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Drexelbrook Associates v. Pennsylvania Pub. Util. Comm'n: Liability of Garden Apartment Landlord as a Public Utility

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DREXELBROOK ASSOCIATES v. PENNSYLVANIA PUB. UTIL. COMM'N: LIABILITY OF GARDEN APARTMENT LANDLORD AS A PUBLIC UTILITY

Recently, the Supreme Court of Pennsylvania decided, in *Drexelbrook Associates v. Pennsylvania Pub. Util. Comm'n*,[1] that a landlord of a large apartment complex who distributes utility services to his tenants for a profit is not a public utility. Since the service involved is not distributed "to or for the public" within the meaning of the Pennsylvania Public Utility Law,[2] the landlord's service is not subject to commission regulation.[3] The purpose of this note is to evaluate the *Drexelbrook* decision, examine the criteria for deciding what constitutes service to the public and suggest guidelines for future determination of cases in this area.

Drexelbrook Associates owns and operates a garden type apartment village known as Drexelbrook in Drexel Hill, Delaware County, Pennsylvania. This apartment village consists of some ninety buildings, containing 1,223 residential units, nine retail stores, and a club containing a swimming pool, tennis courts, a skating rink and a restaurant.[4] An agreement was negotiated with Philadelphia Electric Company and Philadelphia Suburban Water Company whereby these companies were to sell their distribution facilities within the complex to Drexelbrook, who was then to distribute the gas, electricity and water to its tenants. Upon completion of the transfer, water was to be supplied directly to Drexelbrook at four metering points, with gas and electricity each delivered at one metering point. Drexelbrook would then distribute the commodities to its individual tenants, remetering and charging the retail rate based upon individual consumption. Drexelbrook assumed that it would qualify for the wholesale tariff rates for these commodities and by retailing the service to its individual tenants would thereby make a profit. The public utilities commission denied the utilities' application for a certificate of public convenience in order to effect the sale.[5] The commission ruled that Drexelbrook, by receiving the property and using it to distribute utility services, would become a public utility. Without a certificate of public convenience to operate as such, it was held to be an ineligible transferee. Drexelbrook intervened and appealed to the superior court which divided evenly, thereby affirming the commission's ruling.[6] The case was

1. 418 Pa. 430, 212 A.2d 237 (1965).
2. PA. STAT. ANN. tit. 66, § 1102(17)(a) & (b) (1959).
3. PA. STAT. ANN. tit. 66, § 1121 (1959).
4. 418 Pa. at 432, 212 A.2d at 238.
5. 41 Pa. P.U.C. 505 (1964). The application was sought under section 202(e) of the Public Utility Law. PA. STAT. ANN. tit. 66, § 1122(e) (1959).
6. 206 Pa. Super. 121, 212 A.2d 229 (1965).

then certified to the supreme court which reversed, holding that the ultimate consumers involved "consist only of a special class of persons - those to be selected as tenants - and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature."[7]

The Public Utility Law clearly delineates the types of industries to be regulated with the general limitation that the service be "to or for the public for compensation."[8] Even though a concern is within one of the enumerated industries, it will be subject to regulation only if it is serving the public. Various criteria have been formulated to determine whether an industry is serving the public. Generally, a concern which holds itself out as willing to serve all the people indiscriminately to the extent of its capacity or within its area of operation,[9] the public generally, or any defined portion of it, [10] or the indefinite public[11] is deemed to be a public utility. Ordinarily the same result will be achieved irrespective of which phrase is applied.

In *Aronimink Trans. Co. v. Public Serv. Comm'n*[12] a landlord supplied bus service to the tenants of his two apartment buildings to and from an elevated railway terminal. The public utility bus line claimed that the landlord was operating as a competing common carrier without having secured a certificate of public convenience. The court decided that the service was private in nature and not under the jurisdiction of the commission.

In *Borough of Ambridge v. Public Serv. Comm'n*,[13] a manufacturer supplied another manufacturer with water from his own surplus. The vendee-manufacturer had formerly been a substantial customer of the local utility. The utility filed a complaint with the public service commission against the vendor-manufacturer alleging that it was a public utility operating without a certificate. The

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7. 418 Pa. at 436, 212 A.2d at 240.

8. PA. STAT. ANN. tit. 66, § 1102(17) (a) & (b) (1959). A public utility is defined as:

> . . . persons or corporations owning or operating . . . facilities for: (a) Producing, generating, transmitting, distributing . . . natural or artificial gas, electricity, or steam . . . to or for the public for compensation. (b) Diverting, developing, pumping, impounding distributing or furnishing water to or for the public for compensation.

9. Van Dyke v. Geary, 244 U.S. 39 (1917); Motor Freight Inc. v. Public Util. Comm'n, 120 Ohio St. 1, 165 N.E. 355 (1929); Harder v. Public Serv. Comm'n, 90 Pa. Super. 373 (1927); Garkane Power Co. v. Public Serv. Comm'n, 98 Utah 446, 100 Pac. 571 (1940).

10. Camp Rincon Resort Co. v. Eshelman, 172 Cal. 561, 158 Pac. 186 (1916); Masgai v. Public Serv. Comm'n, 124 Pa. Super. 370, 188 Atl. 599 (1936); *In re* Colorado Interstate Gas Co., P.U.R. 1933E, 349.

11. Thayer v. California Dev. Bd., 164 Cal. 117, 128 Pac. 21 (1912); Overlook Dev. Co. v. Public Serv. Comm'n, 306 Pa. 43, 158 Atl. 869 (1932).

12. 111 Pa. Super. 414, 170 Atl. 375 (1934).

13. 108 Pa. Super. 298, 165 Atl. 47 (1933).

superior court held that the service was private in nature.

The dissent in *Drexelbrook* attempted to distinguish these two cases:

> The context of both Ambridge and Aronimink is the problem of whether there is *competition* between utility suppliers in dealing with the public which may be damaging to the public interest. In that context it was decided that the supply of service to a limited group of persons was not service to the 'public.'[14]

The dissent argued that the context in which these cases were decided makes their holdings inapplicable to the *Drexelbrook* situation. Such a distinction does not appear to be valid. The courts in *Ambridge* and *Aronimink* applied the ordinary criteria and decided that the concerns in question were not public utilities in any context. This is not to say, however, that these cases are not distinguishable from *Drexelbrook* on other grounds.

It is well known that a public utility's field of operations is limited by territory or capacity. In *Drexelbrook*, the corporate activities were limited to the physical area of the Drexelbrook apartment complex. Within that sizeable area it proposed to supply all the residents indiscriminately. The field of operations encompassed by the landlord's bus service in *Aronimink* consisted of the distance between the apartment and the terminal or approximately one mile. The landlord's bus undertook to carry only those persons possessing the identity card issued to the tenants of the apartments. It never held itself out as willing to carry all members of the public indiscriminately who applied for service at any of the three stops which constituted its field of operations.[15] Thus under the definition of common carrier as enunciated by the court in *Harder v. Public Serv. Comm'n*,[16] that a common carrier is one who "undertakes to carry for hire all persons indifferently who apply to him,"[17] the landlord could not be considered a common carrier subject to the jurisdiction of the commission. In *Ambridge* it was even more obvious that the manufacturer did not possess the indicia of a public utility, since he never held himself out as willing to supply anyone other than the specific vendee in question. This hardly qualifies as an offer to serve the public indefinitely or indiscriminately.

In *Overlook Dev. Co. v. Public Serv. Comm'n*[18] a developer had constructed a pipeline which connected with the pipes of the utility water company. The developer entered into a contract with the local utility, whereby the utility would supply water to him and other individuals he allowed to connect onto his pipeline. The water company agreed to the condition that the developer was to

14. 418 Pa. at 445, 212 A.2d at 244.
15. 111 Pa. Super. at 417, 170 Atl. at 376.
16. 90 Pa. Super. 373 (1927).
17. *Id.* at 375.
18. 306 Pa. 43, 158 Atl. 869 (1932) (per curiam).

have exclusive control over the granting of connection permits. The water company metered and charged each individual directly on the basis of consumption. One individual refused to accept the developer's terms and was denied connection rights. The public service commission found that the pipe had been dedicated to public use and ordered the connection. The superior court declared the order confiscatory and unreasonable and reversed the commission's order.[19] The supreme court held that the main was not devoted to public use since the developer did not hold himself out as willing to serve the indefinite public. He had reserved the right in the contract with the water company to decide who would connect to the main and upon what terms. The distinction between public and private use seems somewhat less clear in this case since the developer was holding himself out as willing to serve anyone with whom he can come to terms, though not necessarily indiscriminately. It does not appear, however, that there was any intention that everyone in the area who desired to connect to the pipe would be allowed to do so and hence no dedication to public use was intended.

It should be noted here that in *Overlook*, as well as in *Ambridge* and *Aronimink*, the defendants did not possess a monopoly of the service. In *Ambridge* the vendee-manufacturer was originally a customer of the public utility. In *Aronimink* the utility provided the same service, claiming that the landlord was competing. The *Overlook* court infers that residents of the area might well have demanded that the utility lay its own pipes and provide connections.[20] The Drexelbrook tenants had no such option. They are a captive public. Drexelbrook's contract with the utility created a monopoly. The abuses that might reasonably follow by allowing large areas of monopoly in utility service were not inherent in *Ambridge*, *Aronimink* or *Overlook*. Moreover, there were no pressing policy considerations warranting a broadening of the rule. It would appear, therefore, that the *Drexelbrook* court actually had no clear mandate to follow.

To declare a concern a public utility which is inherently not a public utility would violate the due process clause of the fourteenth amendment. Private property which is not devoted to public use may not be made subject to public regulation by legislative fiat.[21] Whether a particular concern or a particular type of service is public is a judicial question.[22] Being a judicial question, the interpretation of the term "public" by other courts should offer certain

19. 101 Pa. Super. 217 (1930).

20. 306 Pa. at 50-51, 158 Atl. at 872.

21. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

22. See, *e.g.*, Black Rock Placer Mining Dist. v. Summit Water & Irrigation Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943); Natatorium Co. v. Erb, 34 Idaho 209, 200 Pac. 348 (1921).

guidelines to be considered when interpreting the term as found in the Pennsylvania statute.[23]

An interesting Missouri case[24] involved a landlord distributor who supplied electricity to the tenants of his several buildings and also solicited customers in the area of his transmission lines. It was decided that he was a public utility to the extent that he was servicing customers outside his own buildings. The service to his own buildings, however, was private in nature and could not be regulated by the public service commission. The court does not reveal exactly how it concluded that the service to the landlord's buildings was private in nature, but the conclusion does lend support to the decision in *Drexelbrook*.

In further support of *Drexelbrook* is a New Jersey case, *Junction Water Co. v. Riddle*.[25] The court concluded that an individual who supplied water from his own well through private pipes to his tenants was not a public utility. The court declared the true criterion to determine whether the concern is a public utility "is whether or not the public may enjoy it of right or by permission only."[26] This rule is occasionally applied by courts in other jurisdictions.[27]

The New Jersey rule has been justly criticized in Arizona[28] and Wyoming.[29] In *Rural Electric Co. v. State Bd. of Equalization*[30] the Wyoming court succinctly pointed out the infeasibility of such a criterion:

> To state that property has been devoted to public use is to state also that the public generally, in so far as it is feasible, has the right to enjoy service therefrom. *It may be as difficult to determine the one fact as the other.* In such case we cannot determine the right to demand such service by the fact that the plant is a public utility, and the fact that it is a public utility by the fact that the right to demand the service exists. That would be simply reasoning in a circle.[31]

Such a criterion merely avoids the issue. Whether the concern is a public utility and whether the public has a right to service are conclusions generally drawn from the same facts. The concern's ac-

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23. PA. STAT. ANN. tit. 66, § 1102(17) (1959).

24. State *ex rel* Cirese v. Public Serv. Comm'n, 178 S.W.2d 788 (Mo. App. 1944).

25. 108 N.J. Eq. 523, 155 Atl. 887 (1931).

26. *Id.* at 525, 155 Atl. at 889.

27. See Clarksburg Light & Heat Co. v. Public Serv. Comm'n, 84 W.Va. 638, 100 S.E. 551 (1919); see also Twelfth St. Market Co. v. P. & R. Terminal R.R., 142 Pa. 580, 21 Atl. 989 (1891). Pennsylvania appears to have since abandoned reliance on this criterion.

28. Natural Gas Serv. Co. v. Serv-Yu Co-op., Inc., 70 Ariz. 235, 219 P.2d 324 (1950).

29. Rural Electric Co. v. State Bd. of Equalization, 57 Wyo. 451, 120 P.2d 741 (1942).

30. 57 Wyo. 451, 120 P.2d 741 (1942).

31. *Id.* at 460, 120 P.2d at 747-48. (Emphasis added.)

tivities determine whether it is a public utility. In so far as the New Jersey criterion ignores the actual activities of the utility which create the right of the public to demand service it is unworkable. Moreover, cases based upon such reasoning would seem to be of little moment in determining what factors make a concern a public utility.

The Ohio Supreme Court concluded in *Jonas v. Swetland Co.*[32] that a realty company which distributed electricity to its tenants and employees was not a public utility. In a later case,[33] however, a natural gas company who supplied natural gas to a few selected domestic and industrial consumers was declared to be a public utility. The court dismissed *Jonas* by the cursory statement that it "presented no facts which gave a semblance of proof that the Swetland Company was engaged in the business of selling electricity and therefore a public utility."[34] Although the most cursory reading of *Jonas* would disclose that Swetland Company was indeed in the business of selling electricity, the case has not been expressly overruled and represents the law as to landlord distributors in Ohio.

In the Michigan case of *Ten Broek v. Miller*,[35] a resort company's service of light and water to its cottagers was declared to be service to the public. The court went on to declare Ten Broek a semi-public utility without giving any standards for its pronouncement or explaining what constitutes a semi-public utility.

A California case involving a similar situation which produced a clearer decision was *Camp Rincon Resort Co. v. Eshelman.*[36] The maintenance of a telephone line by two resort companies was declared to be a public service despite the resort companies' assertions that the service was private in nature. The telephones were for the sole use of sojourners in their camps and for use of which they exacted a charge. The court reasoned:

> The camps of the petitioners were open to the accommodation of the public. The telephone lines were devoted to the use of the persons occupying these camps. . . . A service of

32. 119 Ohio St. 12, 162 N.E. 45 (1928). See also Southern Ohio Power Co. v. Public Util. Comm'n, 110 Ohio St. 246, 143 N.E. 700 (1924).

State *ex rel* Bricker v. Industrial Gas Co., 58 Ohio App. 101, 16 N.E.2d 218 (1937).

34. *Id.* at 106, 16 N.E.2d at 221.

35. 240 Mich. 667, 216 N.W. 385 (1927).

36. 172 Cal. 561, 158 Pac. 186 (1916). *But see* Story v. Richardson, 186 Cal. 162, 198 Pac. 1057 (1921) wherein the landlord of a twelve story office building serving his tenants with electricity from his own generating equipment was held not to be a public utility. The court relied upon Twelfth St. Market Co. v. P. & R. Terminal R.R., 142 Pa. 580, 21 Atl. 989 (1891), and Thayer v. California Dev. Bd., 164 Cal. 117, 128 Pac. 21 (1912), and ignored *Rincon*. It should be noted, however, that *Story* arose on the question of whether defendant Story was liable for a particular tax assessed upon certain public corporations, and *Rincon* arose from the disconnecting of complainant's service. It is obvious that the action in *Rincon* touches more closely the essence of utility regulation.

> this kind, offered to 'the public generally, or to any defined portion of it,' is a public service. . . . The petitioners did not offer the use of their telephone to privileged and selected individuals in their camps. The service was offered to all, within the class of camp occupants, who desired to use it.[37]

The Supreme Court of the United States has also pronounced its judgment in this area of the law. In *Van Dyke v. Geary*[38] the defendant owned a water system by which she supplied water only to those persons who purchased lots from her. These lots were plotted on the defendant's land which was a part of a town inhabited by several hundred consumers. The Corporation Commission of Arizona sought to reduce defendant's rates. The defendant claimed that the commission had no jurisdiction since the service was private in nature and not offered to the public generally. The Court said:

> [T]he offer thus is to supply all the 'inhabitants' within the given area. . . . The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility.[39]

Several hundred consumers were serviced by the defendant who maintained the only source of supply for the development. The court declared that "the character and extent of the use make it public; and since the service is a public one the rates are subject to regulation."[40]

When applying the words upon which *Drexelorook* based its decision, "defined, privileged and limited group,"[41] to *Van Dyke* and *Rincon*, it appears that the principles involved are identical. The consumers in both *Van Dyke* and *Rincon* were as privileged and limited as were the tenants in *Drexelbrook*. The difference is not one of principle; it is one of technicality. In *Drexelbrook* the consumers were tenants of the supplier; in *Van Dyke* and *Rincon* they were not.

These cases seem to indicate that if the consumers are tenants of the supplier then, *ipso facto*, they are outside the jurisdiction of the commission. Such a distinction is certainly not imperative from the generally accepted wording of the rule defining public service as holding oneself out as willing to serve the public generally or any defined portion of it,[42] or as willing to serve all the people within one's area of operations.[43]

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37. 172 Cal. at 562, 158 Pac. at 186.
38. 244 U.S. 39 (1917).
39. *Id.* at 48.
40. *Ibid.*
41. 418 Pa. at 436, 212 A.2d at 240.
42. Camp Rincon Resort Co. v. Eshelman, 172 Cal. 561, 158 Pac. 186 (1916); Masgai v. Public Serv. Comm'n, 124 Pa. Super. 370, 188 Atl. 599 (1936); *In re* Colorado Interstate Gas Co., P.U.R. 1933E, 349.
43. Van Dkye v. Geary, 244 U.S. 39 (1917); Motor Freight Inc. v. P.U.C., 120 Ohio St. 1, 165 N.E. 355 (1929); Harder v. Public Serv. Comm'n,

The rationale of the courts that have made this distinction can probably be explained by either or both of two statements: (1) The fact that the tenants resided in the supplier's private property lends a special character of privateness over and above that conveyed by the ordinary defined group; (2) The numbers of consumers affected in those cases were negligible. Certainly the courts that decided these cases did not conceive of the situation in which entire communities would be tenants of a single landlord or a small group of landlords.

This raises another general legal principle with respect to public service. The *Van Dyke* decision was not based solely on the fact that the Van Dykes offered to serve all the individuals in a defined area. A large number of consumers were being served a vital commodity by a monopolistic distributor. The majority refers to this latter consideration as "the character and extent of the use,"[44] which means essentially that "one who uses his property in supplying a large community with [a vital commodity] thereby clothes such property with a public interest and subjects the business to public regulation."[45] The large community mentioned in *Van Dyke* was no larger than in *Drexelbrook*. No exact figures are given of the total number served, but from the available facts[46] it appears that the number was actually smaller than the total residence capacity of Drexelbrook. Based upon the public interest doctrine there appears to be no distinction between *Van Dyke* and *Drexelbrook*. There does appear, however, to be a clear distinction between *Drexelbrook* and those cases in which the numbers serviced were negligible.

The reasoning of the *Van Dyke* court was applied by the Pennsylvania Superior Court in *Pennsylvania Chautauqua v. Public Serv. Comm'n.*[47] This line of reasoning could have been adopted by the supreme court in *Drexelbrook* with better results than were achieved. The *Van Dyke* approach is flexible and obviates the necessity of distinctions based upon matters irrelevant to the basic aims of public utility regulation. In *Drexelbrook* the entire public interest aspect appears to have been practically ignored by both sides in the controversy

Some measure of the future impact of *Drexelbrook* was apprehended by the dissent when it drew the hypothetical situa-

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90 Pa. Super. 373 (1927); Garkane Power Co. v. Public Serv. Comm'n, 100 P.2d 571, 98 Utah 446 (1940).

44. 244 U.S. at 48.

45. *Id.* at 39.

46. *Id.* at 47.

47. 105 Pa. Super. 160, 160 Atl. 225 (1932). Appellant, a religious-cultural corporation, purchased a tract of land upon which it founded a community. The corporation installed a water system which serviced only the area of the community, although some of the residents within the tract were not members of the actual corporation. The corporation was held to be a public utility.

tion of a handful of giant landlords retailing service to perhaps as many as 20,000 consumers. It observed that under the majority rule these consumers would not be protected from inadequate service and unreasonable rates, stating that:

> Actually, if the majority is correct, then, in the preceding example, the public consumer, whom the Legislature intended to protect, has disappeared into thin air. The landlord is little more than a middleman, distributing the services for a profit. He 'consumes' little if any of the service himself. He has taken the place of a distribution subsidiary of the public utility.[48]

The dissent further states that in common sense the landlord ought to be regulated "while distributing utility services to those who really comprise the consuming public,"[49] and concludes:

> The problem which the majority does not face can only become more aggravated with the continuation of the trend of absorption of the consuming public into large scale leasing projects of residential and commercial characters.[50]

Conclusion

Garden apartment projects similar in character to Drexelbrook are becoming larger and more numerous. Many of them are practically self-sustaining communities containing stores, parks, clubs and pools. It is illogical that the residents of these communities should not have the guarantees of adequate service at a reasonable rate which other members of the public enjoy, instead of being left to the mercy of an unregulated monopolistic distributor. This is precisely what the public utility law was enacted to prevent.[51]

It has long been recognized that the economic disparity caused by monopoly induces the possessor of that monopoly to take advantage of those who depend upon his product or service. In the absence of regulation, monopolistic complacency and the desire for profit will result in service of an inferior quality at higher prices.[52] The only recourse the tenant would have would be expensive and uncertain litigation.[53] Indeed, in many cases he would have no recourse at all.

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48. 418 Pa. at 444, 212 A.2d at 243.

49. *Id.* at 444, 212 A.2d at 243-44.

50. *Id.* at 445-46, 212 A.2d at 244.

51. See Relief Electric Light, Heat & Power Co.'s Petition, 63 Pa. Super. 1 (1916).

52. Standard Oil Co. v. United States, 221 U.S. 1 (1911); The Case of Monopolies, [1878] 6 K.B. 1260, 1263.

53. Unless covered by the lease the tenant generally would have no remedy for exhorbitant rates. Where the service itself is so inadequate as to deprive him of the beneficial use of the premises there might be a constructive eviction which would suspend the tenant's liability for rent, provided the tenant vacates within a reasonable time. See Tallman v. Murphy, 120 N.Y. 345, 24 N.E. 716 (1890). One can hardly call a rule which forces the tenant to vacate his residence a remedy.

The lack of control over the landlord utility distributor gives the landlord a competitive advantage and presents excellent profit making opportunities, a situation likely to attract more landlords into the field of utility distribution. In the future, distribution of utility services by the landlord is likely to become the rule rather than the exception, especially in the new multi-building complexes. The landlords of these communities will install their own facilities in the construction stage, demanding single point wholesale rates while retailing the services to their individual tenant consumers. Even the established concerns who do not submeter and retail service are likely to follow the Drexelbrook example when the advantages become apparent. The size of these concerns and their increasing numbers make the unregulated distribution of service a fact of most urgent public interest. The *Drexelbrook* rule is unrealistic in the light of modern conditions.

It appears that when the criteria of public service are applied, those courts that have dealt with the situation of the landlord supplier have concluded that he is not a public utility. It is readily evident that when the welfare of a large number of persons is at stake, rules based upon such narrow and irrelevant issues as whose tenants the consumers are, are plainly inadequate. The novel situation presented by *Drexelbrook* dictates a fresh look at the principles of law which attempt to define service to the public in Pennsylvania. Basing an analysis upon the import of *Van Dyke* and ignoring the irrelevant consideration of whose tenants the consumers are, one can arrive at a more realistic approach to the problem. In distinguishing between public and private utility service there are at least two basic factors to consider: (1) Whether the service is affected with a public interest; (2) Whether the concern has held itself out as willing to serve everyone indiscriminately within the limits of its capacity or area of operations. This dual test would allow the commission to eliminate from the scope of its regulation the small landlord distributors whose service is not affected with a public interest because of its limited extent.

The question of when a landlord's utility service ceases to be private in nature must be answered in the light of the circumstances of each case by reference to such factors as: The number and type of buildings, the number of tenants, and the tenants' dependence upon the landlord. The classification of the extremes, such as Drexelbrook, will be relatively easy. The broderline cases will be more difficult, but that is to be expected in any area of the law where a broad legal principle is sought to be applied.

In *Terminal Taxicab Co. v. Kutz*,[54] the Supreme Court of the United States gave recognition to the principle that mere volume or extent of service may be a basis of distinction between public and private service among concerns of the same class or type. The

54. 241 U.S. 252 (1916).

Court commented that:

> Complaint is made that jurisdiction has not been assumed over some other concerns that stand on the same footing as the plaintiff. . . . The ground alleged by the commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. There is nothing to impeach the good faith of the commission or to give the plaintiff just cause for complaint.[55]

The flexibility of this distinction allows the commission to carry out the purposes of public utility regulation without the undue burden of regulating the many small concerns whose insignificant size indicates they are not a matter of public interest. This concept is not revolutionary.[56] Actually what is suggested here is not a departure from existing principles of law, but rather the use of common sense in applying them.

Under the suggested application of the principles of public utility law, it is apparent that Drexelbrook and similar concerns are public utilities and should be subject to appropriate regulation.

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55. *Id.* at 257. The act to which the court referred was the Act of March 4, 1913, ch. 150 § 8, 37 Stat. 798:

> [P]ublic utility embraces every common carrier including . . . every corporation . . . controlling or managing any agency for public use for the conveyance of persons or property within the District of Columbia for hire.

56. In Brinks Express Co. v. Public Serv. Comm'n, 117 Pa. Super. 268, 178 Atl. 346 (1935), the court recognized that extent, as well as the character of the service is a material consideration. The court held that "before appellant's business can come under the supervision of the commission, it must . . . affect a substantial part of the community." *Id.* at 276, 178 Atl. at 349.