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Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers

Public utilities providing gas, electric, water, and telephone service have commonly exacted cash deposits or guarantees from some non-business consumers as a condition of initiating service. Despite some restrictions on the size of these deposits, in most states utility companies may legally demand substantial cash sums—often an amount equal...
to the customer’s anticipated consumption for two or three months.\(^7\) In practice the companies’ deposit rules generally exempt higher income consumers,\(^8\) and most of the deposits required are paid by low-income users.\(^9\) Since the poor may often have difficulty accumulating the necessary cash,\(^10\) the deposit requirement may deprive people of a basic necessity, not because they could not pay the utility’s bills, but because they could not raise the larger sum necessary for the deposit. Even for those able to furnish a deposit, having their money held indefinitely remains a serious inconvenience—if not a hardship.\(^11\) The legal interest which the utilities must pay on amounts deposited\(^12\)


The actual breakdown of persons depositing sums in excess of $30: $150 (1 person); $100-110 (3); $90-99 (1); $80-89 (3); $70-79 (5); $60-69 (2); $40-49 (6); $30-39 (19). Id. at 4.

8. Although no exhaustive study of this had been conducted, the Urban League checked the more affluent areas of Washington, D.C. at random and discovered that deposits were generally not required. Id. at 5.

Interview with H. Loomis, Revenue Div., Southern New England Telephone Company, New Haven, Oct. 30, 1968, indicated that the credit checks conducted by the telephone company before the imposition of deposits may result in residents of lower-income areas being the only ones who are required to make deposits. These deposits, however, reflect the credit standing of the particular applicants and not any conscious design to demand deposits from all residents of low-income neighborhoods.


10. D. CAPLOVITZ, THE POOR PAY MORE, 109-12 (1967). In one survey, Caplovitz discovered that 73 per cent of surveyed families have $100 or less in liquid assets. Id. 110.

An additional survey of the Washington, D.C. area revealed that 13 of 260 respondents had been without gas following discontinuation of service for non-payment of a bill because of their inability to accumulate cash to pay both the bill and deposit requirement. Complaint in Lewis v. Washington Gas Light Co., supra note 7, at 4-5. Four different surveys were conducted. Interview with Mrs. Sarah Smith, supra note 7.

11. Some commissions require a refund of the deposit after a sufficient period of trouble-free relations with the customer. Certain rules and regulations presume that prompt payment to the utility for a certain time period demonstrates satisfactory credit and requires refunds of deposits. N.J. Dept. of Pub. Util., § 14:407-1a (shall review a customer’s account at least once every two years and if such review indicates that the customer has established satisfactory credit the deposit shall be refunded). Even states where the utility may initially demand a deposit from any customer have a comparable rule. Pennsylvania Pub. Util. Comm’n, § VII2(b) (1946) (deposit returned when customer has paid undisputed bills for 12 consecutive months).

Others are silent on this matter, e.g., Vermont Pub. Util. Comm’n, Gen. Order No. 43, § 6 (1965) (raises the possibility that the utility may retain the deposit until service is terminated).

12. Utilities by common law decision were required to pay interest on the sums deposited by customers, usually at rates between four and six per cent. Union Light,
hardly compensates poor families since the interest rate offered may be far below the rate that would induce voluntary saving. Thus, requiring deposits from certain consumers means that utility service is considerably more costly for them than for those consumers not required to pay deposits.

By imposing these burdens, public utilities may not only discriminate unreasonably and unlawfully among users, but also violate their statutory duty to provide all consumers with adequate service on reasonable terms. At the same time, the deposit requirements raise fourteenth amendment questions of unequal treatment.

I. Duty to Serve

Utility companies argue that unless deposits are required in certain cases, small uncollectible accounts—too costly to pursue through legal processes—will raise the costs of utility operation and, consequently, the burden on consumers.


Commission and utility rules govern the interest which must be credited. E.g., Washington Gas Light Co., General Service Provision § 3 (five per cent); Pennsylvania Pub. Util. Comm'n, § VII2(d) (six per cent). See Re Kalia Tel. Co., 55 P.U.R.3d 525 (1964) (Ohio P.U.C.) (required to pay 3½ per cent rather than no interest). Statutes also govern interest rates. See note 15 infra.

Some cases suggest that interest payments legitimize the demand for a cash deposit: e.g., "[t]he requirement that the company should pay interest upon deposits is but the compliment of the rule that it may require a deposit." Union Light, Heat & Power Co. v. Mulligan, 177 Ky. 662, 670, 197 S.W. 1081, 1085 (1917); Community Natural Gas Co. v. Moss, 55 S.W.2d 224 (Tex. Civ. App. 1932). But consumers have different conceptions of what interest rates are required to forego current consumption.


If a deposit rule is authorized by specific statutory authority, then presumably only constitutional provisions can be utilized to attack the imposition of deposit requirements. Of course by statutory construction, the breadth of the particular statute may be restricted by the broader general statutory duties imposed upon the utility. For example, perhaps the statutory duty not to discriminate requires the reading of credit-worthiness standard into a particular statute authorizing deposits. See N.Y. TRANSP. CORP. LAW § 13 (McKinney 1944).

In states which have statutes regulating a peripheral aspect of deposit requirements, such as interest rates, tariff filings and commission regulations might still be invalidated on statutory grounds. The assessment of interest rates and often criminal sanctions if the corporation fails to pay interest to the consumer may imply that the legislature views deposits as devices which must be circumscribed as much as possible. See ANN. LAWS MASS. ch. 158, § 16 (1930); Mich. Comp. LAws ANN. § 460.651 (1967) (interest), § 460.652 (1967) (repayment); VT. STAT. ANN. tit. 27, § 1211 (1967) (abandoned utility deposits).

14. E.g., CAL. PUB. UTIL. CODE § 453 (West 1956); N.Y. PUB. SERV. LAW § 91(1)-(2) (McKinney 1955); R.I. GEN. LAWS ANN. § 39-2-2 (1956); Wis. STAT. ANN. § 8196.22 (1957).


There may be dangers in employing constitutional safeguards in this area. Constitutional arguments may fail to take account of the real economic problems involved in striking down these practices. Indeed, it may be politically preferable to rely on legislative mandates to achieve this end.

increase the price of service.\textsuperscript{17} Although utilities can terminate service if a bill remains unpaid for more than a relatively short time,\textsuperscript{18} they have contended that the threat of termination alone does not adequately deter or protect against consumer defaults.\textsuperscript{19} Regulatory commissions and courts have, therefore, approved deposit requirements on the ground that the cost of bad accounts would otherwise fall on customers who pay their bills promptly.\textsuperscript{20}

Many, if not most, businesses, however, write bad debts off as a business expense and pass the cost on to their customers. It is true, of course, that utilities must deal with all consumers served by their facilities and cannot screen their customers. But the utility companies have government-guaranteed monopolies, and in the absence of competition, only commissions or courts can monitor their discriminatory policies or hidden charges. Few people, and particularly few poor people, can forego utility service to avoid being overcharged. Finally, the fact that requiring substantial deposits puts utility service out of some people’s reach altogether ought to be balanced against the economic needs of the utility. The utilities’ deposit requirements should, therefore, be carefully measured against the utilities’ duty to serve the public on reasonable terms.


\textsuperscript{18} E.g., Washington Gas Light Co., Gen. Serv. Provision § 9(b) (failure to pay within 20 days after rendition of bill—5 days written notice to customer); Conn. Regs. § 16-11-38(b) (discontinue service after diligent effort to collect—7 days written notice); Vermont Pub. Serv. Comm’n, Gen. Order No. 43, 11, B(1) (following expiration of grace period provided customer given 5 day written notice); Michigan Standards of Gas Service § 33 (revised 1944) (10 days after expiration of discount period—5 days after written notice).

In order to ensure that the cash deposit remains intact, discontinuation of service has been authorized even if the deposit exceeds the consumer’s indebtedness. Pilger v. Abington Elec. Co., 6 P.U.R. (n.s.) 374, 377-78 (1934) (Pa. P.S.C.) (the company acted within its rights in discontinuing service because if the bill were paid out of the deposit, then the consumer would be required to make up the difference and service could be discontinued for failure to do so); Hicks v. Carolina Power & Light Co., 175 S.C. 330, 179 S.E. 822 (1935); Community Natural Gas Co. v. Moss, 55 S.W.2d 224 (Tex. Civ. App. 1932) (inures to the benefit of the company primarily and the company is entitled to require it be kept intact).

\textsuperscript{19} Re Guarantee & Deposit Rules & Disconnect Procedure, 11 P.U.R. (n.s.) 439, 444 (1935) (Wis. P.S.C.) (recognizing right of disconnection as extra-legal device as well as deposit); Short v. Baltimore Gas & Elec. Co., 63 P.U.R.3d 493 (Md. P.S.C.) (allowing an internal rule governing disconnection but also recognizing the utility’s right to demand a deposit).

\textsuperscript{20} Community Natural Gas Co. v. Moss, 55 S.W.2d 224 (Tex. Civ. App. 1932) (if exhaustion of deposit allowed, then consumer who paid his bills would be discriminated
Official scrutiny of these practices, in fact, has not been adequate. Utilities regulated by public service commissions generally must file tariffs outlining their deposit practices and, of course, comply with whatever statutory and commission provisions exist on the subject. In addition, in states which permit utilities to exact deposits only from customers with "unsatisfactory" credit, the commission may review a company's initial assessment of an applicant's credit. Neither the commissions nor the courts which oversee them, however, have proved willing to find the demand for a deposit from a particular applicant arbitrary or unreasonable so long as the utility has acted in apparent good faith and in line with an appropriately filed deposit rule. Courts against; Short v. Baltimore Gas & Elec. Co., 63 P.U.R. 3d 493 (1966) (Md. P.S.C.); Re Guarantee & Deposit Rules & Disconnect Procedures, 11 P.U.R. (n.s.) 439 (1935) (Wis. P.S.C.); Manhattan Reporting Bureau, Inc. v. New York Elec. Co., 1926 B.P.U.R. 1, 3 (N.Y. P.S.C.).

21. In 1964, state commissions exercised jurisdiction over telephone companies in 49 of 50 states, gas companies in 47 of 50 states, and electric companies in 46 of 50 states. C. PHILLIPS, THE ECONOMICS OF REGULATION 91 (1965) [hereinafter cited as PHILLIPS]. The District of Columbia also regulates gas, electric, and telephone companies.


24. See note 49 infra, outlining the burden of proof placed on customers. This function of reviewing the credit rating of the customer has been considered a managerial function with which the commission is reluctant to interfere. See Re Guarantee & Deposit Rules & Disconnect Procedure, 11 P.U.R. (n.s.) 439 (1935) (Wis. P.S.C.).

25. Complaints from consumers may be handled informally and formally. PHILLIPS 137-42; P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 37 (1964) [hereinafter cited as GARFIELD]. Formal complaints are governed by statutory requirements of notice, written decisions, and other procedural safeguards. E.g., CONN. GEN. STAT. ANN. § 16-18 (1958).

26. Judicial review of commission decisions is limited to certain courts by state statutes and the scope of review may be limited as well, but in practice state courts have not been reluctant to intervene in commission decisions. See Joslin & Miller, Public Utility Rate Regulation: a Re-Examination, 43 VA. L. REV. 1027, 1032 (1957); see also GARFIELD 40-43.


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and commissions have seemed no more eager to question the reason-
ability of the deposit rules themselves, or to consider whether they
breach the utility's duty to serve the public.28

Requiring consumer deposits is sensible only if it actually deters
defaults or minimizes losses for the utility company—something which
the companies have not yet convincingly shown.29 If deposits do not
save utilities and their customers money, they are neither necessary nor
reasonable. Even if the utilities can demonstrate that the practice of
exacting deposits does serve its stated purposes, the commissions
should then determine whether the resulting economies justify a reser-
vation on the utilities' duty to serve. In Berner v. Interstate Power
Company, the Iowa Supreme Court declared a utility might adopt
rules that balance "the necessity that people be provided service
against the right of the utility to receive fair compensation for services
rendered . . .,"30 but held unreasonable a rule authorizing disconnec-
tion of service for a past-due account at another location.31

Other courts and commissions have fashioned similar procedural32
and substantive rules 33 which circumscribe a utility company's freedom

the consumer; however, customer required to tender payment of $28.19 in prior indebtness); Reese Chesapeake Tel. Co., 97 P.U.R. (n.s.) 29 (1952) (Ohio P.U.C.).

If the rule itself is unreasonable or discriminatory or employed in bad faith, then the
complainant will be awarded remedies. Barriger v. Louisville Gas & Elec. Co., 195 Ky.
268, 244 S.W. 690 (1922) (discriminatory application); Phelan v. Boone Gas Co., 147 Iowa
626, 2 N.W. 208 (1910) (bad faith on the part of the utility). See Re Plentywood Elec.
Co., 1900 C.P.U.R. 676 (Mont. P.S.C.) (where flat $5.00 deposit did not reflect actual costs).

If no rules are filed, then enforcement of a deposit may be arbitrary and unreasonable.
See note 2 supra.

Of course, commissions may be striking down many arbitrary exactions of utilities in
informal hearings, and cases which reach the formal hearing stage may reflect unrea-
sonable demands by a customer.

Plant Bd. of Monticello, 29 S.W.2d 817 (Ky. 1934); Bartman v. Wisconsin Mid. Power
Co., 214 Wis. 608, 254 N.W. 376 (1934) (where customer tampering with meter, the
utility may refuse to furnish service unless paid for costs of tampering).

Categories for which a utility may cease service according to an appropriately filed
tariff include: (1) refusals of customers to pay for services; (2) attempts to evade payment
or stealing of services; (3) using service for unlawful purposes; (4) interfering with or destroying service facilities; and (6) violating service regulations.


Duty to Serve, 62 COLUM. L. REV. 312, 323 (1962), states that "notwithstanding a
utility's duty to serve the public a variety of circumstances may justify a refusal to
serve particular individuals. The duty to serve is not absolute, and it is only reasonable
that abuse of the right to serve should result in a loss of the right."

29. See note 67 infra.

30. 244 Iowa 298, 301, 57 N.W.2d 55 (1953). Prior to 1963, the Iowa Commerce Com-
mission lacked rate making power over utilities providing services in cities and towns.

See IOWA CODE ANN. § 490A1 (1963). Of necessity, the courts took an active hand in
controlling certain utility practices.

31. 244 Iowa 298, 303.

32. See note 35 infra for examples of procedural protection.

33. See pp. 454-55 infra. Indeed utilities have been forced to extend services to areas
to undercut service for the sake of revenues. For example, despite the commercial desirability of immediately discontinuing service when a customer has missed the due date on a bill, both commissions and legislatures have required such procedural safeguards, such as written notice to the customer, before the utility may shut off his service.\textsuperscript{34} Some courts and commissions have prohibited the termination of service based on debts owed the utility for different services or merchandise,\textsuperscript{35} for service at another location,\textsuperscript{36} or for service to another member of the household.\textsuperscript{37} Utilities may also be required to provide service as long as the customer pays current bills, notwithstanding unpaid past bills.\textsuperscript{38} Judicial treatment of these cases may simply reflect "the legalistic view that regards each contract as separate and distinct,"\textsuperscript{39} but it which offer lower rates of returns than present service areas. Lakewood Township v. Lakewood Water Co., 29 N.J. Super. 422, 102 A.2d 671 (1954); But see Cedar Island Improvement Ass'n v. Clinton Elec. Light & Power Co., 4 P.U.R.3d 65 (1954) (Conn. P.S.C.). Although the utilities cannot be deprived of their property without due process of law, there is a zone of reasonableness in rates of returns. New England Tel. & Tel. Co. of New Hampshire v. State, 104 N.H. 229, 183 A.2d 237 (1962); Wisconsin Tel. Co. v. Public Serv. Comm'n, 232 Wis. 274, 287 N.W. 122 (1939).

34. General written notification must precede disconnection. See note 18 supra for examples of time periods involved.

Some courts have construed procedural rules strictly against the utility. In Brewer v. Brooklyn Union Gas Co., 33 Misc. 2d 1015, 228 N.Y.S.2d 177 (Sup. Ct. 1962), the court required the company to adhere strictly to the statutory requirements governing the discontinuation of service. In Sokol v. Public Util. Comm'n, 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P.2d 265 (1966), the court required that a warrant be issued before telephone service could be summarily disconnected because of alleged illegal activities. See Note, 55 CALIF. L. REV. 566 (1967); Note, 67 COLUM. L. REV. 773 (1967); Note, 20 STAN. L. REV. 156 (1967); Note, 12 VILL. L. REV. 661 (1967).


Current Conn. Regs., § 16-11-108 (1968), bar denial of service for (1) failure to pay service by former occupant of premises; (2) failure to pay for merchandise purchased; (3) failure to pay for different type or class of service; (4) failure to pay a bill as guarantor of another; (5) failure to pay because of an inaccurate meter; (6) failure to pay an estimated bill. The utilities are presumably allowed to discontinue service if an outstanding bill exists for the same type and class of service at any location.


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seems far more likely that the courts took into account the necessity of the utilities' services and the danger that utilities were exploiting the governmental grant of monopoly power in making these demands.

Moreover, public utilities have available other less drastic remedies to protect themselves against defaulting customers. For serious credit risks, the companies could add a small amount to the monthly bills to insure against later defaults. Alternatively, these customers could be billed on a weekly basis, or the utility could require prepayment for part of the service. Finally—and perhaps more fairly—the utilities could spread the cost of bad accounts among all of its customers, as most businesses do. Any of these alternatives will necessarily raise the cost of utility service to those assessed the additional charges. Furthermore, if these charges were restricted to customers without a good credit rating, some of the poorest consumers who are not good credit risks might find themselves subsidizing those who default frequently, such as transients. For the poor these added costs might prove as much of a barrier to obtaining utility service as the present deposit requirements. A consumer might, of course, be permitted to choose between a deposit and an insurance premium.

Of course, the utilities must still demonstrate the need for any of these devices; and it is not yet clear what the magnitude of the added charges would be, or whether utilities could draw defensible distinctions among their customers to justify imposing charges on some but not on others. Intelligent appraisal of these alternatives will depend on the readiness of the courts and commissions to compel utilities to produce the necessary data on the default rates and the amounts of the defaults for different classes of customers.

S.W.2d 413 (1934) (dictum); Luffy v. Manufacturers Light & Heat Co., 5 P.U.R. (n.s) 242 (1934); Berner v. Interstate Power Co., 244 Iowa 298, 57 N.W.2d 55 (1953); Miller v. Roswell Gas & Electric Co., 22 N.M. 594, 166 P. 1177 (1917).


42. In Wisconsin, the public utility commission has issued regulations permitting weekly billing, but it is not mandatory. Wis. Ann. Conv. § 134.08(9)(a).

43. Some utilities—notably telephone companies—already require prepayment of some of the price of service.
II. Discrimination

Even if the deposit requirement is not in itself an unreasonable condition of providing service, the methods by which utilities determine who must pay a deposit may amount to unlawful discrimination in service under state utility laws. Of course, not all discrimination is forbidden, and a utility is free to treat one class of users differently from another if there is adequate justification for doing so. It is usually not enough, however, that one group will tolerate a higher charge or that the utility wants to outbid a competitor for the patronage of another group. For most cases of discrimination, the company must justify its action by some difference in the value of the service to the customer or in the cost of supplying service to him.

While some jurisdictions allow a public utility to demand a deposit from any user, most states—by statute or regulation—prohibit exact-

44. The Wisconsin Public Service Commission, perhaps the only commission to address this issue directly, declared that regulations allowing the utility discretion to require deposits according to credit-standing did not unreasonably discriminate among customers. *Re Guarantee & Deposit Rules & Disconnect Procedures*, 11 P.U.R. (n.s.) 439 (Wis. P.S.C.).

45. Arkansas Nat’l Gas Co. v. Norton Co., 165 Ark. 172, 263 S.W. 775 (1924) (a distinction may be made between different classes of consumers on account of location, amount of consumption or other material condition which distinguish them from each other); Northern Ill. Water Corp. v. Illinois Commerce Comm’n, 53 Ill. 2d 580, 213 N.E.2d 274 (1965) (considering whether there were justifiable reasons for differentiating rates on the basis of the existence of common hallways); *Re Guarantee & Deposit Rules & Disconnect Procedures*, 11 P.U.R. (n.s.) 139 (Wis. P.S.C.).

46. *Arkansas Nat’l Gas Co. v. Norton Co.*, 165 Ark. 172, 263 S.W. 775 (1924) (a distinction may be made between different classes of consumers on account of location, amount of consumption or other material condition which distinguish them from each other); Northern Ill. Water Corp. v. Illinois Commerce Comm’n, 53 Ill. 2d 580, 213 N.E.2d 274 (1965) (considering whether there were justifiable reasons for differentiating rates on the basis of the existence of common hallways); *Re Guarantee & Deposit Rules & Disconnect Procedures*, 11 P.U.R. (n.s.) 139 (Wis. P.S.C.).

47. There is a range of reasonableness within which rates for particular classes of service may lie. The minimum is the incremental cost of service plus some contribution to fixed costs, while the maximum equals the value of service for the particular class of customers (however value of service is defined). *Garfield* 138-40. Yet commissions treat the establishment of rates within the range of reasonableness quite differently. The Wisconsin Public Service Commission demarked value of service as the upper bound to which costs could be apportioned. *Re Milwaukee Gas Light Co.*, 51 P.U.R. (n.s.) 290 (Wis. P.S.C.). The Virginia Commission declared that cost was an element to be considered in rate making but that because drawing distinctions among customers on the basis of costs was difficult and because no evidence as to costs was presented, it would rely on the value of service. *Re Virginia Elec. & Power Co.*, 9 P.U.R.3d 225, 239 (1955). In one Connecticut case, the court admitted that no single rule could be utilized to determine rates but that “rates must not be so low as to be confiscatory or so high as to exceed the value of service to the consumer.” *Noroton Water Co. v. Public Util. Comm’n*, 24 Conn. Supp. 441, 445, 193 A.2d 724, 728 (Super. Ct. 1962). This middle of the road approach seems to indicate the arbitrariness of much rate-making.

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tion of deposits from consumers with "satisfactory credit." Although this requirement makes a certain amount of discrimination unavoidable and, by strong implication, lawful, it also recognizes that payment of a deposit is a hardship and that it should be required only when necessary. In states which require creditworthiness, a customer can in theory always demonstrate his good credit and exempt himself from the deposit requirement, which might suggest that the requirement is impartially administered. But for the poor, ignorant of their rights and unable to afford the assistance necessary to prosecute an appeal from a utility's initial decision, such a guarantee typically remains an empty promise. The utilities, furthermore, have created broad and weighty presumptions, based on certain indications of the user's income and net worth, which lift the burden of proving creditworthiness from some applicants and make it rest much heavier on others. One gas company, for example, exempts homeowners and professionals unless the company's previous experience with the particular customer shows that he is a poor credit risk. Whether reliance on such crudely-defined categories reflects a belief that some groups never default, a fear that they would not tolerate the additional charge, or merely administrative


Although tariff filings or commission regulations authorize deposits from any customer, this does not mean that all utilities will demand deposits from everyone. In Vermont, practices vary from charging deposits to all new customers, to charging only rental customers, to charging according to credit ratings. Letter from Ernest Gibson III, Chairman, Vermont Public Service Board, to Raymond F. Boulander, Oct. 18, 1968.

49. E.g., N.J. Bd. of Pub. Util. Commrs Regs. § 14:407-a; Wis. Admin. Code § 134.06 (1)(a) (1966) (credit not established satisfactorily to utility); Michigan Pub. Serv. Comm’n Order No. 1692 (Rules for Electrical Service Revision of 1944) § 1a(a) (until a customer shall have established a satisfactory credit rating).

Some regulations and utility rules establish categories of customers who have presumptively established satisfactory credit. Pacific Tel. & Tel. Co., California, Rule No. 6 (1967) ([1] paid all bills within 12 consecutive months to this or other phone company; [2] owner of the premises or other local real estate; [3] continuously employed by present employer for 2 or more years or retired and on pension).

The burden is usually upon the applicant to establish his credit, and the tariffs and regulations do not generally prescribe how the applicant is to sustain this burden. E.g., Washington Gas & Light Co., Gen. Serv. Provision, § 3; Potomac Elec. Co., Washington, D.C., § 4.


51. Interview with Mrs. Francis DeAngelis, Service Representative of Southern Connecticut Gas Company, New Haven, Oct. 25, 1968. Connecticut is one of the states which allow the utilities to exact deposits from whomever it desires. The Gas Company has adopted a narrower rule and relies on indicia of credit-ratings. See note 53 infra.
convenience, these criteria hardly isolate with any precision those customers likely to default in payment of their utility bills. Even though wealthier consumers may in fact default less often than others, their number is not free of credit risks. Yet because of the deposit practices of many utilities, bad risks in the higher income groups pay no deposits while perfectly reliable users in lower-income must either deposit cash, undertake the often difficult task of proving their creditworthiness, or do without the utility's service.

Even where the public utility does not employ broad presumptions, but applies the satisfactory-credit standard in each individual case, it may still create unjustified distinctions among its customers. If the utility makes its own credit assessment, the discretion inherent in the very general “creditworthiness” standard allows value judgments and prejudices to play their part in a credit rating. Moreover, the danger of unreasonable discrimination still remains when the utility relies on an outside credit check, such as the customer's general retail credit rating, in applying a deposit requirement. Low-income consumers frequently acquire poor credit ratings by refusing to complete payments on installment purchases of defective or shoddy merchandise. A bad credit rating earned in this way seems an inappropriate test to predict that a customer will default on his utility bill.

The possibility that public utilities may require deposits not for the reasons they state, but to exploit their monopoly position, sharpens doubts that the requirement is reasonable and fair. Though utility managements do not advertise the fact widely, they consider how much

52. The complaint in Lewis v. Washington Gas Light Co., note 7 supra, suggests that the utility may use geographic-area credit ratings. Id. at 5. Questioned on this practice, Kent H. Brown, counsel for the New York Public Service Commission, declared that there has been “evidence of an unduly discriminatory application of the requirement, geographic, ethnic, or other.” Letter from Kent H. Brown, Counsel for the New York Public Service Commission, to Raymond P. Boulanger, Nov. 18, 1968. Of course, many utilities probably do rely on actual credit-ratings. See letter of Ernest Gibson III, note 48 supra, and interview with H. Loomis, note 8 supra.


54. In states which allow utilities to exact deposits from whomever it desires, the applicant for service must comply with the utility's demand for a deposit regardless of his credit-rating. Here, the utility could avoid unreasonable discrimination by demanding deposits on the same basis from everyone, though this practice might cast further doubt on the reasonability of the tariff. Usually utility companies in these states apply the same presumptive standards used elsewhere, which raises the same questions of arbitrary discrimination.

55. For example, a person who has never borrowed from a reputable institutional lender, or maintained a charge account at a large store, may have difficulty establishing that his credit is good.

56. Utilities are granted by franchise exclusive geographic areas in which they render service. The competition they face may be only inter-industry competition. GARFIELD 12.
consumers will pay as well as costs in pricing service. To the extent that regulatory commissions allow, utility companies attempt to charge each identifiable group of customers according to the elasticity of its demand for utility services. The low-income consumers who generally have to give deposits are also low-volume users with highly inelastic demand curves. A utility can exact deposits from them with little fear that they will turn to alternative services or move to a neighborhood where utility service does not have this added cost. Thus, low-income users may pay more than their fair share of the cost of service while other users such as affluent, high-volume residential customers pay less. Required deposits constitute part of this overcharge, enabling

57. Bonbright identifies three concepts of value of service: (1) most profitable rate of charge; (2) rate discrimination; and (3) market clearing price. J. Bonbright, Principles of Public Utility Rates 88-90 (1961) [hereinafter cited as Bonbright]. Rate discrimination may serve justifiable purposes in an industry with decreasing average costs. It may be socially desirable, for it can allow a company with excess capacity to expand sales and utilize the facilities more fully, thereby spreading fixed costs and reducing prices for all customers. Phillips 309. For discussion of pricing electric and gas utilities according to elasticities, see C. Wilcox, Public Policies Toward Business, 343-48 (1960) [hereinafter cited as Wilcox].

58. At least in the literature of economics, the “value-of-service” principle is taken most frequently to mean that principle of rate design under which the difference in the prices charged by a given enterprise for its various products are based, not just on differences in the costs of production but also on differences in the relative “price elasticities of demand.” Products for which the demand will not be seriously curtailed by relatively high prices will be made to bear these prices. Products for which the demand will vanish or fade if the prices are set far above out-of-pocket or marginal costs will be priced near to these costs.

59. Low-income consumers are often tenants, and so they may have especially inelastic demand curves because of their reliance on the fixed investment of the landlord in particular utility receiving equipment. Cf. Bonbright 333 (discussion of changing elasticities of demand curves in the short and long run).

60. Presumably higher income domestic consumers would not as easily be locked in by their investment in utility receiving equipment, since they could either change services or move. Cf. G. Stigler, The Theory of Price 45 (rev. ed. 1952), for countervailing considerations.

61. Wilcox concludes on this subject:

The commissions, moreover, have tended to favor discrimination where it has had the effect of expanding consumption and bringing about a fuller utilization of productive capacity. They have thus approved the creation of low-rate classes, the reduction of rates in successive quantity blocks, and the adoption of objective rate plan. As a result, the wide differentials established between these classes have been allowed to stand. In the case of electricity, particularly, the low rates go to big business, where demand is elastic and where protection by government is not required. The high rates go to small business and to householders, where demand is inelastic and where such protection is really required. The law thus fails to give to those who need it most the aid it was intended to provide.

utilities to obtain cash for current needs at rates of interest that may be substantially below market rates. Therefore, if utilities are permitted to exact deposits at all, the deposit requirement should be limited closely to cases where the possibility of default on the utility bill can be demonstrated to be real. In practice, this standard probably means that deposits should be required only when the customer has previously defaulted unjustifiably on a bill issued by the utility company itself or by another utility offering similar service in another locality.

III. Conclusion

Facts which would show whether utility deposits fulfill their stated purposes or some other objective, or whether the criteria for requiring deposits unreasonably and unfairly discriminate against low-income users, are peculiarly within the control of the public utilities themselves. Complainants who must produce at least part of this evidence the allowance on the condition that the utilities file descriptions of their promotional practices in the future.

63. Circuit Judge J. Skelly Wright observed in a speech delivered to the Briefing Conference sponsored by the Federal Bar Association in Washington, D.C., on December 4, 1968, that "[a]nother area in which the poor may be subsidizing the rich is the requirement of many power companies that some consumers put up deposits before they can get service." Whether utilities can take advantage of consumer deposits seems to depend on their ability to incorporate these deposits into the rate base through some accounting manipulation. Ordinarily, consumer deposits are not included in the rate base. GARFIELD 71-72. Nevertheless, it does seem possible for utilities to include them. Because some provisions are provided for working capital in the rate base, the utilities may be able to forego some borrowing in the capital market or divert retained earnings to other projects and rely on consumer deposits to supply it with working capital. For a brief discussion of the inclusion of working capital into the rate base, see GARFIELD 71, and see Re Southern California Gas Co., 55 P.U.R.3d 300, 316-17 (1968) (Cal. P.S.C.), for an example of the computation of working capital credited to the rate base. The utility could then capture the difference in interest rates between those available in the market and those paid to consumers.

Most commissions require utilities to pay four to six per cent on cash deposit, see note 12 supra, while current interest rates in the long-term capital market have been considerably higher. (Yields on triple-A utility bonds peaked at about 6.7 per cent in the spring of 1968, declined after the surtax passed by Congress, but have been edging up again. On October 7, 1968, Chesapeake & Potomac Telephone Company of Maryland sold $75 million of triple-A debentures priced to yield 6.60 per cent. Allan, Money Rates Pushing Up Again, N.Y. Times, Oct. 13, 1968, § 3, at 1.) Of course, a comparison of nominal interest rates is unrewarding. Certainly, the cost of supervising consumer deposits may raise nominal rates of 4-6 per cent to much higher levels. On the other hand, financing by debt capital can be extremely costly as the percentage of outstanding debt to equity capital increases. Though customer deposits may be insignificant when viewed in relation to annual revenues, they may assume large absolute values. In 1967, the Southern New England Telephone Company had $6,216,000 credited to customer accounts, although it is unclear how much of this was for line extensions rather than credit deposits. Moody's Public Utility Manual 1410 (Aug. 1968).

64. As to the electric and gas utilities at the present time, the deficiencies and
in order to challenge a deposit rule successfully face an all but insurmountable obstacle. Nonetheless, commissions and courts have uniformly declared that complainant has the burden of proving that a commission regulation previously approved or a utility rule previously filed with the commission violates a statutory provision.65 This hard-and-fast placement of the burden of proof rests on the justification that any other rule would expose the utilities to continual harassment by irate customers.66 Plainly enough, however, courts can fashion more flexible rules which would neither inflict endless litigation upon the utilities nor foreclose the possibility of effective consumer-initiated challenges to deposit requirements. In cases where the regulatory commission has approved a deposit requirement without close inquiry into its reasonableness and fairness,7 or where there has been no recent re-examination of the utility's rules and practices, the court or commission should place the initial burden of producing evidence on the utility.68 Perhaps the utility should also bear the burden of demonstrating paucity of published cost analyses make it impossible to determine the effect of "value-of-service" principles on typical rate structures.

Although uniform systems of accounts control the accounting practices of utilities, these would not provide sufficient cost data to undertake a study of deposit practices. See PHILLIPS, 149-50 for a discussion of accounting systems.


67. Perhaps data has been presented to commissions informally or in hearings which have not been challenged and unreported. But in the formal adversary hearings which have been reported, the inquiry has seemed to extend only to an analysis that uncollected bills are outstanding. See Manhattan Reporting Bureau, Inc. v. New York Tel. Co., 1926B P.U.R. 1 (1926) (N.Y. P.S.C.), which stated only that the telephone company had $793,000 in uncollected telephone bills. No further analysis of these uncollectibles was attempted. See also Re Southern Counties Gas Co. of Cal., 7 P.U.R.3d 267 (1937) (Cal. P.U.C.).


68. While the complainant attacking the commission regulation or utility tariff generally has the burden of proving that such regulation or tariff is unlawful, see notes 65-66 supra, creative interpretation of state statutes may provide opportunities for the
the lawfulness of the requirement if its deposit rules became effective without any commission hearing at all—as with deposit rules which arose under the common law and were later accepted without investigation by the commissions.69

Lying behind these questions, and lending them special significance, are serious constitutional problems of due process and equal protection. Though some courts have failed to see "state action" in the filing and approval of a utility tariff,70 state regulation and supervision of public utilities constitute sufficient intervention to cloak a deposit requirement with governmental authority.71 The Supreme Court has held that economic status cannot be the basis for distributing certain important state-created benefits, despite compelling practical reasons for conditioning the right to such benefits on an ability to pay.72 Thus, complainant to shift the burden back to the utility. Conn. Gen. Stat. § 16-23 (1949) provides:

All regulations, practices and service prescribed by the commission shall be in force and prima facie reasonable, unless suspended or found otherwise in an action brought for that purpose or until changed or modified by the commission.

While the statute and cases do not clearly indicate who must sustain the burden of proof when the commission initiates an inquiry, in practice the commission must shift the burden to the utility or treat the burden of proof requirement as non-existent (or at the least unimportant).

The Illinois Commerce Commission has been authorized to place the burden on the utility to justify its practices where the commission initiates an inquiry. The court relied on an apparent misreading of a statute relating to the valuation of property and may merely have intended to allow the commission to place the burden on the utility where it had not sustained the burden previously. See City of Chicago v. Commerce Comm'n, 13 Ill. 2d 607, 617, 170 N.E.2d 776 (1955), where Ill. Rev. Stat., ch. 111 2/3, § 30 (1950), is cited as the basis for the shifting of the burden of proof.

It seems but a slight extension of the above argument for the commission, in a proper case, to require the utility to sustain the burden of proof despite the fact that the proceedings against the utility have been filed by a group of private citizens. But see Metropolitan Dist. Comm'n v. Department of Pub. Util., 352 Mass. 18, 224 N.E.2d 502 (1967).

69. See note 67 supra.
72. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Supreme Court held that "a state violates the equal protection clause of the fourteenth amendment whenever it makes the election of the voter or payment of any fee an electoral standard." Id. at 666.

One may argue that the payment of a poll tax reflects or even fosters interest in the political process. But these or similar arguments are in this case irrelevant to an analysis of the equal protection clause. Because suffrage is conceived as a fundamental right, the state cannot "dilute a citizen's vote on account of his economic status." Id. at 668.

The Supreme Court has not limited its protection of rights to those drawn from the Constitution. The Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956) (free criminal trial transcript or equivalent), and Douglas v. California, 372 U.S. 353 (1963) (provision of free counsel on first criminal appellate level), indicated that if the Constitution does not require a certain right such as appellate review of criminal proceedings, but the state chooses to provide that right, it cannot erect barriers which "discriminate on ac-
Public Utilities and the Poor

when a state creates a right in its citizens to receive utility services at reasonable charges and on reasonable, non-discriminatory terms, there is considerable doubt that it can permit utility companies to demand an unreasonable tribute from one class of consumers simply because they are poor. The right to public utility services may not rank with the franchise, or with procedural due process in criminal cases, on a conventional scale of liberties, but to the poor nothing may be more immediately important than fair treatment by those who supply the needs of their daily existence.\(^3\)

count of poverty . . . \(^3\)51 U.S. at 17. If a right such as appellate review in criminal cases is to exist, it must be provided to all regardless of economic status. It must be admitted that the Court in Griffin and Douglas may have been groping for a due process rationale. See the dissent of Justice Harlan in Douglas, 372 U.S. at 360.

See also Comment, Equal Protection and the Indigent Defendant: Griffin and Its Progeny, 16 STAN. L. REV. 394 (1964). The commentator declared that "the court has in fact found state action to violate the equal protection clause where upon balance the good or benefit reasonably to be accomplished for society fails to outweigh the harm or deprivation imposed on those unfavorably classified." Id. 399. It is indeed questionable whether the costs imposed upon the utility exceed the human costs involved in the deprivation of service.

\(^3\)3. The Kerner Report states that "it is clear that many residents of disadvantaged Negro neighborhoods believe they suffer constant abuses by local merchants." THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274 (Bantam ed. 1968). While these grievances may have been over-shadowed by criticisms of police practices, employment opportunities, and housing, abuse of commercial practices did rank fourth in the scale of grievances in two cities. Id. at 196 n.222.