

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEAST DIVISION

LINDA GAMBLE, RUBY COPELAND and)	
ROGER COPELAND on behalf of themselves)	Civil Action No.
and all others similarly situated,)	
)	
Plaintiffs,)	
)	
)	
v.)	
)	
CITY OF COOKEVILLE, TENNESSEE,)	
)	JURY TRIAL
Defendant)	DEMANDED

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION FOR TEMPORARY RESTRAINING ORDER**

This is a class action pursuant to 42 U.S.C. § 1983 in which injunctive and declaratory relief is sought so as to vindicate, *inter alia*, the due process rights of the customers of the Defendant, City of Cookeville, Tennessee’s Electric, Water, and Gas Departments. The Court has jurisdiction “to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.” 28 U.S.C. § 1343(4).

The facts and equities herein establish all of the pre-requisites necessary for this Court to issue emergency relief in favor of the plaintiffs and all others similarly situated, to wit: (1) Plaintiffs are likely to prevail on the merits; (2) Plaintiffs are

likely to suffer irreparable injury unless relief *pendente lite* is granted; (3) Defendant is not likely to suffer substantial harm if such relief is granted; and (4) the public interest considerations favor Plaintiffs. *See, e.g.*, Connection Distribution Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1496 (1999) (setting forth the pertinent factors for determining whether a preliminary injunction should be granted).

A. Irreparable Harm

The Plaintiffs as a class seek to require the City of Cookeville to follow the letter and spirit of Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) by providing its utility customers with adequate notice of the procedures for disputing bills and termination of utility service. As noted by the Supreme Court in Craft,

The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.

Id. at 15-16.

As paragraph 6 of the Verified Complaint and the attached Exhibits A and C illustrate, the orange hang tag does not comport with the constitutional requirement set forth in Craft. The delinquent customer is not apprised of any dispute

mechanism but is only encouraged to pay or lose utility service. It is no surprise in light of this inadequate notice of an opportunity to be heard on a billing dispute that the City of Cookeville has never held a hearing on a utility bill dispute. (Deposition of Donna Dennis from Hargis vs. AAA Collections, Inc. and City of Cookeville, Tennessee, United States District Court for the Middle District of Tennessee, Case number 2-00-0074, p. 48). Furthermore, the City of Cookeville does not have written policy, ordinance, or “anything” that sets forth utility billing disputes. (Deposition of Donna Dennis, p. 49-50). Therefore customers who wish to dispute utility bills have a limited time without any written procedures to determine a course of action before suffering the irreparable harm of the loss of electricity and water for their family’s households as described in the Verified Complaint and as actually suffered by Linda Gamble and the Copeland family when utilities were terminated at their homes.

“Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.” Craft, 436 U.S. at 18. It is readily apparent from the Supreme Court’s analysis in a case strongly on point, that the termination of utility services can cause harm for which monetary damages alone can not compensate.

B. Likelihood of Success on the Merits

Reliance on Craft as well as other caselaw dealing with the constitutionality of notice and hearing for the termination of utility service suggests that the Plaintiffs will easily prevail on the merits. *See e.g., Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974) and *Smith v. Tri-County Elec. Membership Corp.*, 689 S.W.2d 181 (Tenn.App. 1985). *See also Greene vs. Lindsey*, 456 U.S. 444 (1982) (“Notice by mail [rather than service by posting notice on a door] would go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense.”).

There is the strongest probability the Court will find three days an insufficient time period before terminating a person’s access to a basic necessity such as utility service. To comply with due process a municipal utility must provide notice sufficiently in advance to permit the customer adequate time to prepare for and be present at the hearing. Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973). Three business days¹ does not afford individuals time to research records, obtain legal

¹ The orange hang tag does not notify the recipient that they are given business days rather than calendar days as the Defendant believes it will encourage swifter resolution (read “payment”) if the customer is unaware of the extra time allotted. (Deposition of Donna Dennis, p.22-23)

counsel, arrange for time off from work to address the issues, nor actually prepare for even the most rudimentary of hearings. Three days only enhances the pressure a utility customer bears regarding a bill that may very well be properly disputed.

That the City of Cookeville allows insufficient time for an opportunity to be heard on a utility bill need only be compared to the Tennessee state regulations (which are not applicable to municipality-owned utilities). The Rules of the Tennessee Public Service Commission, Regulations for Electric Companies, § 1220-4-4-.19, requires 7 days notice before termination. Although these rules do not directly apply to municipality owned utilities, the length of time before terminating electric service is more than double what the City of Cookeville allows.

The Defendant currently has in place a practice that sacrifices accuracy and fairness in collecting utilities bills for the coercive power inherent in their monopolistic position in the marketplace over a basic need, i.e. water and electricity. The Defendant recognizes that terminating services forces its customers with a purported delinquent bill to make payments if they want to live in the City of Cookeville. Failure to timely pay a utility bill could result in a delinquent customer having to move somewhere else. (Deposition of Donna Dennis, p. 47.).

The Defendant also views the orange hang tags not as a constitutionally required notice of important due process rights to be given before termination of

utilities but rather as a courtesy. (Deposition of Donna Dennis, p. 29).

Furthermore, it is clear that without written policy nor a written contract, the charging of \$10.00 is an unauthorized, arbitrary charge which the Defendant unilaterally imposes upon a customer for bringing the notice to the customer's door. Query as to why the Defendant doesn't charge \$5.00, \$20.00, or even \$25.00. Neither Ms. Gamble nor the Copelands signed any agreement binding them to pay a \$10.00 notice delivery charge. Such an arbitrary charging of a sum violates the Tennessee Consumer Protection Act as it is misleading as to the actual terms of the business relationship.

In light of the total lack of due process consideration by the City of Cookeville, the overzealous focus of Defendant on collection without regard to fundamental fairness to its customers, and the Defendant's obvious lack of familiarity with the requirements of Craft, the likelihood of success on the merits for the Plaintiffs is high to a point of near certainty.

C. No Substantial Harm to Defendant

No substantial harm would result to the Defendant should it be temporarily restrained from terminating utilities without providing adequate notice and an opportunity to be heard as set forth in the motion itself. While customers would not be summarily shut off from utilities after only three days pending a hearing as they are now; the Defendant only suffers an insignificant possibility of not being paid for

a few extra days utilities with in comparison with the denial of due process and wrongful termination of utilities is a minor inconvenience for the Defendant.

D. Public Concern

The greater concern of the public is the danger of improper denial of life's basic necessities therefore the City should be immediately restrained from its unconstitutional collection practice by way of leverage over its consumers. The abuse of power could create safety concerns even if only one family in Cookeville is denied utilities this coming week without proper notice or adequate time to be heard as is constitutionally required.

WHEREFORE it is respectfully requested that the Court grant Plaintiffs' motion for a Temporary Restraining Order as set forth in their motion.

Respectfully submitted,

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