In the

Supreme Court of the United States

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,

Petitioners,

vs

No. 76-39

WILLIE S. CRAFT, ET AL.,

Respondents.

Washington, D. C.
November 2, 1977

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v.	:	No. 76-39
WILLIE S. CRAFT, ET AL., Respondents.	:	

Washington, D. C.

Wednesday, November 2, 1977

The above-entitled matter came on for argument at 10:42 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

FRIERSON M. GRAVES, JR., ESQ., 2020 First National Bank Building, Memphis Tennessee 38103, for the Petitioners.

THOMAS M. DANIEL, ESQ., Memphis and Shelby County Legal Services Association, 325 Dermon Building, 46 North Third Street, Memphis, Tennessee 38103, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-39, Memphis Light, Gas and Water against Craft.

Mr. Graves.

ORAL ARGUMENT OF FRIERSON M. GRAVES, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

My name is Frierson Graves and I represent the Memphis Light, Gas and Water Division which is a part of the City of Memphis, a municipal utility which has both electric, gas and water operations.

This action arose when Mr. and Mrs. Craft and several others sued the Memphis Light, Gas and Water Division, alleging that their utility services were being terminated without due process of law and they asked for both injunctive and declaratory relief.

The District Court implied that there was property in the utility services -- it really didn't say one way or the other but the implication is there -- but found that minimum due process was present in the procedures used by the Light, Gas and Water, but it suggested a change in the notice that we were giving to our customers when the final notice was sent out, which was an additional stuffer or flyer. This change was made in the notice and a final order entered. It was an

appeal to the Sixth Circuit which found that utility service was property. However, this finding as to due process had two different holdings. As to Mr. and Mrs. Parks who had an admitted liability for an amount of a bill, the Sixth Circuit said that our final notice, applying to credit counselors and a hearing before credit counselors to arrange budget payments or extended payments, was a sufficient constitutional due process, notice and hearing. But, on the other hand, the Crafts who allegedly had a dispute that our notice and our hearing was not sufficient, and we didn't have established procedures for hearing nor did our notice use the word "dispute" really in it applying to the Crafts.

We petitioned this court and the two questions were whether or not utility services are property, and secondly, whether or not the procedures used by the Light, Gas and Water meet the minimum requirements of due process, or what procedures must be used.

I'd like to say, first, that a utility wants to keep its customers on line. It wants to generate the revenue, whether it is a municipal utility or a private utility, because we in Memphis operate on a nonprofit basis, as a municipal utility, just to pay expenses. So the more revenue we are able to generate from the customer, then the better to spread that for your administrative expenses among your ratepayers.

Secondly, we think -- and we think our procedures

establish this -- that a utility ought to do all it can to help its customers pay their bills. And one of the things that we did which is in the record of this Court is to establish a budget procedure, or a policy of having extended payments.

QUESTION: I suppose a fair corollary of what you have just suggested is that the paying customers should not be required to subsidize the nonpaying customers.

MR. GRAVES: Your Honor, I think that goes back to the, sort of the common law rules about a utility, that you shouldn't give free service because, just as you must provide service to a customer, reasonable service to him so that every person can have the service, likewise, you should not give the service to a customer who is not paying for that because you are discriminating against the ratepayer in that way. And, of course, they say that reason is both a reasonable rule for free service, plus the fact that you are avoiding numerous small, petty suits because utility service is merely a credit transaction. Normally, you have an individual, either an oil contract -- In Memphis, you can have your utilities connected by calling up on the telephone and saying, "Will you connect the utilities to my address." The utilities are connected. You are asked to pay a deposit of $25.00 in this that's sometimes placed upon your first bill. You have a small credit transaction there for which we extend the new customer 65 days of service, almost, or that possibility, 60 or 65 days

before we can cut the person off.

QUESTION: Mr. Graves, I want to be sure -- The damages feature of this case -- It's gone, is it not?

MR. GRAVES: The court suggested that the Crafts be allowed a $35 credit and they were allowed that credit. So, I don't consider that damages are still in this case, sir.

QUESTION: If damages are out, is the case rendered moot by your new procedures?

MR. GRAVES: No, sir, because we still don't have what the Petitioners wanted. We established a notice and procedure and Sixth Circuit said that, they didn't comment on our new notice, but our old notice was still constitutionally deficient. And so that's their declaratory judgment and relief that our notice was not sufficient in this. And, of course, we are contending that utility service is really not property.

QUESTION: The Sixth Circuit's analysis on this point was based on its -- at least in part -- on its Palmer case, wasn't it?

MR. GRAVES: Yes.

QUESTION: And that didn't address Tennessee law at all, as I read it.

MR. GRAVES: No, sir, that was a private utility that the court found was sort of callous and we don't think that our policies do that. They were -- Also, it was conceded that utilitity services were property, in that case for a private

utility.

QUESTION: What do you understand to be the reasoning of the Sixth Circuit here as to why a continued utility service is a property under the Fourteenth Amendment?

MR. GRAVES: Your Honor, they cited a number of cases which rely on several reasons, one, that water or electricity is indispensible to life and, therefore, you should have it. And they cite a number of cases, both District and other circuits, that tend to say both necessity of life or that there is some -- by having this as a municipal utility, we have that state action, and also that you have the rule that you should give utilities to every customer.

QUESTION: Of course, the state action inquiry is quite different from the property interest.

MR. GRAVES: That's right.

QUESTION: Mr. Graves, under Tennessee law, is there a legal right to receive a utility service so long as one pays for it?

MR. GRAVES: Yes, sir. We go back to a 1902 Tennessee case of Jones v. Nashville and that established, more or less, a franchise ordinance. That establishes what I think was merely the common law and general rule of utilities, that quasi-public type of corporation, that when you provide the service you must give it to all customers, but you have -- and the right is upon the utility to furnish

those services to the customers, but the utility may make reasonable rules. And among those rules is that they can deny the service to a person if he doesn't comply with it.

QUESTION: This case involves a dispute as to whether or not the bill submitted by the utility was correct.

MR. GRAVES: Yes, sir, and I think the rule, whether it is an admitted liability or a dispute, that the utility can determine the rules and regulations and that the right of either suing for an injunction, paying under protest and suing or suing for damages, that the rule was made in common law for the utility's benefit and not as an entitlement or an independent source or a state statute to allow an entitlement to the customer, because the utility could terminate but it did so at its peril in this case in making it subject for damages.

QUESTION: Your position is that state law remedies were adequate and no constitutional, there is no constitutional entitlement to a prior hearing.

MR. GRAVES: Yes, sir. And that you cannot argue that water is indispensable to life or electricity is indispensable for life, because if that is so, then a person with an admitted liability for it, that's merely using the services, why should you ever be able to cut them off? Congress this past year appropriated $200 million for the Community Development Act to help pay on utility bills for this past

winter. But that is if they want energy stamps or other manners in which to pay for utility services it should be a taxpayer program and not a ratepayer program that is upon the utility to maintain this.

QUESTION: I take it then you say if a utility sends a person a notice and says, "You are cut off," and the person wants to know why and the utility says, "It's none of your business," and then the person sues the utility and wins, then the utility freely admits that, "Well, we just cut you off for no reason at all," you would agree, under state law, the utility would be liable?

MR. GRAVES: Yes, sir. And under state law, the utility would have to adopt reasonable rules, because --

QUESTION: I understand that. But you say despite that there should be no constitutional requirement that the utility even notify the person as to what the basis for the cutoff is.

MR. GRAVES: Your Honor, I think they've got to send them the bill so they know what they have to pay. And once they know their just due --

QUESTION: Well, I know, but I -- In my example, the utility simply notifies the person, "You are cut off," gives no reason whatsoever.

MR. GRAVES: No, sir, he couldn't do that. They'd have to tell them what amount was due.

QUESTION: There is some constitutional requirement, then, for adequate prior notice, or not?

MR. GRAVES: No, sir, the common law rule is that you must send any creditor his bill in this. When you have sent the creditor his bill and you have told him, "You owe $9.89 for utilitities," then you are telling him pay the $9.89 or you will be terminated by a certain date.

QUESTION: You do say, then, that there is a requirement that the utility, beforehand, before cutting off, go through some procedure to let the person know what his obligation is.

MR. GRAVES: What his obligation is, but not the fact that he may dispute what that obligation is and have a continued right to get the water out of the city pipes in the street or the gas out of the pipes and continue this while he is during a dispute, because if they want to terminate it on the basis of this, they don't have to do a continued credit transaction, and they can't say well, that's because it is a necessity of life or they say there is some independent source, such as,a state statute to do this. Because there was state statute enough in Jackson when they codified common law rights to say --

QUESTION: What if the utility cuts the person off without sending him the bill?

MR. GRAVES: I think that that gives rise to damage

action, too. I don't know if it is constitutional or not, but I think --

QUESTION: That's what I want to know. That's what the issue is in this case, at least part of it.

MR. GRAVES: I don't think the issue is whether or not you must send a bill. I admit that you must send a bill.

QUESTION: Well, why? What's the source of the obligation?

MR. GRAVES: The source of the obligation is the credit transaction. The question is, do you have to continue selling on credit while you are litigating whether they owe the past credit, or not?

QUESTION: Well, if you agree with Mr. Justice White's question of a moment ago, then you have to -- you are conceding there is some sort of a limited property interest, are you not?

MR. GRAVES: I am saying under the common law there is a right to receive the service so long as you obey the rules and regulations.

QUESTION: And under the statute of the state. Under the state law.

MR. GRAVES: Well, under common law regarding utilities.

QUESTION: Is that in force in Tennessee?

MR. GRAVES: Of course, sir. It is in force

everywhere, just like Jackson v. Metropolitan. They had to furnish services to anybody that would pay for them. And if they didn't pay for it, then the question was could they cut it off?

QUESTION: What I want to know is: The utility cuts a person off, doesn't tell them why, doesn't send them a bill, doesn't do anything, just cuts them off. Would the person then have a 1983 suit for failure to provide an adequate notice beforehand? That's part of the issue in this case.

MR. GRAVES: You are making the assumption that they are not sending any bill at all, not making any claim --

QUESTION: Yes, I am.

MR. GRAVES: All right. If they send a bill, then --

QUESTION: I just said they didn't send any bill, didn't give them any notice. Now what?

MR. GRAVES: Your Honor, then I think they merely have a common law right to damages against the utility and it is not a constitutional -- no violation of constitutional right.

QUESTION: No violation of constitutional rights, despite the fact that there is a property interest there.

MR. GRAVES: Well, I don't consider it a property interest for continued payment, continued credit being given.

QUESTION: May I ask you a hypothetical question

to see if it will shed some light on your position, for me. A newspaper is not a public utility, is it?

MR. GRAVES: That's right, sir.

QUESTION: But they serve people at their homes, with a carrier service and bring the newspaper there. Would you say there is any obligation on the part of the newspaper, enforceable obligation to deliver newspaper just because people want it, or can they refuse anyone they want?

MR. GRAVES: I think they can refuse it, like any other credit transaction, sir.

QUESTION: Now, a utility, on the other hand, is not free to refuse service, is it, in Tennessee?

MR. GRAVES: It is not free to refuse service except under its rules and regulations, if it hasn't been paid for past service.

QUESTION: In the first instance, if a customer calls up and says, "I want water, gas and electricity," they must --

MR. GRAVES: They must serve them if it has the reasonable means to do it at that time. If they live five miles from town --

QUESTION: My question assumes they are on the main line.

MR. GRAVES: Yes, sir.

QUESTION: So, that distinction is of some importance

to this case, isn't it?

MR. GRAVES: Yes, sir. And we say that -- in answer, again, to Justice White, if they didn't get a bill to begin with, then they have received some damages and they have an adequate remedy of law, but it is not a constitutional right to continued paying it on the basis of not paying a bill and not having a continued entitlement to credit while they are litigating for past credit extended.

QUESTION: Now, the newspaper could give you a subscription free because they might think it was good for them to have you on their subscriber list, but charge me, your next-door neighbor, full price, could they not?

MR. GRAVES: Yes, sir.

QUESTION: But they can't do that in a utility.

MR. GRAVES: No, sir. They have to charge everyone the same rates, without discrimination.

QUESTION: None of this has to do with the Constitution?

MR. GRAVES: No, sir, it does not.

QUESTION: If I walked into Macy's and asked them to charge something for me, I take it even if Macy's is partly owned by the City of New York, they are free to tell me, "No, we are not going to charge." The fact that I may be a delinquent creditor and they haven't sent me a bill doesn't mean that something in the Constitution gives me a property

right to get my next transaction charged. But, am I not right in thinking that Tennessee treats the utilities somewhat differently than it would Macy's?

MR. GRAVES: Our Patterson case says that you may adopt a rule that you can terminate for nonpayment. And our other cases say that you can still terminate for nonpayment even if there is a dispute because the termination is at your peril and the utility could be sued for damages if they made that improper determination.

QUESTION: Mr. Graves, I have a question that I wanted to ask earlier because it is really a threshold question. How is your client, Memphis Light, Gas and Water Division of the City of Memphis amenable to suit at all under 1983, because of the doctrine of Monroe v. Pape and the City of Kenosha, and others?

MR. GRAVES: Your Honor, we considered the fact of saying that we were not a person. We are also sued for our individual commissioners. We were being asked for declaratory relief, so that the previous counsel before me did not choose to raise that argument as to whether they were a person because we also had our individual commissioners sued who could be charged, and were charged under the charter with making the policy. Just as individual boards of education or individual, other members of boards would make policy.

QUESTION: Judge Peck's opinion in the Court of

Appeals says that the District Court, correctly, I think, says that the District Court after trial found that there was no civil rights jurisdiction over municipally owned MLG&W -- a footnote to the case -- and he says nothing further about it in the entire opinion, and the court neither affirms nor reverses that. But isn't that a correct holding, under the --

MR. GRAVES: Yes, sir, it is, but the counsel who tried this before me chose not to raise the question --

QUESTION: But that's been decided, that's gone out of the case, hasn't it, by the District Court, and it was not reversed in the Court of Appeals?

MR. GRAVES: Your Honor, I don't think he really was finding that. I think he was finding that we were not violating due process in this. He may have mentioned that, but he still entered his decree and said we should have a better notice and we should give credit and our individual commissioners were also sued in this case, as well.

QUESTION: Would you agree that if the Court of Appeals, through Judge Peck, is correct in saying that the District Court held that you were not suable under 1983 that that was a correct holding.

MR. GRAVES: Yes, sir.

QUESTION: Because you are a municipality.

MR. GRAVES: Yes, sir. Under the Charter of the City of Memphis and just a division of it.

QUESTION: Of the City of Memphis, aren't you?

MR. GRAVES: Yes, sir.

May it please the Court, I would like to talk a little bit about the facts on our hearing and notice, because we consider --

QUESTION: First of all, before you get to that, do you concede, then, that there is property?

MR.GRAVES: No, sir. I am not conceding there is property because I don't consider there is an independent source, by state statute or otherwise, that you've said in Board of Regents v. Roth and others that makes it -- that what we are talking about is the general law of utilities which would apply to a private or a municipality, which says that you can make reasonable rules which include, at your peril, terminating someone for what you consider nonpayment.

QUESTION: Right. So, now when you are moving on to talk about the procedures that you do provide, you are saying, assuming arguendo there was a deprivation of property, but only arguendo, is that right?

MR. GRAVES: That's right.

On that basis, sir --

QUESTION: Let me just ask one question on the property issue. Assume for a moment you have a customer who has paid his bill and the utility admits he paid his bill, could the utility cut his services off without notice, and so

forth, without raising any federal question. I realize you would have the state law liability, but you say even there there is no property interest.

MR. GRAVES: No, sir.

QUESTION: Why not?

MR. GRAVES: Because we've made an error in taking that service, he has the same common law actions to go in and ask for an injunction, to go in and say that you've made a mistake --

QUESTION: I know his state law remedies. Doesn't he also have a state law right to continued service? If he has paid his bills.

MR. GRAVES: If he has paid his bills.

QUESTION: Now, why isn't that property, within the meaning of the Fourteenth Amendment?

MR. GRAVES: Your Honor, the fact of whether or not the utility makes a mistake --

QUESTION: No, no, no. No mistake at all. They know it. They say, "We have decided to cut you off. You paid your bills, but we are going to violate state law. We have all sorts of reasons, you are a bad person," whatever it may be. Does he have a federal property interest in having continued service? Does he have a property interest in continued service when he has paid his bills -- and everybody acknowledges he has paid his bills? Is that a property right,

within the meaning of the Fourteenth Amendment, and if not, why not?

MR. GRAVES: Your Honor, I think, under the law of utilities, he has the right to a service, whether that makes it a constitutional right --

QUESTION: I am not asking that. That's admitted.

MR. GRAVES: That's admitted.

QUESTION: Why isn't that a property right, within the meaning of the Fourteenth Amendment?

MR. GRAVES: Because I don't think it reaches that independent source that the Court has said must make it Fourteenth Amendment, that is by state law, rule or understanding that you've done it. Now if you say that is so, then you have made it. But when you look at the education case, Goss v. Lopez, and say because the state chose to provide the service and passed the statute that may -- and also a statute you must attend school, that made it federally protected. But we don't have that statute or that independent source.

QUESTION: But you have a state law that says you must provide the service when --

MR. GRAVES: No, sir, it is not a state law, it is just the regular law of utilities, just the common law.

QUESTION: But it is the law followed in the State of Tennessee, isn't it?

MR. GRAVES: Yes, sir, and every state.

QUESTION: Don't you have a decision of the Supreme Court of Tennessee to that effect?

MR. GRAVES: Yes, sir.

QUESTION: You aren't drawing a distinction, are you, between the law declared by your court and the law declared by your legislature?

MR. GRAVES: I am from the standpoint that they are declaring it the common law for utilities throughout every state, Your Honor, and they are following the general rule. Now if that makes it a constitutionally protected property right, then it may be in this. But I didn't think it met the test of Roth.

QUESTION: In Roth that you cite, was there a state statute?

MR. GRAVES: Yes, sir. You had a state statute that provided for free education and a state statute for compulsory attendance. And when they suspended somebody then they should be given a hearing.

QUESTION: You are thinking of Goss v. Lopez.

MR. GRAVES: Yes, sir.

QUESTION: I thought you cited Roth, avowed tenure.

MR. GRAVES: Avowed tenure, yes, sir.

QUESTION: Was that a statutory right?

MR. GRAVES: I think they sent it back to determine

whether or not it was a de facto type of right.

QUESTION: Would that have made a difference? Suppose the university board had prescribed tenure.

MR. GRAVES: Well, our rules and regulations also provide that if you pay your bills you get your service, but if you don't pay your bills you don't get the service. So that's the distinction between them.

QUESTION: I suppose in Tennessee there are some privately-owned utilities, are there not?

MR. GRAVES: Yes, sir, and they are under the Public Service Commission.

QUESTION: Now, those privately owned utilities function by virtue of a grant franchised from the state, do they not?

MR. GRAVES: Yes.

QUESTION: I assume, as in other states, the franchise itself defines the right of every person within the reach of the service to receive that service, if he pays for it.

MR. GRAVES: Yes.

QUESTION: Would you say with respect to a private utility that is or is not a property right in Fourteenth Amendment terms?

MR. GRAVES: Your Honor, if they were under state action, but some of the District Court cases say because of

those state statutes that makes it a property right. On the other hand, I say that's no different than just the codification of the common law, and does that make it a property right?

QUESTION: In other words, you would draw no distinction between a private utility in this respect and a public utility?

MR. GRAVES: No, sir, we are still subject to damages and liability for failure to abide by our own rules and regulations.

Now, I would like to say something about our notice in this case. We sent out notices that not only had a final notice but it also had a flyer in it that said if you had any dispute, in some cases. In some cases, it didn't say the word "dispute" but it said, "If you are having difficulty paying your bill, come to the credit counselors."

We think that the record clearly shows that we were giving adequate notice and a hearing, for this reason. When somebody gets a utility bill they say, "I didn't use that much service, you made a mistake. I've got too high a bill." When you talk to the Light, Gas and Water, we re-read 33,000 meters during 1973, so we were cognizant of any complaint and did something about it, of any high bill. If you had difficulty paying your bill, or you had something the matter with it, 62,000 people came into the credit office

during that year and were handled by the credit officials.

When the Crafts had their problems because they bought a duplex and the real estate agent said, "Don't pay any attention to the fact that you've got two meters here," then the Crafts had help, even though they had 25 days from the time they got their bill until they got final notice of a cutoff. They went to the utility. They got their meter put back in. They got their utilities on and they lasted from June until September when a meter reader went by and they said, "Our check's in the mail," and they didn't cut off. When they cut off in October, they went to the utility and somebody must have told them at the utility that "You've got two meters. You ought to have them combined, if you don't want a duplex with two meters." They did it. They didn't pay their bill again. When they were cut off in November, even though they were getting two bills -- not double billing, split billing -- each meter registering the service -- when they came back in November their utilities were cut back on and they were put on budget billing and they paid $25.00, or so, and $100 were delayed. When in December they were to be cut off again, December 28th they called up and got an extension until January 8th; in this time, the meters were finally combined because the electricians and plumber had made a mistake in combining which ones that were there. So that you can't say that we were callous toward the Crafts, or

anybody. And we consider that when we were giving that information and handling the people and adopting the budget procedure and that when you have a dispute, regardless of whether it is an amount of a bill or whether you owe that much or whether you owe it at all -- If you go to Macy's you go to the credit department -- to any big place. When you go to the utility, those notices which are not in the opinion but in the Appendix say MLGW credit department at the bottom. So that's where you know to go.

QUESTION: Macy's is not government.

MR. GRAVES: That's right, sir.

QUESTION: The Fourteenth Amendment applies only to state government or --

MR. GRAVES: That's right, sir, but when we give you notice of who to come to and we say, "MLGW credit department," or "credit counselors," or "if you are having difficulty paying your bill," I think common sense tells you that you go to the credit department -- that's the people that sign the bill -- and that the record shows that we handled over 100,000 people through either the credit department or calling up to get extensions or re-reading their meters, and we did it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Daniel.

ORAL ARGUMENT OF THOMAS M. DANIEL, ESQ.,

FOR THE RESPONDENTS

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

This case arose as a result of a dispute that developed in Memphis, Tennessee, between Mr. and Mrs. Willie S. Craft and the Memphis Light, Gas and Water Division. Without going into the details of that dispute, I think it is fair to say that the dispute existed over a period of several months prior to the filing of this suit, during which time the Craft's utility services were terminated on several occasions, and also during which time the Crafts made good faith efforts, as the District Court found, to resolve their dispute with Memphis Light, Gas and Water Division.

The dispute that developed occurred because of double computer billing that was being sent to the Craft's residence. And during this period, Mrs. Craft made several efforts, even to the point of going to the offices of Memphis Light, Gas and Water Division and spending the entire day in an effort to ascertain the reasons for the terminations and to try to straighten out the problem.

There is one important fact that should be noted in this that is important to a proper resolution of this case. And that is that Memphis Light, Gas and Water Division then, as now, has no orderly dispute resolution process. And

that's why Mrs. Craft was unable to resolve her dispute with the Memphis Light, Gas and Water Division.

Mr. Graves has indicated that Memphis Light, Gas and Water Division did not harshly treat the Crafts. The record is quite the contrary in this case. On one occasion when Mrs. Craft called to explain that her bill had been paid, she was met with the response, "Pay it again." And on another occasion when she was talking with someone at the Memphis Light, Gas and Water Division concerning her bill,she was actually cursed by one of the employees. But the important point is that no dispute resolution process exists within Memphis Light, Gas and Water Division.

QUESTION: Do you have a small claims court system in Tennessee?

MR. DANIEL: We have what's called a General Sessions Court, Your Honor, but it is not a small claims court in the sense that no lawyers are allowed to appear such as we have in some states.

QUESTION: Suppose the notice said, "You haven't paid your bill. If you have any complaints about it, come and see Mr. So and So at Room so and so, between the hours of so and so. Bring any information you have. Bring your lawyer if you want to. And we will hear your side of the story to see if we have made a mistake."

Would that be enough to satisfy you,before there is

a cutoff?

MR. DANIEL: I think a notice of that sort is the type that we are asking.

QUESTION: So your answer is yes?

MR. DANIEL: It is hard to say yes to a specific notice without seeing it in print and going over it.

QUESTION: But you don't,for example, claim that before there is a cutoff there has to be some independent hearing examiner or a full adversary trial?

MR. DANIEL: Well, your question was directed to the notice, but I think what we are asking for is the type of notice that you just mentioned, to give the person an opportunity for some type of hearing. That would only have to be, at the first stage, an informal conference with a responsible official at Memphis Light, Gas and Water Division. And then if it is not resolved at that stage, I think there should be an informal hearing before an impartial hearing examiner.

QUESTION: You mean before a termination of service?

MR. DANIEL: Yes, Your Honor.

QUESTION: What authority do you have for that in our cases?

MR. DANIEL: I think in numerous cases decided by this Court.

QUESTION: Name one.

MR. DANIEL: Such as Goldberg v. Kelly. I think before the termination of welfare service in that case --

QUESTION: What kind of hearing was that?

MR. DANIEL: That was an informal hearing before an independent hearing examiner prior to the termination.

Let me make clear that when I say --

QUESTION: Well, when you say an independent hearing examiner, did not Goldberg v. Kelly simply say that it must be within the organization, but a different person?

MR. DANIEL: That is correct. And I wanted to point out we are not necessarily asking for someone outside the company, so long -- even if it is an employee of the company -- so long as that person has the independence to look at the case fairly and to make a decision in favor of the consumer, we feel that that would be adequate.

QUESTION: Don't you think that the natural urge of a utility to sell as much of its product as possible gives them a certain amount of independence in that respect?

MR. DANIEL: I suppose it does, but the record in this case indicates that they also have some problems in resolving disputes that develop between customers. And one of the problems that Mrs. Craft had was that the persons that she was communicating with were lower-level employees who really did not have the authority to resolve any dispute that might have developed. We are saying the situation would

probably be improved if a responsible company official, in other words, a higher-level employee --

QUESTION: Mr. Daniel, is the reason for that that it is a public utility or that it is a state?

MR. DANIEL: I think because it is a state in this case.

QUESTION: You wouldn't have any claim unless the defendant is a state, a state within the meaning of the Fourteenth Amendment.

MR. DANIEL: That's correct, Your Honor.

QUESTION: And what about the other officers?

MR. DANIEL: I am not sure --

QUESTION: The commissioners.

MR. DANIEL: Well, the --

QUESTION: Are they state officers?

MR. DANIEL: Well, they are employees of the city, at least insofar as they are officials of the Memphis Light, Gas and Water Division. They are state officers, yes.

QUESTION: Well, their president and vice-president.

MR. DANIEL: Yes.

QUESTION: So far, you have largely, in response to questions from the Court, addressed yourself to the due process of the case, Mr. Daniel. Do you think the Sixth Circuit's analysis of the property interest question, which I suppose logically comes before the due process inquiry, is

satisfactory in the light of Roth and Cinderman.

MR. DANIEL: No, I don't think their analysis is as full as it should be. I think at the time this case was decided they were just relying primarily on other cases. I think, as this Court has pointed out, there must be reference to whether this property interest exists under state law. But I think it is clear that under the state law of Tennessee a person has a right to receive utility service and the utility supplier has a duty to supply. So I think a proper analysis under Roth and Cinderman and more recent decisions of this Court, that there clearly is a property interest under state law.

QUESTION: And you did not appeal or seek cert from that portion of the Sixth Circuit's opinion which held that where the bill is undisputed judgment goes for the defendant in a case like that.

MR. DANIEL: That is correct. We do not assert that the customers have the right to free utility service. There is no question but what utility service may be terminated for nonpayment in Tennessee. It is just that we question the right of the utility service, under the Fourteenth Amendment, to terminate utility service while a dispute is pending.

QUESTION: I want to be clear that you are not asking that the fact finder to resolve this dispute must be independent and neutral, apart from the utility.

MR. DANIEL: That is correct, we are not asking --

QUESTION: It can be an employee of the utility, you said, I think, a responsible representative?

MR. DANIEL: A responsible company official. I think that would be adequate.

QUESTION: I am not sure what official means.

MR. DANIEL: Well, I think there was a distinction made in the Palmer case of the Sixth Circuit, in that an official or an officer of the company would have more freedom to rule in favor of the customer than a lower-level employee. In other words --

QUESTION: Mr. Graves suggests you go to the credit department. Would that be okay?

MR. DANIEL: No, I don't think that would be okay because the problem, as the record in this case indicates, is that the employees in the credit department are concerned primarily with getting people to pay their bills. They are not concerned with resolving disputes. The record in this case indicates that they don't even have the time to do that because there are so many calls that they get each day there is no way possible that they can deal with disputes concerning bills. The only thing they can deal with is people who are having difficulty paying an admitted liability.

QUESTION: Mr. Daniel, may I ask you a question, please.

I'd like to ask about your objection to the notice and the Court of Appeals holding on the notice, and put to one side the hearing problem. And also, of course, I am just asking you about the constitutional requirement as to an adequate notice, as opposed to what a commission might say is desirable, in the sense of telling the customer how to go in and straighten out the dispute.

Your point, as I understand it, is that the notice, although it told the customer of the harm that was about to occur, namely, that he was about to be cut off, it did not explain to the customer the procedure to be followed in avoiding that harm.

MR. DANIEL: That is correct.

QUESTION: Now, is there any precedent that you know of, under the Fourteenth Amendment, for holding that a notice must do more than tell the person to be harmed about the prospective harm but must go further and, in effect, give him legal advice as to what his possible remedies must be?

MR. DANIEL: Well, I think, the holdings of this Court indicate that the question of notice and hearing is always a variable according to the circumstances of a particular case. I can't cite any specific holding that would require that, but I think that under recent decisions of this Court the type of notice that has been required in certain cases, such as Morrissey v. Brewer, was a very

specific notice and it informed the person of more than just the action that was about to be taken. It also informed the person of the steps that they might take to prevent the threatened harm.

The problem in this case is that Mrs. Craft attempted to take some steps to prevent the threatened harm. She acted as any reasonable person would and went to the office of Memphis Light, Gas and Water Division, but was unable to resolve the dispute because she was never informed either there or in the notice of what she could do.

QUESTION: Often, I suppose, in a serious matter when a citizen gets notice of something about to happen, one thing he can do is ask a lawyer for help. Presumably, if either of these people had asked a lawyer for help, it would have been straightened out in a hurry.

MR. DANIEL: Well, I am not even sure that it would have been straightened out in a hurry because --

QUESTION: You don't think a letter to the president of the company which said, "You terminate this service and you are going to get sued for $3 million," or something like that, might not have gotten action?

MR. DANIEL: That's possible, but my only point is there is no dispute resolution process within Memphis Light, Gas and Water.

QUESTION: Does the record tell us how often there

are disputes about the amount of the bill as opposed to questions of credit, and things like that?

MR. DANIEL: The only indication in the record as far as numbers is that during the year 1973, I believe, when this case was being litigated, there were something like 33,000 high-bill complaints. Now, as to whether that can be classified as a dispute, I don't know, but I think that it probably would be. This is certainly different from some of the cases in this area, such as the one that Your Honor decided in the Seventh Circuit where the record indicated that there were only a small number of disputes that developed over a certain time period. And also, I believe, in the Lucas case which Your Honor decided, there was a process within the company for resolving disputes and most of them were, in fact, resolved, prior to termination of service.

QUESTION: That's right. They were required by state regulation.

MR. DANIEL: That's correct.

Another important factor there is that the Public Service Commission in that case, since it was a privately owned utility, had the authority and did in fact intervene on many occasions and halt the termination of service while the dispute was being resolved. In this case, the Public Service Commission has no jurisdiction over Memphis Light, Gas and Water Division, and there is nobody that can intervene

like that and halt the termination while the dispute is being resolved.

QUESTION: The Court would have to supervise this, wouldn't they?

MR. DANIEL: No, I don't think so, Your Honor.

QUESTION: That's what worries me.

MR. DANIEL: I think all we are asking the Court to do is to set up or to order Memphis Light, Gas and Water Division to set up a dispute resolution process. It would not mean that every time a person had a dispute concerning their utility service that they could run into federal court for a resolution.

QUESTION: Why not?

MR. DANIEL: Well, I think there would be no right of action in federal court to resolve the dispute. The claim here is that the Fourteenth Amendment is violated because due process is not being provided.

QUESTION: Well, I mean, due process is, you know, is about like that, isn't it? Who would decide how much due process was going on?

MR. DANIEL: I think we are asking you --

QUESTION: I mean, you said somebody cursed over the phone. Well, if you put that person in charge of the division that wouldn't help, would it?

MR. DANIEL: I suppose not, Your Honor.

QUESTION: Well, what would help?

MR. DANIEL: Well, I think what would help is, as we've discussed previously, to have a hearing examiner who has the responsibility to hear disputes that develop between consumers and Memphis Light, Gas and Water Division who has the authority to render a decision --

QUESTION: And to enforce it?

MR. DANIEL: And to enforce that decision.

QUESTION: How can you do that in a public utility?

MR. DANIEL: Well, I would --

QUESTION: You mean he could enforce it -- Say, become chairman of the board? Or council, or whatever this thing is?

MR. DANIEL: The commissioners of the utilities.

QUESTION: So he would be over them?

MR. DANIEL: I don't think he would necessarily be over them. I really don't see a problem developing that Your Honor has anticipated. I assume enough good faith on the part of Memphis Light, Gas and Water Division that if they have a hearing examiner and he hears the case and orders that the utilities be turned back on, that he would be a high enough company official that he could order lower-level employees to turn the utility service back on.

QUESTION: That's the first time you've used the term "hearing examiner." Previously, you had said, I thought,

any responsible employee of the company. There is quite a difference between that and a hearing examiner. That has some connotation that responsible official does not have.

MR. DANIEL: If there is any confusion there, I was using the terms interchangeably, that the person who is hearing the case could be a responsible company official.

QUESTION: Sort of an ombudsman type.

MR. DANIEL: That is correct, Your Honor.

QUESTION: You used the term "hearing the case" which certainly, I would think, does nothing to dispel the fears that some of us may share with Justice Marshall. If this is a case that goes before a hearing examiner, you really have a brand new division of the utility. Are you suggesting that formal a procedure is required simply by the language in the Fourteenth Amendment that says no property shall be taken without due process?

MR. DANIEL: I think if we look at what the Sixth Circuit did, for example, in the Palmer case, as an indication of what I am talking about. There they required that a responsible company official within the utility supplier be able to hear the dispute in an informal manner and make the decision as to whether service should be terminated or not. So that, while the person hearing the dispute was an employee of the official, they nevertheless conducted an informal type dispute resolution process. But they would not necessarily have to be

completely disassociated from the utility supplier.

QUESTION: Suppose the notice said you owe some money, you are going to be cut off in 20 days. If you have any objections, file your suit in court. And you can ask for a preliminary injunction. If you can satisfy the ordinary standards for a preliminary injunction, of course, the service wouldn't be cut off. But if you can't satisfy them, the service will be cut off. Then you can go ahead and try your lawsuit and get damages if you win. This is a state court suit.

That's the notice you get. Would that satisfy the Fourteenth Amendment, or do you think the Fourteenth Amendment requires an administrative hearing?

MR. DANIEL: I think the Fourteenth Amendment requires some type of opportunity for hearing prior to the termination of service. I do not think that the common law remedy of suing for damages in state court would be adequate.

Now, this Court, recently, in Ingraham v. Wright, held that a common law suit for damages was adequate in the context of corporal punishment. I think that case is quite different from here. First of all, the governmental interest involved there in school discipline --

QUESTION: You mean a full court hearing isn't good enough procedure to satisfy the Due Process Clause?

MR. DANIEL: The problem with the full court hearing

in that situation is that the burden of proof is switched to the customer to show that he is right and the utility service is wrong. That's a reverse of the normal common law procedure, that one asserting something due has the burden of proving that it's due. It puts the burden on the customer to hire a lawyer, pay the litigation expenses required to institute a stay in state court.

QUESTION: Well, suppose you had this administrative setup the way you want it and you have a so-called responsible company official, wouldn't it be enough under our cases, if after hearing the customer's side of the story, he said, "I think there is probable cause to believe that you haven't paid your bill and that you owe us some money, and there is probable cause to cut the service"? Isn't that sufficient? He doesn't have to make some final decision, just has to say some probable cause for it.

MR. DANIEL: I think that that might be sufficient as an initial process but, as the Sixth Circuit required in the Palmer case, what we are asking is that if he makes that decision there still should be some type of informal hearing where a written decision is rendered.

QUESTION: This is before the cutoff?

MR. DANIEL: Not necessarily before the cutoff.

QUESTION: Well, that's what we are talking about right now.

MR. DANIEL: Before the cutoff, that might be sufficient under the decisions of this Court.

QUESTION: Can you say whether it would or not be sufficient?

MR. DANIEL: I think it would be sufficient before the cutoff, as long as at least after the cutoff there would be a more formalized hearing or --

QUESTION: But it still has to be administrative.

MR. DANIEL: That's correct.

QUESTION: Could the person have one a month, a hearing once a month?

MR. DANIEL: I suppose it's conceivable that a person could abuse the process in that way, but I don't think the fact that there might somewhere be a customer who would abuse the process would mean that we should abandon the requirements of the Fourteenth Amendment.

QUESTION: I mean, if the complaint is -- which I don't know about you, but I have the same complaint every month -- my bill is too much. So I would go there each month and have a hearing and I would say, "This is too much," and the company would say, "Here is the meter. Read it." Then, what else would you do? Nothing.

MR. DANIEL: That's correct. I suppose it's possible --

QUESTION: Does that seem silly to you?

MR. DANIEL: It does, and I don't think most people would abuse the process in that way, because what we are talking about here is real disputes that people have concerning their utility service.

QUESTION: The dispute is that you were double billed which, obviously, was a mistake.

MR. DANIEL: That's correct.

QUESTION: And you'll never have a hearing with who made the mistake. You'll never have a hearing with the computer.

MR. DANIEL: That's correct, you would not.

QUESTION: So, I don't see what the hearing would be about.

MR. DANIEL: Well, the hearing, such as in the Craft case, would be about why the Crafts were getting two bills every month, rather than one that most customers get and whether that bill was correct or not.

QUESTION: That was partly related to the fact that they had an off-again on-again program on their own part, two meters and then one meters and then two meters. They brought on some of these problems by their own indecision, did they not, or changes of decision?

MR. DANIEL: Even though they were aware that they had two meters, they thought and were, in fact, told by a Memphis Light, Gas and Water Division employee that one of the

meters was bolted off, and so they thought that service was only coming through one meter. I think, as the district court found, Mr. and Mrs. Craft were making every effort to find out what the problem was and were ready and willing to pay the bill that was due; it was just that they could not understand why they were getting those two bills and Memphis Light, Gas and Water Division seemed unable to explain it to them.

QUESTION: Now this has been litigated for nearly five years, hasn't it?

MR. DANIEL: Well, it started in 1974, so about four years.

QUESTION: 1973, I thought.

MR. DANIEL: Well, the dispute started in 1973, that's correct. The suit was not actually filed until '74.

If the Court please, what we are asking this Court to do in terms of requiring due process here, as this Court has done in numerous cases, is to balance the private interest that is involved here and the government's interest. The private interest that is involved here is an extremely important interest. It is the interest in the very means to life in some situations. We are talking about water service, gas and electrical service which, in the cold winter months, provide, the means for heat in most municipalities in this country. So the significance of this interest is quite important. Termination of this interest can cause serious

harm to a customer, and in some cases has even caused death. And so we are not talking about a situation like this Court dealt with in Ingraham v. Wright, where we are talking about corporal punishment of students. We are talking about the potential for much more serious harm to the Plaintiff. We also have to balance that against the government interest involved here. The government's interest, of course, is preserving scarce physical resources. But there is no reason that Memphis Light, Gas and Water Division cannot provide the type of notice and hearing that we are requesting within the time-frame that they presently terminate service, and still be able to preserve their scarce physical resources. The fact that a person gets a hearing does not mean that they are not going to have to pay the bill. If it is found that the customer is incorrect, they will nevertheless have to pay the bill --

QUESTION: And also the cost of the hearing.

MR. DANIEL: And the cost of the hearing, we would concede that.

QUESTION: Would you tell me why this is a proper 1983 suit?

MR. DANIEL: Well, if the Court please, we are dealing here with a property interest under the Fourteenth Amendment and, of course, the source --

QUESTION: I am really going to Mr. Justice Stewart's

question to your colleague --

MR. DANIEL: As to whether Memphis Light, Gas and Water Division is a person?

QUESTION: Yes.

MR. DANIEL: Well, I think that that issue has not really been raised, but --

QUESTION: It is a jurisdictional issue though, isn't it?

MR. DANIEL: Yes.

QUESTION: So, isn't it always open?

MR. DANIEL: Yes, Your Honor.

QUESTION: Well, what about it then?

MR. DANIEL: I think that we have sued individual defendants here, commissioners of Memphis Light, Gas and Water Division, who clearly are persons, under Section 1983, even though it is questionable whether Memphis Light, Gas and Water Division, itself, is a person.

QUESTION: You say it is questionable. What do you think the answer is?

MR. DANIEL: I think they are probably not, because in Memphis the Memphis Light, Gas and Water Division is not a separate corporation. It is a part of the city.

QUESTION: So this party, to the extent that Memphis Light, Gas and Water Division is a party here, it couldn't be?

MR. DANIEL: That's correct, Your Honor. I would agree with that.

QUESTION: And let's assume there were some damages. Would it be paid out of city funds?

MR. DANIEL: I don't know the answer to that, since the damages would be --

QUESTION: What if they were to be paid out of city funds? Then are the individuals persons?

MR. DANIEL: I think that whether the damages were paid out of city funds would not make any difference, as to whether they are persons under Section 1983.

QUESTION: Would it make any difference under the Eleventh Amendment?

MR. DANIEL: I don't believe it would.

QUESTION: Because it is a city.

MR. DANIEL: Because it is a city, that's correct, Your Honor.

I did want to raise one point in that regard. Mr. Justice Blackmun raised the issue of mootness in this case, and raised the question as to whether there is a damage issue still open. It is Respondent's position that there is a damage issue still open in this case, if this Court affirms the holding of the Sixth Circuit. There were no damages ordered at the District Court level because the District Court held that we had no due process right, but if this case

is remanded on the holding that the Plaintiff did have a right to due process prior to termination of service, I think the issue of damages would still be an open question. And for that reason the case is not moot. In addition to that, on the claims for declaratory and injunctive relief, I think that this case would come within that class of cases which are capable of repetition yet evading review, as set out by previous decisions of this Court, so that it would not be moot for that reason.

QUESTION: Mr. Daniel, in addition to the claim that there was a deprivation of property here without due process of law, there was also a claim on behalf of a party named Holmes that there was a denial of equal protection of the law by the Defendant.

MR. DANIEL: That's correct.

QUESTION: Nobody has talked. What happened to that in the Court of Appeals, and what's your position?

MR. DANIEL: That issue, we believe, has been finally decided by the Court of Appeals for the Sixth Circuit. That issue was not raised by the Petitioners.

QUESTION: So it is out of the case.

MR. DANIEL: That's correct.

QUESTION: That was a refusal to install, I think, wasn't it?

MR. DANIEL: That is correct, Your Honor, and the

Sixth Circuit held that there was a denial of equal protection and I believe the Petitioners have conceded that point.

QUESTION: And there was no appeal from that.

I see. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Graves.

REBUTTAL ORAL ARGUMENT OF FRIERSON M. GRAVES, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GRAVES: I have one sentence.

I agree with Justice Marshall that everyone complains about the amount of the utility bill, so it is a question of whether it is a dispute or not. And we say by our notice to come to the credit department, that we established a hearing procedure because the evidence was that our credit counselors usually have 15 to 20 years of service and are competent people, and so they would be the ones, and you need 10 or 12 or 15 people because we have 235,000 electric customers and we feel that establishing that initial contact -- and the Crafts waited until they had the notice and their utilities had been terminated and then they came and they got help and advice by telling them, "Combine your meters. We will put you on a budget payment." And it wasn't double billing, but split billing because they got the service through each meter.

QUESTION: That doesn't solve the problem which seems to be hanging in air, whether their due process rights,

such as the Sixth Circuit has outlined, are satisfied if they don't get the answer they like?

MR. GRAVES: Your Honor, I don't think that everybody gets the answer they like about utility bills in this because I think a utility could not compromise and give away the utilities just on the basis of settling it, that they would have to attempt to charge what was reasonably said by the meter to the person.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:42 o'clock, a.m., the case in the above-entitled matter was submitted.)