

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

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DOROTHY MAE JOHNSON, surviving spouse,  
and LOIS TOWNES, as Next of Kin to J. DEAN  
JOHNSON, deceased,

Plaintiffs,

v.

No. 2:12-cv-02664-MSN-tmp

CITY OF MEMPHIS, MEMPHIS LIGHT, GAS  
& WATER DIVISION,

Defendant.

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**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Before the Court is Defendant Memphis Light, Gas & Water Division's Motion for Partial Summary Judgment, filed April 25, 2018. (ECF No. 150.) After considering Defendant's motion, Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment (ECF No. 158), Defendant's Reply in Support of its Motion for Partial Summary Judgment (ECF No. 161), and the oral arguments of counsel on March 5, 2019, this Court **DENIES** Defendant's motion as to Plaintiffs' § 1983 due process claim and **GRANTS** Defendant's motion as to Plaintiffs' § 1983 equal protection claim.

**BACKGROUND**

Plaintiffs' Complaint was filed in the Circuit Court of Shelby County, Tennessee on June 13, 2012. (ECF No. 1.) Defendant removed the matter to the United States District Court on July 27, 2012, because of Plaintiffs' § 1983 claims creating federal question jurisdiction. (*Id.* at PageID 2.)

This matter has had two separate issues addressed by the 6th Circuit Court of Appeals. In the 2015 appeal, 777 F.3d 838 (6th Cir. 2015), the appellate court gave the following detailed account of the facts:

J. Dean Johnson, a long-term employee of Memphis's Public Works Division, worked in sanitation, lifting and emptying garbage cans. MLGW denied him public utility services for his new apartment in February 2010 because he could not produce state-issued photo identification. On August 4, 2011, Johnson died of heat stroke in his apartment, where the internal temperature was 93.2 degrees Fahrenheit. He was sixty-five years old at the time of his death and had no electricity, heat, or air conditioning in his home. Plaintiffs allege that his death was caused by MLGW's denial of services.

Johnson, an African American, was born in rural Mississippi and delivered by a midwife. He had no birth certificate and had difficulty acquiring one from the state, in part due to his intellectual disabilities. In sworn affidavits, Johnson's niece, Lorena Jackson, and a longtime co-worker, Melvin Hunt, testified that although Johnson was able-bodied, he was substantially intellectually impaired. Ms. Jackson described Johnson as having "severe learning disabilities," such that he was unable to read and write, could not do basic math, had "severe memory problems" and difficulty planning, and was unable to care for himself without help. He had problems communicating with others and often became angry or frustrated as a result. Johnson could apparently write his name but would misspell it and was unsure of his birthdate, he did not drive or keep a bank account, and he was dependent on co-workers to bring him to and from work. In order to pay bills and feed himself, Johnson used cash, but he was often cheated and did not know the meaning of any documents he signed. He is not known to have attended school beyond second grade. Mr. Hunt, who worked with Johnson for over forty years, confirmed that Johnson had to be driven to and from work, needed help filling out forms or legal documents, and that he was "unable to give a complete answer or to carry [on] a conversation, or to understand simple mathematical problems." Although Johnson lived by himself, he was evidently highly reliant on nearby family, friends, neighbors and co-workers for regular assistance with the routines of everyday life.

When Johnson moved to 2931 Park Avenue, # 8, in Memphis, Tennessee, two nieces—Ms. Lois Taylor and Ms. Jackson—accompanied him on two different occasions in February 2010 to MLGW offices to help him obtain services for his new apartment. Johnson apparently had had utility services in past residences, and Ms. Jackson had accompanied him to MLGW offices on several previous occasions and dealt with bill irregularities and service problems on his behalf. Both nieces characterized Johnson as easily confused and frustrated by such encounters. When she accompanied him to MLGW on February 5, 2010, Ms. Taylor had to explain to Johnson that he could not go straight to the billing department but had to inform another employee there that he wanted utilities turned on. Ms. Taylor then waited with him until his name was called. She went back to an office with him and

participated in the conversation, during which the MLGW employee told Johnson that he didn't have the proper identification—he “had to either have a State I.D. or a driver's license.” Ms. Taylor described Johnson's attempts to communicate his situation: “He didn't drive, and he was explaining that he couldn't get a State I.D., and he was asking what was wrong with [his work] I.D., it had a picture on it.” Ms. Taylor showed the MLGW employee Johnson's work identification card while Johnson showed his social security card. Ms. Taylor then asked if the MLGW employee could call Johnson's job to verify his identity, but she refused. The MLGW employee then gave Ms. Taylor a copy of a slip on which she had written “invalid I.D.” As they left Johnson appeared to be upset or “heated.” Ms. Taylor testified in her deposition that to her knowledge Johnson only contacted MLGW while with her or her sister, as “[h]e wouldn't have called because he didn't know how to call, ... he wouldn't know what to say.” After their encounter with MLGW, Ms. Taylor told Johnson that she would need to take him to Jackson, Mississippi, to see about getting a birth certificate, and he agreed, but she never did so.

After MLGW denied Johnson utility services, he spoke with his sister, Lois Townes, who told him that to get a state identification card he had to go to Brownsville, Tennessee, where he had started school, and get his school record. Ms. \*842 Jackson testified that “Uncle David” had apparently written away for some information on Johnson's behalf and then taken Johnson to Brownsville. Johnson was “excited” because he had obtained some papers there and he thought that these would be sufficient for him to obtain utilities. On February 26, 2010, Ms. Jackson accompanied Johnson to an MLGW office for a second time, although she stayed in the waiting area while he went back to speak with an MLGW employee. She testified that she “let him go back there because he knew ... what to say and everything.” A short while later she heard a “commotion” as a woman accompanied Johnson out of the office, apparently trying to get him out quickly “because he was really upset.” She explained to Ms. Jackson that Johnson did not have the proper state-issued identification. As she did so, Johnson was still trying to show her his papers and explain that he worked for the City of Memphis. “[A]t that point he didn't know what to do,” Ms. Jackson testified. According to Ms. Jackson's affidavit, Johnson “did not understand how to solve the problem with his identification or his birth certificate nor did he understand whether or not he had any rights with respect to [MLGW] and its denial of utilities.”

In 2010 only, MLGW had a policy that required applicants to produce a state-issued photo identification card in order to have utilities connected. However, in the years prior to and following 2010, the forms of identification that Johnson presented—a photo identification issued by his employer, Memphis's Public Works Division, and a social security card—would have been sufficient to obtain utilities. The 2010 policy also stated that “[e]xceptions will be considered for customers 60 years of age and older,” but the MLGW employees Johnson encountered did not attempt to see if he qualified for an exception. MLGW did not train employees regarding how to advise customers who did not possess the necessary photo identification, nor did it train employees on how to deal with customers who were illiterate. MLGW made no efforts to contact potential customers who were denied utilities as a result of the policy in effect in 2010.

After Johnson's death, Plaintiffs sued MLGW in the Circuit Court of Shelby County, Tennessee, claiming violations pursuant to 42 U.S.C. § 1983, the GTLA, and Tennessee's wrongful death statute. MLGW removed the case to federal district court and moved for summary judgment. The district court granted summary judgment to MLGW, holding that 1) the pertinent state statute of limitations barred all of Plaintiffs' claims; 2) the statute of limitations could not be tolled because Plaintiffs did not submit sufficient evidence that Johnson was of unsound mind; and 3) no alternative statutes of limitation applied. The court found that the affidavits by Jackson and Hunt alleging Johnson to be of unsound mind contradicted statements made in Plaintiffs' complaint and earlier depositions, and noted that Plaintiffs had not claimed Johnson to be of unsound mind prior to their response to MLGW's motion for summary judgment. Plaintiffs timely appealed, arguing that the district court erred 1) in determining that the statute of limitations barred their claims, and 2) in finding that Plaintiffs failed to present a genuine issue of material fact regarding whether Johnson was of unsound mind.

777 F.3d at 840–42. The court reversed the grant of summary judgment to Defendant and remanded the case, finding that “Plaintiffs have presented sufficient evidence of Johnson’s mental disability, and thus the applicability of a prior version of Tennessee’s tolling statute, Tenn. Code Ann. § 28-1-106 (amended 2011), so as to create a genuine issue of material fact as to whether Johnson was of unsound mind when the action accrued.” *Id.* at 847.

After the Sixth Circuit remanded this case back to this Court, Defendant moved to exclude Plaintiffs' sole expert witness, Dr. Miguel A. Laboy, M.D., pursuant to Fed. R. Evid. 702. (ECF No. 127.) The District Court held that “Dr. Laboy’s testimony should be excluded because it was not expressed to the requisite degree of certainty and was the result of flawed methodology that did not reliably rule in or rule out potential causes of Mr. Johnson’s death.” (ECF No. 150-1 at PageID 2150.) The Sixth Circuit reversed that holding and remanded back to this Court. *See Johnson v. Memphis Light Gas & Water Div.*, 695 Fed. Appx. 131 (6th Cir. 2017); (ECF No. 139).

On April 23, 2018, Defendant moved for leave to file a partial summary judgment addressing Plaintiffs' § 1983 claims. (ECF No. 148.) The Court granted Defendant's motion "[f]or good cause shown."<sup>1</sup> (ECF No. 150 at PageID 2143.)

### **STANDARD OF REVIEW**

Federal Rule of Civil Procedure 56 permits a party to move for summary judgment — and the Court to grant summary judgment — “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party asserting the presence or absence of genuine issues of material facts must support its position either by “citing to particular parts of materials in the record,” including depositions, documents, affidavits or declarations, stipulations, or other materials, or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Asbury v. Teodosio*, 412 F. App'x 786, 791 (6th Cir. 2011). Fed. R. Civ. P. 56(c)(1). When ruling on a motion for summary judgment, the Court must view the facts contained in the record and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge the credibility of

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<sup>1</sup> Plaintiffs argue that MGLW's Motion for Partial Summary Judgment should be denied because it is untimely and unduly burdensome. (ECF No. 158-1 at PageID 2230.) “Thus, five years and nine months after the case was removed by MLGW to the district court expired before Defendant for the first time raised the defense that Plaintiffs failed to plead a viable § 1983 claim against MLGW.” (*Id.*) This argument should have been raised when MLGW requested leave to file another motion for summary judgment. The Court already granted such leave and will not deny MLGW's motion for that reason.

witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex*, 477 U.S. at 323. The moving party may discharge this burden either by producing evidence that demonstrates the absence of a genuine issue of material fact or simply “by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c). “A genuine dispute exists when the plaintiff presents significant probative evidence on which a reasonable jury could return a verdict for her.” *EEOC v. Ford Motor Co.*, 782 F.3d 753, 760 (6th Cir. 2015) (quotation marks omitted). The nonmoving party must do more than simply “show that there is some metaphysical doubt as to the material facts.” *Adcor Indus., Inc. v. Bevcorp, LLC*, 252 F. App’x 55, 61 (6th Cir. 2007) (quoting *Matsushita*, 475 U.S. at 586). A party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *See Beckett v. Ford*, 384 F. App’x 435, 443 (6th Cir. 2010) (citing *Celotex Corp.*, 477 U.S. at 324). Instead, the nonmoving party must adduce concrete evidence on which a reasonable juror could return a verdict in her favor. *Stalbosky v. Belew*, 205 F.3d 890, 895 (6th Cir. 2000); *see* Fed. R. Civ. P. 56(c)(1).

The Court’s role is limited to determining whether there is a genuine dispute about a material fact, that is, if the evidence in the case “is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. To start, the Court does not have the duty to search the record for such evidence. *See* Fed. R. Civ. P. 56(c)(3); *InterRoyal Corp. v.*

*Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Additionally, the Court must “view the evidence presented through the prism of the substantive evidentiary burden” applicable to the case. *Anderson*, 477 U.S. at 254. Thus, if the plaintiff’s evidentiary standard of proof at trial is preponderance of the evidence, then on a motion for summary judgment the Court must determine whether a jury could reasonably find that the plaintiff’s factual contentions are true by a preponderance of the evidence. *See id.* at 252–53.

“When the non-moving party fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper.” *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 914 (6th Cir. 2013) (quoting *Chapman v. UAW Local 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc)). Courts must analyze a motion for summary judgment with due regard not only for the rights of the party “asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury,” but also for the rights of those “opposing such claims and defenses to demonstrate in the manner provided by [Rule 56], prior to trial, that the claims and defenses have no factual basis.” *Celotex*, 477 U.S. at 327.

### **ANALYSIS**

Defendant Memphis Light, Gas & Water Division (“MLGW”) moves for partial summary judgment on Plaintiffs’ claims under 42 U.S.C. § 1983 (“§ 1983”). As an initial matter, a § 1983 claim must embody at least two elements: (1) “a plaintiff must allege that he was deprived of a right guaranteed by the United States Constitution or the laws of the United States,” and (2) “the deprivation was caused by a person while acting under color of state law.” *Barney v. Lincoln Elec. Co.*, 43 F.3d 1471 (6th Cir. 1994). Here, Defendant does not contest that it was acting under color of state law for the purposes of its summary judgment motion; however, MLGW does not concede

that it is a state actor and has reserved rights and objections regarding that issue. (ECF No. 150-1 at PageID 2151 n.3.) Therefore, for purposes of this Motion, the Court finds that Defendant was acting under color of state law during its relationship with Mr. Johnson. The case at bar thus turns on whether Plaintiffs have made out the first element of their § 1983 action: deprivation of a constitutionally protected right to due process and equal protection.

Defendant argues that Plaintiffs' § 1983 due process claim fails because Plaintiffs cannot prove that Mr. Johnson was deprived of a constitutionally protected right. Defendant further argues that Plaintiffs' § 1983 equal protection claim fails because MLGW's policy requiring a state-issued photo identification card for utility hookups is rationally related to a legitimate governmental interest. The Court will first address Plaintiffs' due process claim before moving on to equal protection.

### **1. Due Process Claim**

The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Congress has subsequently generated a federal cause of action providing:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Here, Plaintiffs claim protection under § 1983 on grounds that Mr. Johnson had a property interest in new utility service hookups, and that MLGW deprived him of this property interest without due process by having a policy that prevented him from being able to obtain new utility service. Defendant counters that Mr. Johnson had no protected constitutional property



interest in receiving new utility hookups without complying with MLGW's reasonable requirements.

Actions based on deprivations of due process fall into two categories: violations of procedural due process and violations of substantive due process. Here, Plaintiffs' due process claim appears to be procedural in nature rather than substantive.<sup>2</sup> For procedural due process claims, courts perform a two-part analysis: "first, whether the alleged deprivation involves a protected property interest, and second, whether 'the procedures attendant upon that deprivation were constitutionally sufficient.'" *Mator v. City of Ecrose*, 301 Fed. Appx. 476, 479 (6th Cir. 2008) (quoting *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). "Only after identifying [a protected property interest] do we continue to consider whether the deprivation of that interest contravened notions of due process." *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002).

Thus, this Court must first address whether Mr. Johnson had a protected property interest in new utility connections.<sup>3</sup> For an individual to have a property interest subject to due process protections, "a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court further explained that such entitlements are, "of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an

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<sup>2</sup> See *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion) (holding that substantive due process claims are generally limited to those involving "marriage, family, procreation, and the right to bodily integrity.").

<sup>3</sup> To succeed in a § 1983 due process claim, an individual must have a constitutionally protected property right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .").

independent source such as state law.”<sup>4</sup> *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting *Roth*, 408 U.S. at 577). In explaining the creation of a protected interest, the Supreme Court opined that the most common way a State engages in that undertaking is by “establishing substantive predicates to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.” *Kentucky Dep’t of Corrections*, 490 U.S. at 462. In other words, “[a] State creates a protected liberty interest by placing substantive limitations on official discretion.” *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). In this instance, the Tennessee Supreme Court has done just that, holding that public utility companies in Tennessee are “obligated by the law” to provide service “to all inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause.”<sup>5</sup> *Farmer v. Nashville*, 156 S.W. 189, 190 (Tenn. 1913)); *see also* Tenn. Code Ann. § 7-82-402(b) (regulating procedure within utility companies for the handling of billing disputes).

“Although the underlying substantive interest is created by ‘an independent source such as state law,’ *federal* constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.” *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978) (internal citations omitted). In *Craft*, a case involving a disputed gas and electric bill, the United States Supreme Court held that the expectation of utility services rises to the level of a “legitimate claim of entitlement” in the category of property interests protected by the Due Process Clause. *Id.* at 11.

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<sup>4</sup> “Property rights are created and defined by independent sources such as state law and not by the Constitution.” *Braun v. Ann Arbor Charter Tp.*, 519 F. 3d 564 (6th Cir. 2008); *Thomas*, 304 F.3d at 576 (“Property interests are not created by the constitution.”).

However, this legitimate claim of entitlement to utilities is not unfettered. In Tennessee, public utility customers are also expected to follow reasonable rules promulgated by the utility company, as explained by the Tennessee Supreme Court in *Farmer v. Nashville*:

a water company is charged with the public duty of furnishing water to all of the inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause; but that such a company *may adopt reasonable rules for the conduct of its business, and the operation of its plant*, and such rules, so far as they affect its patrons, are binding on them, and may be enforced, *even to the extent of denying water to those who refuse to comply with them.*

*Farmer*, 156 S.W. at 190 (emphasis added) (citing *Watauga Water Co. v. Wolfe*, 41 S.W. 1060, 1061 (Tenn. 1897)). Tennessee courts have also held that a utility may terminate service “for nonpayment of a just service bill.” *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730, 733 (Tenn. Ct. App. 1975).

Though Tennessee law creates a protected property interest in existing utility services, this Court finds no authorities regarding new utility connections. In *Memphis Light, Gas and Water Division v. Craft*, another case involving an alleged deprivation of due process at the hands of MLGW, the Supreme Court determined that individuals were entitled to certain protections under the Fourteenth Amendment because there was a property interest in currently existing utility service. 436 U.S. at 22. Namely, the Court made note of the great implications of access to utility service, and that an individual who was deprived of this access, could suffer irreparable harm. *Id.* at 18 (noting that even a short cessation in essential utility service may threaten an individual’s health and safety). The Court also held that due process required MLGW to make available to a customer, information regarding procedural steps on how to air and settle grievances. *Id.* at 13–15. The fact that the instant case involves denial of initial service rather than discontinuance of existing service does not render *Craft* inapposite. By all accounts, the denial of applications for

utility service is equally as dangerous to individuals as the termination of existing utility service. In addition, Mr. Johnson did in fact have utility connections with MLGW prior to seeking utility connection at his new address, 2931 Park Avenue. (ECF No. 158-1 at PageID 2223.) *See also Johnson*, 777 F.3d at 841 (“[Mr.] Johnson apparently had had utility services in past residences, and Ms. Jackson had accompanied him to MLGW offices on several previous occasions and dealt with bill irregularities and service problems on his behalf.”). Mr. Johnson had previously been a MLGW customer, but MLGW denied utility connection because of a one-year policy requiring a state or federally issued photo identification that could not be issued by an employer, even if that employer was a government entity. (See ECF No. 150-2 at PageID 2163 (providing Mr. Johnson “attempted to use his [City of Memphis] employee identification badge in lieu of the required valid state-issued photo identification in order to connect his utilities.”).) Ironically in this case, Mr. Johnson was and had been an employee of the City of Memphis for forty-two years. (ECF No. 158-2 at PageID 2247.)

In its Motion for Summary Judgment, Defendant argues that “Mr. Johnson did not have a constitutionally protected right to have utility services connected to his house without meeting MLGW’s *reasonable requirements*.” (ECF No. 150-1 at PageID 2155) (emphasis added). In delineating what constitutes reasonableness, Defendant directs the Court’s attention to *Coghlan v. Starkey*, 845 F. 2d 566 (5th Cir. 1988), wherein the utility company disconnected the plaintiff’s water after she failed to pay her bill and made no effort to pay past due amounts. In *Coghlan*, the court noted that the plaintiff had never even applied for service; rather, the plaintiff had a “unilateral expectation” of service. 845 F. 2d at 569. Defendant also cites an Eleventh Circuit case, *James v. City of St. Petersburg*, where the plaintiff refused to comply with the city’s

requirements for initiating water service, such as paying a security deposit. 33 F. 3d 1204, 1307 (11th Cir. 1994).

These two cases are distinguishable from the case at bar for several reasons. Chiefly, Mr. Johnson made it known that he was willing to pay for utility service, and that the monetary aspect of the service was not at issue. Also, unlike the plaintiff in *Coghlan*, Mr. Johnson made an effort to apply for utility services. Here the issue is, after establishing a property interest, whether the requirement of different forms of identification is reasonable as a policy, not whether Mr. Johnson's inability to comply is the reason for denying service, as the two cited cases suggest.<sup>6</sup>

To this end, MLGW's policy during the time Plaintiff applied for utility service required applicants to present a state or federal photo identification card in order to have utilities connected. While the policy seems to have facial validity in serving a particular purpose, here a purported attempt to cut down identity theft (ECF No 150-1 at PageID 2149), the policy may have nevertheless created an unconstitutional barrier for certain individuals under certain circumstances. Particularly, as the Court noted in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971):

[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, *this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.*

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<sup>6</sup> The Court also finds Defendant's final argument lacking. Citing *Kamal v. City of Toledo, Dept. of Pub. Utilities*, Defense points out that the district court rejected the plaintiff's argument because there was no state law that gave the plaintiff a property interest in service. *Kamal v. City of Toledo, Dept. of Pub. Utilities*, 3:13-CV-574, 2014 WL 1493136, at \*3 (N.D. Ohio Apr. 14, 2014). However, as previously noted, the Supreme Court has stated that public utility companies in Tennessee are "obligated by the law" to provide service "to all inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause." *Craft*, 436 U.S. at 11 (quoting *Farmer*, 156 S.W. at 190). Such an obligation, specifically under the facts in this case where MLGW is the only utility provider, creates a property interest.

*Id.* at 379 (emphasis added). The *Boddie* court further opined that this principle is applicable to disputes over matters beyond such sacred rights given by the First Amendment, explaining instead that “[n]o less than these rights, the right to a *meaningful opportunity to be heard within the limits of practicality*, must be protected against denial by particular laws that operate to jeopardize it *for particular individuals.*” *Id.* at 379–80 (emphasis added) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). So, “[j]ust as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party’s opportunity to be heard.” *Boddie*, 401 U.S. at 380.

Applying these principles, the Court is compelled to find that, due to this Plaintiff’s circumstances, MLGW’s facially valid requirement for different forms of identification foreclosed this particular Plaintiff’s opportunity to “be heard.” *See id.* This Court further finds that MLGW’s seemingly arbitrary rule changes in consecutive years terminated, in whole, Plaintiff’s access to utility service, as set out by the Tennessee Supreme Court. *See Farmer*, 156 S.W. 189.

The Court also points out that MLGW improperly seeks to benefit from its own failure to adhere to its own policy to consider exceptions for customers 60 years of age and older. According to Defendant, in Tennessee “there is . . . no protected Constitutional property interest in receiving utilities without complying with reasonable rules. And because the rules were not complied with by Mr. Johnson, there was no protectable property right. If there is no Constitutional property right, then due process does not attach.” Transcript of Oral Argument at 9–10, *Johnson v. Memphis Light Gas & Water Div.*, No. 2:12-cv-02664 (W.D. Tenn. argued Mar. 5, 2019). By the same token, the Sixth Circuit Court of Appeals noted that “[t]he 2010 policy . . . stated that ‘[e]xceptions will be considered for customers 60 years of age and older,’ but the MLGW

employees Johnson encountered did not attempt to see if he qualified for such an exception.” *Johnson*, 777 F.3d at 842. Clearly, Mr. Johnson qualified for the exception. Just as clearly, MLGW’s failure to apply the exception is itself unreasonable.

MLGW cannot eat its cake and have it too.<sup>7</sup> Under the facts of this case, MLGW’s contention that the decedent had no Constitutional property right simply because he did not comply with rules MLGW itself failed to follow is disingenuous at best. Had MLGW followed its own rules for customers 60 years of age and older, Mr. Johnson would likely have had utilities connected.

Based upon the foregoing principles concerning property interests<sup>8</sup> and due process established by the Supreme Court, this Court finds MLGW’s denial of utility service to Mr. Johnson, without more, constitutes a denial of due process if done without justification. And while it is difficult to conceive of any possible, reasonable justification in this case, there is at least a genuine issue of material fact whether MLGW’s denial was reasonably justified. Accordingly, summary judgment as to Plaintiffs’ due process claim is **DENIED**.

## 2. Equal Protection Claim

The Fourteenth Amendment provides, in relevant part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. “[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every

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<sup>7</sup> The “eat-have” sequence, though less common since the mid-20<sup>th</sup> century, is the traditional proverb. *Garner’s Usage Tip of the Day: You Can’t Eat Your Cake and Have it Too*, LAW PROSE, <https://www.lawprose.org/garners-usage-tip-of-the-day-you-cant-eat-your-cake-and-have-it-too-you-cant-have-your-cake-and-eat-it-too/> (last visited Aug. 18, 2020).

<sup>8</sup> Mr. Johnson had a property interest in electricity. MLGW is the only utility provider in Memphis, Tennessee where Mr. Johnson lived, and MLGW’s actions herein foreclosed his only lawful prospect of access to it.

person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citation and quotations omitted). “Equal protection analysis turns on a threshold question concerning the appropriate level of judicial scrutiny of the distinguishing characteristics.” *Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. 1985). “If no suspect class or fundamental right is involved, the court’s job is to determine whether the legislative classification is rationally related to a legitimate government purpose.” *Id.* In order to successfully assert a claim for violation of the Equal Protection Clause, a plaintiff must show that he was similarly situated in all material respects to others whose treatment he desires, coupled with a discriminatory purpose on the part of the accused state actor(s). *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–266 (1977); *Taylor Acquisitions, L.L.C. v. City of Taylor*, 313 Fed. Appx 826, 836 (6th Cir. 2009).

In the case at bar, Plaintiffs do not allege the deprivation of a fundamental constitutionally protected right and the policy at issue does not, on its face, single out a suspect class. Thus, Plaintiffs’ equal protection claim is subject to rational basis review—a point Plaintiffs concede in their response to Defendant’s motion for summary judgment. (*See* ECF No. 158-1 at PageID 2240.) Plaintiffs also agree that MLGW’s ultimate goal of protecting customers from identity theft “was reasonable,” indicating Plaintiffs’ belief in the existence of a legitimate government interest. However, Plaintiffs argue that MLGW’s 2010 policy was not rationally related to said underlying, legitimate interest and had a disparate impact on persons who “for whatever reason (race, age, illiterate, mentally challenged, impoverished) could not obtain a birth certificate, or . . . produce a picture ID issued by the State . . . .” (*Id.*)



Upon reviewing the record, this Court finds Plaintiffs' equal protection claim fails as a matter of law for several reasons. First, Plaintiffs have not met their burden to affirmatively show Defendants treated Mr. Johnson differently from other, similarly situated individuals as required by federal law. *See Arlington Heights*, 429 U.S. at 265–266. Second, Plaintiffs have not presented any evidence of discriminatory intent or purpose on the part of MLGW. Instead, Plaintiffs' discrimination allegations focus largely on disparate impact which, by itself, is insufficient. Although "evidence of a policy's disparate impact may be probative in determining whether the policymaker harbored a discriminatory intent," it is not the touchstone of an equal protection claim. *Spurlock v. Fox*, 716 F.3d 383, 400 (6th Cir. 2013) (citing *Arlington Heights*, 429 U.S. at 266). Third, even if a showing of disparate impact alone were enough to support a claim of equal protection, Plaintiffs fail to properly cite to anything in the record addressing their claims that Mr. Johnson was mentally handicapped or that poor African Americans were disadvantaged in getting birth certificates in rural north Mississippi. Although this may be true, Plaintiffs' counsel was specifically asked to point to some expert testimony or some other proper citation in the record to support their disparate impact allegation, but Plaintiffs' counsel was unable to properly cite to the record. Therefore, summary judgment as to Plaintiffs' equal protection claim is **GRANTED**.

### **CONCLUSION**

For the foregoing reasons, Defendant's Motion for Partial Summary Judgment is **DENIED** as to Plaintiffs' Due Process Claim and **GRANTED** as to Plaintiffs' Equal Protection Claim.

**IT IS SO ORDERED** this 18th day of August, 2020.

*s/ Mark Norris*  
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MARK S. NORRIS  
UNITED STATES DISTRICT JUDGE