilmembers
FROM: Carey F. Smith, City Manager *CFS*
SUBJECT: Termination of Electric Service Due to Nonpayment

State legislation passed this year requires that all electric providers establish written procedures for termination of electric service due to non-payment. The law requires us to submit a policy to the Office of Regulatory Staff by November 1, 2006. City staff served on and guided a committee comprised of SCAMPS members and Municipal Association staff to develop a model policy that addresses the following components required by the law:

- ✓ procedures for termination of special needs customers
- ✓ procedures for termination of residential service during extreme weather
- ✓ standards for determining extreme weather conditions
- ✓ notification procedures
- ✓ payment arrangement procedures
- ✓ referral to social service agencies, and
- ✓ establishing and maintaining a third party notification system.

The model policy was received well by the SCAMPS membership on September 19, 2006. Our policy is consistent with that model and addresses all areas required by the law. It will be submitted to the Office of Regulatory Staff for our compliance and is attached for your information.

Attachment



CITY OF ROCK HILL
P.O. BOX 11706, ROCK HILL, SC 29731-1706
PHONE 803-329-7010 · FAX 803-329-7007

City Docs (Marshall)
57

Procedures of the City of Rock Hill for the Termination of Electric Service Due to Nonpayment

These procedures are established to ensure fair and uniform procedures with regard to the disconnection of electric service by the City. The procedures are established in accordance with State Law Sections 5-31-2510, 5-31-2520, 5-31-2530, 5-31-2540 and 5-31-2550.

Collection Cycle and Schedule for Disconnection of Service for Nonpayment. The City will observe the following collection cycle and schedule for disconnection of service for nonpayment:

- The collections cycle begins on the day the bill is printed and dated. This is day 0 in the cycle.
- On Day 16, the bill is past due.
- On day 21, the bill is noted as delinquent and a 3 percent late fee is assessed.
- On or about Day 29, a past due notice is printed on the next month's bill or a past due notice is mailed separately. Both types of notices provide notice of the scheduled disconnection date. This is mailed on or about Day 30.
- On Day 39, the service is eligible for disconnection.

If any of the above dates in the collection cycle fall on a Saturday, Sunday or official holiday of the City, the collection event occurs on the next business day.

Notification and Disconnection Procedures for Nonpayment. The City is committed to providing notice to all customers of a scheduled disconnection date for nonpayment. The City will provide adequate notice of the anticipated disconnection date on the monthly bill. The City shall observe the following disconnection procedures:

- The City will generate a list each day of all customers eligible for disconnection on that day.
- City staff members will review each account in the morning to see if the customer has made a payment to prevent the disconnection. Staff will also check to see if the customer is a Special Needs Customer and/or if the customer participates in the Third-Party Notification Program.
- Customers eligible for disconnection are added to the disconnection list.
- Service technicians will check the weather at 7:00 am to determine whether a disconnection is appropriate for that day.
- Service technicians will make disconnections. The City ensures that all disconnections are completed by approximately 2:00 p.m. to enable the customer to pay before the end of the business day at 5:00 p.m.

- If the customer pays in full or arrangements are made to enter into a payment plan, the City will use reasonable efforts to reconnect service as soon as possible, provided the customer pays a \$30 reconnection fee (or a \$60 after-hours reconnection fee). Service will not be restored until such time as the customer meets these financial obligations.

As a matter of normal practice, the City will not disconnect electric on Fridays or on days before an official City holiday. However, at the City's discretion, disconnections may occur on any day of the week, including Fridays or on days before an official holiday, provided the City has followed the Notification and Disconnection Procedures for Nonpayment.

Payment Plans. The City recognizes that customers occasionally face extraordinary circumstances and difficult financial situations. For this reason the City has established a payment plan program to assist customers in satisfying their delinquent account.

Payment plans for delinquent accounts will be managed as follows:

- A payment plan of up to three months may be offered customers experiencing extraordinary circumstances. An extraordinary circumstance is broadly defined as a significant event or events affecting a customer's life and ability to pay. City customer service representatives will use their best judgment in applying the extraordinary circumstances determination and are expected to seek advice and confirmation from supervisory staff as needed. The representative granting approval must enter appropriate account notes.
- Payment plans may be entered into prior to disconnection of service or after disconnection of service.
- The payment plan will require a minimum 33 percent of the total delinquent amount to be paid at the time the payment plan is agreed upon and the remaining delinquent amount paid in scheduled installments within a maximum period of three months.
- Payment plans may be entered into only three times in a 12-month period. Otherwise, payment in full is required.
- In the event any payment plan term is not met on the scheduled date or current bills incurred during the payment plan time period are not paid in full by the due date, service will be disconnected and the total past-due amount will be due prior to reconnection of service.
- Payment plans may not be used to satisfy deposits for new accounts, reconnection fees or administrative investigative fees.

Availability of Public or Private Assistance in Paying Bills. Annually, the City will include as part of the regular monthly bill or as a bill stuffer a list of social service agencies that have agreed to have their agency name and contact information sent to customers as a resource for financial assistance.

As part of the normal process of working with customers with delinquent accounts, the City will provide the names of these social service agencies to customers on request. If interested, customers may apply directly to these agencies for assistance. The agencies evaluate the customer's application for assistance and, if appropriate, notify the City of the results. The City does not make any financial assistance determinations.

Standards for Determining Weather Conditions. The City will not disconnect any electric service when at 7:00 a.m. the high temperature for the day is forecast to be 99 degrees Fahrenheit or higher during cooling months or 35 degrees Fahrenheit or lower in heating months. These guidelines shall reflect actual temperature forecasts and not the projected heat indexes or wind chill temperatures. The temperature forecasts reported by www.noaa.gov, www.weather.com, or www.accuweather.com will be used to determine weather forecasts. If any of the three on-line resources show a forecast high temperature outside the disconnect threshold (99 degrees or higher or 35 degrees or lower), the City will not disconnect service on that day.

Third-Party Notification Program. The City is committed to a third-party notification program for its electric customers. At least once each year the City will notify all customers that the Third-Party Notification Program is available. The notification will direct any customer interested in participating to contact the City and complete the required Third-Party Notification Form (attached) that will be kept on file by the City. The Form must be resubmitted by the customer annually (by October 15) to ensure continued participation in the program.

Disconnection procedures for customers participating in the Third-Party Notification Program are as follows:

- On the day prior to the scheduled disconnection date, the City will call the telephone number for the customer and the third-party listed on the Third-Party Notification Form to notify them of the City's intention to disconnect the customer's service by approximately 2:00 p.m. the following day for nonpayment.

Recognition of Special Needs Customers. The City is committed to meeting the requirements of our special needs customers and will keep on file a master list of Special Needs Customers.

To be recognized as a Special Needs Customer, the customer and a South Carolina licensed healthcare provider are required to complete the Medical Certification Form (attached) certifying the customer or a member of the customer's household suffers from a health condition which would be especially dangerous to the patient's health if the electricity is disconnected for nonpayment. The Form, documenting a qualifying condition, must be faxed or e-mailed from the office of the licensed healthcare provider. The certifying healthcare provider must be licensed in South Carolina as a medical doctor, physician's assistant, nurse practitioner or advanced-practice registered nurse.

The Form must be resubmitted by the customer annually (by October 15) to continue participation in the program.

A Special Needs Customer will be encouraged to participate in the Third-Party Notification Program. The Third-Party Notification Form (attached) must be completed and submitted to the City to participate in the program and resubmitted annually (by October 15) to continue participation in the program.

A Special Needs Customer will be given the same privilege as other customers to participate in a payment plan (detailed herein). If a Special Needs Customer is subject to disconnection and has not taken advantage of a payment plan, the City will observe the following schedule for disconnection of service for nonpayment:

- The City will notify the special needs customer and the authorized third-party (if the Special Needs Customer is participating in the Third-Party Notification Program) at least 3 days prior to the scheduled service disconnection date. That notification will communicate the payment terms required to avoid service disconnection. The City will personally contact the Special Needs Customer or the City will call the telephone number for the customer listed on the Special Needs Customer Medical Certification Form. The City will call the telephone number for the third-party listed on the Third-Party Notification Form.
- The City will leave a notice at the front door of the Special Needs Customer on the day prior to the scheduled disconnection date. The notification will restate the payment terms required to avoid service disconnection. In the event the stated terms are not met, the City will disconnect service and may do so at any time after the time specified in the notification.
- After disconnection, if the customer pays in full or arrangements are made to enter into a payment plan, the City will use reasonable efforts to reconnect service as soon as possible, provided the customer pays a \$30 reconnection fee (or a \$60 after-hours reconnection fee).

Special Needs Customers are in no way released from their obligation to pay their monthly bills according to the terms as noted on the monthly bill.

CITY OF ROCK HILL, SOUTH CAROLINA
THIRD PARTY NOTIFICATION FORM
(Please Type or Print all Information)

Name _____ Account Number _____

Social Security Number _____

Phone Number _____

Account Address _____

The City is committed to a third party notification system for its electric customers. The intent of this program is to offer our customers the opportunity to have a third party notified in the event of disconnection of electric service due to non-payment of bills.

Customers wishing to take advantage of this system must complete this form in its entirety and return it to City of Rock Hill Customer Service Division, P.O. Box 11706, Rock Hill, SC 29731-1706. By submitting this form, the customer authorizes the City to release his/her utility account information to any or all of the parties listed by the customer below. The customer also assumes the responsibility to the City of any changes to the contact information listed on this form.

In the event that service for the above utility account is scheduled for disconnection, the City will call the telephone number for the customer and the third-party listed on the Third-Party Notification Form to notify them of the City's intention to disconnect the customer's service.

This form relates to electric service and the City reserves the right to disconnect any other service for which payment is past due.

In the event that the City attempts to notify the account holder (customer) and the authorized third party listed below and is unable to reach any or all parties, the City will continue with service disconnection as scheduled.

This form must be renewed annually by October 15 to ensure service continuity.

Authorized Third Party:

Name _____

Phone Number _____

Street Address _____

City, State, Zip _____

Customer Authorization:

I, _____, understand and agree to the terms listed herein and authorize the City to notify the above authorized third party as to the status of payment or non-payment of my City utilities account. I further understand that failure of the City, upon reasonable attempt described here, to notify me or the authorized third party will not preclude the City from disconnecting my electric service.

Customer Signature: _____ Date: _____

Customer Printed Name _____

Third Party Signature: _____ Date: _____

Third Party Printed Name _____

Date: _____

City Docs (Marshall)

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Please submit completed form to: City of Rock Hill Customer Service Division, PO Box 11706, Rock Hill SC 29731-1706

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

ROBERT K. MARSHALL, JR.,)
AND DONNA CHAPMAN)
MARSHALL, DOING BUSINESS)
AS "ROCK HILL PROPERTY)
MANAGEMENT", A SOUTH)
CAROLINA GENERAL)
PARTNERSHIP,)

PLAINTIFFS,)

-VS-) C.A. NO. 09-CP-46-03360

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 SERVICE)
MANAGER,)

DEFENDANTS.)

DEPOSITION OF ROBERT K. MARSHALL, JR.

ROCK HILL, SOUTH CAROLINA

JANUARY 24, 2012

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

Page 3

1 Deposition of Robert K. Marshall, Jr., taken before
2 me, Shirley Dallas-Gerrald, CVR-CM, a Notary Public for
3 the State of South Carolina, in the law offices of
4 Spencer and Spencer, Rock Hill, South Carolina,
5 commencing at 1:05 P.M., on January 24, 2012, in
6 accordance with the South Carolina Rules of Civil
7 Procedure.

8 It was stipulated by and between Counsel for the
9 Plaintiff(s) and Counsel for the Defendant(s) that this
10 deposition is taken for any purpose allowed under the
11 South Carolina Rules of Civil Procedure.

12 That the signing of the transcript of deposition
13 by the witness is reserved.

14 * * * * *

15 Robert K. Marshall, Jr., first being duly sworn, deposes
16 and says as follows:

17 Examination: (By Mr. White)

18 **Q Mr. Marshall, my name is Mark White. I represent**
19 **the City of Rock Hill in this action. Have you**
20 **ever given a deposition before?**

21 A Yes, I have.

22 **Q How many times?**

23 A Once.

24 **Q What was that about?**

25 A A malpractice lawsuit.

Page 2

Appearances: For the Plaintiffs -
J. Martin Foster, Esquire
Attorney at Law
Rock Hill
South Carolina

For the Defendant -

Mark White, Esquire
Jeremy Melville, Esquire
Spencer and Spencer
Attorneys at Law
Rock Hill, South Carolina

Also Present -

Donna Marshall

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**** QUESTIONS CERTIFIED FOR THE COURT

Page 82, Line 14 Through Page 87, Line 24

Page 4

1 Mr. Foster - Just for the record, can we
2 put on there that we are beginning at
3 1:00 rather than 9:30 because of agreement
4 of counsel?

5 Mr. White - Okay.

6 **Q How long ago was the deposition?**

7 A I would have to look that up for you. I don't
8 keep those dates in my mind.

9 **Q More than five years ago?**

10 A It may have been five. I'm not sure.

11 **Q Somewhere along in there the rules of the road**
12 **changed a little bit. We'll talk about those for**
13 **a quick second. During the deposition, if you**
14 **have any question about my question, I ask that**
15 **you bring that to my attention. If you don't**
16 **understand the question, if you will so note that,**
17 **I will work on making it -- add clarity to it.**
18 **If you do answer the question, I will take by that**
19 **response that you think you understand the**
20 **question, you're responding fully and to the best**
21 **of your ability. Is that fair?**

22 A Okay.

23 **Q During this deposition, if you have any questions**
24 **or comments, you will direct them to me. I'll**
25 **also ask that as you respond, if you will try to**

1 (Pages 1 to 4)

1 respond audibly. We have a lot of non-verbal
2 responses that are very effective in discourse, but
3 they're very difficult for Ms. Dallas.

4 As you notice, you were put under oath.
5 Since you have been deposed before, may I presume
6 that you understand the significance of that oath?

7 A Yes.

8 Q Our conversation today can be used at later times
9 for various purposes.

10 A I understand that.

11 Q I'm not one of those that has an agenda. If you
12 want to take a break at any time, please just
13 note that. We will find a good stopping point
14 shortly and take breaks. We're not here to
15 establish any sort of an endurance record.

16 I need to ask you a few personal questions
17 about your ability to respond to questions today.
18 Are you under any sort of medications that could
19 affect your ability to understand and respond
20 fully to questions today?

21 A To the best of my knowledge, I'm not. No.

22 Q Is there anything going on with your life other
23 than that that might affect your ability to
24 respond and understand questions completely today?

25 A Not that I know of.

1 Q It's an odd set of questions, but one lawyer here
2 didn't go through that. He established a really
3 great record in a case, and the guy claimed he
4 had a stroke that morning. We just try to go
5 through those things.

6 A I'm not having a stroke.

7 Q If you are, please let me know. What kind of
8 business are you in?

9 A Property management.

10 Q How long have you been in that business?

11 A I usually tell people just about all of my adult
12 life.

13 Q It's a family business of sorts?

14 A Yes. I guess you could say I've been in the
15 management business. It sort of started out as
16 basically working on rental property for my
17 granddad, just doing the basic handyman work.

18 Q This deposition you gave before, were you a party
19 in that action?

20 A I was a plaintiff, yes.

21 Q And you sued who?

22 A It was an eye doctor. The name is on the tip of
23 my tongue, and I can't get it. I'm sorry.

24 Q Was it a local action here in York County?

25 A Yes, it was. It may come to me.

1 Q Was it a local doctor?

2 A Yes.

3 Q How was that action concluded?

4 A We settled out of court.

5 Q Tell me about your education real quickly?

6 A I have a masters degree in business administration
7 and an undergraduate degree in mathematics.

8 Q Coming out of college, did you have a full time job
9 under somebody's employ?

10 A Coming out of college, no.

11 Q You worked in the rental business?

12 A Coming out of college I had a part time job, I
13 think, in the computer room or something like that.
14 Which coming out? It was an undergraduate and then
15 there was a graduate.

16 Q I was referring then to your undergraduate degree.

17 A I was like part time in the computer lab.

18 Afterwards, I went into the family business.

19 Q You are how old?

20 A Now?

21 Q How old now?

22 A Sixty.

23 Q How many properties do you own?

24 A I really don't keep track of how many I own. I
25 thought about the question. I thought about

1 going in and trying to count them, but I still
2 might be off. I could sit here and think about
3 them in my mind and maybe count them up for you.
4 They're on the tax record. They would be easy
5 to look up for anybody.

6 Q Would it be more than 20?

7 A It might be slightly more than 20 that I personally
8 own.

9 Q Do you still manage properties for other family
10 members?

11 A Yes, I do.

12 Q Would that be more than 20?

13 A Yes.

14 Q Are all these properties in York County?

15 A Yes.

16 Q Would a majority of them be within the city
17 limits of Rock Hill?

18 A Yes.

19 Q What types of property are we talking about?
20 Are they all residential dwellings or commercial
21 included?

22 A I have just a few commercial units. Most
23 everything is residential.

24 Q Are your commercial units within the city?

25 A Just one basically; where our office is.

- 1 **Q Do you have any multi-family housing?**
 2 A Yes, we do.
 3 **Q Would those be duplexes or larger density**
 4 **apartments?**
 5 A The apartment complex we have is made up of
 6 six-plexes, four-plexes, tri-plexes and duplexes.
 7 Then there are duplexes in the Rock Hill Homes
 8 area. There are duplexes here and there all over
 9 town.
 10 **Q And you also have single family dwellings?**
 11 A Correct, yes.
 12 **Q Would it be accurate to say that your properties**
 13 **all serve the same segment of the population for**
 14 **dwelling or would there be a stratification as**
 15 **far as rent values?**
 16 A Go back and start over.
 17 **Q Your dwelling units, would they all be targeted**
 18 **to the same population group or would there be**
 19 **high end ones and lower, less expensive units to**
 20 **cater to a different market?**
 21 A That's an interesting question. As best I can
 22 tell from the definition of classes, everything
 23 in Rock Hill is middle class. We don't have a
 24 wealthy -- We don't have a poor class like you'd
 25 see in Mexico. I would say some of them are in

- 1 upper middle and maybe some of them are in middle
 2 and some of them are in lower middle.
 3 **Q As I was asking that really awful question, I**
 4 **thought of another way to ask it. What would be**
 5 **the lowest rent range one of your places would**
 6 **rent for monthly and what would be the highest?**
 7 A One ninety-five and then you might be up to say
 8 around a thousand for a nice three bedroom, two
 9 bath
 10 house. A one bedroom would be like a shotgun
 11 apartment. When you walk in the front door, you
 12 walk into the living room, you walk in the bedroom.
 13 You walk back down a hallway with a bath to your
 14 left and you walk in the kitchen and you walk out
 15 the backdoor.
 16 **Q That was sometimes referred to as an efficiency?**
 17 A You see a lot of them in Charleston.
 18 **Q What would be your occupancy rate in a normal**
 19 **period?**
 20 A Normal period would be ten percent because we will
 21 adjust the rents to make it that way. This is not
 22 a normal period though.
 23 **Q That would be your vacancy rate, ten percent?**
 24 A Right. You adjust your price to make it ten
 25 percent. Right now is not a normal period.

- 1 **Q What would it be right now?**
 2 A It might be 20 or 25 percent depending on where
 3 it is. For example, in the nicer stuff right
 4 now, we have a very low vacancy rate. The lower,
 5 middle class, for some reason, our vacancy rate
 6 is up. I blame that on the housing bubble. We're
 7 still not over it. We're doing better, but we're
 8 not over it.
 9 **Q Your upper range might be benefitting by people**
 10 **putting off buying a home?**
 11 A Exactly.
 12 **Q And renting instead. So, you shoot for ten**
 13 **percent in a normal economic time, and it's**
 14 **creeped up to maybe 20 percent. Have you dropped**
 15 **rents to minimize it to 20 percent?**
 16 A We put off raising rents which might be the same
 17 thing. We haven't raised rents in probably ten
 18 years.
 19 **Q Rock Hill, as a whole, has experienced an increased**
 20 **supply of rental units from the early 90s to the**
 21 **2000s; is that true?**
 22 A I hate to ask you to repeat it, but do it one more
 23 time.
 24 **Q Would you agree that Rock Hill experienced an**
 25 **increased supply in rental units from the early**

- 1 **90s until the mid 2000s?**
 2 A Oh, yes.
 3 **Q A dramatic increase?**
 4 A I don't know that I would say dramatic because
 5 I think a lot of what is rental now might have
 6 been intended to be for a single family in the
 7 bubble burst. Now, it's rental.
 8 **Q I see what you're saying. What would be the**
 9 **average length of the stay of one of your renters?**
 10 **Right now we'll just say across your spectrum.**
 11 A That's a hard question because I really don't
 12 keep up with it.
 13 **Q Do you normally have one year rent agreements?**
 14 A We have a one year rent agreement. I would think
 15 some people break the agreement and move out
 16 early. Some people continue on for the rest of
 17 their life.
 18 **Q Would you have higher volatility and turnover in**
 19 **your lower range of your price point than in your**
 20 **upper range?**
 21 A Probably more turn over in the upper range, but
 22 I'm not certain of that.
 23 **Q You would not expect that at the level of \$200.00**
 24 **a month you would have over a ten year period more**
 25 **-- a higher number of renters in that unit than in**

1 **one that was seven or eight hundred dollars a**
 2 **month?**
 3 A Almost always if somebody is in a higher income
 4 bracket and they can afford something nicer,
 5 eventually they buy something. Whereas in your
 6 lower income units, that person may not have the
 7 ability to be able to handle the complications of
 8 home ownership.
 9 **Q They're looking to exist?**
 10 A That's correct.
 11 **Q There's a mid point in there. You've got your**
 12 **high end and your low end. There is a mid point,**
 13 **whether it is your retiree or something like that,**
 14 **that would probably kind of be where the lines**
 15 **merge and you get your best return and your most**
 16 **stable person; is that right?**
 17 A Probably, yes.
 18 **Q Because on your lowest end those people would be**
 19 **subject to the highest vagaries of ability to**
 20 **pay and the fluctuation of ---**
 21 A To understand how to maintain property.
 22 **Q The fellow that we're talking about in this case**
 23 **was named Willis?**
 24 A Yes.
 25 **Q Did know Mr. Willis prior to these events described**

1 **in the complaint?**
 2 A I only knew him basically through his credit
 3 application.
 4 **Q When I refer to the subject property, I'm going**
 5 **to be referring to the property that he was**
 6 **looking to rent, 1066 ---**
 7 A He rented it, yes.
 8 **Q He ultimately did rent it?**
 9 A Yes.
 10 **Q How long did he stay in it once he rented it?**
 11 A Not very long. He ran into financial problems,
 12 and we actually had to evict him.
 13 **Q Do you remember how many months he was in there?**
 14 A I don't remember. I have his file.
 15 **Q Did he leave owing you money?**
 16 A Yes, he did.
 17 **Q How much does he owe you?**
 18 A Do you mind if I refer to his files?
 19 **Q Please.**
 20 A The reason I'm at somewhat of a loss, we updated
 21 his ledger sheet to make it look a lot neater.
 22 I have the wrong one here. Do you have a copy
 23 of the updated one we sent you. Here it is.
 24 I found it. We updated it, and it came out to
 25 be \$1,920.75.

1 **Q Nineteen hundred dollars?**
 2 A Yes, and seventy-five cents.
 3 **Q How is that broken down?**
 4 A I believe that's what we sent over to you.
 5 **Q According to this document, Mr. Marshall, he stayed**
 6 **with you in your location at 1066 Cherokee Avenue**
 7 **from May 30th until January 25th?**
 8 A That's sort of complicated. He signed the lease
 9 -- We signed the lease with him on 5-29-09. He
 10 moved in and couldn't get his power cut on. I
 11 forewent charging him rent during that period
 12 until he came to us one day and said, I found the
 13 money to pay everybody. I'm going to turn the
 14 power on. We started charging rents as of that
 15 time. So, it gets real complicated.
 16 **Q When was that?**
 17 A It looks like it was maybe in -- 1-15-10.
 18 **Q So, he began to occupy the home on January 1 ----**
 19 A With power on 1-25-10. He moved his stuff in
 20 on 5-29-09.
 21 **Q What stuff did he move in?**
 22 A All of his furniture and stuff.
 23 **Q Do you know where he resided from May of '09 to**
 24 **January of '10?**
 25 A He sort of moved here and there. He had a problem

1 because his mother was in a Section 8 program and
 2 because he was over 18 he couldn't reside at her
 3 house. I think he was in Porter's Motel and,
 4 interestingly enough, I believe they have service
 5 by the City of Rock Hill, and probably staying with
 6 different friends here and there.
 7 **Q Is it your understanding the only reason why**
 8 **he couldn't reside with his mother is due to his**
 9 **age and Section 8 housing?**
 10 A He said because he was over 18 he could not stay
 11 there with her because she was in a Section 8
 12 program.
 13 **Q What changed in January 2010 that allowed him to**
 14 **actually move in with his stuff?**
 15 A He really didn't tell me. He just said, I have
 16 the money now; I've worked something out with
 17 the city. I have power on. I'm going to be
 18 living there.
 19 **Q How long did he stay there after that?**
 20 A It looks like around the eighth month. We had to
 21 evict him approximately in that date. To get you
 22 exact dates, I could probably pull his file over
 23 at the magistrate's office.
 24 **Q What was his payment history with you from**
 25 **January of '10 through August, or whenever the**

1 **eviction was, of '10?**

2 A It looks like he paid as agreed until 6-1, and
3 he failed to pay that month. We took out legal
4 papers on him on 6-15, along with everybody else
5 who hadn't paid us that month. We do them all
6 on the same day. I could not serve him there, so
7 he was mail served. It looks like after 7-8 we
8 did the rule of ejectment which is a court order
9 they put on the door giving him 48 hours to get
10 out. Sometime after that, I actually had to meet
11 over there with a constable and put all of his
12 things out in the yard.

13 **Q During the time that he lived actually in the**
14 **home from January to August, did you speak to him?**

15 A Yes.

16 **Q Did he say anything in June when he was pulling**
17 **out?**

18 A You know, if I had my old telephone with me, I
19 could pull up the text messages. We were texting
20 each other. I remember one thing he said that
21 sort of stuck in my mind was, he kept saying, I'm
22 in the system. I asked him, what do you mean?
23 He said, I was in the system. I said, what do you
24 mean you were in the system? He said, I just got
25 out of jail. That's about all I can remember.

1 **Q When the constable let you into the property**
2 **through the eviction process, Mr. Willis's stuff**
3 **was still there?**

4 A Yes.

5 **Q Or, some of his stuff was still there?**

6 A It was packed. This was a full fledged eviction.

7 **Q What did you do with ---**

8 A We put it out in the front yard. The City of
9 Rock Hill gets very upset if you put it on the
10 street. I knew he knew about the eviction. It's
11 sort of nice to the person, if you want to be
12 nice to them, to put it in the yard. If it's on
13 the street, it's more likely to be pilfered.
14 I just put it right outside the door, maybe ten
15 feet out. The company that he rented some of it
16 from came and got some of it, which probably
17 lessened his debt to them. I remember that.
18 Right after that, it just started pouring down
19 rain. We were completely through, and the
20 constable was gone, I remember driving down the
21 street, and it just let loose. Whatever was out
22 there probably got ruined.

23 **Q Do you know where he is now?**

24 A In our deposition with the city witness, I think
25 I saw an address on Springdale Road or something

1 on the records. That's all I would know. He
2 may be buying power from y'all, may have paid you
3 up. I don't know.

4 **Q Do you know what his occupation was at the time**
5 **or now?**

6 A He worked for McDonalds, 2600 North Cherry Road.
7 That's where he worked when he applied for the
8 apartment. I don't know what he's doing now.

9 **Q For purposes of the complaint, the time period**
10 **we're talking about is in May of '09?**

11 A Yes.

12 **Q And, Mr. Willis contacted you and filled out an**
13 **application to rent the subject property.**

14 A That's right.

15 **Q Then he went to the city to try to arrange**
16 **utilities?**

17 A Right.

18 **Q And was told he had a delinquency at another**
19 **location.**

20 A That's correct.

21 **Q And, it was after that that he moved all his stuff**
22 **into your property?**

23 A I believe in this situation, and I'm not certain of
24 this, we did have this happen like three times or
25 four times in a row. People signed a lease with

1 us, moved in and then couldn't get their power cut
2 on.

3 **Q So people would be actually moving stuff in**
4 **without the power on?**

5 A They were under the assumption they just had to
6 go down there and get their power cut on and then
7 find out they had a bill, and they couldn't
8 figure out any way -- Then we would either have
9 to put them out or they'd move back out.

10 **Q I always seem to move at night so, I guess, that**
11 **wouldn't work for me.**

12 A At some point, I started making people go to the
13 city and get their power cut on first before they
14 signed the lease. I didn't know we had new
15 management down there, and that is what had
16 happened. There was a change in the city's policy.

17 **Q So, you don't dispute that Willis had a past due**
18 **account at another property, do you, within the**
19 **city?**

20 A No. I was with him when he went to the city and
21 discussed trying to settle that problem. So, I
22 know he had one.

23 **Q When you switched up, when you realized there was**
24 **a problem, and you changed tact and you tried**
25 **to put the service in your own name, or you and**

1 your wife's name, you didn't hide the fact that you
2 were doing so, so that Willis could occupy the
3 property?

4 A No.

5 Q You told the city, I want to put this in my
6 name because I want to rent it to Mr. Willis?

7 A It was right after they refused to give him a
8 plan that his finances would afford him to be
9 able to work with. I walked right across the
10 hallway and said, put it in my name. Nothing was
11 hidden.

12 Q Have you ever tried to put service at that property
13 in your name not linked to tenancy of Mr. Willis?

14 A Actually I have.

15 Q What happened?

16 A The guy lived there for years with like temporary
17 power, like a year and a half. He finally quit
18 paying me, and I had to evict him.

19 Q That's not since Mr. Willis?

20 A That was before.

21 Q Since this issue in May of '09, have you tried to
22 put 1066 Cherokee in your name and was denied the
23 ability to hook up power in your name?

24 A No, since that --- I'm not sure. It's very rare
25 that I put the power in my name even for temporary

1 repairs now.

2 Q Is it your contention that the city would refuse
3 you the ability to cut on your property in your
4 name?

5 A There is no doubt about that.

6 Q No doubt which way?

7 A That they would let me include rents with --
8 You know, let me include rents and utilities.

9 Q Just so when I go back and read this I understand.
10 You agree that the city will let you hook up your
11 property in your name, the utilities in your name?

12 A Only for temporary, like clean up. That's all
13 they will do.

14 Q Let me ask you. Is it your understanding that if
15 you wish to put 1066 Cherokee Avenue, the utility
16 service in your name today, you would be refused
17 that?

18 A That's correct.

19 Q Why do you think that?

20 A Well, when I called to get it on for temporary
21 clean up they asked me, are you sure this is just
22 for clean up and not want to include rents and
23 utilities. I've actually been asked that question.

24 Q Well, let's say you wanted to rent it to somebody
25 who has no delinquency within the City of Rock

1 Hill. Is it your understanding that if you called,
2 and you said, I want to put 1066 Cherokee Avenue in
3 my name, they say, is it for clean up. You say,
4 no, I'm going to rent to John Smith. Is
5 it your understanding they will not let you do
6 that?

7 A Yes, it is.

8 Q What do you base your testimony on?

9 A I've been refused.

10 Q Give me an example of when you were refused that
11 exact scenario.

12 A Actually, it was next door to this unit in the
13 same duplex. I asked them to let me do that.
14 They just said, you know, we can't do that. The
15 guy had already moved in. It was on for temporary.
16 We never said anything more to them. It went like
17 that for a couple of years or maybe a year and a
18 half or so.

19 Q So, next door to 1066 Cherokee Avenue, you had
20 utilities in your name on a temporary service
21 but you were actually renting the property, the
22 dwelling to a third party?

23 A That's correct. The guy was supposed to do down
24 there and do it, and he never did it. He never did
25 it. He just kept paying the bill as it was

1 presented to him. It never got done. It wasn't
2 intentional. It just sort of happened that way.

3 Q I'm going to go back to a hypothetical. Let's
4 say it's 1064 Cherokee. No, let's say 1066.
5 Let's say right now the property is vacant.

6 A Okay.

7 Q And John Smith comes up to you and says, I want
8 to rent 1066. You decide you want to include
9 utilities in the rent. So, you go down to the
10 City of Rock Hill and you say, I want to hook up
11 1066 for a dwelling for my renter. They're going
12 to ask you who; is that right?

13 A (Indicating)

14 Q And, if you say John Smith, and for our
15 hypothetical John Smith has never lived within
16 the State of South Carolina before in his
17 life.

18 A Right.

19 Q Is it your testimony today that your understanding
20 is you would be refused that circumstance?

21 A That's my understanding.

22 Q Please tell me why you believe that. Who, what
23 documents? Tell me everything that makes you
24 conclude that that would be a rejected request.

25 A My conversations about getting power on

- 1 temporarily, they quiz me on is this for somebody
2 who is going to live there? Are you sure this is
3 just for your clean up?
- 4 **Q Is there any other basis or reason that makes you**
5 **believe that that request would be rejected, other**
6 **than the questions you get when you hook something**
7 **up for temporary?**
- 8 A At the moment, I can't think of anything. Let me
9 think for a moment. I can't think of anything at
10 the moment.
- 11 **Q Is there any document that you think would support**
12 **your understanding of how that would play out?**
- 13 A Say if I call them up and I say, I've got this
14 empty building. I want to cut the power on in my
15 name. I'm going to rent it to other people.
16 Before Willis, I had asked that question. I had
17 been told, no, we don't want to do that. It was
18 verbal.
- 19 **Q But nobody told you they wouldn't do it?**
- 20 A They said, we don't want to do that Mr. Marshall.
- 21 **Q It's not a real trick thing. With temporary power,**
22 **I can understand there being a lot of question**
23 **there. Do you understand that temporary power**
24 **comes with a different set of rules?**
- 25 A That's correct.

- 1 **Q If someone were to operate property under temporary**
2 **power, the city would not be receiving income for**
3 **services that are actually being rendered say for**
4 **sewage and pick up and some other things.**
- 5 A On the case that I just mentioned, basically next
6 door to Mr. Willis in the same building, I asked
7 that question. They basically just said, we don't
8 want to do that. I said, well, could I do it?
9 Can I just put it in my name and include it in
10 the rent. I was talking to Gerald. I'm sure
11 you know him.
- 12 **Q Gerald who?**
- 13 A Goins. He said, Bob, we just want to do that.
14 I said, well, would you do it? I never got a
15 yes answer. So, my understanding was they would
16 not do it. We already had it on there for
17 temporary for clean up. The guy had already moved
18 in. The time just going, and he kept staying
19 there. Finally, he didn't pay me, got in
20 financial problems, and we had to evict him also.
- 21 **Q Would it change your view of the city's policies**
22 **or -- Would it change in part your view of the**
23 **city's position in this lawsuit if you understood**
24 **that you could, in fact, hook up power at 1066**
25 **Cherokee for John Smith or any other person who**

- 1 **does not have a delinquency in the City of Rock**
2 **Hill's utility system? That you could, in fact,**
3 **do that as many times as you want.**
- 4 A Ask the question again.
- 5 **Q Would it change your perspective and your view**
6 **of the city's liability to you, under the matters**
7 **in the complaint, if you were made to understand**
8 **and accept that for all your properties, every**
9 **single one of them, you could hook the utilities**
10 **up in your name and as you rented them, all you**
11 **would have to do is identify in the first**
12 **instance who the renter was. If that person did**
13 **not have a delinquency, the city would cut the**
14 **power on in your name?**
- 15 A The city is already doing that for other people
16 without that last requirement so, no, it wouldn't
17 change my position.
- 18 **Q We'll get to that in a second. First of all**
19 **though, you understand you can't do that?**
- 20 A That's right.
- 21 **Q What I'm asking you is, if you could do that,**
22 **say you have 100 properties, you could do 100**
23 **that way or you could do 50 one way and 50 another**
24 **or however you choose. The city would provide you**
25 **service ---**

- 1 A I guess my answer is no because basically my
2 competition can cut the power on, include it in
3 the rent and they don't have to tell the city
4 squat. I'm not even sure if that would be legal
5 for me to tell them who I'm renting it to because
6 of the FACT Act.
- 7 **Q The FACT Act?**
- 8 A That's what the city tells me, they can't tell me
9 nothing. They can't tell me anything because of
10 the FACT Act. They can't tell me who's living in
11 my units, who has power in my units. They can't
12 tell me where they move. They can't tell me
13 anything.
- 14 **Q Is it your understanding the city would be**
15 **prevented by that act to disclose to you**
16 **delinquencies or the fact of someone having a**
17 **service?**
- 18 A They can't disclose to me whether a person is
19 behind. They can only disclose to me whether it
20 is on or off.
- 21 **Q How would the city's inability as a utility**
22 **provider of disclosing a delinquency on a debt**
23 **somehow render you incapable of identifying to**
24 **the city ---**
- 25 A It's a two way street.

1 **Q Hold on. Would render you incapable of identifying**
2 **to the city who a proposed lessee would be?**

3 A The law would apply to both of us equally. It's
4 a law that requires that they not give out
5 information to me, that the law should apply to me
6 also, should it not?

7 **Q Presuming for just a second of our discussion**
8 **today that the Fact Act does not in anyway prevent**
9 **you from disclosing to the City of Rock Hill who**
10 **a proposed lessee would be, having nothing to do**
11 **with any sort of delinquent debt or anything.**
12 **Would you still have a problem identifying to the**
13 **city who your lessee would be if you wanted**
14 **utilities in your own name?**

15 A I'll still have to say that I need to be able to
16 compete on equal ground with my competitors, and
17 they don't have to do that.

18 **Q I'm not talking about your competitors just yet.**
19 **I'm asking you a simple question which is: If**
20 **the FACT Act does not prevent you from disclosing**
21 **who a lessee would be in a certain property, would**
22 **you be unwilling to provide that to get the power**
23 **cut on in your own name?**

24 A Yes, I would be unwilling to provide that because
25 I want to be treated equally amongst my

1 competitors.

2 **Q So, it's not because of the FACT Act you don't**
3 **want to provide it. It's because of other**
4 **issues that ---**

5 A Both. I have competition. I have to compete.

6 **Q Have you ever been advised that the FACT Act**
7 **would prohibit you from disclosing that information**
8 **to the city?**

9 A Every time I listen to the recording at the gas
10 company or the city, I get that same spiel.

11 **Q The recording advises you, you can't tell the city**
12 **who a lessee is?**

13 A The gas company has a better recording.

14 **Q Excuse me, sir. Are you telling me that when you**
15 **call the gas company, the recording tells you, you**
16 **cannot tell the City of Rock Hill who a lessee in**
17 **a property is?**

18 A It tells me that information like that can't be
19 given out.

20 **Q Information like what?**

21 A Who the account name is in. It just says they're
22 not going to give out information on who has power
23 where or has gas where. It says information like
24 that is forbidden to be given out unless they
25 can verify definitely that it's the person. They

1 will only give it to the person that the
2 information is on.

3 **Q What I asked you is, have you ever read the act**
4 **or been advised by someone?**

5 A I read the act. I don't know where they get
6 that from. One guy at the gas company said, I went
7 to a two week course, and that's the way it is.
8 I'm not going to a -- I don't know how they -- You
9 know, you can read something and you can interpret
10 it one way, and it can be interpreted another way
11 by an attorney in Washington or somewhere.

12 **Q All I'm asking you, sir, is your desire not to**
13 **state who a lessee would be, and your belief that**
14 **that is prevented by the FACT Act, you have never**
15 **been advised that, nor have you come to that**
16 **conclusion by reading the act itself or any other**
17 **publication?**

18 A Actually, I had a long discussion with the guy at
19 the gas company, and he pretty much agreed with me
20 on that. He had taken a two week course.

21 **Q What's his name?**

22 A I can't recall. I'm sure I've got his email in
23 my computer. If I am to volunteer information on
24 the FACT Act, I might go over a little fact that we
25 know about the FACT Act, other people I see going

1 to the city to get their power cut on. Would you
2 like for me to go over that?

3 **Q Is this about your competitors?**

4 A No, this is about the FACT Act.

5 **Q Sure.**

6 A Okay. Someone had power cut on and came back to
7 the office with the receipt and everything. We
8 were talking about it. They said that the people
9 next to them were trying to rent a house. The city
10 discovered they had rented a house with someone
11 else and there was a bill still owed. They said,
12 well, if it's not too much, we'll just pay it so we
13 won't have to have all this bother. How much do we
14 owe? How much is owed by my old
15 roommate? The city says, we can't tell you how
16 much is owed. They said, well, how can we decide
17 whether to pay it or not? The city says to them,
18 just give us your Mastercard or Visa and you will
19 find out when you get your statement. To me,
20 that's pretty far reaching on the FACT Act and
21 how they interpret it.

22 **Q Well, first of all, did you hear that conversation?**

23 A No.

24 **Q Do you remember the name of the person that relayed**
25 **you the conversation?**

- 1 A I don't recall the name of the person.
 2 Q **Do you know the name ---**
 3 A We did rent to them.
 4 Q **We try not to talk over each other. We don't**
 5 **know the name of the person who is speaking**
 6 **on behalf of the city, do we?**
 7 A We actually rented to them.
 8 Q **No. We don't know the name of the person who**
 9 **was speaking on behalf of the city, do we? Do**
 10 **you know the name of that person?**
 11 A I do not know.
 12 Q **So, we don't know their position either, or title?**
 13 A However, I verified it with one of the customer
 14 representatives. I called down there and asked
 15 them if that was the way they did it. They said,
 16 at this time, that's the way we're doing it.
 17 Q **Who did you speak to?**
 18 A That was Gerald Goins again. I thought it was
 19 kind of an interesting story, so I wanted to
 20 verify it.
 21 Q **When did you speak to Mr. Goins?**
 22 A That was quite a while ago. I don't know the
 23 exact date.
 24 Q **We don't now the name of the lady that was hearing**
 25 **it, right?**

- 1 A I think I probably can dig it up for you.
 2 Q **What's her name?**
 3 A I said, I think I can probably dig it out of my
 4 files for you. I may or may not be able to.
 5 Q **Sitting here today, we don't know the name of who**
 6 **this lady is?**
 7 A Well, she brought me back a receipt and rented
 8 from me?
 9 Q **Do you know her name right now?**
 10 A No, I don't know right now.
 11 Q **We don't know the name of the lady that was being**
 12 **spoken to by the city right now, do we?**
 13 A Of course not.
 14 Q **We don't know the name of the person supposedly**
 15 **speaking on behalf of the city?**
 16 A No. We know the guy that verified that I was
 17 hearing the policy, Gerald Goins.
 18 Q **Have you actually tried to obtain service to**
 19 **rent property in your name at any location within**
 20 **the City of Rock Hill and were refused?**
 21 A I think after this thing with Mr. Willis, we did
 22 change our policy to require people to get it
 23 cut on before we even signed a lease with them.
 24 Q **Is that a no?**
 25 A That's a no.

- 1 Q **Do you have any reason to believe that if Mr.**
 2 **Willis had tried to obtain service at another**
 3 **property, owned by other people, the city would**
 4 **have treated him differently.**
 5 A Yes, I asked him to go to the Cobb House and see
 6 if they would rent to him, and he came back and
 7 said they would. He told me how much which ones
 8 would cost him and gave me a detailed report on
 9 it.
 10 Q **Let me ask my question again. Do you have any**
 11 **reason to believe that the city would have allowed**
 12 **Mr. Willis service at a property, had the property**
 13 **been owned by somebody else?**
 14 A He was living in Rock Hill getting utilities
 15 through the City of Rock Hill, through other
 16 people at the same time.
 17 Q **Let me try a third time. Do you have any reason**
 18 **to believe if Mr. Willis approached the city about**
 19 **obtaining service in May of '09 and the property**
 20 **was owned by somebody else, the city would have**
 21 **responded differently?**
 22 A No, I don't have anything -- Any idea.
 23 Q **Is it your understanding that the Cobb House is**
 24 **situated and the circumstances the same as 1066**
 25 **Cherokee?**

- 1 A It's a rental.
 2 Q **Is that the full extent of your knowledge of the**
 3 **circumstances at the Cobb House?**
 4 A It's a rental business that competes with me.
 5 Q **Do you know of any other dissimilarities between**
 6 **the utility service at the Cobb House and 1066**
 7 **Cherokee?**
 8 A I don't know how the electrical system is set up.
 9 Q **Are you familiar with a master meter?**
 10 A They may have one.
 11 Q **Are you familiar with that arrangement?**
 12 A No, I'm not. I just know it would be all one
 13 meter.
 14 Q **Do you have any reason to believe that if you had a**
 15 **quadplex, under a master meter, and you had the**
 16 **service in your name, and Mr. Willis had approached**
 17 **you about renting Apartment C, that the city would**
 18 **have prevented you from renting to Mr. Willis?**
 19 A I don't believe they would because they would
 20 rent to him at the Cobb House at that time.
 21 Q **I'm saying if you owned one of your quadplexes,**
 22 **A, B, C and D and there's just one meter, and it**
 23 **was under your name, because there is only one**
 24 **meter, and you don't know whether A is burning**
 25 **half of it. Are you still good?**

- 1 A (No response)
- 2 Q Sir, there's a master meter, and you've just built
- 3 that into your rate somehow. If Mr. Smith moves
- 4 out, and Mr. Lewis moves in, do you have any reason
- 5 to believe the city would have prevented you from
- 6 renting to Mr. Willis at that quadplex?
- 7 A I don't have any reason to believe that, no.
- 8 Q So, if the Cobb House is situated and configured
- 9 that way ---
- 10 A The city just doesn't know.
- 11 Q But, if the circumstances are such that if you
- 12 owned the Cobb House or places that are like the
- 13 Cobb House, you could have rented to Mr. Willis,
- 14 just as could have the Cobb House in May of '09.
- 15 A Most likely, yes.
- 16 Q One thing I want to know. Sometimes people think
- 17 government picks on them because they are who they
- 18 are. Sometimes people don't like government.
- 19 Sometimes people think government is just doing
- 20 something they shouldn't do. I'm trying to figure
- 21 out if you're both -- I know you're the second.
- 22 I'm trying to figure out do you also think they
- 23 don't like Mr. Marshall.
- 24 A I think they probably do like me.
- 25 Q You don't disagree the city should try to collect

- 1 its past due utilities?
- 2 A No, I don't disagree with that.
- 3 Q And, you understand past due utilities is a
- 4 significant burden on the city's fisc.
- 5 A I understand that.
- 6 Q Do you also see that if someone could relocate
- 7 within the city and just alternate whose name the
- 8 utility is in, then they could rack up a really
- 9 large delinquency?
- 10 A People do that.
- 11 Q Let me ask it this way. Do you understand that the
- 12 city's definition of family - I think it's six
- 13 or more people whether related or not - might be
- 14 because of some federal housing laws?
- 15 A I'm familiar with those federal housing laws.
- 16 Q Do you recognize the modification, what we normally
- 17 would consider a family, in light of those federal
- 18 housing laws?
- 19 A I understand that.
- 20 Q So, if you had six ---
- 21 A I'm not in that family.
- 22 Q If you had six fellows ----
- 23 A I'm not defined in that family.
- 24 Q I'm asking you a question. If you had six
- 25 gentlemen who want to live in the city and don't

- 1 pay their utilities, they could now go to six
- 2 places and just rotate who gets the utility
- 3 service. So, it would be six times --
- 4 A That's correct.
- 5 Q -- before the city could finally do anything
- 6 without some policy like the one that you are
- 7 bothered by?
- 8 A It also happens to me.
- 9 Q Is that true? Let's start there.
- 10 A That's true. That could happen. Also, that
- 11 same scenario happens to me. I may have a guy move
- 12 out or get evicted. A year later his brother comes
- 13 in to rent from me. I rent to the brother because
- 14 I can't discriminate against this guy. Later I may
- 15 find out I was tricked, but I still have a contract
- 16 with the brother. The same thing happens in the
- 17 city. What makes y'all think y'all can go out
- 18 there and do any different than I can do?
- 19 Q Let me ask you. When you rent to a person, do
- 20 you require that they put the occupants of the
- 21 home on the rental agreement?
- 22 A Not on the rental agreement, on the application.
- 23 Q On the application.
- 24 A But, I can't make them tell the truth.
- 25 Q If the brother comes back and tells the truth,

- 1 that his brother is going to be staying there with
- 2 him, it's your understanding that you can't
- 3 refuse the application?
- 4 A Say the contract has already been consummated, and
- 5 they've move.
- 6 Q Let's stay with my facts. My fact is, John Smith
- 7 has rented from you, and he was a deadbeat, and he
- 8 didn't pay, and he owes you money.
- 9 A Right.
- 10 Q Joe Smith comes to you and fills out an application
- 11 and truthfully listed that his brother, John, is
- 12 going to be living with him.
- 13 A Correct.
- 14 Q Is it your understanding that you have to rent
- 15 to Joe?
- 16 A That would be my understanding that that's a
- 17 different individual, and I have to treat him
- 18 differently. I can't hold the sins of his brother
- 19 against him.
- 20 Q Assume for a second that there is no law that would
- 21 prevent you from renting to Joe and John. Isn't
- 22 that the same situation that the city has enacted
- 23 by ordinance?
- 24 A You're saying -- I don't know. Ask me the question
- 25 again.

1 **Q** I'll change it around a little bit. That wasn't
2 a good question. Assuming there is no law to
3 prevent you from renting to Joe when he's going
4 to have John living with him, because John owes
5 you the debt. Couldn't you then decide? You
6 could make one or two choices, true? You could
7 decide to rent to Joe and get some money from
8 Joe, or you could decide not to rent to Joe
9 because you want to try to get your money from
10 John, or you don't want to be burned twice by
11 John; is that right? If there is no law to prevent
12 you, that's your choice, isn't it?

13 **A** It's an economic choice, what you're asking me.
14 If there's no law that prevents me from holding
15 the sin of the delinquent brother, and he's going
16 to live with say the guy that's got a great job
17 and great credit and has no criminal record.
18 That guy is going to rent from me, right? He
19 wants to let his brother move in with him, who
20 owes me money. You're saying I can hold the
21 sins of the brother against the other one.
22 Even if I could hold the sins against him, if
23 that guy is a great guy, and he's got great credit,
24 he just wants to help his poor brother, I'm not
25 sure I would forego losing the money like the city

1 does.

2 **Q** And, that's a business decision?

3 **A** That's correct. If you're taking a hypothetical
4 question that I can't hold sins against two
5 people.

6 **Q** My follow up on it though is, it's reasonable to
7 make the other decision, too. Your decision
8 would be the brother hasn't burned me, I'm going
9 to try to -- take the opportunity to make money
10 on the brother and see if I can't get back some
11 profit that I lost on John. My question to you is,
12 isn't it reasonable to take the other approach and
13 say, I'm not going to give shelter through Joe to
14 John?

15 **A** That's the way we usually look at it. I mean, I
16 have to obey the law.

17 **Q** Assuming there is no law that prevents it.

18 **A** I know.

19 **Q** So, would it be reasonable to say, I'm just not
20 going to do that?

21 **A** That would be the normal reaction.

22 **Q** So, it would be reasonable. It's just not the one
23 you would do?

24 **A** I would try to make the best decision to maximize
25 the profits for the owner of the property. That's

1 my main goal. I would think that should be the
2 main goal of anybody in business, including the
3 people in the utility department.

4 **Q** You said the normal thing would be to do the
5 opposite, and that would be a reasonable approach,
6 just not the one that you'd take?

7 **A** I wouldn't think -- The normal reaction is what
8 we're trying to get away from.

9 **Q** I'm just trying to ask, is it unreasonable to say,
10 I'm not going to rent to Joe when he is going to
11 give shelter to John, because John has already
12 burned me and owes me money. Is that unreasonable?

13 **A** Yes, I think it is.

14 **Q** Why?

15 **A** Because the guy that has good credit should be able
16 to not have his brother cause him to get turned
17 down.

18 **Q** That's a fairness question. I'm asking you about a
19 reasonable business practice.

20 **A** You're asking me about a reasonable humanistic
21 reaction, not a business action. A business action
22 is to make money. A human may say, you've got the
23 same last name as that guy. I'm not going to do
24 business with you.

25 **Q** Let me add one more fact to our hypothetical then.

1 You find that when you require Joe -- When you
2 prevent Joe from renting from you because of John,
3 you find John all of a sudden tends to pay more of
4 his old debt, that actually helps you on your lost
5 debt recovery on an order of forty percent. You're
6 recovering now dead money, in addition to renting
7 to Joe. With that extra fact, not only is that not
8 a reasonable business practice, isn't that a
9 brilliant business practice?

10 **A** I don't -- I think I see where you're going with
11 that, but I'm not sure that would ever apply to
12 me.

13 **Q** This is my hypothetical world. You can say it
14 never exists on this earth, but in my hypothetical
15 world you said it is all about what is the most
16 business sense, which generates the most income.
17 I'm saying, if you refuse Joe ---

18 **A** If I refuse Joe ---

19 **Q** --- because of John, unless John makes up his old
20 debt. By doing that, you will lose Joe sometimes,
21 but you find over the course of time you cover
22 forty percent more of your old debt. Isn't that
23 a brilliant business decision that's reasonable?

24 **A** I lost a good tenant, no. That's a dumb ass
25 decision.

1 **Q Even if it generates forty percent more revenue,**
 2 **in my hypothetical?**
 3 A I just don't see how your hypothetical could
 4 ever exist.
 5 **Q Again, I'm just trying to see ---**
 6 A Of course, if your hypothetical existed, yes, I
 7 would say that would be the better way to go. I
 8 don't see how it could ever exist.
 9 **Q Sometimes we use hypotheticals to test. You said**
 10 **before it was unreasonable because it was ---**
 11 A Making logic ---
 12 **Q No, you said it was unreasonable because of a**
 13 **bad decision, and your job in business is to**
 14 **maximize your revenue. So, I changed the**
 15 **hypothetical to see when the revenue was higher**
 16 **would you change your outcome.**
 17 A If you change all logic, yes, anything is possible,
 18 quantum mathematics or something.
 19 **Q We're not approaching the speed of light here.**
 20 **All I'm saying is, if you change the paradigm**
 21 **to where it creates more revenue under your stated**
 22 **basis of your decision making, you should say**
 23 **absolutely, I'd kick Joe out in a heartbeat because**
 24 **I'm increasing my revenue by forty percent, and**
 25 **that's a good thing.**

1 A If I find out I can go to city hall by way of
 2 China, and it's quicker, yeah, I'd go that way.
 3 **Q Exactly.**
 4 A And, if it would save me money, but that's a little
 5 outrageous.
 6 **Q I never asked you to agree to the hypothetical**
 7 **construct. All I asked you is when I created ---**
 8 A If you include in the hypothetical it makes more
 9 money, yeah, in that world that would be the way
 10 to go.
 11 Mr. White - Go off the record for one second.
 12 Whereupon - A discussion was held off the
 13 record which was not reported.
 14 **Q While we were off the record, I asked you to review**
 15 **the document that is your responses to**
 16 **interrogatories.**
 17 **Whereupon - A discussion was held off the**
 18 **record which was not reported.**
 19 **Q Mr. Marshall, I'm looking at answers to**
 20 **interrogatories of defendant, which was**
 21 **prepared and served on your behalf by your**
 22 **attorney. I believe you thumbed through this**
 23 **a second ago. Did you see anything that you**
 24 **disagree with as far as content?**
 25 A As I told you, I would have to sit down and

1 study that in more depth. It's too long to read
 2 right here now.
 3 **Q Well, we may actually do that. Did you see**
 4 **anything that you noticed a disagreement with?**
 5 A No.
 6 **Q Request number 8 dealt with all occasions that**
 7 **plaintiffs were subjected to liability of past**
 8 **due bills. Your response includes the sentence,**
 9 **there is no claim in the complaint that the**
 10 **plaintiffs were personally made liable for past**
 11 **due bills of third parties.**
 12 A Talking about myself.
 13 **Q Right. Your complaint does not allege that you**
 14 **were ever made liable for say Willis's account.**
 15 A There was some discussion about that I think. I
 16 think we finally found some state law or something
 17 that I might have sent it to whoever was in charge
 18 or something. I can't remember.
 19 **Q I'm asking you, do you agree with ---**
 20 A No, they've never sent me a bill or anything.
 21 **Q The next to the last sentence in your response.**
 22 **Mr. Foster - I would suggest you might**
 23 **also have to refer to the interrogatory.**
 24 A It would seem like to me if I can't cut on the
 25 power somewhere and put it in my name, and I'm not

1 included in the family definition because somebody
 2 was going to live in the house that owed the city a
 3 bill, then I'm not sure -- It looks like to me
 4 they're making me responsible. They're not sending
 5 me a bill or anything, but they're refusing to let
 6 me cut the power on and rent my property. So that
 7 in essence is passing the buck to me though I'm not
 8 even in that law.
 9 **Q The question is, do you agree with the**
 10 **interrogatory response to the first question?**
 11 A The response is, on information and belief? Is
 12 that where it starts?
 13 **Q That's the whole response. The part that I was**
 14 **focusing in on just for the sake of time is,**
 15 **there is no claim in the complaint that plaintiffs**
 16 **were personally made liable for past due bills**
 17 **of third parties.**
 18 A My right to rent my property was deprived of me.
 19 I'm not sure if that would fit that or not. It
 20 was because somebody who owed the city a bill was
 21 going to be in my unit. I was deprived of the
 22 ability to rent it, which cost me rent.
 23 **Q Does that mean that you believe because of that**
 24 **some sort of associate of property that that was**
 25 **the city making you liable for Willis's account?**

1 A I certainly lost money.
 2 **Q I'm not asking you that, sir. I'm asking you,**
 3 **do you believe the city dunned you for Willis's**
 4 **account?**
 5 A Dunned?
 6 **Q Charged you for it?**
 7 A No, they never sent a bill.
 8 **Q Did they ever require that you pay it as your**
 9 **liability?**
 10 A No, they did not.
 11 **Q For something that you wish to have happen, that**
 12 **account had to be satisfied by Willis or other,**
 13 **that's true?**
 14 A For that particular unit, yes.
 15 **Q But, the city never turned to you and said you or**
 16 **your wife are responsible for Willis's past due**
 17 **account, pay it, it is your liability?**
 18 A No, they never did that.
 19 **Q You did verify the complaint, is that true?**
 20 A (No response)
 21 **Q You did. Do you remember verifying the complaint?**
 22 A When we filed on the city?
 23 **Q Yes.**
 24 A I'm pretty sure I went over it with Martin before
 25 we filed it.

1 **Q I'll show you what I represent to you is the**
 2 **complaint. It does not include the attachments,**
 3 **but that is the body of the complaint.**
 4 A Okay.
 5 **Q Have you seen that document before?**
 6 A I'm sure I have. I looked over it before he
 7 filed it.
 8 **Q Do you recall reading it?**
 9 A I do recall looking it over and reading it, yes.
 10 **Q I'm going to ask you, not about the whole thing,**
 11 **but about specifics. The complaint sets forth the**
 12 **situation of Willis. That is in paragraph 10**
 13 **he contacted to rent the property. He tried**
 14 **to rent the property. The city refused him service**
 15 **at the location. In paragraph 17 it says, the**
 16 **facts set out had been repeated at times in the**
 17 **past by the city and its agents with regard to**
 18 **other rental clients and potential rental clients**
 19 **of plaintiffs. Who are these potential rental**
 20 **clients or other rental clients that were the**
 21 **same situation as Willis?**
 22 A Off the top of my head, I can think of four. I'm
 23 sure there were more.
 24 **Q What are their names?**
 25 A Angel Joseph, 1086 Cherokee, could not get the

1 power on. Her brother came in a month or two
 2 after that and the same problem. I can't remember
 3 his name.
 4 **Q When was that?**
 5 A 5-7-09. The next one, Nikia Moffatt rented 235
 6 Whitgreen and could not get her power cut on.
 7 That was on 11-12-08. Let's see. Sherkia Reid,
 8 her former roommate owed a power bill. I think
 9 that's when they were still telling the amount.
 10 **Q They what?**
 11 A They were still telling them the amount of the
 12 bill at point. I kept having discussions with
 13 her, and she finally just moved. I kept saying,
 14 you know, you didn't sign a contract with the
 15 city. That's where y'all's definition of family
 16 came in. That's three. Four might include ---
 17 Mr. Foster - Since these people are in
 18 part set out in the responses to discovery,
 19 do you wish me to hand the witness that
 20 copy?
 21 Mr. White - Not yet.
 22 **Q Do you recall the locations for all -- I think we**
 23 **have Angel Joseph, the brother of Angel Joseph,**
 24 **Nikia Moffett and Sherkia Reid, that's four.**
 25 A It looks like she wanted to rent 1086 Cherokee.

1 The brother, you know, we ---
 2 **Q Sherkia?**
 3 A No, Angel Joseph was 1086 Cherokee. Nikia Moffatt
 4 was 235 Whitgreen. Sherkia Reid was 242 Whitgreen.
 5 The brother of Angel Joseph, I have no idea. We
 6 recognized he was her brother, and we said, you're
 7 going to say the same problem. It never got very
 8 far.
 9 **Q Can you tell me what the rental history was for**
 10 **1086 when Angel wasn't able to rent it, when it**
 11 **was finally let?**
 12 A I think we lost the next year. It probably set
 13 empty. I just recently rented it. It's sort of
 14 interesting how some things will sit empty and some
 15 things will rent right away. It's just probably by
 16 luck of which key you draw out or which unit they
 17 pick out on the list to go look at. I don't know.
 18 **Q Do you know where Angel Joseph eventually found**
 19 **housing?**
 20 A No, I do not.
 21 **Q Do you know what her rental history or payment**
 22 **history is since then?**
 23 A No, I do not.
 24 **Q Do you know where the brother of Angel Joseph**
 25 **eventually rented?**

1 A No, I do not.
 2 **Q You don't know the rental history of the location**
 3 **he was looking at?**
 4 A None of these questions would be possible for me to
 5 answer because the city won't give out that
 6 information.
 7 **Q I'm asking you about the place of yours that he**
 8 **was looking at renting?**
 9 A I can look that up maybe and see what the rental
 10 history is on it.
 11 **Q Nikia Moffatt, you don't know where she ended up?**
 12 A No.
 13 **Q Nor her performance under whatever agreement she**
 14 **had in that arrangement?**
 15 A No, I do not.
 16 **Q And the same for Sherkia Reid?**
 17 A I don't know where they went.
 18 **Q What is your profit margin on 1086 Cherokee?**
 19 A It's not a commodity like I buy something for
 20 fifty cents and sell it for a dollar. I'm not
 21 sure I've ever heard a profit margin.
 22 **Q Is there a cost avoidance when it's sitting**
 23 **empty?**
 24 A Just cost us the taxes on it basically. If you
 25 had a mortgage, there might be a mortgage payment.

1 It depends on which units you have, which ones
 2 have mortgages. That has a lot to do with who
 3 owns it. We are basically the property manager.
 4 We don't really deal with profit margin. We
 5 deal with vacancy rate.
 6 **Q Well, every dollar received is not profit, is it?**
 7 A No, you have to have repair work done.
 8 **Q And, there's added operating costs from an**
 9 **occupancy versus a vacancy, correct?**
 10 A Yeah, they're going to have a plumbing problem
 11 fixed from time to time.
 12 **Q Have you done any analysis of what those avoided**
 13 **costs are for each property?**
 14 A No, we don't analyze them. In fact, it has a lot
 15 to do with who lives there.
 16 **Q So, you have no information about that?**
 17 A No. We don't keep any kind of -- We would have it
 18 in our records. We could actually figure it out,
 19 but it would be exhaustively difficult. You would
 20 have to match up each utility bill with the unit.
 21 That goes on a statement that goes to the owner.
 22 **Q Are there any other rental clients or potential**
 23 **rental clients that fall within the category of**
 24 **what you intended by paragraph 17? I'll read it**
 25 **again. Facts set out have been repeated at times**

1 **in the past by the city and its agents and**
 2 **employees with regard to other rental clients and**
 3 **potential rental clients. Are these four the**
 4 **exhaustive list or are there more?**
 5 A I could create a list of more of them. What we
 6 would have to do, we would have to go through and
 7 look at the folks that we cleared to rent from
 8 us, went to the city and were unable to get power
 9 cut on. There is another list, and I don't know
 10 that there is any way to create it.
 11 Say we were able to advertise we include
 12 utilities to help you get over the first deposits.
 13 There's a \$150.00 deposit at the gas company.
 14 There's a \$250.00 at the city. Both of them are on
 15 sliding scales depending on your credit or your
 16 history with the city or the gas company.
 17 If we were able to do the same thing that
 18 our competition did, how much more business could
 19 we get?
 20 **Q Go back for a second. You're still operating under**
 21 **the assumption that you're not able to provide**
 22 **utilities in your own name for your lessees.**
 23 A Yes.
 24 **Q If you take that way, assuming you're wrong on**
 25 **that and you could be doing that today. You could**

1 **have been doing that the last five years. You**
 2 **just aren't. Then what other potential rental**
 3 **clients or actual rental clients have you lost**
 4 **because of these same actions by the city and**
 5 **its agents.**
 6 A Like I said, I probably could produce a list of
 7 people that we've cleared and haven't come back
 8 because they couldn't get their power on.
 9 **Q Has anything prevented you from preparing such**
 10 **a list to date?**
 11 A Probably just the pressure of time. When would
 12 you find the time to produce that list? I haven't
 13 like gone through -- Every time somebody couldn't
 14 get it, I didn't make a note of it.
 15 **Q I'm just asking you, if -- All the information that**
 16 **you would need to prepare such a list has been**
 17 **available to you since you filed the complaint, has**
 18 **it not?**
 19 A Right, but I don't -- I just have not produced a
 20 list, no.
 21 **Q Going back to if you were able to advertise. I**
 22 **believe I asked you, and you answered yes -- I**
 23 **mean, you answered, no, you have not. You have not**
 24 **asked the city to put any one of your properties**
 25 **that you own or manage, the utilities in your name**

1 for you to rent. You've never asked that and been
2 denied?
3 A Yes, I did. I did it on the one next door to
4 Mr. Willis.
5 Q You weren't denied that. I believe your testimony
6 was they said, well, we'd rather not. You weren't
7 denied that.
8 A They basically said, no, we don't want to do that.
9 I kept asking the question, and they never would
10 let me do it. I wanted to do it. I didn't want
11 this guy living there on temporary power. I
12 finally gave up because I never could get the
13 city to do it. This was over the phone. They
14 just wouldn't let me do it. This guy had a family
15 member that owed a bill, and he was scared to go
16 down there and get it cut on. I just said, well,
17 I'll just cut it on and bill you. I never could
18 get it put in my name, as if a resident were
19 living there.
20 Q So, the testimony you gave about an hour ago wasn't
21 accurate?
22 A I think that is what I told you. I mean, I might
23 not have. I think I said I tried. I called, and
24 they kept saying, we just don't want to do that.
25 Mr. White - Off the record for a minute.

1 Whereupon - A discussion was held off the
2 record which was not reported.
3 A I had this guy living next door, and the power
4 was on temporary. I called, and I asked. They
5 just kept saying, no, we don't want to do that.
6 Q Well, in this case ---
7 A I finally gave up.
8 Q Well, in this case, I noticed you were very
9 adamant about getting responses in writing. In
10 that case, there is not writing, is there?
11 A It is hard to get writing statements from the
12 city.
13 Q Well, you didn't have any problems in this case,
14 did you?
15 A Yes, I did.
16 Q There are not emails setting forth each party's
17 position in great detail.
18 A The only way I've gotten a written response on
19 all this stuff -- When I went in to the city I
20 asked for something in writing, and I didn't get
21 it.
22 Q Mr. Marshall, is there an email chain between
23 you and the city setting forth both party's
24 position in this case?
25 A There may be, but I'm going to tell you how I

1 got the written ---
2 Q I'm not asking you that. I'm asking you is there
3 one?
4 Mr. Foster - The witness has a right to
5 explain an answer.
6 Mr. White - The witness needs to respond
7 to the question. This ---
8 Mr. Foster - Which he is attempting to do.
9 A There were all sorts of emails. I'm sure I can
10 go back and look them up. When I went with Mr.
11 Willis to the city, and they gave him the terms
12 of their plan for him to make his old debt good
13 and put it in his name, I looked at them and said,
14 that's a different plan than what I'm used to
15 you giving. I'll just put it in my name, and I'll
16 let him pay fifty dollars more a month or something
17 as he can afford.
18 I went across the hallway to utilities and
19 told them to put it in my name. They refused to
20 do it. I said, give me something in writing
21 saying you're refusing. They wouldn't do that.
22 Q Is your testimony they never did that?
23 A They never gave me something in writing saying, no,
24 we won't do that. The way I remember finally
25 getting a document that I could use in court, is I

1 filed a complaint at the advice of my attorney with
2 the commission. The commission then sent the
3 complaint to the city manager who then wrote me a
4 letter telling me, we're not going to let you do
5 it.
6 Q That had to do with 1066. It had to do with Mr.
7 Willis who had a delinquency.
8 A That's right.
9 Q What I'm asking you about is, have you ever asked
10 for a piece of property to be put in your name
11 for you to rent, having nothing to do with a
12 delinquent individual with the City of Rock Hill?
13 A I tried to do it on the one next door about a
14 year or so before Mr. Willis. I never could get it
15 done. We handled everything over the phone at
16 that time. I would call and get power cut on. I
17 said, now I want this cut on like somebody is
18 going to live there but just send me the bill, and
19 I will take care of it with the tenant.
20 Q And, that's when you're speaking to Gerald?
21 A Yes. He just said, they don't want to do that.
22 Q Do you know Gerald's position over there?
23 A He's just one of the people that can cut power on
24 and off. That's it. He works under Lori, I'm
25 sure.

- 1 Q Did you ever speak to his supervisor?
- 2 A No, I did not.
- 3 Q Did you ever state frankly, I want to do this.
- 4 I mean, him saying, I don't want to do that,
- 5 according to your testimony. He didn't say,
- 6 according to your testimony, the city will not do
- 7 do. All he said was, the city doesn't prefer to
- 8 do that.
- 9 A I'm pretty sure he kept with the preferred version.
- 10 Q Other than Angel Joseph, the brother of Angel
- 11 Joseph, Nikia Moffatt and Sherkia Reid, is there
- 12 anybody else that would fall in the category under
- 13 you allegation in 18, that as a result of the
- 14 city's actions, plaintiff's lost potential tenants
- 15 and rental income?
- 16 A Just going back to the fact that we have people
- 17 never come back when we give them a letter saying
- 18 we'll rent to them.
- 19 Q The ones you can tell me about today, are those the
- 20 only four you can tell me about today?
- 21 A Yes, that's the only four.
- 22 Q And, you can't tell me the duration that their
- 23 rental would have been today. Can you tell me
- 24 that?
- 25 A They were signing a contract.

- 1 Q Does that mean you would have received a year's
- 2 worth of rent?
- 3 A As agreed, yes.
- 4 Q Did you receive a year's worth of rent from Mr.
- 5 Willis?
- 6 A I don't think so.
- 7 Q From January to August?
- 8 A It looks like he paid me seven months.
- 9 Q In spite of signing a year agreement?
- 10 A Right.
- 11 Q So, it's not uncommon for people to sign ---
- 12 A He only paid five months. These two months
- 13 we never got paid.
- 14 Q So, it's not uncommon for people to sign a year
- 15 agreement, and you only receive five months rents?
- 16 A That can happen, yes.
- 17 Q Have you ever collected the balance from Mr.
- 18 Willis?
- 19 A No, I have not.
- 20 Q Is that uncommon for you not to be able to recover
- 21 on your contract claims?
- 22 A That happens a lot.
- 23 Q And, we don't know exactly what the rent rates
- 24 would have been for each of Angel Joseph, the
- 25 brother of Angel Joseph, Nikia Moffatt and

- 1 Sherkia Reid?
- 2 A Angel Joseph was \$265.00. Her brother would have
- 3 been \$265.00. Nikia Moffatt was \$225.00. Sherkia
- 4 Reid was \$235.00.
- 5 Q You've never done any analysis over what percentage
- 6 of that would be a net profit over a cost avoidance
- 7 of a vacancy?
- 8 A I think there's a rule of thumb, maybe ten percent
- 9 goes towards repairs or somewhere in that range.
- 10 It's just a rule of thumb because you never know
- 11 what's going to happen, what's going to break.
- 12 Q This rule of thumb, has it been published in any
- 13 scholarly journal?
- 14 A No, it's just a -- I think you might see it maybe
- 15 in a text book for property management.
- 16 Q Can you tell me the name and author of the text
- 17 book?
- 18 A No, I just remember taking the course, and it
- 19 having something in the text book. I think it
- 20 was ten percent. I'm not going to say for certain.
- 21 Q Have you ever done any analysis to see whether
- 22 that number bears out in your properties over the
- 23 40 years you've been operating them?
- 24 A No, I've never done an analysis.
- 25 Q Just to clear up what I think was a

- 1 misunderstanding that I had. In the complaint, you
- 2 stated in paragraph 16, Thomas, that's Lisa
- 3 Thomas, I think, on behalf of the city, asserted
- 4 that supplying utility service to Willis under
- 5 the circumstance above, would result in Willis's
- 6 past debt being charged to plaintiffs. You don't
- 7 mean by that, that the city was holding you liable,
- 8 as we talked about a little while ago, for Willis's
- 9 debt? You mean by that rather that for you to rent
- 10 the property ----
- 11 A I think at one time she said she would, and then
- 12 I think she reversed herself.
- 13 Q She would what?
- 14 A Bill us for his -- If I put him in there, they
- 15 would send us a bill personally for his past due
- 16 amount, if I let him move in there and cut the
- 17 power on. Then I think she retracted that. It's
- 18 coming back in memory.
- 19 Q Would it be fair to say that she made it clear
- 20 that Mr. Willis had to clear up his old debt?
- 21 He didn't have to pay the whole thing, did he?
- 22 A She wanted one-third, one-third, one-third on the
- 23 salary of a guy that works at McDonalds.
- 24 Q Then she modified that further later, didn't she?
- 25 A No, that was the modification. The original was,

- 1 one-half, one-half.
- 2 **Q Whatever the arrangements were, she was always**
- 3 **clear that Mr. Willis had to clear that up?**
- 4 A Right.
- 5 **Q Then you approached her about putting it in your**
- 6 **name.**
- 7 A I don't think I approached her. I just walked
- 8 across the hallway and told them to put it in my
- 9 name.
- 10 **Q You presented the alternative where the utility**
- 11 **service would be placed in your name at 1066,**
- 12 **for Mr. Willis?**
- 13 A In my name. I think what I told them was that I
- 14 would make sure that he paid \$50.00 toward the
- 15 bill or I would evict him.
- 16 **Q Then you were told you could do that, but he still**
- 17 **had to make arrangements to clear up his**
- 18 **delinquency on some payment plan?**
- 19 A I was never told that he could do that.
- 20 **Q You don't believe there was an email in which you**
- 21 **were told you could do that, but he still had to**
- 22 **make -- he had to first make arrangements on his**
- 23 **delinquency?**
- 24 A I don't recall anything.
- 25 **Q Look at City Docs 48 and 49. It's an email chain.**

- 1 **I'm going to start at the one that's about a**
- 2 **third down the page. It's an email from Lori**
- 3 **Thomas to Rock Hill -- Navacore. Is that you?**
- 4 A That is the service we probably used at the time.
- 5 John Gettys, Chaplin, Anne Bunton and somebody.
- 6 Moore. Specifically, I want you to review after
- 7 they gave you the code section of 29-31, the
- 8 sentence reads: If you so choose to establish
- 9 service at this location, and include the fees in
- 10 your rent, although not our preference, we can
- 11 allow that. However, each location will require
- 12 a service agreement, possibly a deposit, given
- 13 that I assume you would want to do this as a
- 14 commercial customer. As a part of the
- 15 service agreement, we require disclosure of those
- 16 residing. If any of those persons have utility
- 17 debt that is still due to the city, arrangements
- 18 for payment of that debt is required. I will
- 19 ask you to review that and see if you have seen
- 20 that before.
- 21 A I just don't remember this email. I'm sorry.
- 22 **Q It's been a while ---**
- 23 A And, I might point out again, they don't require
- 24 anybody else that includes utilities -- In fact,
- 25 some do with separate meters. They don't require

- 1 anybody to disclose who their tenants are. And,
- 2 if they can't disclose to me who has power on
- 3 because of the FACT Act, how can I disclose to
- 4 them who I am renting to?
- 5 **Q Who has a property with a separate meter that when**
- 6 **they go in and arrange for new service does not**
- 7 **have to disclose who the lessee is?**
- 8 A The Latham Company.
- 9 **Q Wait a minute now. Careful with my question. Who**
- 10 **has a separately metered property, when they put**
- 11 **in a new service, new service, when they go in and**
- 12 **say, take this off temporary and put it on a new**
- 13 **service, does not have to disclose who the tenant**
- 14 **is?**
- 15 A If it is a separate meter and they've had it on for
- 16 years, that wouldn't fall in your questions. Is
- 17 that what you're saying?
- 18 **Q The Cobb House ---**
- 19 A Has one meter. There are other ones that have
- 20 separate meters.
- 21 **Q Those people don't get -- Or do you understand that**
- 22 **they do, there's no disclosure if the service is**
- 23 **continuous, as they go from one tenant to the**
- 24 **other. It's only when you go from -- Do you**
- 25 **disagree that everyone has the same disclosure**

- 1 **requirement as they go from service to**
- 2 **temporary service; when it goes from temporary**
- 3 **service to full service, there is a disclosure**
- 4 **requirement of the lessee, and that's true to**
- 5 **anybody. Do you disagree with that?**
- 6 A Well, that's what I was asking to do with the one
- 7 next to Mr. Willis. I just wanted to put it in
- 8 my name, and it would stay in my name.
- 9 **Q Doesn't that email say you can do just that?**
- 10 A This email says I have to disclose who the tenant
- 11 is, and make arrangements. Like I say, I don't
- 12 recall this. Basically, I don't think -- This
- 13 seems to be saying that for me to include rents and
- 14 utilities, I would have to disclose who the tenant
- 15 was.
- 16 Mr. White - Let's go off the record just
- 17 for a second.
- 18 Whereupon - A discussion was held off the
- 19 record which was not reported.
- 20 **Q Let's go back to City Docs 48 and 49. First,**
- 21 **I'm going to ask you, do you believe you received**
- 22 **this email?**
- 23 A I just don't recall it. I may have.
- 24 **Q Did you ever have an email address of**
- 25 **rockhill@navacore.net?**

1 A Yes, I did.

2 **Q So, you don't believe you didn't receive it, you**
 3 **just don't remember receiving it?**

4 A I just don't remember it.

5 **Q That's fine.**

6 A I've read it, and I don't think it would have
 7 changed my position. It's requiring disclosure
 8 of information that I would think would require
 9 the permission of the person I'm disclosing
 10 information about, to be given out.

11 For example, somebody wants a credit
 12 application. We make them sign a statement saying
 13 they agree to let me get their credit, and it's
 14 okay with them. I would be afraid to pull a credit
 15 report without getting written permission from the
 16 person wanting the credit report. I've actually
 17 been audited on that.

18 **Q Again, I think we've plowed that ground a little**
 19 **bit. Other than the FACT Act, you don't believe**
 20 **there's anything that prevents you from disclosing**
 21 **to the city who a lessee is, right?**

22 A Yeah, I think they could probably say I slandered
 23 them or something. I don't know. I'm just saying
 24 I'm not going to give out information to an
 25 establishment without written permission from that

1 person saying it's okay for me to do it.

2 **Q Do you have any reason to believe that a potential**
 3 **lessee would deny that permission, assuming there**
 4 **was some legal requirement that you have to tell**
 5 **the city who the lessee is?**

6 A I would certainly make sure they gave it to us.

7 **Q Have you ever asked a lessee for that permission**
 8 **and been denied?**

9 A Yeah, I've had people refuse to sign the
 10 application. We just don't do business with them.

11 **Q Well, there are a lot of reasons why someone might**
 12 **not sign an application. I'm asking you have you**
 13 **ever said I need to let the city know you are the**
 14 **lessee at this place, and the person said, no, you**
 15 **can't do that.**

16 A I'm sorry. Ask the question again.

17 **Q Have you ever requested a tenant's permission for**
 18 **you to notify the city that that tenant will be**
 19 **residing at that location, and the tenant said, no,**
 20 **you may not tell the city that?**

21 A No, that's never happened.

22 **Q You agree that in the email that I showed you a**
 23 **minute ago the city communicated to you that**
 24 **for a new service you identify the tenant, you can**
 25 **set up utility services in your name at your**

1 **properties?**

2 A That's what that email appears to say, yes.

3 **Q Have you ever been told anything by anybody at the**
 4 **city that contradicts that?**

5 A No, it doesn't contradict that.

6 **Q I want to ask you to review the response to**
 7 **interrogatory number 11 and then we're going to**
 8 **talk about that.**

9 A (Witness complies) This is what we gave to Martin,
 10 and I think he gave it to you, yes.

11 **Q Other than what's provided here, is there any**
 12 **other damage category that you are claiming against**
 13 **the city in this action?**

14 A Not in this action.

15 **Q The interrogatory was identify and specify all**
 16 **monetary. I just want to make sure there's no**
 17 **other component or category of damages other than**
 18 **what's here. Any other facts which support the**
 19 **damages you've claimed other than what you**
 20 **explained in this?**

21 A No.

22 **Q Do you have any documents that haven't been**
 23 **produced in this case that support these damages**
 24 **claims?**

25 A Not to my knowledge.

1 **Q Other than what we've talked about today, have you**
 2 **studied the vacancy rate and issue to any greater**
 3 **degree than what we've discussed or provided in**
 4 **this document?**

5 A We don't try to study it too hard. We just try to
 6 get them rented.

7 **Q So that's a no?**

8 A We have constraints as to how much money we can
 9 spend.

10 **Q So the answer to that question is no?**

11 A No.

12 **Q In computing any of these damages, did you rely on**
 13 **any published studies, treatises or other scholarly**
 14 **works?**

15 A No.

16 **Q I believe we talked about this earlier, but there**
 17 **was no examination or study done to identify or**
 18 **quantify offset avoided costs?**

19 A What do you mean? If something is empty, we try
 20 to rent it as quickly as we can. That would be
 21 avoiding costs.

22 **Q Let me define that term. If you lost out on a**
 23 **renter because of the city's policies ----**

24 A We figured that in. When we gave you the amounts
 25 on these individuals, if we had rented that unit,

1 yes, we -- we didn't charge double. We didn't
2 charge you and the person that re-rented the
3 unit. No, we didn't do that.

4 **Q But, the amount that's in this \$142,560 ----**

5 A That's just an estimate.

6 **Q That's an estimate, but it's based off the \$265.00**
7 **for Sherkia Reid -- or \$235.00, excuse me. \$235.00**
8 **for Sherkia Reid?**

9 A That was basically saying, gosh, if we could have
10 offered this service like our competitors do, you
11 just move in, the power's on. If we could have
12 done that, how many more units could we have
13 filled up.

14 **Q What percentage of the amounts described in**
15 **paragraph 11 is attributable to the fact that you**
16 **believe the city prevents you from putting it in**
17 **your name as your competitors do? Is it 100**
18 **percent or half of ---**

19 A It might be maybe half or a little more. I'm not
20 sure. One reason we looked at the records -- We
21 tried to get everything done for Martin. The next
22 day we realized it was quite a bit less than it
23 actually was. It definitely wasn't 100 percent.
24 I wasn't saying I was hitting a 100 percent fill
25 up rate. I just noticed that those folks that have

1 utilities on seem to fill their units up very
2 easily. It is much easier for the person to move
3 in. There's no deposit with the gas company.
4 There is no deposit with the city. You just get
5 your credit check, and you put up the deposit with
6 the landlord and you move in. That's pretty easy.

7 Think about it. If you came into town and
8 you had just gotten a job here, do you want to go
9 to three places to move in or one place?

10 **Q Based on the email we looked at, documents**
11 **48 and 49, which was dated in June of '09 ---**

12 A If they're saying ---

13 **Q Wait a minute.**

14 A These people still have to be cleared by the city.

15 **Q In June of '09, you were informed at least no later**
16 **than then that you could, in fact, have these**
17 **services in your own name.**

18 A No, it was stipulated I had to disclose who the
19 tenant was. They had to go to the city and be
20 cleared.

21 **Q As would be true for anybody else in the city?**

22 A Not that I know of. I mean, my competition has
23 it already on. The people just move in. To
24 just clear it for the first person, I just --
25 seems weak.

1 **Q What evidence do you have that any of your**
2 **competition do not have to satisfy the exact**
3 **procedure that was set out for you in that email of**
4 **June 24, '09?**

5 A I had people go to the Latham Company and ask what
6 the procedure was and look at their units. They
7 said, you don't have to say a thing to the city. I
8 have emails from these people. I have emails from
9 University Place saying, no, your daughter doesn't
10 have to do a thing with the city. She can just
11 move in.

12 **Q Did you identify any factors at your locations that**
13 **are distinct from their locations with respect to**
14 **whether it was a new service or a continuation of**
15 **an old service?**

16 A I've got a vacant unit, and I tell the city I want
17 the power on so that I can offer this service.
18 They're going to say, who is the first tenant.

19 **Q Stop right there. Do you have any reason to**
20 **believe that Latham, in that exact same**
21 **circumstance, had any different requirement from**
22 **the city?**

23 A They made no requirements of them.

24 **Q So, you're saying in the exact same circumstance**
25 **where you have to identify the tenant, Latham, if**

1 **he were in that position, did not have to identify**
2 **the tenant?**

3 A Correct.

4 **Q And, what do you base that testimony on?**

5 A On emails both from him and University Place.
6 I actually had somebody go to Latham and look at
7 his units and talk to them about it. There is no
8 requirement that they say anything to the city
9 about who's going to be in their units.

10 **Q Is Latham transitioning from a temporary service to**
11 **a full service in that same case?**

12 A He put it in his name from the very beginning, and
13 it's always been in his name.

14 **Q Is he going to temporary services when he doesn't**
15 **have a tenant?**

16 A Not that I know of.

17 **Q All right. I asked you, in the same facts that**
18 **you present for you, do you have any evidence that**
19 **Latham gets different treatment from the city, and**
20 **you said, yes. But, then, when we delve into it,**
21 **the facts are different.**

22 A No.

23 **Q I'm asking you, sir, if you go from transition ---**

24 A You're saying ---

25 **Q Excuse me. If you're going from temporary service**

1 to a full service, you're asked who the tenant is,
 2 correct?
 3 A (No response)
 4 Q Is that correct?
 5 A Right. Even if there is no tenant.
 6 Q Do you have any reason to believe that Latham,
 7 going from temporary service to full service, is
 8 not asked that same question?
 9 A I don't know when he set it up, but I doubt he
 10 was.
 11 Q I'm asking you do you have any evidence?
 12 A No.
 13 Q So, you don't know anything about that situation?
 14 A What we know is we actually had people go to
 15 Latham and ask, you know, if I have a problem with
 16 the city on an old utility bill is there going to
 17 be any problem? They said no.
 18 Q Do you have any reason to believe that you would
 19 have a problem with that if you put 1066 Cherokee
 20 under your name with John Smith, who has no history
 21 of any problems with the city, and then you, like
 22 maybe Latham, just continue that service straight
 23 on. Someone's daughter comes in from college and
 24 says, do I have to say anything to the city? Do
 25 you have any reason to believe that would be

1 different?
 2 A Let's check. Let's find out when Latham set
 3 the units up.
 4 Q I'm not asking ---
 5 A And, when ---
 6 Q Sir ---
 7 A When University set those units up, I bet they
 8 just put them in their names and told the city,
 9 we're going to rent these with utilities included,
 10 they're in our names. They never go back to the
 11 city and tell them who the first or second or third
 12 tenant is.
 13 Q I'm asking you if you had that situation, that
 14 complies with the June '09 email ---
 15 A If I want to put it in my name and include
 16 utilities, I really as best I can tell, should
 17 not be obligated to tell the city squat, who's
 18 there. I ought to be able to give it free to a
 19 bum off the street if I want to.
 20 Q That's your opinion. I'm asking you do you know
 21 that
 22 the city treats someone else differently under the
 23 same exact facts?
 24 A I think they do. I think they let people move
 25 into temporary housing with all sorts of debts,

1 and they're all over town.
 2 Q Do you see anything in this email ---
 3 A The guy that I was trying to do that with, went
 4 to Porter's Motel or whatever and received city
 5 services there.
 6 Q Mr. Marshall, do you believe that it is your
 7 constitutional right to rent any property to
 8 anybody under any circumstance?
 9 A Well, if they're wanted for murder or something or
 10 they are an escaped convict, no, I don't think so.
 11 Q So, the answer is no. That's not ---
 12 A Except for that scenario, yes.
 13 Q So, unless it's a murderer, wanted for murder,
 14 you believe it's your constitutional right to rent
 15 your property to anybody at any time.
 16 A I believe I could probably rent my property without
 17 even knowing who's there. If I just wanted to say,
 18 okay, you pay me \$50.00 a week, and if it's not
 19 here I'm going to start papers on you -- You know,
 20 it would be irresponsible of me, but I don't see
 21 why I couldn't do that.
 22 Q Mr. Marshall, I'm going to ask you to please listen
 23 to my questions and try to answer the question
 24 that's asked. The question that is asked is, do
 25 you believe it is your constitutional right to rent

1 your property to anybody anytime unless they are
 2 wanted for murder?
 3 A Yes, I do.
 4 Q I want to go now to what evidence do you have.
 5 I want a full complete -- I don't want what you
 6 think. I don't want what you suspect. I'm going
 7 to be asking you specific questions about what
 8 do you know and how much do you know about the
 9 situation. The June 24, '09 e-mail to you sets
 10 forth the city's policy under its ordinance on what
 11 you would have to do to rent something -- to put
 12 service in your own name. Okay?
 13 A Okay.
 14 Q Does the email say anything about you having to
 15 disclose subsequence tenants to the first,
 16 if there's no change in service. Does it say
 17 anything about that?
 18 A It doesn't say anything about subsequent.
 19 Q It requires you notify ---
 20 A Let's look at it.
 21 Q The question is, does it require you, when you put
 22 service in your name, disclose who the tenant is?
 23 A That's what it's telling me.
 24 Q Do you have any facts where you know someone put
 25 service in their name and did not have to disclose

1 that tenant at that time?

2 A The guy I rented to went right out there to

3 Porter's Motel and rented a room.

4 Q Do you know for a fact that Porter's Motel put the

5 new service in that guy's name the day he moved in?

6 A It was already on.

7 Q How is that responsive to my question? My

8 question is, do you know anybody that was allowed

9 to put service in their name for some who violates

10 -- Excuse me, that did not disclose who the tenant

11 is?

12 A Every unit that has a master meter would be that

13 way because they can't -- You know, it's a master

14 meter. It's cut on for everybody that comes into

15 that building.

16 Q Mr. Marshall, do you know anyone who put service

17 in their name that did not have to disclose the

18 tenants at the time?

19 A I told you, anybody with a master meter would have

20 done that.

21 Q The service is already included.

22 A That's right.

23 Q I'm not asking down the continuum. I'm saying

24 at the moment the service is initiated ---

25 A Do you think when the Cobb House was first turned

1 on they disclosed to the city who each person was

2 that was moving into each unit? I don't think

3 they did.

4 Q Do you know that they didn't? Do you have any

5 facts to show they didn't?

6 A No, I don't, but it would be ludicrous.

7 Q But, you have no evidence to suggest otherwise.

8 It is your supposition only that you're offering

9 to me about that?

10 A We could check.

11 Q I'm asking you. Do you have anything other than

12 your supposition today about that?

13 A No, I don't.

14 Q Do you have any reason to believe that once you had

15 service at 1066, that there's any requirement

16 from the city that you disclose who the subsequent

17 tenant is?

18 A That's why I wanted to study this a little more.

19 Q Take your time please. At that location. That

20 means anybody that resides there that I have

21 knowledge of, I'm suppose to disclose to the

22 city whether it be first, second, third. If

23 any of these persons have a utility debt, then

24 that is still due to the city. It doesn't say

25 first, second, third. It just says, we require

1 disclosure of those residing at that location

2 from you, Bob Marshall. It doesn't say I have the

3 freedom to rent to people like second, third

4 tenants without saying anything to the city.

5 Q Mr. Marshall, that email says that when you set up

6 service in your name, you have to disclose the

7 tenants, correct?

8 A Disclose those residing at the location.

9 Q Does it say anything about a duty on you to

10 disclose anybody other than those that are

11 residing when you set up the service?

12 A That's what it means to me.

13 Q I'm asking you what -- You're inferring something

14 from it, but it doesn't state that, does it?

15 A That's what it states. It says, we require

16 disclosure of those residing at that location.

17 It doesn't say first, second or third. It just

18 says those. So, if I have knowledge that Mr.

19 Willis moves out, and Mr. Jones moves in, according

20 to this, I should disclose that.

21 Q No, according to your reading of that.

22 A How else do you interpret English.

23 Q Mr. Marshall, have you asked anybody from the

24 city if once you had service in your name was

25 there any sort of requirement or any document ---

1 A I ---

2 Q I'm asking you, sir, did you ask anybody?

3 A I didn't need to. It's right here.

4 Q Did you ask anybody? The question is, did you

5 ask?

6 A I didn't need to ask. It's right here.

7 Q Mr. Marshall, the way this works is, I ask you

8 a question, respond ---

9 A No, I have not asked.

10 Q Thank you. So, assuming that the city has no

11 requirement that you disclose subsequent tenants,

12 do you have any reason to believe that the city

13 would have a different requirement of you?

14 A Yes.

15 Q Assuming that the city's policy and the city's

16 ordinances do not require as you're reading into

17 that, assume that's not true ----

18 A I just answered the question I thought. This is

19 what -- I mean, this is this. It is what it is.

20 Q Mr. Marshall, I'm asking you do you have any

21 reason to believe that -- Excuse me. Assuming

22 that the city has no requirement ---

23 A Assuming they have no requirement.

24 Q Assuming they have no requirement that you disclose

25 subsequent renters, after service is cut on.

1 A Okay.

2 Q Do you have any reason to believe they would treat

3 you differently in that regard?

4 A No.

5 Q Do you have any knowledge about the Cobb House or

6 Porter Motel or any other location that it has a

7 policy different than that, assuming there is no

8 requirement by the city of subsequent notification

9 of tenants?

10 A We're going back --- It's very complicated. You're

11 saying that ---

12 Q I'm saying ---

13 A You're basing it on the assumption. I would have

14 to agree with you because you are basing it on that

15 assumption.

16 Q The city has no requirement that anybody -- Assume

17 that the city has no requirement that anybody

18 notify the city -- Let me start over.

19 A So, they're going to have a record ---

20 Q Wait a minute.

21 A --- even though I'm ten tenants away from Mr.

22 Willis, that Mr. Willis is still there. That's

23 crazy.

24 Q I'm not asking you to opine as to the prudence of

25 the city policy. I'm asking you what your

1 understanding and evidence is about the city

2 policy. The question is this. Assume that the

3 city has a requirement that if you put service

4 in your name you have to disclose the tenant that

5 you're putting the service for. That's step

6 one. Step two is, the city has no requirement or

7 even process to allow ----

8 A It's ---

9 Q Wait a minute. To allow for disclosure if the

10 tenancy changes.

11 A To be honest with you, these questions are getting

12 so ---

13 Q Mr. Marshall ---

14 A --- difficult based on this assumption and that

15 assumption.

16 Q Mr. Marshall ---

17 A I'm not sure that I could really trust myself to

18 make that judgement without sitting down and

19 analyzing for a day or so.

20 Q Mr. Marshall, if you will listen to the question,

21 you might have some credibility and challenging

22 to the reasonableness of the question. You're not

23 even allowing me to finish it.

24 A Go ahead.

25 Q Where we are headed is, I want to know what

1 evidence you have that you're being treated

2 differently. You keep crossing facts.

3 A That's pretty good right there. We require

4 disclosure of those residing at the location.

5 That's pretty darn good.

6 Q Are you done?

7 A And you brought it out to me.

8 Q Are you done?

9 A Yes.

10 Q The question now is, do you have any facts that,

11 assuming that the city has a policy that if you put

12 the service in your name you have to disclose the

13 tenant you're doing so. And, there is no process

14 by the city in which you have re-disclosure upon

15 the change of tenancy? Do you have any knowledge

16 that you're being treated differently than the Cobb

17 House or Porter or anybody else?

18 A Yes, I have knowledge.

19 Q What facts do you have, sir?

20 A Gosh, this is it.

21 Q I'm asking you about facts.

22 A What did you just hand me? I'm sorry. I'm not

23 trying to be hard to get along with. I'm sitting

24 here -- I asked you to let me re-read it.

25 Mr. White - Certify the last five pages

1 please. All right, sir. The next step

2 to this process is, we're going to certify

3 these pages. I'm going to file a motion

4 to compel your answers. A judge is going

5 to review these questions, and he's going to

6 decide for himself whether he believes they

7 are completely unwarranted, impossible of

8 comprehension.

9 A I ---

10 Mr. White - Sir, and then he's going to

11 analyze your responsiveness and your good

12 faith in answering.

13 A Okay.

14 Mr. White - I've never had to do that. I

15 really think it shouldn't start today and

16 shouldn't start over something like this.

17 A Okay.

18 Mr. White - You keep saying people are

19 being treated differently. I'm trying to

20 ask you questions to reveal the fact that

21 you are analyzing differently under

22 different circumstances. You are not wanting

23 to answer those questions of those facts or

24 are either ignoring the question or now saying

25 it is too difficult to comprehend. I'm

1 entitled to ask you questions and to vet your
2 claim.
3 A Let's try the question again.
4 **Q Thank you.**
5 A I'm closing my eyes so I can concentrate. Okay?
6 **Q That's fine. I do it a lot. We'll come at it**
7 **from the east side. Do you have any reason to**
8 **believe that the Cobb House, in initiating new**
9 **service, was not required to identify its**
10 **tenants?**
11 A I don't have any information, no.
12 **Q Do you have any reason to believe that Porter,**
13 **when initiating a new service, was not required**
14 **to identify its tenants?**
15 A I don't have any information, no.
16 **Q Thank you. The last one I know of is Latham. Do**
17 **you have any reason to believe that Latham,**
18 **initiating a new service, has not been required**
19 **to identify its tenants?**
20 A I don't have any information on that either.
21 **Q All right. Do you have any information to believe**
22 **that any of the three of those, when coming from a**
23 **temporary service to a full service, was not**
24 **required to identify the tenants at the time of the**
25 **shift?**

1 A I don't have any information on that, no.
2 **Q The last one is, do you have any information that**
3 **if you had continuous service at any of your**
4 **locations, that you did not go from temporary**
5 **back to full service, it was continuous of**
6 **service, that if there was a change of tenants**
7 **that the city would require you to notify it of**
8 **the change of tenant?**
9 A This email.
10 **Q I got that. Is there anything other than that**
11 **email ---**
12 A No.
13 **Q --- that you based that belief on?**
14 A That just hit me right here when I read it.
15 Mr. White - I appreciate that, sir. I
16 recognize that my questions could have been
17 better. That was partially my fault. I
18 apologize.
19 **Q In your interrogatory number 11, it doesn't**
20 **provide your damages of \$142,000, it provides**
21 **that your damages are at a max of \$142,000?**
22 A Actually, we messed up. It could have been a max
23 of more than that. We just messed up, but ---
24 You were asking for something, and I got it to
25 Martin, and I did it as quickly as I could. Then

1 Donna said the next day I messed up. I said, oh,
2 well, we'll see what happens.
3 **Q The only policy that you're complaining about ---**
4 **In your complaint, there's a lot of different, and**
5 **to Martin's credit, there are a lot of different**
6 **avenues for the relief to be granted. The**
7 **policies that you're complaining of is 29-31**
8 **D & E; is that correct?**
9 A About the family stuff.
10 Mr. Foster - At this point, I interpose an
11 objection.
12 The way you handle this deposition is
13 counsel's choice. There's been a question of
14 what position you take, what do you think of,
15 which I do not personally understand to
16 be a fact deposition. You are now asking
17 for him to state an opinion, as I understand
18 it, about what he's, quote, unquote, actually
19 asking for in the complaint, if I understood
20 correctly. If that is the case ---
21 Mr. White - I believe you could handle that
22 objection just with an objection to the form.
23 I appreciate the assistance to the extent ---
24 Mr. Foster - Well, if I may put it on the
25 record briefly. The answer ---

1 Mr. White - I didn't read it that way.
2 Mr. Foster - I did not assume you did.
3 Nevertheless, I think you are asking him to
4 take the legal position which he is not
5 capable of doing.
6 **Q I'm going to ask you, are there any policies,**
7 **practices or ordinances that you're seeking**
8 **liability be imposed on the city other than --**
9 **Section 29-31 D & E, as it applies to you. I**
10 **think E just kicks in because of the family**
11 **definition.**
12 A This seems to be where I said I'm not a member of
13 the family. Does that answer it?
14 **Q Is there any other ordinance or policy of the**
15 **city that you feel aggrieved of as part of this**
16 **lawsuit?**
17 A We are considering other lawsuits, but this is
18 a separate.
19 **Q A companion question, the core facts for which**
20 **you are seeking the city be held liable to you**
21 **comes from the fact that the city would not, in**
22 **the case of Willis, allow you to rent the property**
23 **to him with the utility in his name or in your**
24 **name for him?**
25 **Mr. Foster - I continue my objection.**

1 **Mr. White - I will allow the continued**
 2 **objection until we shift gears here.**
 3 A I'm going to close my eyes and try to concentrate
 4 on the question. Ask it again.
 5 **Q The fact pattern that has given rise to -- the**
 6 **core fact is you're not able to rent your**
 7 **property, in the one case to Mr. Willis, or to**
 8 **people in similar situations to Mr. Willis. That's**
 9 **where your constitutional rights are being**
 10 **violated and your statutory right under 1983?**
 11 A Yes.
 12 Mr. White - Let's take a break and let me
 13 check on one thing.
 14 Whereupon - A recess was taken and documents
 15 were marked as Deposition Exhibits 1 and 2.
 16 Mr. White - That's all.
 17 Examination: (By Mr. Foster)
 18 **Q In response to some questions by Mr. White you**
 19 **indicated that Mr. Willis, during your dealings**
 20 **with him, had a past due account with the**
 21 **city.**
 22 A Yes.
 23 **Q Is it your recollection that Mr. Willis**
 24 **had produced the past account or was the past**
 25 **account that of a third party?**

1 A That was his.
 2 **Q It was his. Sir, you and Mr. White had some**
 3 **colloquy about the definition of family. Do**
 4 **I recall correctly that that was based upon the**
 5 **city statutes?**
 6 A It's based on the federal statutes and what a
 7 family is.
 8 **Q Which you believe to be accurate or applicable?**
 9 A What they have in their law is what I understand
 10 is Federal ---
 11 **Q Let me do what Mr. White did and direct you to**
 12 **the question I'm asking. Mr. Marshall, you**
 13 **understand these Federal statutes to be applicable**
 14 **to this situation, which you understand have a**
 15 **definition of family in them.**
 16 A Well, the city certainly thinks they are
 17 applicable.
 18 **Q Is that the basis of your assumption, sir?**
 19 A I don't know that I want to say what I think of
 20 the city's assumption.
 21 **Q Well, I have to be obvious, sir. Do you have any**
 22 **legal training?**
 23 A No. I know what right and wrong is.
 24 Mr. Foster - Off the record.
 25 Whereupon - A discussion was held off the

1 record which was not reported.
 2 **Q Sir, Mr. White asked you about calculation of**
 3 **profits and a calculation of how long tenants**
 4 **had a tendency to stay in your apartments. Do**
 5 **you recall that?**
 6 A I recall that.
 7 **Q Is that information that could be calculated by**
 8 **you given some time?**
 9 A Given a lot of time, yes.
 10 **Q How much time would you require?**
 11 A I don't even want to think about it.
 12 **Q Well, I'm going to ask you to.**
 13 A Can I confer with my partner?
 14 **Q Your wife you mean?**
 15 A Yes.
 16 Mr. Foster - I don't know whether that's
 17 allowed unless counsel will agree.
 18 Mr. White - We will ask her in a little
 19 while.
 20 A How long it would take to calculate that. It
 21 might be quickly, and it might take a month.
 22 **Q Would you be relying upon any text books or**
 23 **learned treatises in order to do that?**
 24 A Just crunching numbers. We also have to take
 25 care of what comes in the door every day.

1 **Q So, you wouldn't necessarily require any**
 2 **learned treatises to calculate normal length**
 3 **of residency?**
 4 A It would just be number crunching.
 5 **Q And, it wouldn't require any learned treatises**
 6 **to figure out the amount of profit on a particular**
 7 **place overall?**
 8 A No, it would not. You would just have to add
 9 the numbers.
 10 **Q Could that be made available?**
 11 A It could.
 12 Mr. Foster - I proffer if it is of any
 13 interest to opposing counsel.
 14 Mr. White - Absolutely.
 15 **Q Then it is asked of you, and we would have to do**
 16 **that.**
 17 A Which units?
 18 **Q I assume all, although if you have reasons to**
 19 **believe that the ones that we're discussing have**
 20 **a different category of residency and profit than**
 21 **others to some appreciable extent ----**
 22 A So, you want me to go through and take each one
 23 of my properties for one year or two years ----
 24 **Q No, sir. I would not ask that. I do not propose**
 25 **to speak for Mr. White. What I'm saying is this:**

1 If you are capable for doing it overall for all
2 your properties, I'm asking you to do it in answer
3 to his questions. If there is any reason that you
4 would believe that a particular area, such as
5 Whitgreen or the place where Mr. Willis stayed,
6 would have a significantly different amount of
7 profit or vacancy, I would ask you to calculate
8 that and supply it to myself so that it can be
9 supplied to Mr. White.

10 A I'm not sure exactly what you're asking. I'm
11 sorry.

12 Q Ask me and I will try to clarify.

13 A You want me to go back to the office, say over the
14 next month, and try to figure out each unit that
15 we manage ---

16 Q No, sir, not each unit. I tended to say overall.
17 If Mr. White wishes each unit ---

18 A To do it overall, you would have to do each
19 unit.

20 Mr. Foster - Does Mr. White require the
21 figures as to each unit?

22 Mr. White - I want to require that
23 interrogatory number 11 be answered. That
24 is the statement of damages. He can answer
25 that however he chooses.

1 A Okay.

2 Q Explain to me, perhaps I lost track here, in your
3 colloquy with Mr. White as to the damages in
4 response to interrogatories, you indicated there
5 would be a different percentage than the amount
6 stated here in response number 11 which you
7 narrated. I'm showing you number 11. I'm asking
8 you to explain what you intend by using the term
9 percentage?

10 A When I said percentage, I'm sorry, it's just ---

11 Q If I'm allowed ---

12 A When I said there was normally ---

13 Q Let me ask the question. I believe the term
14 got started in response to questions by Mr. White
15 to the effect of, are you saying that 100
16 percent of these damages are due and owing by
17 the city. Then you and he had a colloquy, as I
18 would characterize it, as to whether it was
19 100 percent, whether that was total or there was
20 a part of that. I'm asking you to tell me what
21 you intended by the use of the term percentage
22 because bluntly, it went passed me.

23 A Well, in real estate the vacancy rate should be
24 around 10 percent. My understanding is at 10
25 percent and what you're asking for rent is a

1 Mr. Foster - Which would indicate, without
2 trying to make a joke, Mr. White would have
3 the right to attack it if it did not meet
4 his standards, quite obviously, of evidence.

5 A So, what we did in one day, you want us to try
6 to do a little better basically?

7 Q Precisely. What I would like for you to do, I
8 would like for you to calculate all of your
9 places together. If you think it is significantly
10 different as to the areas that we've dealt with
11 and you've testified to, as to Mr. Willis's place,
12 as to Whitgreen or whatever, as to those areas,
13 physical areas, I would ask that you calculate
14 those. That is what I would ask you to do and
15 direct you to do for the purpose of this
16 deposition.

17 A Why don't we restrict this to say the duplexes in
18 Rock Hill Homes and Whitgreen Apartments. Would
19 that be ---

20 Q I would ask you to do it overall, if you can.

21 A That would be on individual houses that ---

22 Q All the properties owned or controlled by yourself,
23 sir.

24 A Through a management contract ---

25 Q Yes, sir.

1 fair market value. If it's more than 10 percent,
2 then you're probably asking too much. If it's
3 less than 10 percent, you're not asking enough.
4 Is that where we were on percentages?

5 Q I'm asking about what you intended, sir?

6 A That's what I intended. That's the target.

7 Q Are you saying that that would affect your answers
8 or our answers to number 11?

9 A Since I'm going to have to go through and re-hack
10 the numbers, I'll certainly keep that in mind.

11 Q Thank you. In response to the questions and your
12 colloquy with Mr. White as to emails or email
13 included on defendant's 48 and 49, which I believe
14 was an email from Ms. Rogers. There was, as I
15 recall, a great deal of discussion about what
16 would be allowed, if I'm saying it right, in
17 reference to those emails -- I'm pausing to
18 reference the ones we're talking about.

19 A I know exactly what you're talking about.

20 Mr. White - Would you like the court exhibit,
21 Martin?

22 Mr. Foster - It's your exhibits. I don't
23 think you put them in.

24 Mr. White - I put one of them in.

25 Mr. Foster - 48 and 49?

1 Mr. White - Yes, sir.
 2 Mr. Foster - Which one did you put in, sir?
 3 Mr. White - Pages 48 and 49.
 4 **Q I'm quoting therefrom. This is from Ms. Thomas**
 5 **in the middle of her paragraph after quotation of**
 6 **the statutes. As a part of the service agreement,**
 7 **we require disclosure of those residing at the**
 8 **location. If any of those persons have a utility**
 9 **debt that is still due to the city, arrangements**
 10 **for the payment of that debt are required. Sir,**
 11 **at any time in your dealings with the city on**
 12 **Mr. Willis, was there any indication that an**
 13 **amount of the schedule owed by him on those**
 14 **debts was going to be any different than the one**
 15 **that you had discussed with Mr. White; that it**
 16 **would be in any circumstances less than the**
 17 **figure ---**
 18 A No. They wanted one-third, one-third and one-
 19 third. That was a reduction from one-half, one-
 20 half, over a two month period to a three month
 21 period.
 22 **Q Do I understand; therefore, that there was no**
 23 **offer of any other schedule with Mr. Willis?**
 24 A I made an offer, but it was rejected. I wanted
 25 to get \$50.00 a month until he paid it up because

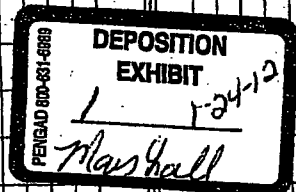
1 that is what he could afford to pay. He was
 2 flipping burgers. He can't do -- He might not be
 3 able to do that.
 4 Mr. Foster - Give me just a moment.
 5 **Q I would be correct, I assume, in saying there is**
 6 **nothing in writing that you're aware of where a**
 7 **different schedule was offered?**
 8 A Not that I know of.
 9 Mr. Foster - Thank you, sir. I believe
 10 that is all I have.
 11 Mr. White - I would just say that with
 12 counsel's agreement, we'll hold the deposition
 13 open to the extent a damages calculation or
 14 explanation is revised.
 15 Mr. Foster - I have advised Mr. Marshall.
 16 I'm unsure whether our new calculation will
 17 meet the standards required by opposing
 18 counsel. There will be other calculations
 19 made and supplied to you, as I understand it,
 20 within the month, sir?
 21 A Right.
 22 Ms. Marshall - Two.
 23 A Donna wants two.
 24 Mr. White - All I'm asking is I wish to hold
 25 this open to the extent I get something new.

1 Mr. Foster - That's what I'm asking. That's
 2 absolutely true.
 3 Mr. White - I have nothing further.
 4 A I hope we're real busy, and I have a hard time
 5 doing this because that means we're renting things.
 6 Whereupon - Deposition was recessed at
 7 3:55 p.m.

Signing of Transcript Shirley Dallas-Gerrald, CVR-CM
 Notary Public/Court Reporter
 of Deposition By
 Witness Reserved
 (Recorded deposition tapes retained fifteen days from
 date of certification or until transcript has been
 signed in cases when signature is not waived.)

Deposition of Robert K. Marshall, Jr.

DATE	ITEMS	FOLIO	✓	DEBITS	CREDITS	BALANCE
5/29	May 30 - June 29 rent			245		245
6/1	June 30 rent			817		253
7/1	July			245		498
8/1	Aug			245		743
9/1	Sept			245		988
10/1	Oct			245		1233
11/1	Nov			245		1478
12/1	Dec			245		1723
1/1/2010	Jan 1 - 25			197.58		1920

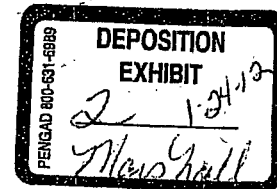


power at 1066 Cherokee and rent the unit with the power and water on. If I can rent units with the power included you will sell power with our guarantee of the bill being paid. I will collect rent and not lose tenants. Furthermore, if you can put in place the same program the gas company has, I and others may simply have the power switched on to avoid dangerous situations and fires. I don't look forward to this, but it may be simply the best way to protect the property and maximize profits.

By law I can't tell you who will live in my units and you can't tell me who has the power on. I need to know what I have to do to get the power on at 1066 Cherokee and include it in the rent without disclosure of who is living there. If you will not cut it on without disclosure, then I need to have this documented.

Thanks for looking into this for me.

Bob Marshall, Rock Hill Property Management



----- Original Message -----

From: LThomas@cityofrockhill.com

To: rockhill@navacore.net

Cc: john.gettys@mortongettys.com ; Spencer, W. Chaplin ; ABunton@cityofrockhill.com ;

PMoore@cityofrockhill.com

Sent: Wednesday, June 24, 2009 12:15 PM

Subject: Re: Fw: power with rent

Mr. Marshall:

Patricia Moore forwarded your e-mail to me. I believe that there is a bit of confusion here, and I would like to take this opportunity to further clarify the issue. Below is a section of the Municipal Code for the City of Rock Hill that addresses responsibility for utility bill payment.

ARTICLE II. RATES, CHARGES AND BILLING

DIVISION 1. GENERALLY

Sec. 29-31. Payment of bills; delinquency.

(a) Consumers of water, electricity, sewer service and all other services provided by the city shall pay without discount all bills rendered for such services not later than the 15th day following the rendition date, except that when the 15th day falls on Saturday, Sunday or a legal holiday, payment may be deferred until the next ensuing business day. On the sixth day thereafter, a three percent penalty will be added to the utility services account, which penalty shall be in addition to any other cost, expense or fee.

(b) For accounts that are past-due, a notice of disconnection is conspicuously displayed on the subsequent billing notice for that account. This notice details the date that payment must be received and the amount which must be paid to avoid disconnection of service.

(c) In some cases, the city employee will deliver a notice in lieu of the disconnection allowing an additional determined amount of time for a customer to satisfy the past-due balance prior to disconnection of service.

Upon delivery of such notice, the same fee as set out in the schedule in appendix A shall apply to the account.

(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32.

(e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household

City Docs (Marshall)

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employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830.

(Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)

If you so choose to establish service at this location and include the fees in your rent, although not our preference, we can allow that; however, each location will require a service agreement, and possibly a deposit especially given that I assume you would do this as a commercial customer. As a part of the service agreement, we require disclosure of those residing at the location. If any of those persons have a utility debt that is still due to the City, arrangements for the payment of that debt are required. The municipal code is very specific in the definition of "consumer" and "family"; thus before we can establish service for you at this location if Mr. Willis has any prior debts to the City of Rock Hill, those must be settled. Please understand that due to FACT Act regulations, I am unable to discuss specific requirements for an individual customer; however, as I understand the situation, Mr. Willis should have all information necessary to fully inform you of any issues he may have, if any exist, with regard to establishing utilities with the City of Rock Hill.

Please let me know if you need any further clarification on this matter.

Kind regards,

Lori Thomas
Customer Services Manager
City of Rock Hill
PO Box 11706
Rock Hill, SC 29731-1706
Phone/803-329-7071
FAX/803-329-8759
lthomas@cityofrockhill.com

From: Patricia Moore/Rock-Hill
To: Lori Thomas/Rock-Hill@Rock-Hill
Date: 06/24/2009 11:35 AM
Subject: Fw: power with rent

Lori:
Here's the email from Bob Marshall.

Thanks,
Patricia Moore
Finance
City of Rock Hill
P. O. Box 11706
155 Johnston St.
Rock Hill, SC 29731
(803)325-2500

City Docs (Marshall)

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

ROBERT K. MARSHALL, JR.,)
AND DONNA CHAPMAN)
MARSHALL, DOING BUSINESS)
AS "ROCK HILL PROPERTY)
MANAGEMENT", A SOUTH)
CAROLINA GENERAL)
PARTNERSHIP,)

PLAINTIFFS,)

-VS-) C.A. NO. 09-CP-46-03360

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 SERVICE)
MANAGER,)

DEFENDANTS.)

DEPOSITION OF DONNA MARSHALL

ROCK HILL, SOUTH CAROLINA

JANUARY 24, 2012

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

Page 3

1 Deposition of Donna Marshall, taken before me,
2 Shirley Dallas-Gerrald, CVR-CM, a Notary Public for the
3 State of South Carolina, in the law offices of Spencer
4 and Spencer, Rock Hill, South Carolina, commencing at
5 4:00 P.M., on January 24, 2012, in accordance with the
6 South Carolina Rules of Civil Procedure.

7 It was stipulated by and between Counsel for the
8 Plaintiff(s) and Counsel for the Defendant(s) that this
9 deposition is taken for any purpose allowed under the
10 South Carolina Rules of Civil Procedure.

11 That the signing of the transcript of deposition
12 by the witness is reserved.

13 * * * * *

14 Donna Marshall, first being duly sworn, deposes and says
15 as follows:

16 Examination: (By Mr. White)

17 **Q Ms. Marshall. My name is Mark White. I believe**
18 **you sat through the fun and exciting deposition of**
19 **your husband.**

20 A Correct.

21 **Q Sometimes we'll reference the same kind of words**
22 **and terms as we did with him just to kind of be**
23 **efficient with our time on yours. If ever you**
24 **need something clarified, please let me know.**

25 A I will.

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Appearances: For the Plaintiffs -

J. Martin Foster, Esquire
Attorney at Law
Rock Hill
South Carolina

For the Defendant -

Mark White, Esquire
Jeremy Melville, Esquire
Spencer and Spencer
Attorneys at Law
Rock Hill, South Carolina

Also Present -

Robert Marshall

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Examination by Mr. White

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1 **Q The same few introductory comments, and the one**
2 **I forgot is, during a break, you're not allowed**
3 **to discuss the content of the deposition with**
4 **anybody. If you were to do so, all of sudden**
5 **we can talk about that even if it was your**
6 **lawyer. We try to avoid that.**

7 A Okay.

8 **Q Are you under any sort of medication or other**
9 **personal situation which could affect your ability**
10 **to understand and respond to my questions today**
11 **fully?**

12 A No, not to my knowledge.

13 **Q Have you given a deposition before?**

14 A No.

15 **Q In the family business, which we talked about**
16 **with your husband, would it be fair to say you**
17 **are very much involved, sort of involved or**
18 **couldn't care less about it?**

19 A Involved in certain aspects of it.

20 **Q Maybe we can streamline this. Which aspects are**
21 **you involved in?**

22 A Mostly just the record keeping and stuff like
23 that.

24 **Q You do the bookkeeping?**

25 A (Indicating yes)

- 1 **Q And, you keep the records on the accounts and**
 2 **who's paid what?**
 3 A Right.
 4 **Q Are you at all in any way involved in discussions**
 5 **with the city about who can do what when and to**
 6 **which house and with who is living there?**
 7 A No, I've never spoken or seen Ms. Thomas until we
 8 were in here a month or so ago.
 9 **Q Did you have any direct communications between**
 10 **you and Mr. Willis?**
 11 A Well, he came in our office. I could have
 12 possibly spoken to him when he was putting in
 13 his application.
 14 **Q That's a good point. Did you have any discussion**
 15 **with him about the issue of getting his power**
 16 **cut on?**
 17 A At that point in time, we were only telling people
 18 that would be something that they would have to
 19 take care of themselves.
 20 **Q How long have you been married to the big lug?**
 21 A It will be thirty years in September.
 22 Mr. White - I hope you take her somewhere
 23 nice.
 24 Mr. Marshall - On 9-11.
 25 A It was on 9-11, by the way.

- 1 **Q You had no direct contact with Mr. Willis about**
 2 **the issues or communications between him and the**
 3 **city or about getting the power cut on?**
 4 A Not really. I mean, he may have called and said
 5 something to me about it. Basically, I just
 6 passed it on to Bob.
 7 **Q Were you ever present when a discussion was**
 8 **being conducted with any city official about Mr.**
 9 **Willis or the issue of delinquent power renters?**
 10 A I was never present at the city. I may have been
 11 in the room whenever there was telephone
 12 conversation going on. I would have only heard
 13 one side of it.
 14 **Q That would be your husband's side?**
 15 A Right.
 16 **Q I'm sorry for the weirdness of the questions, but I**
 17 **don't want to go through a long list of things**
 18 **and they are completely inapplicable. I'm trying**
 19 **to find out where the applicable parts are.**
 20 A Okay.
 21 **Q Do you have any knowledge about how the city has**
 22 **applied its ordinances to your properties which**
 23 **you believe are different than how they apply the**
 24 **ordinances to other people's property?**
 25 A I've never even really read their ordinances.

- 1 To my knowledge, I can't really answer that I
 2 don't think.
 3 **Q Do you have any knowledge or facts that make you**
 4 **believe the city has treated you and your husband**
 5 **differently than it has treated anybody else as**
 6 **to renting properties to people with delinquent**
 7 **accounts?**
 8 A I don't have any knowledge, no.
 9 **Q Any belief you have on whether the city has**
 10 **treated you differently would just be kind of**
 11 **flowing from your husband's beliefs?**
 12 A Not necessarily. I am fully capable of thinking
 13 for myself.
 14 **Q I didn't mean it that way. Let me ask it this**
 15 **way. Do you believe the city has treated you**
 16 **all differently than it has treated other people**
 17 **under the same circumstances?**
 18 A On first appearance, when you see other people that
 19 are doing the thing that we were attempting to do,
 20 it would appear so.
 21 **Q But, if you dig deeper, do you have any reason to**
 22 **believe that they were exact same circumstances**
 23 **but yet they were getting different treatment?**
 24 A It appeared that it was the same circumstances to
 25 me until -- But, when I read that, and you went

- 1 into all that about the first person, to me it
 2 would seem that that would mean at any given time
 3 if they wanted to know who was in there whether it
 4 was the first tenant after the service was turned
 5 on, the tenth or the one hundredth that you would
 6 have to tell them. That's the way I would have
 7 read that. After what you've said today, it
 8 appears to me that if you wanted to work the
 9 system, you could. The first time, come in there
 10 with a person that is of good quality. You could
 11 find somebody that you know is of good quality
 12 that wants to rent from you. You go ahead and
 13 you set that system up for that unit, and then
 14 in the future if somebody has a problem, from
 15 what you told me, I'm inferring what you said
 16 here, rather you didn't tell me, you're saying
 17 that six months, a year down the road, if you
 18 know somebody has a bad bill, a past due bill
 19 rather, with the city, we could put them in
 20 there. Am I ----
 21 **Q I'm a mere lawyer. I'm incapable of creating a**
 22 **fact. I will say, do you have any facts that**
 23 **would contradict that is the way the circumstances**
 24 **are in Rock Hill?**
 25 A You said that ----

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1 **Q Do you have any reason to think that the City of**
2 **Rock Hill will require you to notify them as to**
3 **the first renter, but the City of Rock Hill has**
4 **no policy or ordinance which requires or has a**
5 **follow up procedure to figure out who's in there**
6 **at a later date?**
7 A So, you're asking me if ----
8 **Q Do you have any reason to know that's not true?**
9 A No, I don't have any reason to know that's not
10 true.
11 **Q Are you aware of any zoning ordinance violations**
12 **in and around town? Have you ever seen them?**
13 A I've seen them. I really don't pay much
14 attention to that.
15 **Q Two dwellings on a single residential lot or**
16 **something like that?**
17 A Yeah, I've seen things like that.
18 **Q Is it your understanding the city goes around**
19 **looking for those things, those circumstances?**
20 A They do have a program that is suppose to be
21 -- go around looking for -- To my knowledge that
22 they go around and cite owners of property whether
23 they be homeowners or whatever for code
24 violations. Is that what you're talking about?
25 **Q Changing subjects on you. Do you have any**

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1 **knowledge that any other provider of rental housing**
2 **is allowed to change or create new service without**
3 **notifying who the first renter is?**
4 A No.
5 **Q Do you have any knowledge that the city would**
6 **prohibit you and your company or husband from**
7 **creating a master meter situation or creating a**
8 **service in your name and continuing that way as**
9 **maybe is done by other people within the city? Do**
10 **you have any reason to think they would stop you**
11 **all but let others?**
12 A What, put a master meter in?
13 **Q Right.**
14 A No.
15 **Q Do you know of any law that would prevent you**
16 **from disclosing to the city who a renter is**
17 **in a particular place?**
18 **Mr. Foster - If I could interpose my same**
19 **objection about her legal ability to answer**
20 **the question. Go ahead and answer if you**
21 **can.**
22 A I do not -- I wouldn't really know of any specific
23 law. I know there are privacy laws, and we chose
24 to err on the side of caution.
25 **Q Is it your contention that the city tried to make**

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1 **you all responsible for Willis's bill?**
2 A No. I never spoke with them about it one way or
3 the other.
4 **Q Are you aware of any renters that y'all are**
5 **unable -- or any individuals y'all are unable to**
6 **rent to or potential people y'all are unable to**
7 **rent to because of the city policy other than**
8 **those that you heard your husband mention?**
9 A There are those. Then there are the ones that
10 I think we touched upon that -- I think he
11 explained how we changed our policy whenever this
12 started so that we don't even sign the lease with
13 someone until they come back with a contract from
14 the city proving that they can and they have gotten
15 the power turned on.
16 **Q Do you know the names of anybody that you stopped**
17 **the process of trying to rent to because of that**
18 **circumstance?**
19 A Our policy now is we write a letter telling --
20 stating we have approved John Smith to rent
21 this address. We tell them to go down there and
22 get the power turned on. They have their money
23 for us. Usually, they want to go ahead and give
24 it to us.
25 They go down there, and the ones that we

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1 never see, I can only guess that that would be
2 the reason why because they have gone that far in
3 the process.
4 **Q Are there business reasons why it would be**
5 **uneconomic to put properties in your name**
6 **utility-wise and not switch them or turn them off**
7 **or put them on temporary?**
8 A Say that again.
9 **Q Would there be an economic reason why you wouldn't**
10 **want to say put 1066 in your name and just leave it**
11 **like that for the next ten years, renters coming**
12 **and going?**
13 A It would be something that we would have to have
14 a track record on to see if we wanted to continue.
15 If it were sitting vacant -- You know, I'd have to
16 see what the bills were going to be when it was
17 sitting vacant to see whether it would be a smart
18 economic move to keep it on.
19 **Q Some places can take more than a month or two to**
20 **rent?**
21 A True.
22 **Q I think I heard earlier that some might take**
23 **a year.**
24 A That's possible.
25 **Q Nothing we want to crow about, but that's possible.**

- 1 A That's possible.
- 2 **Q There are economic reasons why you might not want**
 3 **to leave your power on in your name the whole time**
 4 **because that property might sit for a while, and**
 5 **there's some extra amount you're paying by not**
 6 **going to a temporary service or to no service;**
 7 **is that right?**
- 8 A I guess there's a minimum amount. We would just
 9 have to see what it was. Quite frankly, even
 10 when it's empty, we still have to pay that run off
 11 fee so you still have to pay a bill to the city
 12 for it, each and every one of them.
- 13 **Q We had a long discussion with your husband about**
 14 **analysis that was done to calculate damages and**
 15 **opportunities lost and lost profits. Were you**
 16 **in here for that discussion?**
- 17 A I was in here.
- 18 **Q Do you have any actions or documents or analysis**
 19 **to add to what he testified was done to come up**
 20 **with the amount of damages that y'all have**
 21 **identified in this case?**
- 22 A Well, basically, we have those four instances
 23 along with Mr. Willis. Basically, we -- You know,
 24 the rent that we lost between the period when he
 25 signed his lease and was ready to move in there,

- 1 but he couldn't live there without power, and the
 2 time that he was able to actually pay the city
 3 from whatever source I don't know. Then he
 4 was able to move in. That time period on him.
 5 The other would be the people that I mentioned
 6 that we had written letters for that had gone
 7 to the city and then never came back to us
 8 because they were unable to get their utilities
 9 turned on.
- 10 **Q Did y'all try to relet 1066 Cherokee from May**
 11 **to December of '09?**
- 12 A He still had his things in there.
- 13 **Q Was he paying you?**
- 14 A No.
- 15 **Q Isn't your normal policy that when someone is not**
 16 **paying you, you commence proceedings the next**
 17 **month by the 15th?**
- 18 A A good portion of that time we were trying to
 19 work and get this all worked out. I think that
 20 is where the time elapsed. We were still in the
 21 process of trying to get the power on in some
 22 way, shape or form.
- 23 **Q But, during none of that period, May, December,**
 24 **did y'all try to let the property to anybody else?**
- 25 A No. We had other vacancies. So we had places --

- 1 You know, there were other places people could go.
- 2 **Q Have y'all sued Mr. Willis for his debt to you?**
- 3 A No. People of that ---
- 4 Mr. Foster - Socio-economic class.
- 5 A --- level, yes, are -- Over the years, we have
 6 learned they are virtually worthless to sue. They
 7 have nothing and probably will never have anything.
- 8 **Q Have you ever encountered the phrase judgment**
 9 **proof?**
- 10 A Yes. That's the word I'm looking for.
- 11 **Q Do you find that people that are judgement proof**
 12 **are more likely or have a higher rate of default?**
 13 **Instead of a full year, they have a higher rate**
 14 **of ----**
- 15 A That would be a hard question. We have some people
 16 that live on social security or disability.
 17 They've been in the same \$200.00 a month apartment
 18 for ten years, pay on time, every time. They
 19 are never going to have anything more than that.
- 20 **Q They are equilibrium.**
- 21 A (Indicating yes)
- 22 **Q They're at financial equilibrium. They can make**
 23 **their bills, but ---**
- 24 A And even a medical emergency because the government
 25 is going to pay for them.

- 1 **Q But, like your husband testified, there was no**
 2 **analysis done to quantify what a default rate would**
 3 **be or what an expected occupancy would look like**
 4 **for any of these individuals or even across a**
 5 **broader spectrum to try to identify the city's**
 6 **impact on your business?**
- 7 A Not anything across the board.
- 8 **Q Well, other than what your husband testified to,**
 9 **was anything else done to try to analyze and**
 10 **quantify your damages?**
- 11 A Not that I know of.
- 12 **Q You didn't do anything other than what he was**
 13 **talking about?**
- 14 A Right.
- 15 Mr. White - Can we take a minute.
- 16 Whereupon - A recess was taken.
- 17 Whereupon - Deposition was concluded at
- 18 4:25 P.M.

Sec. 29-2. Service connections.

(a) *Service agreement.* The city shall furnish agreements approved by the city manager or his designee for any service rendered by the city to its consumers. Forms and agreements are available for use online at the city's official website and in the city offices. Forms and agreements may from time to time be amended to meet the requirements of law, city regulations, city policies and city procedures.

(b) *Connection charge.* In addition to the required deposit there shall be a service connection charge for connections of electric service or water as set out in the fee schedule in appendix A to this Code. When both are connected at the same time, only one connection charge shall be imposed. The connection fee will not be paid at the time the consumer makes the normal deposit, but will be added to the consumer's first utility statement.

(c) *Same-day service.* The service connection charge imposed in subsection (b) of this section is for regularly scheduled next working day service. Should the consumer request the service to be connected the same day as service is applied for, an additional charge as set forth in the fee schedule in appendix A to this Code shall be imposed. The same-day connection charge will be paid at the time the consumer makes the request, and a separate receipt will be given so the service technician can verify the charge has been paid. The additional charge will be paid up-front at the time of service and the charge pursuant to subsection (b) of this section will be added to the consumer's first utility bill.

(d) *Contract between city and consumer.* The service agreement, when signed by the consumer and by an authorized representative of the city, shall become a contract under which the city agrees to furnish utility services to the consumer, and the consumer agrees to receive and pay for the service in accordance with the rate schedule and the service regulations of the city on file in the office of the city, and as the same may be modified from time to time, which rate schedules and service regulations are hereby made a part of the contract as effectually as if fully set forth therein. The service agreement may be terminated in accordance with the terms thereof and subsection (f) of this section.

(e) *Payment responsibility.* The consumer agrees to be responsible for receipt and payment of bills for these services. Failure to receive a monthly bill does not relieve the consumer of payment responsibility. If a bill is not received, the consumer shall notify the city before the past due date. It is further agreed that should the consumer transfer to another address, other than the one on the original service agreement, the agreement shall be effective at the new address if the consumer receives services from the city unless a new service agreement is executed. It is further understood that should the deposit be determined insufficient, the consumer will make an additional deposit upon request from the city not to exceed the two highest months' utility bills.

(f) *Termination of service.* The agreement shall continue indefinitely; unless otherwise provided, the same shall continue from month to month thereafter. The same may be terminated by either party (after expiration of any fixed period if initially specified), upon one working day notice to the other. It is further agreed that the city reserves the right to discontinue services if the consumer breaches the service agreement. If the service is disconnected for cause, the consumer agrees to pay all outstanding bills and an applicable reconnection fee for service to be restored. The consumer understands that the information furnished on the application will be verified and, if determined inaccurate, will result in the termination of service without prior notice. The applicant understands that the city must take action and expend funds to comply with the request for service. By signing the agreement, the consumer signifies that he or she has the authority to request utility service at the location identified on the application, and attests that the information given on the contract is true and accurate.

(Code 1981, § 29-2; Ord. No. 2012-41, § 3(Exh. A), 9-10-2012)

Exhibit A

ARTICLE II. RATES, CHARGES AND BILLING

DIVISION 1. GENERALLY

Sec. 29-31. Payment of bills; delinquency.

(a) Consumers of water, electricity, sewer service and all other services provided by the city shall pay without discount all bills rendered for such services not later than the 15th day following the rendition date, except that when the 15th day falls on Saturday, Sunday or a legal holiday, payment may be deferred until the next ensuing business day. On the sixth day thereafter, a three percent penalty will be added to the utility services account, which penalty shall be in addition to any other cost, expense or fee.

(b) For accounts that are past-due, a notice of disconnection is conspicuously displayed on the subsequent billing notice for that account. This notice details the date that payment must be received and the amount which must be paid to avoid disconnection of service.

(c) In some cases, the city employee will deliver a notice in lieu of the disconnection allowing an additional determined amount of time for a customer to satisfy the past-due balance prior to disconnection of service. Upon delivery of such notice, the same fee as set out in the schedule in appendix A shall apply to the account.

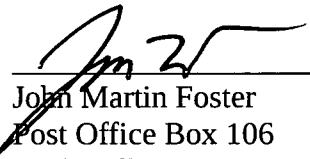
(d) Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered. If the service deposit, or any part thereof, has been utilized for payment on an account, a new service deposit shall be made by the consumer in accordance with the provisions set forth in this chapter. When it becomes necessary to handle customer accounts outside of regular working hours, additional charges shall apply as provided in section 29-32.

(e) For purposes of this section, the term "family" shall be defined as one or more people, plus their household employees, who live together in a dwelling unit as a single housekeeping unit. This definition shall include unrelated individuals defined as handicapped by title VIII of the Civil Rights Act of 1968, amended by the Fair Housing Amendments Act of 1988. It also expressly includes the residents of those homes housing nine or fewer mentally or physically handicapped individuals on a 24-hour basis as provided by S.C. Code 1976, § 6-7-830.

(Code 1981, § 29-31; Ord. No. 2001-67, § 4, 10-2-2001; Ord. No. 2004-32, § 3, 6-28-2004)

CRTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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February 18, 2014

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

RECEIVED

FEB 24 2014

SC Court of Appeals

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.

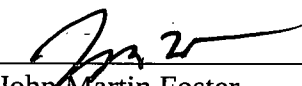
PROOF OF SERVICE

I certify that I have served one (1) copy of the Record on Appeal, on the following party of record:

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

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, pursuant to Rule 233(b), S.C.A.C.R.

February 19, 2014



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