CONSTITUTIONAL LAW—NOTICES OF UTILITY SHUTOFFS NEED NOT MEET DUE PROCESS STANDARDS WHERE RULES PROMULGATED BY THE IOWA STATE COMMERCE COMMISSION DO NOT CREATE A STATE ACTION BY UTILITY COMPANIES—*Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission* (Iowa Supreme Court 1983)

Due to unseasonably mild weather in January 1981, utility companies in Iowa began disconnecting electricity and natural gas service to customers in arrears.[1] Iowa State Commerce Commission (ISCC) rules then in effect only required that services not be disconnected if the temperature was forecast to go below 20° Fahrenheit within a twenty-four hour period.[2] Otherwise, utility companies were free to disconnect, which they did often.[3]

As part of a predictable public outcry, the Iowa Citizen/Labor Energy Coalition (IC/LEC) petitioned the ISCC to promulgate new rules which would require reconnection of services when temperatures again went below 20° Fahrenheit.[4] The ISCC agreed to a hearing and issued notices in the Iowa Administrative Bulletin relaying the scope of the rulemaking proceedings to interested parties.[5] As a result of opinions expressed at the first meeting, the ISCC decided to alter the scope of the rulemaking proceedings by substituting an "ability to pay" standard for the temperature standard then in effect.[6] Since this greatly differed from the scope of the original notice, a new notice was issued[7] and a second meeting was held after which the present shutoff rules were adopted.[8]

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1. Des Moines Register and Tribune, Jan. 23, 1981, at 1A, col. 1. Companies began disconnecting service of customers with delinquent bills from $500 to $700, and progressively worked their way down to lower amounts. *Id.* One company assessed its average shutoff range for delinquent customers to be $175. *Id.*

2. IOWA ADMINS. CODE §§ 250—19.4(15), 250—20.4(15). (The Iowa State Commerce Commission derives its regulatory authority over Iowa utilities from IOWA CODE Ch. 476 (1983)).

3. Des Moines Register and Tribune, Jan. 23, 1981, at 1A, col. 1. In the month of January, 1981, one company disconnected the service of 38 customers, while Iowa Power and Light issued 30 shutoff orders for each day in January in which the temperature was forecast to go above 20° Fahrenheit for at least a 24-hour period. *Id.*

4. Appendix at 1, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983). In its Petition for rulemaking, the IC/LEC described itself as an organization of 45 affiliate groups, representing over 250,000 Iowans, the majority of whom were utility users within the state. Appendix at 1, 335 N.W.2d 178.

5. Appendix at 4, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

6. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178, 180 (Iowa 1983).

7. Appendix at 7, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

8. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d at 180.

IC/LEC filed an application for rehearing challenging, among other things, the sufficiency of the rules regarding notice prior to disconnections which are postponed due to temperatures in winter months falling below 20° Fahrenheit, as well as the adequacy of those rules concerning notice to tenants of impending shutoffs caused by landlord payment defaults.[9] Rehearing was denied.[10] IC/LEC then filed a petition for judicial review in the District Court of Polk County.[11] Judge Bergeson affirmed the Commission's rulemaking decision.[12] An appeal to the Iowa Supreme Court was filed, alleging that certain rules promulgated by the ISCC denied disconnected customers due process of law under the fourteenth amendment.[13] The Iowa Supreme Court *held*, affirmed.[14] Notices of utility shutoffs by gas and electric companies need not meet due process standards where rules promulgated by the ISCC do not create a state action by "ordering" the companies to disconnect service. *Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Comm'n*, 335 N.W.2d 178 (Iowa 1983).

In upholding the decision of the district court by relying on *Jackson v. Metropolitan Edison Co.*,[15] the Iowa Supreme Court has expanded the scope of the *Jackson* doctrine. In Iowa, *Jackson* now stands for the notion that no "state action" is present in a utility shutoff situation unless the state has "ordered" the action.[16] This is a harmful misinterpretation of *Jackson* as well as incognizance of case law which admit of several means, other than a state's "order," by which "state action" can be found.

As part of its petition for judicial review, the IC/LEC alleged that the Iowa State Commerce Commission had failed to give sufficient notice of its intended actions in adopting new rules concerning utility shutoffs as required by Iowa law.[17] Section 17A.4(1)(a) of the Iowa Code provides that prior to change of rules, an agency should give notice of its intended action.[18] This notice must include either the terms or the substance of the intended action as well as the time when and location where interested persons might present their views.[19]

The Commission's first notice stated an intent to consider procedures

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9. Appendix at 86, 87, 89, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

10. Appendix at 100, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

11. Appendix at 106, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

12. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d at 179.

13. *Id.* at 182.

14. *Id.* at 183.

15. 419 U.S. 345 (1974).

16. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 182, 183 (Iowa 1983).

17. *Id.* at 179, 180.

18. Iowa Code § 17A.4 (1981).

19. Iowa Code § 17A.4(1)(a) (1981).

for reconnecting utility service "when temperatures were forecast to go below 20° Fahrenheit, and the establishment of guidelines for utility use of Service Limiter Adapters."[20] After a hearing was held, the Commission decided to change the focus of its rulemaking proceedings by discussing implementation of an "ability to pay" standard in place of the temperature standard.[21] After the present rules were adopted, IC/LEC claimed a violation of section 17A.4(1)(a) in that three new provisions exceeded the scope of the notices.[22] After a review of the three contested provisions, the Iowa Supreme Court concluded that they were an accommodation between an ability to pay standard and the temperature standard and therefore within the scope of the two published notices.[23]

The Iowa Supreme Court found section 174A.4(1)(a) similar to section 553(b) of Title 5 of the Federal Administrative Procedures Act,[24] and thus

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20. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178, 180 (Iowa 1983).

21. *Id.*

22. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 180. The three provisions were adapted to two separate sections of the Iowa Administrative Code sections of the I.A.C., one dealing with electric companies, the other with gas companies. IOWA ADMIN. CODE §§ 19.4(15)(h)(4), 19.4(10), 20.4(15)(h)(4), 20.4(11). The three contested provisions of either section of the Administrative Code are the same regardless of which type of utility it deals with and therefore were treated as only three contested provisions. IOWA ADMIN. CODE §§ 19.4(15)(h)(4), 19.4(10), 20.4(15)(h)(4), 20.4(11). IC/LEC, Inc. v. ISCC, 335 N.W.2d at 180.

IOWA ADMIN. CODE §§ 19.4(15)(h)(4), 20.4(15)(h)(4) provided that a utility could not disconnect service to a customer when the National Weather Service forecast for the following 24 hours includes a forecast that the temperature would go below 20° Fahrenheit. IC/LEC argued that the temperature protection of this provision was only limited to customers who had entered into payment plans to extinguish their past due bills. Brief for Appellant at 44, IC/LEC, Inc. v. ISCC, 335 N.W.2d 178 (Iowa 1983).

The second set of provisions, found in IOWA ADMIN. CODE §§ 19.4(10), 20.4(11) provide that a customer may dispute the reasonableness of a payment agreement through a formal complaint to the Commission. IC/LEC argued that this provision only allowed dispute of the agreement only within a ten day time period immediately following the entering into of the agreement. Brief for Appellant at 44, 45, IC/LEC, Inc. v. ISCC, 335 N.W.2d 178 (Iowa 1983).

The final provisions, also listed under *Iowa Admin. Code* §§ 19.4(15)(h)(4), 20.4(15)(h)(4) dealt with application for energy assistance in the winter months. IC/LEC contended that a time period in which a person could apply for energy assistance had been established. Brief for Appellant at 45, IC/LEC, Inc. v. ISCC, 335 N.W.2d 178 (Iowa 1983).

23. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 181.

24. *Compare* the Iowa statute with federal law. *Iowa Code* § 17A.4(1)(a) provides:

> Prior to the adoption, amendment or repeal of any rule an agency shall:
> give notice to its intended action. . . . The notice shall include a statement of either the terms or the substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their view thereon.

Id. 5 U.S.C.A. § 553(b) (1976) provides:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

looked to federal case law for guidance.[25] *Wagner Electric Corp. v. Volpe*[26] concerned a judicial review of a dispute over the adequacy of notice under section 553(b).[27] The notice was issued to inform interested parties that standards governing performance of turn signal and hazard warning flashers were to be amended to incorporate by reference the Society of Automotive Engineers standard.[28] The notice, however, did not provide for changes in the sampling provisions (procedures to determine the quality of flasher lights and hazard signals), although these changes were discussed at the meeting.[29] The petitioner objected to the notice on this ground.[30]

The Third Circuit Court of Appeals held that section 553(b) had been violated.[31] It concluded that an agency has a duty to submit rules to additional comment only where a notice is not "sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process."[32] In light of *Wagner*, the Iowa Supreme Court found that although the rules adopted were not those originally proposed, they were "in character" with and a "logical outgrowth" of the two notices already given.[33]

In a separate issue, the Iowa Supreme Court concluded that the ISCC was not required to adopt proposed rules, nor was it required to respond to every argument given at the hearing in its order.[34] The ISCC's only obligation was to consider them.[35] In order to determine whether an agency considered proposed rules, the entire record must be examined.[36] The Court

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> The notice shall include—
> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subjection does not apply—
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Id.

25. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 180.
26. 466 F.2d 1013 (3d Cir. 1972).
27. *Id.* at 1014.
28. *Id.* at 1014, 1015.
29. *Id.* at 1015.
30. *Id.*
31. *Id.* at 1020.
32. Wagner Electric Corp. v. Volpe, 466 F.2d at 1019-20.
33. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 181.
34. *Id.* at 182.
35. *Id.*
36. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 181 (Iowa 1983); *see* BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1906 (1980) (interim regula-

concluded, after its examination, that specific objections of the IC/LEC, such as a lack of consideration of health hazards to shutoff victims, were adequately discussed at the hearing.[37] Although the ISCC had not adopted the IC/LEC proposals, the record showed that the issues had been adequately debated.[38] This was all that the rules required.[39]

Finally, the IC/LEC contested several procedural rules adopted by the ISCC,[40] claiming that the fourteenth amendment was violated since customers and residents whose services had been disconnected were denied due process in certain circumstances.[41] These rules allowed a utility to disconnect service to tenants of customers who had failed to pay their bills with only two days' notice as well as allowing disconnection to those customers who had originally received notice of termination but were not shut off because the temperature for a 24-hour period had gone below 20°.[42] When the temperature once again rose above 20°, a utility could terminate service without any further notice.[43]

The fourteenth amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty or property without due process of law."[44] Consequently, individuals are protected by this clause against the actions of a state which would deprive them of life, liberty or property.[45] However, the fourteenth amendment can *only* be invoked when there is a state action.[46] Any action by a private person on the other hand is never subject to the constraints of either the fifth or fourteenth amendments.[47] It would therefore be incumbent upon a court to find state action before it could discuss a question of due process.

State action may take many forms.[48] It is also well settled that there are no set rules for what constitutes a state action.[49] In *IC/LEC v. Iowa State Commerce Comm'n*, the Iowa Supreme Court relied on *Jackson v. Metropolitan Consolidated Edison Co.* to determine if a state action was present.[50] *Jackson* concerned a woman who brought suit on due process grounds, alleging that her utility services had been disconnected without ad-

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tions clearly signaling changes in final regulations governing discharge of pollutants provided adequate notice).

37. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 181, 182.
38. *Id.*
39. *Id.*
40. IOWA ADMIN. CODE §§ 19.4(15)(h), 20.4(15)(h).
41. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 182.
42. *Id.*
43. *Id.*
44. U.S. CONST. amend. XIV, § 1.
45. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974).
46. *Id.*
47. *Id.*
48. *See infra* note 67.
49. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974).
50. IC/LEC, Inc. v. ISCC, 335 N.W.2d at 182.

equate notice.[51] The distinctions between *Jackson* and *IC/LEC*, however, are significant and closer examination would suggest that the state action question in *IC/LEC* warranted more than a one-page dismissal of the issue. The Court in *Jackson* stated that approval of a utility's business practices by a state regulatory agency, "where the Commission has not put its own weight on the side of the proposed practice by ordering it," does not create state action.[52] The Supreme Court limited this statement with a description of the specific fact situation.[53] The Court opined that "[r]espondent's [the utility company's] exercise of the choice allowed by state law, when the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the fourteenth amendment."[54]

The Supreme Court of Iowa was too quick to rely on *Jackson* as authority for the proposition that actions of all utility companies are not "state actions" unless the state has "put its weight on the side of the proposed practice by ordering it."[55] *Jackson* was not applicable to and can be distinguished from *IC/LEC* for several reasons. Most importantly, in *Jackson* it was the utility company that had promulgated the rules that led to the due process challenge.[56] The Public Utilities Commission had never considered the rules concerning disconnection.[57] The rulemaking proceedings initiated by the ISCC differed in that it was the Commission's position pursuant to Iowa law to promulgate rules concerning utility shutoffs.[58] The IC/LEC was not attacking the actions or the rules of a utility but the rules promulgated by the ISCC.[59] This situation is distinguished from *Jackson* where the hearings discussed did not concern notice of shutoffs to customers at all.[60]

The Supreme Court, in *Jackson*, specifically limited its ruling that no state action is present unless the "Commission has . . . put its own weight on the side of the proposed practice by ordering it" to the context where the initiative to make the rule comes from the utility, and not the State.[61] In *Jackson*, the Pennsylvania Utility Commission had never considered the shutoff provision adopted by the utility company.[62] The Court stated: "Al-

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51. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 347 (1974).
52. *Id.* at 357.
53. *Id.*
54. *Id.*
55. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178, 183 (Iowa 1983); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).
56. Jackson v. Metropolitan Edison Co., 419 U.S. at 345.
57. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 355 (1974). The Court stated: "As a threshold matter, it is less than clear that under state law that Metropolitan was ever required to file this provision as part of its tariff or that the Commission would have had the power to disapprove it." *Id.*
58. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 182 (Iowa 1983).
59. *Id.*
60. Jackson v. Metropolitan Edison Co., 419 U.S. at 357.
61. *Id.* at 357.
62. *Id.* at 355.

though the Commission did hold hearings on portions of Metropolitan's general tariff relating to general rate increase, it never even considered the reinsertion of this [shutoff] provision in the newly filed general tariff."[63] Since the ISCC did, in fact, initiate the rulemaking proceedings which were specifically intended to deal with the problem of shutoffs in cold winter months,[64] *IC/LEC, Inc. v. ISCC* is clearly distinguishable from *Jackson* on this factual basis.

By reading *Jackson* to stand for the proposition that state action is not present in a utility shutoff unless the state has ordered the action[65] and ignoring the fact situation of that case where the utility and not the public utility commission promulgated rules concerning the shutoff,[66] the Iowa Supreme Court has expanded the scope of *Jackson* in Iowa. It has also overlooked a rather large and pertinent body of case law. There is a line of cases subsequent to *Jackson* which reveal that other means (besides a clear state mandate) are available in determining state action issues.[67] Furthermore,

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63. *Id.* at 354, 355.

64. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 182 (Iowa 1983).

65. *Id.* at 183. The Iowa Supreme Court butressed its position on *Jackson* by citing to two other cases. The first, *Srack v. Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975), dealt with an alleged due process deprivation of denying the plaintiff adequate notice when her utility service had been disconnected. In determining the state action issue, the *Srack* case also relied solely on *Jackson* for the proposition that no state action is present in utility shutoff unless the state has required the action and thereby found for the utility company. *Id.* at 158. The *Srack* court did not discuss state action through encouragement.

The second case cited by the Iowa Supreme Court was *Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39 (2d Cir. 1977). In *Taylor* a woman brought an action against her utility company for disconnecting her service without notice and a hearing after she had allegedly tampered with her meter and refused to pay amounts owed as estimated by the utility. *Id.* at 41. The woman contended that since New York had in fact regulated the notice requirements for utility shutoffs, thereby distinguishing the case from *Jackson*, state action was present. *Id.* at 44. The Second Circuit Court of Appeals held that regulation of utility termination was not synonymous with state responsibility for the lack of a pretermination hearing. *Id.* at 45. For state action to be found, the state must have involved itself in the decision not to grant a hearing. *Id.*

66. *Id.* at 182.

67. *Blum v. Yanetsky*, 102 S. Ct. 2777 (1982), relied on the following cases for the proposition that state action is present where the state "has provided such significant encouragement, either overt, that the choice [for a private decision] must in law be deemed to be that of the state". In *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978), the court held that a warehousemen's proposed sale of goods entrusted to him for storage, as was permitted under state law was not a "state action" since only acquiescence by the state was involved. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (the Commonwealth of Pennsylvania, although not responsible for discrimination practiced by a private club, could not by law require the club to comply with its own discriminatory rules). See also Adickes v. S. H. Kress & Co., 398 U.S. 170 (1970).

The following cases discuss the doctrine that a state action nexus can be found if there is "significant encouragement": Gerena v. Puerto Rico Legal Services, 697 F.2d 447, 449 (1st Cir. 1982) (state action exists if government provides "significant encouragement, either overt or covert"); Modabar v. Culpepper Memorial Hospital, 674 F.2d 1023, 1025 (4th Cir. 1980) (state

each of these cases relied on *Jackson* for the proposition that a sufficient nexus must exist between government and private activity for state action to be present.[68] However, that nexus has been found to exist, not by an "order" of the state, but simply through state encouragement.[69]

The most recent Supreme Court case relying on *Jackson* for the sufficient nexus proposition was *Blum v. Yaretsky*.[70] *Blum* concerned a due process challenge to the transfer of nursing home Medicaid patients to different levels of care without notice and an evidentiary hearing. The statutes which the plaintiffs contended were the nexus between the State of New York and the nursing home physicians (creating state action) required the physicians to complete forms to determine whether a patient should be transferred or discharged.[71] The decisions, however, were solely those of the doctors.[72] In concluding that no state action was present, the Court stated: "A state normally can be held responsible for a private decision only where it has exercised excessive power or has provided such significant encouragement, either overt or covert, that the choice must in the law be deemed to be that of the State."[73]

Whether a state action was present in the IC/LEC situation after construction of *Jackson* in light of *Blum v. Yaretsky* and others,[74] can only be determined by "sifting facts and weighing circumstances."[75] It is clear that there was a greater question of state action than the Iowa Supreme Court chose to recognize.[76] The ISCC stated in its Order Adopting Rules (before

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action found "where regulations give impetus to private conduct so as to foster or encourage it. . . ."); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1333 (1st Cir. 1983); Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919 (1st Cir. 1980) ("significant encouragement, either overt or covert," by the state was considered "state action"); International Assn. of Mach. v. Federal Election Commission, 678 F.2d 1092, 1121 (D.C. Cir. 1982) ("acquiescence" insufficient for "state action" but not government activities which "required, encouraged, or coerced" the challenged practice).

68. *See* 674 F.2d at 1025, 692 F.2d at 1333, 678 F.2d at 1919, 678 F.2d at 1121.

69. *See* 674 F.2d at 1025, 692 F.2d at 1333, 678 F.2d at 1919, 678 F.2d at 1121.

70. 102 S. Ct. 2777 (1982).

71. *Id.* at 2781.

72. *Id.* at 2786.

73. *Id.*

74. *See supra* note 67.

75. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). This case involved an equal protection action by a black who was denied service in a restaurant located in an automobile parking building owned and operated by the Parking Authority, a state agency. *Id.* at 716. In finding state action, the Court held that when a state leases property in the manner and for the purposes described, it is a joint participant in the operation of the restaurant and therefore liable for the actions of the private restaurant owner. *Id.*

76. For federal cases discussing other means by which "state action" may be found see: Terry v. Adams, 345 U.S. 451 (1953); Marsh v. Alabama, 326 U.S. 501 (1946) ("public function" test); Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970) ("state compulsion" test); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Authority, 364 U.S. 715 ("nexus" test).

amending its rules to allow utility companies to disconnect service rather than requiring them to do so):[77]

> Our rules should make it clear to the utilities that we expect them to undertake more vigorous efforts to collect past due accounts of customers who may be abusing our existing rules. . . . We intend to examine the diligence exercised by utility companies in collection procedures when they request rate increases. We do not intend to allow responsible customers to be charged for service to "slow pay" customers who are not entitled to the protection allowed by our rules.[78]

It is inescapable that this type of coercion by the ISCC has a direct effect on a utility's decision to disconnect a customer's service. Although the ISCC has since changed the wording in its rule so that a utility "may" disconnect instead of being required to do so,[79] it is still quite obvious that a utility would suffer should it decide not to disconnect.

Although the language of the rule has changed,[80] the coercive intent of the ISCC remains the same. In a rate case decided July 31, 1981,[81] the ISCC found: "It is appropriate and in the public interest that the company review its policies on collection of bad debts, and determine whether or not revisions to those policies can lead to reduced bad debt expenses."[82]

The ISCC then ordered the utility to compile a report "detailing steps taken to minimize the Company's expense for uncollectible accounts."[83] Since disconnection of service is a "legitimate bill-collection tool,"[84] logic dictates that the ISCC "expected the utilities to disconnect services."[85] Therefore, it is clear that although there is no new regulation which orders a utility company to terminate a customer's service, a company would be better off in the eyes of the ISCC when it applies for rate increases if it can show a good faith effort to reduce the extra costs of utility bills paid by good customers.[86] Since it is the good customer who, in fact, pays the bill

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Iowa acknowledged these tests in *Jensen v. Schreck*, 275 N.W.2d 374, 384, 385 (Iowa 1979). In *Jensen*, a forfeiture proceeding, the fact that the sheriff served notice of forfeiture and subsequent notice to quit, was not sufficient to find a state action on the part of the private plaintiff in that action. *Id.*

77. Appendix at 91, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

78. Appendix at 48, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178 (Iowa 1983).

79. Appendix at 91-93, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commission, 335 N.W.2d 178 (Iowa 1983).

80. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 182 (Iowa 1983).

81. In Re Iowa Power and Light Co., ISCC Docket No. RPU-78-27, at 60.

82. *Id.*

83. *Id.* at 63.

84. Appendix at 46, 335 N.W.2d 178.

85. Appendix at 46, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Comm'n, 335 N.W.2d 178 (Iowa 1983).

86. *See supra* note 78.

(through increased rates) for the non-paying customer,[87] the ISCC has set the stage for state action on the part of the utility if not by ordering the shutoffs for nonpayment, then at least by placing the utility companies in a position where it would be in their own best interest to terminate service to delinquent customers.

Although it is clear from the Iowa Supreme Court's application of *Jackson* to the Iowa situation that the Iowa court believes the state has not affirmatively ordered the action in its rulemaking,[88] it is less clear that the state has not created a state action through its encouragement of private actors to deny others their constitutional rights.[89] A U.S. Supreme Court case espousing this doctrine is *Adickes v. S. H. Kress & Company*,[90] where a white woman sued a store claiming infringement of her civil rights.[91] Pursuant to a local custom she was refused service at a restaurant area in a store because she was in the company of blacks (her students) who were served.[92] Upon leaving the store, she was arrested by an officer and charged with vagrancy.[93] In order to sue the restaurant under the federal civil rights statute, state action had to be found.[94] Since the waitress was not a state official, the theory was created that the arrest was made in encouragement of the custom of not serving whites and blacks together.[95] This encouragement was held to satisfy the state action requirement.[96]

Another case, *Reitman v. Malkey*,[97] espousing the encouragement doctrine which the Iowa court might have examined, involved an amendment by referendum to the California constitution which stated that state may not deny a person the right to sell, rent or lease his property to whomever he chooses.[98] The proponents of the amendment contended the statute would not constitute a state action since the wording of the statute was "neutral" in not *requiring* property owners to discriminate.[99] The Court determined, however, that in the existing California environment, the amendment would encourage and foster racial discrimination.[100] This encouragement served to fulfill the state action requirement.[101]

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87. Appendix at 42, IC/LEC, Inc. v. ISCC, 335 N.W.2d 178 (Iowa 1983).
88. Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Comm'n, 335 N.W.2d 178, 183 (Iowa 1983).
89. Jensen v. Schreck, 275 N.W.2d 374, 384, 385 (Iowa 1983).
90. 398 U.S. 144 (1970).
91. *Id.* at 146.
92. *Id.* at 147.
93. *Id.* at 146.
94. *Id.* at 169.
95. *Id.* at 169-71.
96. *Id.* at 171.
97. 387 U.S. 369 (1966).
98. *Id.* at 371.
99. *Id.* at 374.
100. *Id.* at 376.
101. *Id.*

In the same manner, the ISCC has "encouraged" utility shutoffs by promulgating rules which would allow a utility to terminate services with only two days' notice when the shutoff victim is a tenant of a landlord with a delinquent bill,[102] or with no notice when the temperature once again goes above 20° Fahrenheit and the customer's service had been scheduled to be terminated previously.[103] The apparent neutrality of the statute must be looked at in light of the encouragement the ISCC provides to a utility to disconnect, most notably rate increases.[104] This issue, however, was summarily dismissed by the Iowa Supreme Court as a one paragraph afterthought.[105]

A Supreme Court opinion on point is *Public Utilities Commission v. Pollack*.[106] That decision concerned a challenge to an order of the Public Utilities Commission of the District of Columbia placing radio service on passenger vehicles of a street railway company.[107] Capital Transit was a privately-owned public utility operating under a franchise from Congress.[108] Capital initiated an experiment whereby passengers were *forced* to listen to piped-in music as they rode the bus.[109] Several citizens brought an action to seek a discontinuance of this Orwellian[110] practice on first and fifth amendment grounds.[111] The Supreme Court agreed with the lower courts in finding that in the constitutional challenges, a federal action was involved.[112]

In finding a sufficient nexus between the state and private action, the Supreme Court relied upon the fact that Capital Transit was an agency regulated by the Public Utilities Commission, and that, pursuant to protests against use of the radio on buses, the PUC ordered an investigation of it, and after a hearing "ordered its investigation dismissed on the grounds that the public safety, comfort and convenience were not impaired thereby."[113] Similarly, by initiating rulemaking proceedings concerning disconnection of utility service to nonpaying customers of which proceedings notice was an issue, the ISCC, an agency authorized by the State of Iowa, has brought the utility companies' actions under the auspicies of the state.

In conclusion, the Iowa Supreme Court was in error in not finding state

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102. IOWA ADMIN. CODE §§ 19.4(15)(h)(3), 20.4(15)(h)(3).

103. IOWA ADMIN. CODE §§ 19.4(15)(i)(2), 20.4(15)(i)(2), 20.4(15)(h)(4), 19.4(15)(h)(4).

104. Appendix at 48, Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Comm'n, 335 N.W.2d 178 (Iowa 1983); In Re Iowa Power and Light Co., ISCC Docket No. RPU-78-27, at 60.

105. IC/LEC, Inc. v. ISCC, 335 N.W.2d 178, 183 (Iowa 1983).

106. 343 U.S. 451 (1952).

107. *Id.* at 454.

108. *Id.*

109. *Id.*

110. *See* G. ORWELL, 1984 at 3 (1949).

111. Public Utilities Comm'n v. Pollack, 343 U.S. 451, 462, 463 (1952) (the claimants alleged that the music interfered with public convenience, health and safety).

112. *Id.* at 462.

113. *Id.*

action in *Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission* by relying on *Jackson v. Metropolitan Edison Co.* It is apparent from a closer reading of *Jackson* that a significant difference was present between the two cases. *Jackson's* specific finding that the rules at issue were never even considered as part of any decision by a state regulatory agency clearly placed *Iowa Citizen/Labor Energy Coalition, Inc.* outside its realm. Consequently, other cases concerning state action through encouragement should have been reviewed by the court. Perhaps a different result might have been reached. There is certainly evidence of encouragement on the part of the ISCC. Even with the Court relying on *Jackson*, there is a significant body of case law which has interpreted it with a much broader scope, reading it so that "coercion" by state officials would suffice. Certainly, a closer reading of the rule of law in *Jackson* was in order.

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