

In the  
**Supreme Court of the United States**

CATHERINE JACKSON , ETC.,

Petitioner

V

METROPOLITAN EDISON COMPANY

No. 73-5845

Washington , D.C.

Tuesday , October 15, 1974

Pages I thru 46

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CATHERINE JACKSON, ETC.,	:
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Petitioner	:
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v.	: No. 73-5845
	:
METROPOLITAN EDISON COMPANY	:
	:
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Washington, D. C.

Tuesday, October 15, 1974

The above-entitled matter came on for argument at  
10:53 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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C O N T E N T SORAL ARGUMENT OF:PAGE:

JACK GREENBERG, ESQ.,  
For the Petitioner

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THOMAS M. DEBEVOISE, ESQ.,  
For the Respondent

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REBUTTAL ARGUMENT OF:

JACK GREENBERG, ESQ.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-5845, Jackson against Metropolitan Edison Company.

Mr. Greenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENBERG: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the Third Circuit. The case involves whether a public utility which provides electricity under a grant of monopoly conferred by the state, which possesses under state law various and considerable powers and is regulated by the state pervasively may, pursuant to state-granted and approved termination procedures, cut off a consumer's power without notice and hearing for alleged nonpayment of the disputed bill.

Q A consumer or a customer?

MR. GREENBERG: A customer.

I'll answer to this question briefly -- is that a monopoly, functioning under such state-granted powers and regulations which supplies a necessity of life, performs



state action in the 14th Amendment sense and with respect to its termination procedures, must accord due process of law.

And, in a case like this, due process of law requires some sort of fair notice and hearing procedures before termination.

To define Petitioner's position more precisely --

Q Mr. Greenberg, what is the scope in this particular case of the hearing? What would be the issues?

MR. GREENBERG: Our suggestion on the hearing procedure, the hearing on termination, would be that we adopt the position of the brief amicus curiae of the New York State Public Utilities Commission and that is that the cause should be reversed, sent back to the district court with an invitation, the district court extending an invitation or perhaps requiring the Public Utilities Commission to come in and together fashioning a fair termination hearing procedure.

The cases of this Court and elsewhere demonstrate that a large variety of procedures could possibly accord with the requirements of due process of law and we do not argue for any particular kind of procedure.

One procedure --

Q I am not so concerned about procedure, Mr. Greenberg, as what would be the issues in this particular case?

MR. GREENBERG: In this particular case, it would be whether or not the consumer was liable for the payment of this disputed bill and, if so, how much?

Q There would be no other issue, would there?

MR. GREENBERG: Not in this particular case, no.

Q And, as a generality, would that not likely be true?

MR. GREENBERG: That is -- again, I think the brief of the New York State Public Utilities Commission is very useful in that that is the typically the kind of dispute and frequently those kinds of disputes are resolved by sending out an independent meter reader but they sometimes may involve other kinds of issues which may have to be resolved in other ways.

In this particular case, that would be the only issue.

Q You used the term "consumer," Mr. Greenberg. Are you using it in contradistinction to "customer"?

MR. GREENBERG: No, I'm not and I would confess I was slightly puzzled by Mr. Justice Stewart's question. I'm using it almost synonymously.

Q Well, we are going to get on into this case and find that, as I understand it, that your client is not a customer, in fact.

MR. GREENBERG: Well, uh --

Q That is one of the -- that is the issue in this

case.

MR. GREENBERG: That is one of the issues that was raised by the Respondent in this case. However, we would submit that -- that the Petitioner in this case quite assuredly has standing to raise the issues presented in this particular case.

Q Well, you meant any consumer, then, rather than --

MR. GREENBERG: Oh, this is service to her home.

Q You inadvertently, I think, then, gave, from your point of view, the wrong answer to my question.

You said "consumer" and I said, "Do you mean consumer or customer?" and you said "customer." I think, in this, your client is not a customer.

MR. GREENBERG: Well, Mr. Justice Stewart, the company has viewed her as such. They have --

Q She is a former customer. Isn't that correct?

MR. GREENBERG: No, they came to her and they asked her to get \$30 by Monday because the power is going to her home and they are looking to her as being responsible and liable for paying this bill so perhaps that is why I view them synonymously because I think this implicates the standing issue.

They are looking to her for payment of the bill and for the first time in this Court, they are raising the issue that someone else really is responsible for it but

both courts below and the Respondent in this case have treated the case as if she owes the money.

Now, it may be that the money has been paid. We haven't had a hearing. We don't know. It may be that the money has not been paid and someone else is liable for it and it may be that she, indeed, is liable for it.

There hasn't been a hearing and one can't tell.

But they have been treating her as the one responsible for the bill so that is why, in my mind, consumer and customer were synonymous though, in some cases, they might not be.

Q As I understand the utility's point, they would be somewhat indifferent to who paid the money, if the amount due was paid.

MR. GREENBERG: Well, the amount due, for all we know, may have been paid. I think, as I have discussed the issues in this case with other lawyers and students and others, I have not met a person to whom either a mistaken bill has not been sent or who doesn't know someone to whom a mistaken bill was sent.

And it is not an uncommon thing. It may be the bill was paid. There hasn't been a hearing. No one has -- in fact, she has not yet received a bill in this case.

Q But cutting off the service to this particular home isn't the same thing as asserting a claim for the



deficiency in the bill against Mrs. Jackson.

MR. GREENBERG: Well, they did both. An employee of the company came to her house on a Thursday and said, "Have \$30 by Monday," and on Monday, employees of the company came there and without anything being said, they terminated her power.

Q But is that unambiguous as to whether the threat was, "I'll cut off your power or I'll seek a judgment against you?"

MR. GREENBERG: Well, there was never any talk of seeking a judgment against her.

Q So it was just basically cutting off the power.

MR. GREENBERG: Cutting off the power but throughout this case they have maintained, until now, that they cut it off because she has not paid a computed bill.

Now they claim there are some standing issues that they might put in other ways.

Q Now, as I understand it, the service has been resumed under order of the court.

MR. GREENBERG: Under a temporary restraining order.

Q And has any payment been made by anybody for utilities service rendered since it was restored?

MR. GREENBERG: Mr. Justice Blackmun, they have not sent her any bills and I think that may perhaps be

to preserve some legal position they are asserting but they haven't said.

However, she has been budgeting and putting money away in a savings account for the day when the bill arrives.

Q But you wouldn't -- I don't suppose you would object if, under the temporary restraining order, the court could have ordered her to pay currently, for her power?

MR. GREENBERG: Without a doubt.

Q Yes.

MR. GREENBERG: And, in fact, at a point in my argument when I discuss some of the issues that might arise under fair hearing procedures, that certainly could be a condition precedent to a hearing, that is, the paying of some undisputed amount or some basic amount or something of the sort, without a doubt.

I'd like to define Petitioner's position on the state action point a little more precisely before proceeding with the rest of my argument, and that is, it does not necessarily imply that a state action standard must be applied to any of the utility's actions other than those involving the furnishing of electricity, for which it was granted its monopoly power.

For example, the right of the utility to have a religious display at its headquarters or to regulate the speech of its employees or respect their privacy and so

forth involves other factors which need not be considered here and we do not contend that a supplier who does not enjoy a state-conferred monopoly of a necessity or life or anyone else is, by the due process clause, required to grant notice and hearing before cutting off, for example, milk deliveries or gasoline or credit or so forth.

In those cases, the consumer can always turn to another source and such a case also would consider other factors.

Q In your brief, you speak about the public function notion, rely on Munn against Illinois and you cite the Nebbia case. Is this a part of the argument you are making to this Court?

MR. GREENBERG: It is a part of the argument only in the sense that the court of appeals for the Third Circuit, in deciding either the state action issue or the fair hearing issue or both, would somewhat merge together in the court of appeals' opinion, makes a point that the furnishing of electricity is not state action when the relationship to a subscriber is concerned and they note that it might be state action if a whole community were involved and they point out that the cessation of electricity would interfere with water purification and hospitals and communications and so forth.

We submit that that is far too narrow a view,

that when a consumer's power is cut off and she is essentially cut off from the energy system and has neither heat nor light nor refrigeration, the observation of the court of appeals that she can operate her oil burner manually and use kerosene lamps and put ice in her refrigerator is, you know, is ill-taken. This really is a furnishing of a necessity of life that in a modern society with the infrastructure that we have, that it is the furnishing of something as essential and vital to the community as, let's say, money.

Q Well, that is really a narrower argument than you make in your brief, isn't it? Because if you take that public function and affect it with a public interest doctrine in Munn and follow it through to Nebbia in our decisions, you find that a grocery store in Rochester that sold a quart of milk was affected with a public interest.

MR. GREENBERG: We do not contend for that. In this case we contend only for a monopoly with regard to the services the monopoly was granted its powers to furnish when those services are, as is typically the case with a state-granted monopoly, a necessity of life and we would place in just the clearest category, electricity and water and there might be several other functions as well.

But we assert the argument as narrowly as I have just stated it.



Q Hospital care would be included?

MR. GREENBERG: Well, hospital care would involve the question of alternatives. One, perhaps, can go to a variety of hospitals in many communities but if your power is cut off, there is no place else you can go and if your water is cut off, there is no place else you can go.

If there were only one hospital in the community, it might be one case. That is not always the situation. I would just guess that is rarely the situation.

Q Why, Mr. Greenberg, is the question whether the necessity of life vel non relevant to whether it is action of the state?

MR. GREENBERG: It is not relevant to whether it is action of the state.

Q Well, that is the issue here.

MR. GREENBERG: It is relevant to whether a due process hearing is required in these circumstances. The action of the state obviously --

Q Well, of course, there is no due process hearing required until or unless it is action of the state. That is common ground.

MR. GREENBERG: Yes, the court of appeals -- and I find that others, too, sometimes tend to and perhaps the lawyers merges the questions together. The court of appeals certainly did.

Q Well, that confuses everything, wouldn't you agree?

MR. GREENBERG: Well, it does, but I am responding to the decision on which we are taking it to this Court.

Certainly, it first must be action of the state and it is action of the state whether it is a necessity of life or not.

Q Right. So the necessity of life vel non has nothing to do with whether or not it is action of the state in your submission. Is that right?

MR. GREENBERG: That is right, but it has to do with whether or not a due process hearing is required.

This Court, in --

Q Well, of course a due process -- if it is action of the state, then any state action that deprives anybody of liberty or property has to be taken within the meets and bounds of due process.

Then the question is, what does due process require here in this situation?

MR. GREENBERG: Does it require a hearing? And, obviously, in Roth against the University, the action of the state was involved but a hearing was not required because it was not that kind of a situation.

Q But due process was required.

MR. GREENBERG: Yes.

Q The question is, what does due process --

MR. GREENBERG: Yes, that is correct.

Q -- mean in a particular circumstance?

MR. GREENBERG: Well, I subscribe to our analysis, Mr. Justice Stewart. I was trying to speak in terms of how many of the decisions have treated the subject and in a brief argument, I thought I would speak in the language of a lot of the decisions because, obviously, first, there must be action of the state. If there is action of the state, there must be due process.

Due process sometimes requires a hearing and sometimes does not require a hearing.

Q Right.

MR. GREENBERG: Sometimes due process can be satisfied by other procedures.

Q But necessity of life, for now, does -- you are not arguing whether or not this is state action?

MR. GREENBERG: No, but it certainly does have to do with whether or not a hearing is required.

Q Right.

MR. GREENBERG: And I think the hearings speak of, does the Petitioner --

Q Well, that requires state action.

MR. GREENBERG: -- does he have an option? If he can go off and get a job in another university, that is

something to be taken into account. If one is limited to a particular situation, that is another decision.

Q Right.

Q Mr. Greenberg, would you have found state action in this case, if no tariff had been filed with the state utility commission?

Suppose there had been no action expressed or implied by the state utility commission?

MR. GREENBERG: Mr. Justice Powell, I believe I would. However, I must say that whether state action exists or not involves a mass of factors which have to be put together and weighed and I think even without the tariff being filed and approved and promulgated and as a matter of state law, I think the state granted monopoly powers and the various regulations and so forth would be sufficient.

Now, if you start chipping away one factor after another, at some point I would have to say, well, it is not enough to make state action under, let us say, the Burton test, just to select that.

But I think if you took away only that, yes, there would be state action.

Q Would your basic issue be any different if you were dealing with, let us say, cable television which had been licensed and was regulated?

MR. GREENBERG: Yes, it would be. Yes, it would.



We have just taken the cable television out of our apartment because the children look at it too much and I think everybody functions perfectly happily well and they can look at the television that comes over the regular antenna.

So I do not -- would not think -- there would be state action involved, there would not be a hearing be required by due process.

Now, this case involves a number of factors, some of which I have already alluded to, weighed by this Court in determining whether a notice and hearing are required before summary action may be taken, as in summary termination of employment or dispossession or repossession or garnishee cases.

And, briefly, those factors are, and I just refer to a number that I consider to be among the most important of them, what is the expectation in the funds, service, jobs or so forth of the one claiming the hearing?

Q You are now -- you have now left the state action, I take it?

MR. GREENBERG: For the moment, yes.

Second, what is the effect of summary termination on him?

Three, what alternatives does he have?

Four, what is the effect on the community in

taking time for a hearing?

Five, what costs are involved?

Six, what is the likelihood that the taking is wrongful?

And I would like to elaborate on these points somewhat.

The first is, what is the expectation in the subject matter concerning which a hearing is claimed for termination? If it is sufficient, it is deemed to be a property right although in this case it also can be viewed as involving liberty because when one's power is cut off, one is left in the dark and the cold and it certainly is a circumscription of one's liberty.

The expectation of continuous service is one which subscribers to the utility have a virtual statute.

Section 1171 of the Public Utilities Code requires reasonably continuous service without delays and unreasonable interruptions.

Decisions of the Public Utility Commission which are not cited in the briefs but which are published, such as Westinghouse Club against Pennsylvania Water Company, which is October 8th, 1935, Lufty against Manufacturers Light and Heat, August 27, 1934 and Pishneri versus Browns-ville Water Company, June 12, 1928 and numerous other decisions, these are only three out of several score,

hold that service may not be terminated for nonpayment of a disputed bill but there is no meaningful way to enforce this right because there is no right to a hearing before cut-off.

Counsel in this very case, I might add, has petitioned the Public Utilities Commission on July 25th and 31st, 1973 on behalf of this Petitioner and others in a complaint alleging that they are subject to having their water service cut off for nonpayment of bills without prior hearing and the Commission, on March 20th, 1974, dismissed the complaint as failing to state a cause of action.

It treated them as requesting a rule allowing installment payments to be made on bills but deferred action even on that until after this Court rules in this case.

Therefore, we submit that the Petitioner's expectation is sufficient to rise to the level of property and liberty protected by the due process clause although state procedures are inadequate to protect it.

The second factor, what is the effect of summary termination on the one whose property or liberty is taken?

The effect in this case, we submit, is as brutal, to use the term that appears in the case involving determination of wealth here, as in Goldberg against Kelly, garnisheeing of wages as in Sniadach, which was said to

drive a family to the wall or termination of a driver's license, as in Bell against Burson, which interfered with conduct of a ministry.

And despite the argument of the court of appeals that oil burners can be operated manually and ice can be used in refrigerators and kerosene lamps provide adequate illumination, that is just not so and we just say it is common knowledge that it is not so in an urban society.

I think we all recall the near-catastrophe when the power grid failed in the northeast and that effect upon a single individual is proportionately the same.

Q I don't find these points here.

MR. GREENBERG: These points are not treated in the brief as systematically as I am trying to present them in the argument. They are, perhaps, in one point or another in the brief.

What are the alternatives for the Petitioner?

Petitioner cannot get electricity elsewhere.

Unlike the employee in Arnett who might get another job or the untenured professor in Roth who might get employment elsewhere, the Respondent's monopoly assures that.

Another point which the decisions consider is what may be the effect on the community of taking time for notice and hearing? This is unlike the case of poisoned food, which must be seized before distribution or narcotics,



which must be seized before they work their way into the community and have their effect or the situation of a bank which is about to fail and then will bring financial failure to large parts of the community.

It is not a case like that at all.

It might be argued that taking time for notice and hearing entails costs. Hearings may, indeed, cost something. Petitioner, in theory, may run up fresh, unpaid bills but here a rule could -- and as in New York and as has been suggested by, I believe it was Mr. Justice Blackmun, a requirement of the temporary restraining order might have been continuation of payment of bills.

Petitioner might even be required to pay weekly. A variety of measures can be taken to assure the security of the company. The past bill is owed. The question is, what is going to be happening in the future?

Certainly, this is not a case in which leading time for hearing permits a Petitioner to abscond with property as in some of the cases this Court has treated.

Now, another --

Q Isn't the only thing at issue the \$30? Do you concede that if the company was to continue service that there should be current payment?

MR. GREENBERG: Oh, without a doubt. Oh, sure.

Q And also, if it is found that she really doesn't

owe this \$30, if she goes ahead and pays it, the odds are that she is going to get it back.

MR. GREENBERG: Oh, sure.

Q I mean, so that there is no risk of loss on her part and the real question is whether the \$30, whether it is, without notice or anything, without a hearing, she should be required to put up \$30 pending a hearing on the matter.

MR. GREENBERG: She was agreeable to doing that and I think that case wouldn't be here if they had taken the \$30, you know, and the electricity continued.

Q I don't understand that. She was willing to pay the -- put up the \$30 and litigate about it?

MR. GREENBERG: Well, the -- the record says they said have \$30 by Monday and she said okay. That is all the record says.

Q Was the \$30 tendered?

MR. GREENBERG: No, because when they came out on Monday morning, they just cut off the electricity and wouldn't talk to her.

Q You don't suggest that the company would have turned it off if she had paid them the \$30 and told them, "Well, look, I don't owe the \$30 and I'm going to try to get it back from you"?

MR. GREENBERG: Oh, I think they would have in

this case. The only thing that we know is that they came on Thursday and said, "Have \$30 by Monday," and they came on Monday and they wouldn't talk to her. They cut her off. She called them several times and she also --

Q Well, let me get it clear. Do you say that the due process clause would have been satisfied if the company said, "Look, pay us by Monday or we are going to turn your power off," and she said, "Well, all right, I'll pay you Monday and the only thing is, I am going to litigate with you and try to get it back."

MR. GREENBERG: Oh, I don't think the due process clause would have been satisfied. I just said I don't think we'd have a case here. They just would have settled it between --

Q Well, all right, but you agree that the \$30 is all that is at issue? Because she --

MR. GREENBERG: No. No, Mr. Justice White, because while she has not received a bill, the company's counsel have informed her counsel as set forth in the complaint that she owes \$110.

Q Well, I know, but you concede, Mr. Greenberg, that she would have to pay currently?

MR. GREENBERG: Oh, yes. Yes.

Q Well, all right. Now, so --

MR. GREENBERG: The \$110 is past due. At least,

that is what they have told her lawyer. They have never sent her a bill.

Q You mean, of her own past due bills?

MR. GREENBERG: Yes. Yes.

Q Not the \$30.

MR. GREENBERG: That's right. They claim -- one can interpret the \$30 episode as saying, "Give us a \$30 downpayment on the \$110 that you owe us, past due."

Q Well, I'll put it to you again. The only thing at issue is her past due bills and whether or not it is fair to say, "You put up the money now and we'll keep your power going." That is really the only issue.

MR. GREENBERG: No --

Q Because she is bound to get her money back if she wins.

MR. GREENBERG: Well, the issue in the case is, is she entitled to notice and hearing before the cut-off? That is the issue in the case.

Q Before paying \$30. Or before paying her bills.

MR. GREENBERG: Well, she -- she claims that she doesn't owe anything.

Q I understand that, Mr. Greenberg. But the question is, who has to take the risk?

MR. GREENBERG: That's right.

Q Whose money is going to be up meanwhile?

MR. GREENBERG: Right.

Q Who is losing interest on money meanwhile?

MR. GREENBERG: Right.

We would submit in this case that she is required to notice and hearing before she is required to pay any money on the past bills.

Q I understand your submission. I just want to know what, really, the risk is to her. The risk is to her, is that she really doesn't have the \$30 to put up.

MR. GREENBERG: She didn't at that time. She was on welfare at that time. She is employed now.

Q If she had the \$30 to put up, why, if she'd put it up, the power would stay on and if she won, she'd get it back.

MR. GREENBERG: Well, presumably, yes. She would have, you know, as they said, paid the \$2 even though she wasn't liable for it.

I mean, her submission is that she is entitled to notice and hearing.

Q I know that.

MR. GREENBERG: She is a continuing subscriber to the company. While one hopes, one cannot exclude the possibility that something like this will happen again and --

Q I just take it there is no issue that there is a hearing available sometime. The real question is whether



it is before --

MR. GREENBERG: That's right.

Q She has to put up the \$30.

MR. GREENBERG: That's right and the issue is, is this sufficient property right, as some of the cases refer to it, so that there has to be notice and hearing before her electricity is cut off.

Q But the burden on her is having to put up \$30 pending litigation.

MR. GREENBERG: Or maybe more. Maybe, maybe the entire amount. We don't know.

Q Whatever it is.

MR. GREENBERG: They first said \$30 but then they told her lawyer \$110.

Q Mr. Greenberg, whatever the sum is, that is what we are talking about, is the burden on her of having to put up what her unpaid bill is pending litigation.

MR. GREENBERG: Well, that may not be --

Q I don't know why you don't say yes. I mean, that certainly gets to the issue.

MR. GREENBERG: Well, because I am not certain that that is the fact because she has made some tenders of partial payment and they haven't wanted to take it, so it is not known what it is they want from her.

They haven't submitted a bill to her.

Q What tenders of partial payment has she made?  
Is the record clear?

MR. GREENBERG: The record only --- the record and some of the opinions refer and accept the fact that she has made some efforts to make partial payment.

Q That even makes my question more relevant. If all they have asked her for is \$30, the only issue, the only burden on her, then, was putting up the \$30 pending litigation.

MR. GREENBERG: Well, that was, similarly, the only burden on the person who is garnished in Sniadach.

Q I mean, that does not mean the due process clause does not require a hearing. I am just trying to ---

MR. GREENBERG: She could have ---

Q --- find out what the relative burdens on the ---

MR. GREENBERG: Yes. She could have put up the money first, in what amount one does not know because the lineman said \$30 but she has never received a bill.

It is without a doubt, too, she might have done something which might have satisfied them. Without a hearing, we can't tell what that is, or without a bill or without some representation.

Q Well, you say we shouldn't look at this case as though it involved just the necessity of \$30, pending litigation.

MR. GREENBERG: I think it might involve very much more.

Q No, but it would come out the same way, though, if it was only \$30, wouldn't it?

MR. GREENBERG: It would come out the same way, yes. But I think it may involve very much more.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Greenberg.

Mr. Debevoise.

ORAL ARGUMENT OF THOMAS M. DEBEVOISE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DEBEVOISE: Mr. Chief Justice and may it please the Court:

I do think it is important to the case to take just a minute to go back to the facts on whether this is a termination case or not.

This 28-year-old woman bought a house in '69. A year later, her electricity was terminated for nonpayment of bills, 45 minutes later, in some manner, it was reconnected and thereafter, bills did not come to her. They came to a man who was staying at her house.

A year following that --

Q Does the record show the change in billing occurred?

MR. DEBEVOISE: The only witness was the Petitioner and she says that she has no idea how it came about. But after that and for a period of 13 months, bills came to a man staying in her house.

Q And not to her.

MR. DEBEVOISE: And not to her. And during that period, she made no effort to pay the bill that was outstanding for the service prior to that termination.

Then an employee came on a Wednesday, looking for the man in the house and was informed that he had left some month and a half previously. He also looked at the meter.

The next day, another man came to the house and discussed the situation with the Petitioner and they must have had some discussion about who the customer was and termination and all of that, because she testifies that she told this man to put the electric service in the name of Robert Jackson, "To give me time to get the rest of the money to pay the old bill."

Robert Jackson was her 12-year-old son.

Three days later, a man came and disconnected the service. She then telephoned the company man who had been there the preceding Thursday, found he was not in the office, but he had left word for her to be given his home number so that she could call him at home, which she did.

He then told her, according to her testimony, who

was responsible for the matter now, another employee of the company. She testified she never called him.

Now, it is our position under those facts that she was not a customer who was terminated. Nor did she apply for service. She could still apply for service. The company, in view of the past history under the tariff would have the right to require a reasonable deposit and to --

Q Did somebody tell her to pay \$30?

MR. DEBEVOISE: That is her testimony. And --

Q It is uncontradicted.

MR. DEBEVOISE: And it is uncontradicted and if it was \$30, I'm sure --

Q Well, didn't that recognize her as a customer?

MR. DEBEVOISE: No, it recognized that she was a former customer, as counsel said, with an outstanding bill of over \$100.

Q Did they tell her anything about the \$110 then?

MR. DEBEVOISE: There is nothing at this time in here on the \$110.

Q The only thing in the record is that somebody said, "Lady, give me \$30 or I am going to cut your electricity off."

MR. DEBEVOISE: No, your Honor, it isn't tied together in that fashion. There is mention of the \$30. There is her straightforward admission that she still owed



the bill that was over a year old.

Q I'm not -- all I am dealing with now is whether you were treating her as a customer or not.

MR. DEBEVOISE: I believe, your Honor, that it was a -- there was a discussion about new service. There had to be, because she testified she said "Put it in the name of Robert Jackson."

Now, in that conversation, there was evidently some mention of \$30.

Q Do you usually change service is somebody has a conversation in a house or don't you do it in the office? Or are you different from every place else?

MR. DEBEVOISE: I --

Q Were you negotiating something there? What were you doing?

MR. DEBEVOISE: Well, your Honor, maybe it would be helpful if I took just a minute before getting to state action to tell you the company's procedures in regard to delinquent accounts.

In '73 -- 1973, there were 217,000 notices of delinquent accounts that went out.

Q How many?

MR. DEBEVOISE: 217,000.

Q Is this in the record?

MR. DEBEVOISE: It isn't, your Honor. There are

very similar figures in the City of Philadelphia's brief.

Q Is the 217,000 in York?

MR. DEBEVOISE: In the service area of Metropolitan Edison, which includes more than York. It includes somewhat less than --

Q Well, you don't have many more than 17,000 customers in York, do you?

MR. DEBEVOISE: I don't believe we do, your Honor, no.

Q Well, I mean, after all --

Q That suggests that some of the customers may have received multiple notices, does it not?

MR. DEBEVOISE: Yes, it does. Now, that goes out after -- 30 days after the bill and when no response is heard from that -- and there were 129,000 such cases -- those cases were referred to the credit manager and the credit manager then either, in person, as in this case, where they went out looking for the customer, or by phone or by mail, try to contact the customer. And there were in 1973 only 4,390 terminations.

So it is not a procedure whereby if a bill is not immediately paid the switch is pulled.

Similarly, this is a matter in which the public has tremendous interest. For instance, Fortune reported in September that in March of 1974, when it forewent its

dividend of \$28 million, Consolidated Edison had outstanding bills of \$367 million 151,000 with an average life of 59 days for those bills.

The amount of dividend foregone was \$28 million. It lost \$24.5 million in uncollectible accounts in 1973.

So these procedures on collection are extremely important to the public.

Last Saturday the papers carried the account of the tremendous cutback in electric utilities construction that has been caused, again, by a lack of cash in these times of inflation.

I'd like to turn to the question of state action. I think it is maybe posed most directly by the California Amici when they present the issue that state action is present where significant governmental interests are promoted by a pattern of regulations delegating state power to ostensibly private persons who then act with the force of law.

That is similar to what counsel said and repeated about this grant of monopoly power. It didn't work that way.

In 1913, when the public utility law of Pennsylvania was passed and it set forth regulation over not only electric utilities but, of course, work companies, grain elevator companies, telephone companies, pipeline

corporations, ferries and all the other things -- I might add, and the service of electricity by Met Ed's predecessors had been going on for a substantial time. Met Ed is still subject to a 99-year lease, entered into in 1894 and has a contract in perpetuity with the Town of Middletown to sell them electricity at a cent a kilowatt hour in perpetuity that was entered into in 1906.

So it was not a grant of state power that resulted in the regulated utility system we have today. Instead, it was a recognition that many businesses are affected with the public interest and the desire to protect the consumer led to their regulation.

That being true and Justice Brandeis' concurring opinion in Southwestern Bell goes into this subject at length -- that being true, all acts of a public utility are not actions of the state.

Now, where the state has particularly ordered the electric utility to do something and the utility then goes out under color of that order and does something, certainly, that would be the type of action that would receive the protection that Petitioner here seeks.

On the other hand, the filing of its practices so that its customers will have knowledge of its practices, practices which are not acted on by the state, the tariff being filed because the state requires you, for the

protection of your customers to let your customers know how you are going to operate.

Q Of course, the Petitioner contends, I guess, that the inaction of the Commission after the filing was tantamount to affirmative approval.

MR. DEBEVOISE: I think that is the issue, whether inaction can be accorded with action. Now, I have no question that an electric utility operating under the New York Public Service termination procedures would, then, be acting -- would be state action.

But where there has been no action, we do not believe it should be extended.

It is mentioned in the briefs that Vermont instituted termination procedures. Last week --

Q You say that if the Commission had entered an affirmative order approving the tariff.

MR. DEBEVOISE: Saying, you do it this way.

Q Well, no, it didn't say, you do it this way. It just approved it.

MR. DEBEVOISE: It accepted it for filing, I believe.

Q Well, I know, but let's assume it had entered an order approving it. Let's assume it had been litigated. Say the tariff had been attacked and the attack centered strictly on the rule and the Commission said, this is quite



legal under state law and we approve it. We have no grounds to disapprove it and we approve it.

MR. DEBEVOISE: I think -- I think in that case that the company acting under it would get support and encouragement from state action and a suit against those procedures would lie.

So it is strictly a question of whether no action is equivalent to this type of approval.

Q Now, a suit against those procedures would lie, in fact -- in my brother White's hypothetical, he assumed that there was a suit brought against those procedures and that it was unsuccessful, as I understood his question.

MR. DEBEVOISE: Right. But then the utility went out and --

Q And then the Commission turns the power off without a hearing.

MR. DEBEVOISE: Right.

Q And the issue is, whether the act of turning the power off without a hearing is action of the state.

Q Right.

Q And you would say it would be.

MR. DEBEVOISE: Yes.

Q Do you need to concede that?

MR. DEBEVOISE: Well --

Q You can, safely, in this case, maybe, but that is

a pretty big concession, it seems to me.

MR. DEBEVOISE: It is for the purposes of this case that I am conceding it, your Honor.

Q Do you feel bound by the Pollak case in that regard?

MR. DEBEVOISE: The reasoning behind conceding for this case is, we are a very-heavily-regulated industry. We do have a very important role to play. We do take our orders from the state, the state courts, the federal agencies, this Court and we try to do things correctly.

Our image before the public is, as Justice Brandeis pointed out, is all-important. We have only one way of making money. That is to sell electricity. We don't cut anybody off unreasonably if we can help it.

On the other hand, we get absolutely no assistance from any state or governmental agency in raising the funds necessary to carry on this business.

If a court or a state tells us, this is how you do it, once we have exhausted our protection, we will do it that way.

Q Now, that was Justice White's, what you took to be Justice White's hypothetical but what I understood him to say was not his hypothetical. Situation A, where the utility says, "you do it," where the utility commission says, "You do it this way. Don't give any hearings and collect

the back bills. You have no choice." And the second one, which was his hypothetical, is where the utility commission basically leaves it up to the utility. He says, one is permissible, but maybe the other may be too.

MR. DEBEVOISE: Well, that to me is nonaction and I am sorry if I misunderstood.

Q Well, my example simply was if they filed a tariff and there is litigation about the validity of the termination rule and the commission says, this is perfectly consistent with the state law. We don't require you to do it this way but you may. We approve the tariff.

MR. DEBEVOISE: I think that still is nonaction, Justice White. Excuse me, I thought they were directing it.

Q No, no, they just approved it. But they did. There was the affirmative approval of the tariff.

MR. DEBEVOISE: But not saying that is the way you construe it.

Q No, you could file another tariff if you wanted to but this -- and, of course, they say, now that you have filed it, you must follow it. I mean, that is what a tariff is, isn't it?

MR. DEBEVOISE: Right. Right. But, excuse me, I missed your innuendo.

Q That's all right.

MR. DEBEVOISE: And in VERmont, and I think the

Vermont case last week is interesting, the Supreme Court reversed the public utility commission where they had set up procedures --

Q Did you read this in the newspaper?

MR. DEBEVOISE: Unfortunately, your Honor, it was late last week in Miami.

Q Well, is that hearsay? Or what?

Q It is a court decision in Vermont.

MR. DEBEVOISE: It's a court decision --

Q It's reported out of a newspaper and I think he should say that it is reported out of a newspaper.

MR. DEBEVOISE: Well, it is the Rutland Herald of last week, your Honor, reporting the motion by Vermont Welfare Rights Organization asking the Supreme Court to reconsider its decision voiding the policy of the public service board in connection with termination procedures.

And the only reason that the court voided it was because the public service commission had proceeded without any factual basis in the record. It had not held hearings to determine the circumstances and therefore had no findings in support of their order.

There is no question that the public service commission can direct these things after hearings, like the New York Public Service Commission has done.

That is the utility's protection. If they are

told, do something this way, the regulatory agency has to have support on a basis because the utility is entitled to due process, too.

So, in this case, our position is that there has to be affirmative action directing. Then, if we act under color of that directive, we are subject.

In connection with this grant --

Q Mr. Debevoise, before you move on, I want to see clear, do I understand that you drew a distinction between ordering and approving?

MR. DEBEVOISE: Yes, I do.

Q Now, Justice White suggested approval could indicate that this procedure is all right and some other procedure also may be all right.

MR. DEBEVOISE: Right.

Q In that circumstance, you would say, no state action.

MR. DEBEVOISE: In the case that I can visualize at the moment, Justice Powell, I would, yes. I mean, if it is a question of, in a tariff, when it is accepted or approved, your description of service is in there. The office at which you collect your bills and just lots and lots of material that is in this category that would be subject to change by filing a new tariff and it would only be if you were doing something unreasonable that a commission



would then come along and say, you must change the tariff and do it this way and then I say, they would be directing.

So just their acceptance for filing or approval, I would equate with nonaction.

Q In other words, any kind of action that was consistent with state law and in one sense wouldn't have the approval of state law would be state action?

MR. DEBEVOISE: Exactly. Exactly. In all of the regulated businesses, and there are very, very few businesses that are not regulated to some degree today, whether they are corporations or individuals.

Now, I believe I have covered our main points that we, unfortunately, don't believe this is a termination case because the Petitioner was not our customer. She didn't apply for new service for herself, so it is not an equal protection case.

Q Wouldn't you say, Mr. Debevoise, though, that the order -- that the state has ordered the company to furnish electricity?

MR. DEBEVOISE: I believe that there is no right to receive electric service, except under --

Q Well, isn't there a statutory obligation on the company to furnish electricity?

MR. DEBEVOISE: There is a statutory --

Q Without discrimination and without --

MR. DEBEVOISE: Exactly, I was going to say, except under the Equal Protection Clause.

Now, if we discriminated against her as opposed to any other person who applied for service, I believe that there would be a cause under the Equal Protection clause, as the Davis v. Weir case was holding this summer. But there is nothing --

Q It would be only if you were a state.

Q Right.

Q The Equal Protection Clause doesn't apply to private action, private individuals.

MR. DEBEVOISE: Right. And there we are dealing with a municipal company. But there is no right, nothing to force the company to extend the electric service, except within the bounds of the tariff.

Q But if they -- well, all right, but if they, if a person is willing to live up to the rules of the company, that the company has put out in his tariff, there is a statutory obligation to furnish service.

MR. DEBEVOISE: ONce -- once we have hooked somebody up, accepted somebody as a customer, there is a statutory obligation for reasonably continuous service, I think it is. That is correct.

Now, that obligation, however, is subject to termination if, when we supply service, we are not then paid

for it.

Q You are saying that a state may order a company to furnish electricity and the company can go ahead and be carrying out its statutory obligation to furnish electricity and then the state may permit the termination without notice.

MR. DEBEVOISE: I believe that is correct, your Honor, because the state can only order us to supply electricity within the context of the rights of the utilities. It cannot order us to supply electricity to customers and receive no compensation for it.

Q Well, it could, I suppose, order you to give hearings before termination.

MR. DEBEVOISE: I believe that the public service commission could --

Q Yes, yes.

MR. DEBEVOISE: -- direct that.

Q So that it wouldn't be violating any rights of yours if they ordered it.

MR. DEBEVOISE: As long as we have an opportunity to receive payment.

Q Yes.

Q This would be one of the conditions of your franchise then, in effect, would it not?

MR. DEBEVOISE: Yes. We would have an opportunity

to build before the commission a record on which they would base a decision as to any deviation from our present practice.

I believe that I have given you our position.

MR. CHIEF JUSTICE BURGER: Thank you,  
Mr. Debevoise.

Mr. Greenberg, you have three minutes.

REBUTTAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENBERG: If it please the Court,

I would submit that the state action issue in the case is really no issue at all. I can't imagine for a moment that anyone would say that it is not state action if the electric company decided that it was not going to furnish electricity to black people or not going to furnish electricity to Mexicans.

I think the state action question is manifest.

The issue is, what happens upon a finding and a recognition of the obvious existence of state action in this case?

Now, there has been some talk about Public Utilities Commission against Pollak and how this case was different because the --

Q You would say if the utility refused to furnish electricity to negroes that it could be sued for damages

under 1983?

MR. GREENBERG: Yes.

Q Because?

MR. GREENBERG: It had denied equal protection of the law. It's the same basis of --

Q Well, there is state action, but the question is whether the state denied equal protection of the law. That is the 14th Amendment. The state has to deny equal protection of the law. This just isn't state action.

MR. GREENBERG: It is state action and --

Q That never was indicated. As a matter of fact, the state said, serve everybody equally and the company disobeys the statute and refuses to serve negroes.

MR. GREENBERG: Well, in Screws against the United States, the state law said the sheriff wasn't allowed to beat people up. But if this utility had, as part of its tariffs, the right to use force and violence to go and read a meter and collect a bill, I would assume that that utility meter reader and bill collector, acting pursuant to a tariff, would be engaged in state action and the utility would be liable for -- under the Civil Rights Act.

Q In Screws you are talking about a government official, by definition, a sheriff.

MR. GREENBERG: Yes, but he was acting contrary to state law. I assume that was the --



Q Now, you say if the meter reader beats up the householder, he is liable to 1983 --

MR. GREENBERG: If he is doing it pursuant to a tariff approved by the public utilities commission saying that --

Q Now, wait. He is doing it contrary to the tariff.

MR. GREENBERG: No, the tariff authorizes him to use force.

Q So every meter reader is an agent of the state? In your book.

MR. GREENBERG: No. I am assuming a tariff which authorizes the meter reader to use self-help in order to carry out the policies and the --

Q Well, your argument under Screws, it would be true even if he was ordered not to. But he nevertheless did.

MR. GREENBERG: Yes, but I was responding to the suggestion that he might be acting contrary to state law.

To turn to the Pollak case for a moment, this case is indeed quite like the Pollak case because Respondent's brief demonstrates that 1971 and 1972 tariffs, including this particular regulation as promulgated, after a hearing, addressed to the question of rates. But the rates and the termination procedures were a part of the same regulations which were promulgated and the company makes a point -- and

I think correctly so -- saying that its termination procedures and its rates are inextricably intertwined. Its termination procedures determine its costs of collection and the -- its credit practices and so forth.

MR. CHIEF JUSTICE BURGER: Thank you,  
Mr. Greenberg.

Thank you, Mr. Debevoise.

The case is submitted.

[Whereupon, at 11:46 o'clock a.m., the case  
was submitted.]