DISCRIMINATION AS A SWORD FOR THE POOR: USE OF AN "EFFECTS TEST" IN PUBLIC UTILITY LITIGATION

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> It is a testament to our maturing concept of equality that . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of a willful scheme.[1]

One of the established rules in public utility regulation today is that rates and services are to be offered on a "non-discriminatory" basis.[2] Unfortunately, regulators and ratepayers often use the claim of "discrimination" only as a shield to stop income-based programs designed to protect the poor.[3] Moreover, the claim of "discrimination" has often been confined to "rates" —it is defined as "cost-based" in this context[4]— while discrimination in the provision of service has been

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1. Hansen v. Hobson, 269 F. Supp. 401, 497 (D.D.C. 1967).

2. A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 285 (1969) ("Prevention of discrimination has been a vital regulatory function since federal and state statutes which deal with 'natural monopolies' first acquired teeth. In fact, rebates, preferential charges and service inequalities were largely responsible for such legislative dentures.").

3. *See generally* Colton and Sheehan, *"A New Basis for Conservation Programs for the Poor: Expanding the Concept of Avoided Costs,"* 21 CLEARINGHOUSE REV. 135, 137 (1987) (discussing proposed conservation program justified on an avoided cost basis).

4. For discussion of cost-based discrimination, *see infra* notes 52-57 and accompanying text.

largely ignored.[5] Each of these trends should be reversed.

The anti-discrimination directive can be used as a sword in the public utility arena to protect low-income interests. Anti-discrimination regulations should be applied particularly in the evaluation of the "service" practices of public utilities.[6] State utility statutes should be construed not only to proscribe overt discrimination in rates but also to proscribe more subtle forms of discrimination, inadvertent or otherwise, in the areas of disconnections, deposits, payment plans, late charges and the like.[7] The presence of discrimination in these areas should be determined using an "effects test."[8] Given the success of similar reasoning regarding employment,[9] housing[10] and consumer credit,[11] the failure to do so with regard to utilities seems inexplicable.[12]

This article looks at how the "effects test" might be applied in the utility area. Part I discusses the definition and application of the prohibition against "discrimination" in utility cases. Part II examines the use of an "effects test" in the non-utility context. Part III describes how such an analysis can be used in seeking to prove utility discrimina-

5. *See generally* E. NICHOLS, PUBLIC UTILITY SERVICE AND DISCRIMINATION (1928).

6. "When a utility fails to provide equal treatment for those similarly situated, it should receive attention. Regulatory shoes should remain pointed for that express purpose. Their vigorous use plainly will be in the best interests of regulators and regulated alike." PRIEST, *supra* note 2, at 326. *See also* Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 531 (1911) (discussing why public service companies are subject to peculiar rules of law).

7. *See, e.g.*, Hicks v. Monroe Util. Comm'n, 108 So. 2d 127 (La. Ct. App. 1958) (no difference between refusing to serve and fixing of discriminatory rate).

8. *See, e.g.*, Hsia, *The Effects Test: New Directions*, 17 SANTA CLARA L. REV. 777 (1977). Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976); Note, *Credit Scoring and the ECOA: Applying the Effects Test*, 88 YALE L.J. 1450 (1979).

9. 42 U.S.C. §§ 2000e to 2000e-15 (1970) [hereinafter Title VII]. Congress enacted Title VII in 1964. *See* Civil Rights Act of 1964, Pub. L. No. 88-359, 78 Stat. 296. Title VII was amended extensively in 1972. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

10. 42 U.S.C. §§ 3601-3631 (1970) [hereafter Title VIII].

11. 15 U.S.C. §§ 1691-1691(f) (1976) (popularly known as the Equal Credit Opportunity Act or ECOA).

12. *See* Hsia, *supra* note 8, at 802-03. "As a statutory standard, the effects test continues to expand its scope. It began as a test for scrutinizing employment discrimination but [there] is no reason to preclude its use to interpret other antidiscrimination statutes. In fact, it can persuasively be contended that the effects test is evolving into a generally applicable standard for testing discrimination." *Id.*

tion. Part IV provides illustrative uses of an "effects test" in customer service situations and reviews one particular case to determine if application of this test might have given rise to different results.

I. "DISCRIMINATION" IN THE UTILITY CONTEXT

Most states have codified a prohibition against "unjust" or "unreasonable" discrimination in the rendition of utility service.[13] Those jurisdictions that do not have statutes setting forth such a proscription have judicially incorporated the prohibition.[14] Not all discrimination is banned, however. Rather, only "unreasonable" differences and "undue" preferences fall afoul of the limitation.[15]

Traditional discrimination analysis can be applied in new ways to protect vulnerable low-income populations. No alteration in the nature of the doctrine need be made, simply a change in its application. Rather than looking only at discriminatory preferences, commissions should look also at discriminatory burdens. Rather than examining only discriminatory rate structures, commissions should examine also discriminatory service regulations. Rather than studying only intentional discrimination, commissions should study also de facto discrimination.

A. *The Historical Development of the Doctrine of Discrimination*

The genesis of the proscription on discrimination lies in the utility's common law duty to serve.[16] Dating back to medieval times,[17] the

13. *See, e.g.*, IND. STAT. ANN. § 8-1-2-103 (1988); N.C. GENERAL STAT. § 62-110 (1988).

14. *See, e.g.*, State *ex rel.* Guste v. Council of City of New Orleans, 309 So. 2d 290, 295 (La. 1975).

15. *See, e.g.*, Re Delaware Power & Light Co., 56 Pub. Util. Rep. 3d (PUR) 1 (Del. P.S.C. 1964) (unlawful activities of an electric utility); City of St. Charles v. Illinois Commerce Comm'n, 21 Ill. 2d 259, 172 N.E.2d 353 (1961) (rates discriminated unreasonably against small customers); Re Utah Power and Light Co., 27 Pub. Util. Rep. 4th (PUR) 334 (Utah P.S.C. 1978) (senior citizen rates and discrimination); American Hoechest Corp. v. Department of Pub. Util., 399 N.E.2d 1, 3 (Mass. 1980) (experimental rates for elderly not unduly discriminatory).

16. *See* Burdick, *supra* note 6, at 515. "The features which at common law distinguished those engaged in public or common callings (the original public service companies) from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to serve all applicants for their services, and to perform such services with care without a special assumpsit to that effect. To these primary duties there are certain corollaries, namely, that the service must be reasonably adequate and rendered upon reasonable terms, and that it must be impartial." *Id.*

common law predicated the obligation to provide non-discriminatory rates and services on three grounds.[18] First, the monopolistic character of the services was considered important.[19] Whether it was a ferrier, common carrier, or an innkeeper,[20] the common law recognized that consumers had no choice among vendors and that a law was needed to stand between the provider of services and the abuse that unfettered monopoly power might portend.[21] Second, the common law recognized an implicit agreement in a general assumpsit in the "holding out" to serve the general public.[22] This "holding out" was the factor that created a quasi-contract with the public to serve all who came on just and reasonable terms and on equal terms.[23]

A third line of reasoning held that acceptance of public benefits re-

17. *See* B. WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS §§ 1-42 (1911) "[T]here is to be found from earliest times a peculiar law governing conduct of those engaged in a public employment." *Id.* at 5.

18. *See generally* R. TUGWELL, THE ECONOMIC BASIS OF PUBLIC INTEREST (1922).

19. *See* Munn v. Illinois, 94 U.S. 113 (1876) (the government may regulate the manner in which each uses personal property if such regulation is in the public good). *But see* Brass v. North Dakota, 153 U.S. 391 (1894) (regulating grain elevators only applies to public use elevators); Budd v. N.Y., 143 U.S. 517 (1891) (owner of elevator guilty of exacting charge in excess of statutory rates). *See generally*, Wyman, *The Law of the Public Calling as a Solution of the Trust Problem*, 17 HARV. L. REV. 217 (1904) (problem of monopolies). *But see* Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135 (1914).

For a superb critique of the "monopoly theory," see Rottschaefer, *The Field of Governmental Price Control*, 35 YALE L.J. 438, 451-56 (1926).

20. Wyman, *supra* note 17, at 17. "Barber, surgeon, smith and tailor are no longer in common calling because the situation in modern times does not demand it; but innkeepers, ferrymen, carriers and wharfinders are still in that classification since even in modern business the conditions required them to be so treated." *Id.*

21. *Id.* at 3. "In the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good; and it has again come to be reluctantly admitted that State control is again necessary over such lines of industry as are affected with a public interest." *Id.*

22. Burdick, *supra* note 6, at 515. "It would seem that the origin and basis of the liability of the person engaged in a common calling for failure to serve or for lack of care in the performance of the service, is to be found in the early developed branch of the action on the case." *Id.*

23. *Id.* at 515-16. "It was because a person held himself out to serve the public generally, making that his business and in so doing assumed to serve all members of the public who would apply . . . that he was liable in action on the case for refusal to serve . . . by which refusal or lack of care he committed a breach of assumpsit." *Id.*

quired recipients to serve all who came on equal terms.[24] While the acceptance did not by its terms mandate such activity by the recipient, it necessarily implied it. According to the reasoning, public funds in particular, and government largess in general would not be provided to an institution that unreasonably excluded some part of the populace. In *Re Harrison Rural Electrification Association*,[25] for example, the West Virginia utility commission relied on the fact that Rural Electrification Association (REA) funds were statutorily to be used "for rural electrification. . .[and] the furnishing of electric energy to persons in rural areas who are not receiving central station service."[26] The commission held that the statute meant "all" persons, for Congress could not have intended that public monies be advanced for the benefit of a particular class of persons within an area and denied to others within the area who were willing and able to receive it.[27] A rural electrification cooperative's acceptance of REA funds thus would be an acknowledgment that the co-op is a "public utility."[28]

At least one commentator, however, has concluded that the ban on discrimination postdates the common law duty to serve.[29] According to this commentator, the duty of non-discrimination by a public utility was of statutory origin that did not arise until after the advent of regulatory commissions.[30] In this regard, the cases are inconsistent.[31] In

24. *See* Messenger v. Pennsylvania R.R. Co., 36 N.J.L. 407 (1873). "A company of this kind is invested with important prerogative franchises among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. [If] they had remained under the control of the state, it could not be pretended, that in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. [And] it seems to me impossible to concede, that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. [In] the use of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike." *Id.* at 413.

25. 24 Pub. Util. Rep. (PUR) 7 (W.Va. 1938).

26. *Id.* at 12 (citing Rural Electrification Act chap. 432, 7 U.S.C. Ch. 31, §§ 902, 904).

27. *Harrison*, 24 Pub. Util. Rep. (PUR) at 12-13.

28. It was not the acceptance of REA funds, itself, that conferred public utility status. Rather, the acceptance of REA funds was evidentiary. Acceptance was an acknowledgement that the co-op holds itself out to serve the general public. It is this holding out that is the attribute of a public utility.

29. *See generally* R.K. DAVIDSON, PRICE DISCRIMINATION IN THE SELLING OF GAS AND ELECTRICITY (1955).

30. *Id.* at 30.

Interstate Commerce Commission v. Baltimore & Ohio Railroad,[32] the United States Supreme Court said that the common law "demanded little more than that [railroads] should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."[33] The Court noted, "[i]t was even doubted whether they were bound to make the same charge to all persons for the same service."[34]

In contrast, in *Messenger v. Pennsylvania Railroad*,[35] the New Jersey Supreme Court held:

> A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community.[36]

The United States Supreme Court has suggested that the grant of special privileges is a factor upon which a duty of non-discrimination can be found.[37]

Under whatever common law theory, or under specific statutory directives, there is a clear obligation today to provide non-discriminatory rates and service. Having established the underlying purposes and policies which support that notion, it is necessary to examine precisely what must be shown in order to prove the existence of discrimination.[38]

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31. Burdick, *supra* note 6, at 529. The author, in a turn of the century article, stated: "The doctrine that patrons of public service companies are entitled to similar rates for similar services is probably not to be found in any except recent cases. Until late years, it was not suggested that a man had any ground for complaint if a public service company charge him a rate reasonable *per se*, though another patron were charged less for similar service. And when such a suggestion was made courts took different views to what the common law was on the subject." (citations omitted).

32. 145 U.S. 263 (1892).

33. *Id.* at 275.

34. *Id.* (citations omitted). The Court said further, however, that the "weight of authority in this country was in favor of an equality of charges to all persons for similar services." *Id.* at 276.

35. 36 N.J.L. 407 (1873).

36. *Id.* at 410.

37. *See, e.g.*, Wolf Packing Co. v. Court of Indus. Relations of Kansas, 262 U.S. 522, 535 (1923) (imposing duties of government regulation on those businesses that provide public services).

38. Only cases that have found discrimination to exist are reviewed herein. Well-reasoned and persuasive cases exist finding that discrimination either does not exist, or is justifiable. For an excellent review of whether lifeline rates are discriminatory, see

B. *The Necessary Elements*

For a rate or service to be discriminatory, it must have two essential elements: (1) a benefit or preference to a discrete class of customers and a harm to or burden upon a different class arising as a direct result or a burden or duty uniquely imposed upon a particular class; and (2) a lack of any utility-related basis for making the distinction at issue.

Historically, an analysis of the discriminatory effects of a utility's actions usually has sought to determine whether a utility has granted an undue preference to a particular class of customers. Such cases have examined an expressly articulated purpose to provide an extra benefit to a discernible class. The cases studying special rates for the poor are illustrative.[39] Special rates for the poor have been considered for electricity,[40] natural gas,[41] telephone,[42] and transit[43] services. This preference, when designed to benefit needy persons, has generally taken one of three forms. First, proposals to exempt the poor and the elderly

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Taubman and Rauch, *Recent Decisions on Rate Structure Reform: A Survey With Emphasis on Lifeline Rates*, 10 CLEARINGHOUSE REV. 607 (1976).

39. *See generally* Annotation, *Public Utilities: Validity of Preferential Rates for Elderly or Low-Income Persons*, 29 A.L.R. 4th 615 (1984) (annotation weighs rate structure considerations against objections that rate structures unfairly prefer elderly or low income persons).

40. *See, e.g.*, Re Generic Hearings Concerning Elec. Rate Structure, 36 Pub. Util. Rep. 4th (PUR) 6 (Colo. P.U.C. 1979) (comprehensive investigation of all elements of retail electric rate design); Re Rate Design for Elec. Corps., 26 Pub. Util. Rep. 4th (PUR) 280 (N.Y. P.S.C. 1978) (determining relevance of lifeline concept for electric rate structure); Re Potomac Elec. Power Co., 84 Pub. Util. Rep. 3rd (PUR) 250 (D.C. P.S.C. 1970) (rate determination proceeding); American Hoechest Corp. v. Massachusetts Dept. of Pub. Utils., 399 N.E.2d 1 (Mass. 1980); Re Consolidated Edison Co. of N.Y., 85 Pub. Util. Rep. 3rd (PUR) 516 (R.I. P.U.C. 1978) (rate determination proceeding); Re Central Vt. Pub. Serv. Corp., 7 Pub. Util. Rep. 4th (PUR) 67 (Vt. P.S.B. 1974) (application for rate increase).

41. *See, e.g.*, Washington Gas Light Co. v. Public Service Comm'n, 450 A.2d 1187 (D.C.App. 1982) (affirming rate determination); Mountain States Legal Found. v. Public Util. Comm'n of Colo., 590 P.2d 495 (Colo. 1979) (suit challenging establishment of reduced rates for low income elderly and disabled persons).

42. *See e.g.*, Re Southern Bell Tel. and Tel. Co., 7 Pub. Util. Rep. 3d (PUR) 55 (Ala. P.S.C. 1954) (consideration of telephone rates and services based on income level); Colorado Mun. League v. Public Util. Comm'n of Colo., 591 P.2d 577 (Colo. 1979) (rate determination); Re New England Tel. and Tel. Co., 84 Pub. Util. Rep. 3d (PUR) 130 (Mass. D.P.U. 1970) (investigation of rate schedules); Re New England Tel. and Tel. Co., 89 Pub. Util. Rep. 3d (PUR) 417 (R.I. P.U.C. 1971) (feasibility determination for economy rates).

43. *See, e.g.*, Louisville Transit Co., 82 Pub. Util. Rep. 3d (PUR) 1 (KY P.S.C. 1969) (rate determination).

from proposed rate increases have been suggested.[44] In this instance, rates for the specified class were proposed to stay constant, with increased costs passed on to remaining consumers. Second, an explicit per unit discount has been offered.[45] In these instances, classes such as the poor and the elderly would pay only a portion of their "full" cost of service.[46] Finally, a reduced rate on an initial block of energy has been offered, with subsequent blocks priced at higher rates.[47] The justification for this preference was that such discounts provided an affordable initial amount of energy for basic needs.

In most instances, the preferences were justified strictly on social welfare grounds.[48] In these situations, regulators disapproving such proposals acknowledged the need[49] but denied any responsibility in responding to the need.[50] Typical of the response was a finding of the

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44. *See, e.g.*, Mountain States Legal Found. v. New Mexico State Corp. Comm'n, 687 P.2d 92 (N.M. 1984) (telephone discount rate program).

45. *See, e.g.*, Re Rate Concessions to Poor Persons and Senior Citizens, 14 Pub. Util. Rep. 4th (PUR) 87 (Or. P.U.C. 1984) (based on age or income).

46. It is important to note, however, the circular logic of this statement. To say that rates are not "cost-based," or fail to cover the "full costs," does not acknowledge that "cost" can be defined in many different ways. *See, e.g.*, Mountain States Legal Found. v. Utah Pub. Serv. Comm'n, 636 P.2d 1047, 1056 (Utah 1981) ("Thus, depending on the method adopted by the Commission for allocating costs, some low usage customers could properly be burdened with something less than all of a rate increase attributable to new plant and equipment, based on traditional rate making concepts"). *See also* Comment, *Lifeline Electric Rates: Are They Unreasonably Discriminatory*, 83 DICK. L. REV. 541 (1979) (examining justifications for lifeline rates); Taubman and Frieden, *Electricity Rate Structures: History and Implications for the Poor*, 10 CLEARINGHOUSE REV. 431 (1976) (discusses mechanisms available to alleviate impact of rate increases on fixed/low income persons).

47. *See, e.g.*, Re Lifeline Rates, 46 Pub. Util. Rep. 4th (PUR) 163, 165 (Ariz. Corp. Comm'n 1982); Re Public Serv. Co. of N.H., 95 Pub. Util. Rep. 3d (PUR) 401 (N.H. P.U.C. 1972) (initial low-cost block to poor persons). *See also* Mountain States Legal Found. v. Utah Pub. Serv. Comm'n, 636 P.2d 1047, 1055-57 (Utah 1981).

48. For other grounds, *see infra* note 55 and accompanying text.

49. *See, e.g.*, Re Public Serv. Co. of N.H., 95 Pub. Util. Rep. 3d (PUR) at 448. ("It is evident that low-income people are finding it increasingly difficult to pay for basic electric service. Basic services such as electricity are essential to health and an acceptable standard of living in this country, and no person should be compelled by economic circumstances to which he may be subjected through no fault of his own, to be without such a service.") *Id.*

50. *See e.g., Id.* ("It is a fundamental premise today that persons unable to provide food and shelter for themselves should be helped by a compassionate and relatively affluent society. However, such utility service for low-income persons should probably be subsidized by the taxpayers at large rather than indirectly by other ratepayers of the company."). *See also Washington Gas Light Co.*, 450 A.2d at 1203.

Colorado Supreme Court, which held that although the discount rate "benefits an unquestionably deserving group, the low-income elderly and low-income disabled,. . .[t]his unfortunately does not make the rate less preferential."[51]

The fundamental principle articulated by courts and commissions disapproving preferential proposals for low-income households as discriminatory is that rates must be cost-based.[52] This articulation appears simply to be the standard way to indicate that households which are similarly situated must be treated alike.[53] In many instances, no claim of a utility-related basis for the discount was advanced.[54] In other instances, claims of a cost difference between the benefitted class and others were noted.[55] Such an argument, however, is not always accepted. For example, the argument that seniors impose less of a cost on an electric system was rejected as unsupported.[56] Also rejected was an argument that low-income customers were cheaper to serve.[57]

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51. *Mountain States Legal Found.*, 590 P.2d at 498.

52. *See* Re Rate Concessions to Poor Persons and Senior Citizens, 14 Pub. Util. Rep. 4th (PUR) 87 (Or. P.U.C. 1984). "The court-required distinctions between customers' rates are to be justified by meaningful differences in the service provided by the utility to each customer class, especially the cost of that service. [If] the material billing factors are different, a classification based upon such differences is satisfactory. These factors may include the quantity used, the time of use, the manner of use, or any other factor related to the cost of furnishing that service." *Id.* at 91 (quoting Kliks v. Dalles City, 335 P.2d 366 (Or.1959)). *See also, e.g.*, North Carolina ex rel. N.C. Util. Comm'n v. Mun. Corp. of Scotland Neck, 90 S.E.2d 519 (N.C. 1959); City of Cleveland v. Pub. Utils. Comm'n of Ohio, 406 N.E.2d 1370 (Ohio 1980); United States Steel Corp. v. Pennsylvania, 390 A.2d 849 (Pa. Commw. Ct. 1978).

53. *See, e.g.*, Citizen Action Coalition of Ind., Inc. v. Pub. Serv. Co. of Ind., 450 N.E.2d 98, 101 (Ind. Ct. App. 1983) ("The State prohibits charging different rates for 'like and contemporaneous service.' A targeted lifeline rate structure does precisely that. It charges customers receiving the same service under the same circumstances different rates.").

54. *See generally Mountain States Legal Found.*, 636 P.2d 1047 at 1055-57 (citing recent case law indicating that the basis for disputes is not on a utility-related basis but basis of age and income of residential customers).

55. *See, e.g.*, Boston Edison Company v. Department of Pub. Utils., 375 N.E.2d 305 (Mass. 1978); Re Consumers Power Co., 25 Pub. Util. Rep. 4th (PUR) 167, 232, 238 (Mich. 1978).

56. *E.g., Mountain States Legal Found.*, 636 P.2d at 1058; Consolidated Edison Co., 85 Pub. Util. Rep. 3d (PUR) 276, 297 (N.Y. P.S.C. 1970).

57. *E.g.*, Re Rate Concessions to Poor Persons and Senior Citizens, 14 Pub. Util. Rep. 4th (PUR) 87, 89 (Or. P.S.C. 1976). *But see*, Boston Edison Co. v. Dept. of Pub. Utils., 375 N.E.2d 305, 333 (Mass 1978) (low-use customers did not cause increased rates and could be exempt from rate hike).

In each of these instances, the grant of the preference was found to be to the substantial detriment of the remaining ratepayers. In *Greater Birmingham Unemployment Committee v. Alabama Gas Corp.*,[58] for example, an income-based rate was found to impose an annual $50 cost on remaining ratepayers,[59] a burden deemed unacceptable.[60] In Oregon, the public utility commissioner found that a proposed discount would "require nonpoor customers to provide millions of dollars each year in increased rates."[61] In New York, the annual cost simply to reduce the basic service charge to senior citizens from $2.40 to $1.70 per month was $2 million.[62] Not only the cost of the discount, but the costs of administration, such as determining eligibility, have been considered as well.[63] Additionally, the imposition of a cost, or an adverse effect, on ratepayers not in the benefitted class has been held to be an essential element of a "discriminatory" rate.[64]

Several subsidiary principles regarding utility-related bases for distinctions flow from this general concept. First, non-utility characteristics, such as low-income status, are irrelevant.[65] Characteristics that are not rationally related to the service itself will not support distinctions.[66] Second, the over-inclusive and under-inclusive characteristics[67] of proposals lead to disapproval.[68] For example, in *Citizen*

58. 86 Pub. Util. Rep. 4th (PUR) 218 (Ala. P.S.C. 1987).

59. *Id.* at 227.

60. *Id.* "A plan which imposes costs of this magnitude on non-participating ratepayers is, in our opinion, unduly discriminatory and unjustly preferential."

61. Re Rate Concessions to Poor Persons and Senior Citizens, 14 Pub. Util. Rep. 4th (PUR) 87, 89 (Or. P.U.C. 1976).

62. Re Consolidated Edison Co., 85 Pub. Util. Rep. 3d (PUR) 276, 296 (N.Y. P.S.C. 1970).

63. *E.g.*, Re New England Tel. and Tel. Co., 89 Pub. Util. Rep. 3d (PUR) 417, 423-24 (R.I. P.U.C. 1971); Pennsylvania Pub. Util. Comm'n v. Philadelphia Elec. Co., 91 Pub. Util. Rep. 3d (PUR) 321 (Pa. P.U.C. 1971).

64. *E.g.*, Re Investigation of Airline Rates, 53 Pub. Util. Rep. 3d (PUR) 643 (Ca. P.U.C. 1964); Pennsylvania Pub. Util. Comm'n v. Pennsylvania R.R., 42 Pub. Util. Rep. 3d (PUR) 166 (Pa. 1962).

65. According to the Colorado supreme court, "the PUC's power to effect social policy is restricted by statute no matter how deserving the group benefitting from the preferential rate may be." Mountain States Legal Found. v. Public Util. Comm'n of Colo., 590 P.2d 495, 498 (Colo. 1979).

66. Mountain States Legal Found. v. Utah Pub. Serv. Comm'n, 636 P.2d 1047, 1052-53 (Utah 1981) ("Classification of customers must necessarily be accomplished by reference to general characteristics having some rational nexus with the criteria used for determining just and reasonable rates.").

67. *See, e.g.*, Re Lifeline Rates, 46 Pub. Util. Rep. 4th (PUR) 149, 156 (Ind. P.S.C.

Action Coalition of Indiana, Inc. v. Public Service Company of Indiana,[69] the appellate court held that "if low-income customers use low amounts of electricity and high-income customers use large amounts of electricity, a general lifeline rate structure would be an equitable method of providing assistance to the needy."[70] The court noted, however, that the commission had found that a "positive, but only moderate, correlation exists between level of income and consumption of electricity."[71] The court then found dispositive the commission's conclusion that "although a general lifeline rate structure would benefit low-income consumers who are low users of electricity, it would have the undesirable effect of benefitting many middle and high-income consumers who are low users of electricity and harming a number of low-income consumers who are high users of electricity."[72] With testimony established, the court stated, that family size, and the home's size and age "have a greater effect on electricity consumption than income does."[73]

In contrast to more traditional analysis, this Article examines not the grant of special favors, but rather the imposition of illegitimate bur-

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1982) ("The commission now finds that although a general lifeline rate structure will benefit some low-income/low users, as intended, it will also have the undesirable result of benefitting a substantial number of middle and/or high-income/low users, and harming a substantial number of low-income/high users."); Re Hawaiian Elec. Co., Inc., 43 Pub. Util. Rep. 4th (PUR) 361, 384, 487 (1981); Re New England Tel. and Tel. Co., 84 Pub. Util. Rep. 3d (PUR) 130 (Mass. 1970); Re Generic Hearings Concerning Elec. Rate Structure, 36 Pub. Util. Rep. 4th (PUR) 6 (Colo. 1979).

68. *E.g., Mountain States Legal Found.*, 636 P.2d at 1058. ("In addition, there are others, not senior citizens, in similar economic conditions. However, the Commission has not explained why it defined the class in the manner it did. It is arguable that the classification is underbroad in that sense, but overbroad in the sense that not all senior citizens have lower incomes or consume less energy than the average population.")

69. 450 N.E.2d 98 (Ind. Ct. App. 1983).

70. *Id.* at 102.

71. *Id.*

72. *Id.* Testimony established that 20% of families with income less than $7,500 had below average energy consumption, while 25% of families with income greater than $25,000 had below average energy consumption. *Id.* at 103. A fallacy in this analysis, however, is to define "low-income" simply by the dollar income level. Incomes that otherwise look quite substantial, if used to support large families, will still leave the household below the federal poverty level. A household's poverty status, as opposed to its dollar income level, is a much truer measure of whether that household is "low-income."

73. *Id.* at 103. What the court does not address, however, is whether there is a sufficiently strong correlation between poverty status and certain types of housing to warrant use of income as a surrogate.

dens.[74] These burdens may, for example, take the form of deposits,[75] credit checks,[76] late payment charges,[77] or the like. A "burden" is defined for purposes of this Article as an obligation which treats one customer or class of customers less favorably than all other customers.[78]

Given this review of overt utility discrimination, it is necessary next to turn to the more difficult situation; the instance where a practice is neutral on its face[79] but still has discriminatory impacts. Before proposing a mechanism for assessing this more subtle discrimination in utility practices, we turn to areas of the law where the evaluation of claims of unintentional discrimination have become more routine. We seek to learn from application of the "effects test" chiefly in employment law but also in housing and consumer credit law.

II. THE USE OF AN "EFFECTS TEST" IN THE NON-UTILITY CONTEXT

The primary attribute of an "effects test" is the separation of the results of a practice urged to be discriminatory from the intention of the defending party. The "effects test" does not rely upon proof of the challenged party's improper intent but rather upon the measurement of disparate impacts.[80] The defendant's good or bad faith is irrelevant to any showing that a challenged practice does or does not discriminate against a protected class.[81] Instead, the focus is on discriminatory re-

74. *Cf.* Re Rates for Motor Carriers, 39 Pub. Util. Rep. 3d (PUR) 167 (Or. PUC 1961) (rates subject a person or area to unreasonable prejudice).

75. *See, e.g.*, Southwestern Bell Tel. Co. v. Bateman, 266 S.W.2d 289, 292 (Ark. 151) (deposit requirements).

76. *See, e.g.*, Re Washington Gas Light Co., 82 Pub. Util. Rep. 3d (PUR) 225 (D.C.P.S.C. 1970) (credit categories).

77. *See, e.g.*, State of Louisiana ex rel. Guste v. Council of New Orleans, 309 So. 2d 290, 295 (La. 1975) (late payment charge rules).

78. This definition is based upon the definition of "discrimination" in the Equal Credit Opportunity Act (ECOA). According to the ECOA, to "discriminate against an applicant" for credit means "to treat an applicant less favorably than other applicants." 12 C.F.R. § 202.2(n) Reg. B (1985).

79. For an excellent definition of "facially neutral," *see*, Note, *Credit Scoring*, *supra* note 8, at 1451.

80. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 155 (1976) (Brennan, J., dissenting) (disregarding intent of actor).

81. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Good intent or absence of discriminatory purpose does not redeem employment procedure that are related to measuring job capability."); United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972) (discrimination prevented by Fair Housing Act); United States v. Hughes Memo-

sults.[82] The "effects test" is used to challenge a pattern or practice of the defendant that results in discriminatory impacts on particular classes.[83]

A. *The Initial Showing*

Employment litigation, which often involves allegations of disproportionate racial impacts, provides an excellent model for assessing the presence of discrimination. Here, the primary method for demonstrating a prohibited effect is statistical analysis.[84] Discriminatory impacts can be statistically established in one of three ways. First, as shown in *U.S. v. Georgia Power Company*,[85] a litigant can prove that minorities as a class are excluded by the challenged practice at a substantially higher rate than whites. Litigants use this test to show that a particular employment practice adversely affects minority populations as a whole in a disproportionate way. In *Georgia Power*, for example, the company's requirement that all employees have a high school diploma

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rial Home, 396 F. Supp. 544 (W.D.Va. 1975) (no good faith defense to practices prohibited by Fair Housing Act).

82. Note the difference between constitutional and statutory use of the effects test in this regard. "The United States Supreme Court . . . in 1976 . . . proscrib[ed] the nonevidentiary use of disparate impact in constitutional analysis. In so doing, the Court drew a sharp distinction between the constitutional and statutory standards for measuring discrimination." Hsia, *supra* note 8, at 787 (citations omitted). Hsia notes that "against the restrictive constitutional backdrop, however, the statutory schemes requiring the use of the effects test are increasing." *Id.*, at 789-90.

83. *See, e.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976) (sexual discrimination); Miller v. Bank of America, 418 F. Supp. 233 (N.D.Cal. 1976) (sexual discrimination). *Cf.* Olsen v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976) (promotion of qualified men over qualified women did not suffice to establish "discriminatory impact" so as to make out prima facie case of sex discrimination).

84. Substantial writing has been done on the use of statistical evidence. Some articles simply review court cases relying on statistical evidence. *See, e.g.*, Note, *Evidence: Statistical Proof in Employment Discrimination Cases*, 28 OKLA. L. REV. 885 (1975); Note, *Employment Discrimination: Statistics and Preferences under Title VII*, 59 VA. L. REV. 463 (1973); Montlack, *Using Statistical Evidence to Enforce the Laws Against Discrimination*, 22 CLEV. ST. L. REV. 259 (1973). Other articles review statistical methods. *See, e.g.*, Dorsano, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals*, 29 SW. L.J. 859 (1975); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978); Bogen and Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974).

85. 474 F.2d 906 (5th Cir. 1973).

was successfully challenged. "The requirement undoubtedly screens out blacks at a considerably higher rate than whites," the court said.[86] In the South, the court found, in the 25-44 age group, 64.7 percent of white males, 35 percent of black males, 63 percent of white females, and 34.7 percent of black females, had completed high school.[87] Similarly, in *Griggs v. Duke Power*,[88] the class disproportionately lacked the factor that would include class members among the employed.

A California decision represents the converse of the *Griggs* situation. A company rule dismissing employees who had their wages garnished was struck down in *Johnson v. Pike Corporation of America*.[89] The court observed that "the proportion of racial minorities among the group of people who have had their wages garnished is significantly higher than the proportion of racial minorities in the general population."[90] Unlike *Griggs*, in *Johnson*, the class had a disproportionate share of the attribute which excluded them from being among the employed. As can be seen, the first statistical test can be used in either of two ways: it can examine an attribute that the affected class has, which attribute serves as the basis for the discrimination. Second, it can scrutinize an attribute that the affected class lacks, which attribute serves as the basis for the discrimination.

Under either use of the first statistical test, it does not matter whether there is an actual demonstrated impact upon particular employee/applicants. If the practice can be shown to have a disproportionate impact on the minority population as a whole, even without considering the specific applicants, a prima facie case of discrimination has been made. An attribute that results in discrimination can be either inclusive (all members possessing a certain characteristic are disqualified) or exclusive (all members lacking a certain characteristic are disqualified).

In contrast, the second statistical test specifically examines the employee population. Using this test in *Bridgeport Guardians, Inc. v.*

86. *Id.* at 918.

87. *Id.* Similar figures were found for Atlanta in particular: "Statistics show that for males over 18 years of age, 70.7% of the whites finished high school compared with only 46.2% of blacks." *Id.*

88. 401 U.S. 424 (1971).

89. 332 F. Supp. 490, 492-497 (C.D. Cal. 1971).

90. *Id.* at 494. *See also* Gregory v. Litton Systems, 316 F. Supp. 401, 403 (C.D. Cal. 1970). Employment based on arrests is discriminatory. While blacks nationally comprise 11% of the population, blacks account for 27% of reported arrests, and 45% of arrests based simply on suspicion. *Id.*

Bridgeport Civil Service Commission,[91] the court held that a prima facie case of discrimination was established by comparing the number of minority and white job applicants actually excluded by the challenged practice. In *Bridgeport Guardians*, the court examined the results of a written examination administered over five years by a police department.[92] The court found a prima facie case of discrimination established, noting that "the passing rate for whites was 3 ½ times better than Blacks and Puerto Ricans."[93] A similar challenge was brought against the New York fire department.[94] The "basic facts" that the court found persuasive established that:

> Roughly 11.5% of the 14,168 applicants who entered the examination halls were black or Hispanic. Yet minority members comprised only 5.6% of those who had passed the written, physical and medical examinations at the time of the hearing. Non-minority candidates thus survived the screening process at a rate more than twice that of minority candidates.[95]

The court disapproved this discrimination, as shown by the disparate impact upon the specific individuals involved, rather than upon the minority population as a whole.[96]

Finally, discrimination can be demonstrated by comparing the level of inclusion of minorities by the company as compared to the percentage of minorities in the relevant geographical area. In *Rodriguez v. East Texas Motor Freight*,[97] for example, the court noted that at the time of the complaint, the company had never hired a black or Hispanic line driver[98] in Texas.[99] By the time of the trial, the company had hired three Mexican-Americans but no blacks for its 180-member

91. 482 F.2d 1333 (2d Cir. 1973).

92. *Id.* at 1335.

93. *Id.* 58% of the 568 whites who took the exam passed while only 17% of the 76 Blacks and Hispanics passed. *See also*, Rogers v. International Paper Co., 510 F.2d 1340, 1348-49 (8th Cir. 1975) (statistical evidence sufficient to show racially disparate impact of a skilled crafts testing program).

94. Vulcan Soc'y. of N.Y. City Fire Dept. v. Civil Serv. Comm'n, 490 F.2d 367 (2d Cir. 1973).

95. *Id.* at 392.

96. *Id.* at 392-93.

97. 505 F.2d 40 (5th Cir. 1974) *vacated*, 431 U.S. 395 (remanded after determination that plaintiffs failed to represent class).

98. "Line drivers," as opposed to lower paid "city, pick-up and delivery drivers" were considered the more prestigious jobs at the company. *Id.* at 46.

99. *Id.* at 48, 54.

driver force.[100] The court found that the company had failed to prove that "the relevant labor pool lack[ed] qualified minority persons."[101]

In the *Bridgeport* case, the court relied upon the third test also, in finding discrimination in its police hiring case. In *Bridgeport*, the Second Circuit observed that "while Bridgeport has a combined Black and Spanish speaking population of 25 percent, members of these minorities only represent 3.6 percent of the Department."[102]

This final test, however, can be used to disprove, as well as to prove, a discriminatory effect. In *Butts v. Nichols*,[103] plaintiffs challenged the employment practices of the Des Moines police department.[104] Des Moines had adopted an ordinance prohibiting the city from employing convicted felons.[105] Plaintiffs argued that since the percentage of the black population in Iowa prisons exceeded the percentage of the black population in Des Moines, any ordinance which discriminated against convicted felons also discriminated on the basis of race.[106] This argument would seem to fall directly within the reasoning of *Georgia Power* and *Pike Corporation*. The Iowa court, however, rejected that contention. The court stated: "Although there are several departments in the city which have a low percentage of black employees, the overall percentage of black city employees (7.1 percent) is greater than the percentage of black population in Des Moines (5.62 percent)."[107]

In sum, any one of three statistical approaches can be used to establish a prima facie case of discrimination in employment litigation. One can show discrimination by comparing the percentage of the class discriminated against in the total population to the percentage in the population subject to the challenged practice. One can show that the challenged practice excludes the protected class at an inappropriately disparate rate.[108] One can show a disproportionate representation of the protected class in the population limited by the challenged prac-

100. *Id.*

101. *Id.* at 48, 54.

102. 482 F.2d at 1335.

103. 381 F. Supp. 573 (S.D. Iowa 1974).

104. *Id.* at 574.

105. *Id.* at 574-75.

106. *Id.* at 578.

107. *Id.* at 579. *Cf.* United States v. Georgia Power Co., 474 F.2d 906, 910 (5th Cir. 1973).

108. For example, one must meet a designated credit criteria. However, hypothetically, while 50 percent of all whites meet that criteria, only five percent of Blacks do.

tice.[109] As shown below, these three approaches are also easily adaptable to the utility context.

B. *The Justification*

Even where disparate impacts can be shown, the mere presence of such impacts is often not sufficient to disapprove of a challenged practice.[110] Discriminatory impacts in employment proceedings,[111] for example, can be justified by a showing that the employment practice is a "business necessity."[112] In general, to show a business necessity, an employer must show a significant correlation between the employment practice and "important elements of work behavior which comprise or are relevant to the job."[113]

In addition to examining what is a business necessity, however, one must consider what is not.[114] Perhaps most importantly, mere business convenience has been found to be not a sufficiently compelling "necessity" to override discriminatory impacts.[115] Economic burdens must rise to the level of making alternatives to the discriminatory prac-

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109. For example, while the population of Whiteacre is 40 percent Black, only five percent of the Whiteacre fire department is Black.

110. *See, e.g.*, 490 F.2d at 393. The Second Circuit correctly noted that the disparate impact "does not at all decide the case" but merely places a "burden of justification" on the purveyor of the challenged practice. *Id.*; *Bridgeport*, 482 F.2d at 1335 n.4. The court observed that some courts have held that while a mere discrepancy between a minority population and an employment population may not of itself establish a prima facie case of discrimination, "it does invite inquiry." *Id.* Other courts have held that a substantial discrepancy is sufficient to establish a prima facie case. *Id.* (citations omitted).

111. Due to the disparate fact patterns presented in Title VIII fair housing cases, no uniform analytic framework involving a "necessity" defense can be found.

112. Griggs v. Duke Power Co., 401 U.S. 430, 431 (1971).

113. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting C.F.R. § 1607.4(c)).

114. *See generally* Note, *Business Necessity Under Title VIII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

115. *See, e.g.*, Watkins v. Scott Paper, 530 F.2d 1159, 1181 (5th Cir.); *cert. denied*, 429 U.S. 861 (1976) (where employer has some other option); *see also* Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) ("While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative."); Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971) (employers inconvenience, annoyance or even expense are not sufficient justifications standing alone for discrimination). *See generally* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 587-95 (1979).

tice infeasible. Overall, most cases indicate that a challenged employment practice must satisfy three criteria to fall within the business necessity exemption. First, the practice must relate to a valid business purpose which is sufficiently compelling to override any discriminatory impacts. Second, it must effectively carry out the purpose for which it is said to serve. Finally, there must be no less discriminatory alternative that will carry out that purpose as effectively.[116]

In sum, under specific federal statutory authority, discrimination in employment, housing and credit is prohibited. Under these statutes, discrimination can be demonstrated using an "effects test." The effects test holds that the good faith of the person engaging in the challenged practice is irrelevant; if the practice results in discrimination, it is unlawful. Litigation brought pursuant to this legislation generally involves a three-step process. First, the litigant must establish a prima facie case of discrimination by showing the presence of disparate impacts. Second, the person undertaking the challenged practice may seek to justify the practice, notwithstanding the discriminatory impact, on the grounds that it serves an essential business need. Finally, the litigant may seek to show that any essential business need that may exist can be met by alternative means in a less discriminatory manner. In light of this framework, it is possible to determine whether a similar analysis can be applied in a utility setting.

III. De Facto Discrimination by Public Utilities: A Model

The proscription on discriminatory practices by public utilities should be applied as strictly to service regulation as it is to rate regulation.[117] The fundamental "rule" as set forth not only by the common law[118] but by statute[119] requires a utility to serve on reasonable terms all those who desire the service it renders. "[T]he public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination, and at reasonable

116. Comment, *Title VII*, *supra* note 8, at 175-76, 177-185 (1979).

117. "Discrimination in public utility service is governed by the same principles as those discussed in connection with discrimination in rates." Nichols, *supra* note 5, at 1021-1041.

118. 64 Am. Jur. 2d, Public Utilities, § 16 n.51 (1972) (citations omitted).

119. *See*, Comment, *Liability of Public Utility for Temporary Interruption of Service*, 1974 Wash. U.L.Q. 344, 345-46 n.9 (1974); *see also*, Lake, *Discrimination by Railroads and Other Public Utilities —Preferences to Patrons in a Given Locality*, 25 N.C.L. Rev. 273 (1947) (as applied to the Interstate Commerce Act).

rates."[120] A utility must make its service available to all members of the public to whom its public use and scope of operation extend, who apply for such service, and who comply with its reasonable rules and regulations.[121]

This section proposes a model to use in enforcing this obligation for service regulations by pursuing a claim of de facto violation of the proscription against discrimination. The model is based upon the same substantive principles outlined for assessing rate discrimination.[122] It uses a process similar to that used in employment litigation.[123]

A. *The Substantive Foundation: Applying the Ratemaking Principles*

The same principles that are used to evaluate claims of discrimination in ratemaking should be used to evaluate claims of service discrimination as well. Four such principles stand out. First, a utility may not rely on a social policy ground unrelated to the provision of utility service to justify its service policy.[124] However socially beneficial or justified the policy may be,[125] if there is no utility-related basis for the practice, the policy may not serve to justify a service practice. Second, even when a utility justification is proffered, there must be a rational relationship between the practice and the asserted basis. This relationship must be clearly demonstrated, not assumed.[126] Third, if a prac-

120. Birmingham v. Rice Bros., 238 Iowa 410, 26 N.W.2d 39 (Iowa 1947) (citing 43 AM. JUR. 586). *Cf.* Overman v. Southwestern Bell Tel. Co., 675 S.W.2d 419, 424 (Mo. App. 1984) ("A public utility is obligated by the nature of its business to furnish a service or commodity to the general public which it has undertaken to serve, without arbitrary discrimination. . . . Such duties arise from the public nature of a utility, and statutes providing affirmatively therefore are merely declaratory of the common law." *Id.* (citing 73B C.J.S., Public Utilities § 8).

121. *See, e.g.*, Josephson v. Mountain Bell Tel. Co., 576 P.2d 850, 852 (Utah 1978) (utility must render service to all members of the public who so request and pay for it); *See also* 26 AM. JUR.2D, *Electricity, Gas and Steam*, § 110 (1966) (duty with respect to a delay in commencing electric service); 26 AM. JUR.2D, *Electricity, Gas and Steam*, § 216 (1966) (delay in commencing gas service).

122. *See supra* notes 39-73 and accompanying text.

123. *See supra*, notes 80-117 and accompanying text.

124. *See supra* notes 48-51 and 65-66 and accompanying text.

125. For example, Philadelphia Gas Works recently justified its policy of denying service to applicants who could not prove they were either tenants or homeowners on the grounds that the utility should not contribute to the unlawful and non-consensual occupation of property.

126. *See supra* note 56 and accompanying text.

tice is over- or under-inclusive in nature, it should be disapproved.[127] A practice may not exclude those to which it should apply nor may it include those to which it should not apply. Finally, the foundation of any claim of discrimination is that all persons similarly situated must be treated alike.[128] If households that have no discernible differences are receiving disparate service treatment or if households with different characteristics are receiving identical treatment, a claim of discrimination should lie.

B. *The Procedural Foundation: Applying the Effects Test Principles*

A utility discrimination model fits neatly into the effects test framework developed for employment, housing and credit discrimination. A three-step process is warranted.

First, a complainant must establish a prima facie case that a discrete class of customers is being unreasonably affected by a utility's practice. This step has two components. Initially, there must be a disparate impact on a discrete class of customers. Three different statistical methods exist to establish such an impact.[129] Where the utility model diverges, however, is in the need to establish further that the impact on the discrete class is "unreasonable." Unlike the "protected classes" set forth in the employment,[130] housing,[131] and credit[132] statutes, no particular group of utility customers is entitled to special protection in utility law.[133] Nevertheless, subjecting one class of customers to an unnecessary and disproportionate exposure to the disconnection of service[134] would rise to the level of "unreasonable" discrimination.[135]

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127. *See supra* note 67-73 and accompanying text.

128. *See supra* note 53 and accompanying text.

129. *See supra* notes 84-110 and accompanying text.

130. Title VII prohibits discrimination based on race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a) (1982).

131. Title VIII prohibits discrimination based upon race, color, religion, sex or national origin. 42 U.S.C. § 3604(c) (1982).

132. The ECOA prohibits discrimination based on race, color, religion, national origin, sex, marital status, age, income based in whole or part on public assistance, and the good faith exercise of rights under the federal Consumer Protection Act. 15 U.S.C. § 1691(a) (1982).

133. In this regard, the utility statutes should be viewed more as a consumer protection statute than as a civil rights statute. Compare early discussions regarding the Equal Credit Opportunity Act for the significance of this distinction. *See, e.g.*, Lyckman, *The 1978 Amendments to the Equal Credit Opportunity Act*, 28 BAYLOR L. REV. 633 (1976).

134. The decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971) can be

Moreover, if a customer class is adversely affected for reasons demonstrably unrelated to the utility purpose sought to be served by a practice, the practice producing such an effect should be found to be unreasonable.[136]

If a disparate impact is proven, the second step of the three-step process would permit a utility to justify its practice on the grounds that the practice has a manifest relationship to a legitimate business purpose.[137] Thus, for example, a discounted rate might be supported by evidence that it is the only way to meet competition from fuel-switching,[138] a particular disconnect or deposit practice might be justified on the grounds that it is the only way to reduce bad debt.[139] Similarly, a late payment charge may be argued to be the only way to ensure prompt

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constructively consulted for determining when the exposure is "unnecessary and disproportionate." In *Griggs*, the court found three objectionable features: (1) that the criteria were over-broad and general, *Id.* at 433; (2) that the criteria were based on attributes that minorities had no opportunity to acquire *Id.* at 430; and (3) that minorities had no means to manifest the attribute fairly. *Id.* at 430.

135. Indeed, any violation of a utility's duty to serve would be "unreasonable" action on its part. For a survey of what actions violate a utility's duty to serve, *see generally* Colton, *Regulating the Unregulated Utility: Customer Service Regulations for Rural Electric Cooperatives*, NATIONAL CONSUMER LAW CENTER (July 1989); *see also* Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers*, 78 YALE L.J. 448 (1969).

136. Those regulations universally held unreasonable include disconnecting service for a collateral matter. Annotation, *Right of Public Utility Corporation to Refuse its Service Because of Collateral Matter Not Related to that Service*, 55 A.L.R. 771 (1928); disconnecting for nonpayment of a third party's debt. Annotation, *Liability of Premises, or Their Owner or Occupant, for Electricity, Gas, or Water Charges, Irrespective of Who is the User*, 19 A.L.R.3d 1227 (1968); disconnecting service for nonpayment of an unrelated service, Annotation, *Right of Municipality to Refuse Services Provided by It to Resident for Failure of Resident to Pay For Other Unrelated Services, 60 A.L.R.3d 714 (1974).*

137. Once a prima facie case has been established, the burden of proof would switch to the utility to justify its practice on non-discriminatory grounds. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977). *See also*, Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). When each step is met, the burden switches to the other party. *E.g.*, Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir.1977); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); United Trans. Union Local 974 v. Norfolk and W. Ry., 532 F.2d 336 (4th Cir. 1975).

138. *See, e.g.*, Re Honolulu Gas Co., 86 Pub. Util. Rep. 3d (PUR) 307 (Haw. P.U.C. 1970) (application to adjust rates); Watkins v. Atlantic City Elec. Co., 67 Pub. Util. Rep. 3d 483 (N.J. D.P.U. 1967) (argument challenged). *But see*, Idaho Pub. Util. Comm'n v. Intermountain Gas Co., 73 Pub. Util. Rep. 3d (PUR) 209 (Idaho P.U.C. 1968) Re Iowa Power and Light Co., 63 Pub. Util. Rep. 4th (PUR) 367 (ISCC 1984).

139. *E.g.* Re Washington Gas Light Company, 82 Pub. Util. Rep. 3d (PUR) 225 (D.C. P.S.C. 1970).

payment.[140] As with employment cases, however, strict limits must be placed on this defense. A utility should not be permitted to assert simply that its otherwise discriminatory practice is effective; it must instead show that the practice is essential.[141] Moreover, the fact that other alternatives might be more expensive should not be a permissible defense, unless the expense is so great as to render less discriminatory alternatives infeasible.[142]

The third step in the three-step process is to permit a rebuttal to a proffered utility "business" justification. This rebuttal would show that less discriminatory means are available to accomplish the utility function serving as the basis for the justification. Thus, in a shutoff situation, for example, if a more precise measure of credit-worthiness can be proven, the use of a measure with demonstrably discriminatory impacts should be disapproved.[143]

This line of reasoning can be identified in some past ratemaking situations. To begin, the premise is that rates must be non-discriminatory.[144] At times, however, diversions from this rule are permitted. Discounts have been approved, particularly when necessary to preserve industrial load.[145] The reason for the discount is to serve a utility function: to protect the utility load from competition.[146] These decisions reason that so long as the discounted rate covers the industrial customer's variable costs of production,[147] any additional money paid will

140. *E.g.*, Jones v. Kansas Gas and Elec. Co., 222 Kan. 390, 565 P.2d 597 (Kan. 1977).

141. *See* Note, *supra* note 116. *See also* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) ("The 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. . . . [N]ecessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals.").

142. *See supra* notes 116-117 and accompanying text.

143. *See supra* note 116 and accompanying text.

144. *See supra* 13-15 and accompanying text.

145. *E.g.*, Detroit Edison Company, 68 Pub. Util. Rep. 4th 241 (Mich. P.S.C. 1985) (increase granted); Re Hoosier Energy Rural Elec. Coop., 78 Pub. Util. Rep. 4th (PUR) 120 (Ind. P.S.C. 1986) (increase granted). *But see* Ex parte United Gas Pipe Line Co., 42 Pub. Util. Rep. 3d (PUR) 120 (La. P.S.C. 1961) (future escalation not authorized).

146. *E.g.*, Re Pacific Gas and Elec. Co., 22 Pub. Util. Rep. 3d (PUR) 209 (Cal. P.U.C. 1958).

147. For a discussion of the theory of designing a rate sufficient to recoup the variable costs of production, see generally P. GARFIELD AND W. LOVEJOY, PUBLIC UTILITY ECONOMICS 138-140 (1964).

contribute to the system's fixed costs and thus leave remaining ratepayers better off than had the customer left the system entirely.[148] The additional requirement that the discount be narrowly drawn has been imposed, however, where this type of discount rate has been approved.[149]

In these cases, each of the three lines of analysis can be identified: (1) Is there a discriminatory effect? Yes, there is a rate difference. (2) If so, is it supported by a business necessity? Yes, because there is a need to meet competition. (3) If so, is there a less discriminatory alternative? No, if the rate is drawn sufficiently narrow.

IV. De Facto Discrimination by Public Utilities

A. *Illustrations*

De facto discrimination against low-income households can occur in a variety of contexts when public utility actions are judged by an "effects test." Examples discussed below include discrimination in credit and collection techniques by Michigan Bell, discrimination in the offer of payment plans by Central Maine Power Company, and discrimination in the offer of energy conservation programs by Western Massachusetts Electric Company. In none of these instances did the utility seek to implement programs that were overtly discriminatory against low-income households. Nevertheless, the activities do indeed discriminate against those with low income because of program attributes that are unrelated to any compelling need of the utility. Each practice will be examined separately below.[150]

1. Credit and Collection Techniques

Michigan Bell Telephone Company (Michigan Bell) has a classification scheme for credit and collection purposes that unfairly discriminates against the poor.[151] Michigan Bell's system of "Account

148. *E.g.*, Re Portland Gen. Elec. Co., 86 Pub. Util. Rep. 4th (PUR) 463 (Or. P.U.C. 1987); Re Hoosier Energy Rural Elec. Coop., 78 Pub. Util. Rep. 4th (PUR) 128 (Ind. P.S.C. 1986).

149. *E.g.*, Re Portland Gen. Elec. Co., 86 Pub. Util. Rep. 4th (PUR) 463 (Or. P.U.C. 1987) (discount must be no lower than necessary to retain load).

150. It is less important, with these illustrations, to conclude that discrimination has in fact occurred than it is to understand the underlying rationale.

151. National Consumer Law Center, *Telephone Customer Service Regulations in the Post-Divestiture Environment: A Study Of Michigan Bell Telephone Company*, at 68 - 101 (July 1988).

Groups" is at the center of the scheme. Michigan Bell classifies a customer for credit and collection purposes based solely upon the length of time the customer has had service in his or her own name.[152] Three Account Groups are based upon this "length of service" criterion. Account Group 1 (AG1) includes households which have had service for zero to 12 months; Account Group 2 (AG2) covers households who have had service for 13 to 24 months; Account Group 3 (AG3) covers households with service for more than 24 months.[153] Michigan Bell emphasizes that the only events that will "programmatically change a customer's account group number" are length of service and the existence of a suspension for nonpayment.[154] The Account Group classification is based on the verified length of previous telephone service with any Bell or independent telephone company.[155]

This classification of a customer is the factor upon which a number of credit and collection decisions and actions by Michigan Bell are based. For example, deposits will be collected only from an AG1 household; AG2 and AG3 households have a blanket exemption from deposit requirements as a matter of Michigan Bell policy.[156] Thus, for example, if a customer is found to have a delinquent account with a different Michigan utility, a deposit may be collected only if that customer is an AG1 household. Similarly, AG1 households are subjected to stricter collection techniques. For example, an AG1 household will be sent a shutoff notice when its outstanding arrears is one-half of its average bill.[157] In contrast, AG2 and AG3 households receive only "reminders" in such a situation.[158] In effect, both AG2 and AG3 households are permitted to "carry" an arrears greater than a household identical in all respects but for its length of service.

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152. The customer also may use the name of his or her spouse. *Id.*, at 69.

153. A fourth Account Group includes all households who have had service disconnected within the immediately preceding 12 month period, regardless of the length of service. *Id.* at 68.

154. *Id.* at 68-69.

155. *Id.* at 69. This includes service shared with a spouse or former spouse.

156. *Id.* at 70-71.

157. The arrears must also exceed $25. Thus, if a bill is either less than $25 or less than half of the customer's average monthly bill, no shutoff notice will be sent. *Id.* at 72-76.

158. An AG2 household will receive a shutoff notice only if the household's arrears is equal to $45 or the household's average monthly bill, whichever is higher. An AG3 household receives a shutoff notice if the arrears is twice the average bill or $45, whichever is higher. *Id.* at 75.

The Michigan Bell credit scheme is a utility example of the use of the type of "unscored objective criteria" frequently found objectionable in employment discrimination litigation.[159] The Michigan Bell scheme labels, based upon a single characteristic, a certain population as "less creditworthy." Michigan Bell has decided that households who have had service for fewer than 12 months present credit risks to the Company. What Michigan Bell has failed to acknowledge, however, is the converse: that while more risky households might have had service for fewer than 12 months, not all households who have had service for that period of time would constitute a risk to the company.[160]

The differences between the Bell scheme and the employment cases are minor. In *Gregory v. Litton Systems*,[161] for example, the presence of arrests for crimes other than a minor traffic offense precluded employment.[162] In *Green v. Missouri Pacific Railroad*,[163] the objectionable criterion was the presence of a conviction for a crime other than a minor traffic offense.[164] In *Griggs v. Duke Power Company*,[165] a requirement for a high school diploma was challenged.[166] In *Johnson v. Pike Corporation*,[167] at issue was the garnishment of wages.[168] In each case, a single attribute of the class was used to measure a broad factor: fitness for employment. In no case was there an allegation of any improper intention by the employer in establishing the classification scheme. In *Gregory*, for example, the court expressly found that Litton's policy of disqualifying frequently arrested persons was "objectively applied and was enforced without reference to race, color, religion, sex or national origin."[169] Nevertheless, racial discrimination was present. The court found "this discrimination exists even though such a policy is objectively and fairly applied as between applicants of

159. *E.g.*, Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); Gregory v. Litton Sys. Inc., 316 F. Supp. 401 (C.D. Cal. 1970), aff'd, 472 F.2d 631 (9th Cir. 1972); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

160. *Michigan Bell, supra* note 152, at 96-98.

161. 316 F. Supp. 401 (C.D. Cal. 1970).

162. *Id.* at 402.

163. 523 F.2d 1290 (8th Cir. 1975).

164. *Id.* at 1293.

165. 401 U.S. 424 (1971).

166. *Id.* at 431.

167. 332 F. Supp. 490 (C.D. Cal. 1971).

168. *Id.* at 492.

169. *Gregory*, 316 F.Supp. at 402.

various races."[170]

Applying the principles of the effects test to the Michigan Bell scheme can be constructively compared to the District of Columbia Public Service Commission's decision in *Re Washington Gas Light Company*.[171] In that case, the D.C. commission considered the credit and deposit policies of a gas company. The commission held that while it was reasonable to create categorical exemptions from deposit requirements, the converse practice — to categorically require deposits from all customers not falling in an exempt class — was unreasonable.[172] In language closely paralleling that used in the consumer credit, housing and employment contexts, the commission held that customers should be required to post a deposit "only on the basis of specific information relating to their own credit reliability."[173]

In assessing the use of population characteristics such as that used by Michigan Bell, the inquiry would regard whether there is "inadequate prediction."[174] If the utility, in effect, assigns negative value to attributes possessed in high proportion by groups which are protected, regardless of the actual correlation between those attributes and the behavior actually sought to be measured, the criterion is objectionable.[175] At the least, a criterion may not be overbroad and general. It must permit the protected group to manifest the desired characteristic sought by the utility.[176] As one commentator summarized the legal requirements for consumer credit: "Screening must allow individuals who would perform equally well an equal chance to signal their expected performance."[177] A "sweeping disqualification" of all persons

170. *Id.* at 403.

171. 82 Pub. Util. Rep. 3d (PUR) 225 (D.C. P.S.C. 1970).

172. *Id.* at 227. "If a customer does not fall into an exempt category, the company has a duty to make such inquiry as is necessary to determine the credit of that customer. It cannot say that the customer does not fit into an exempt category and he must therefore pay a deposit." *Id.*, at 228.

173. *Id.* The Commission also stated: "[W]e remain convinced that the decision to require a deposit should be based on considerations directly relating to the credit reliability of the customer involved." *Id.*

174. Note, *Credit Scoring, supra* note 8, at 1456. "It is not the overall accuracy of a scoring system compared with other procedures that is at issue. . . . The issue here is the legitimacy of using systems that may be expected to systematically predict a lower proportion of successes for previously disadvantaged groups than for historically advantaged groups." *Id.* at 1456 n.30.

175. *Id.* at 1458.

176. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430, 433 (1971).

177. Note *Credit Scoring, supra* note 8, at 1474. With Michigan Bell, for example,

with a particular attribute, rather than "a precise measurement" of the desired attribute, is likely to be disapproved in a consumer credit context,[178] and should be disapproved in the utility context as well.

In short, Michigan Bell's Account Group process does not allow households who would perform equally well an equal chance to signal their expected performance. The Account Groups result in a sweeping disqualification of all persons with a particular attribute (length of service) rather than resulting in a precise measurement of the desired attribute of timely payment.

2. Winter Disconnections

The State of Maine has adopted a unique approach to the winter payment problems of low-income customers. Rather than adopting a "pure" winter moratorium, whereby disconnections of service are absolutely prohibited for income-eligible customers from November through April,[179] Maine has adopted a two-pronged approach to winter shutoffs. The first prong requires utilities to make a reasonable effort to make personal contact with customers who are $50 or more in arrears.[180] "Personal contact" may occur either by telephone or by a premise visit.[181] The second prong is a system of payment plans. The commission requires most utilities[182] to offer eligible customers[183] an opportunity to enter into a Special Payment Arrangement. Under this plan, a customer may pay less than the full amount of winter bills as they become due; the difference is then "made-up" in equal increments paid during the non-heating months.[184] In the event that (1) no per-

96% of the households tagged with the "risky" label because of their length of service presented no danger of creating uncollectible accounts on the Bell system. *Michigan Bell, supra* note 152, at 96.

178. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973) (applying *Griggs*, 401 U.S. 424).

179. *See* National Consumer Law Center, Model Residential Utility Service Regulations, 51 (1984).

180. Chapter 81, § 17.D and § 17.A.2, P.U.C. Rules.

181. Chapter 81, § 17.B.9, P.U.C. Rules.

182. Utilities with fewer than 10,000 residential customers are exempt. Chapter 81, § 18.O, P.U.C. Rules.

183. An "eligible customer" is defined to be a customer who "is not able to pay for utility service in accordance with the terms of the bill without exposing the customer or other members of the customer's household to the probability of deprivation of food or other necessities for health or life." Chapter 81, § 17.A.5, P.U.C. Rules.

184. Chapter 81, § 17.A.4, P.U.C. Rules.

sonal contact is made with the customer, or (2) personal contact is made and the customer and utility fail to agree on a payment plan, or (3) a payment plan is agreed to but is subsequently broken, a utility may seek to disconnect service even during the winter months so long as it first seeks and obtains approval from the Maine Public Utility Commission's (PUC) Consumer Assistance Division.[185]

A recent report for the Maine PUC, prepared by the National Consumer Law Center, found that these rules operated, however unintentionally, to discriminate against a discrete population of low-income households.[186] The report found that 70 percent of the households for whom a winter disconnection was sought,[187] and 80 percent for whom a winter disconnection was granted,[188] lacked telephone service in their home. The study found that the homes without telephones did not have greater debt than the remaining population.[189]

The study found further that the structure of the utility's collection procedures worked to exclude households lacking telephones. According to the study, a statistically significant difference existed in the number of "no-phone households" that arranged to make full or partial payments, that obtained public assistance, and that entered into payment plans.[190] The study concluded:

> "It would appear that households which lack telephone service do not have the same ability to undertake the basic activities necessary to maintain home heating. They cannot contact social service agencies for public assistance; nor can they contact their utility to make payment plan arrangements."[191]

Based upon this analysis, the Maine PUC was urged to eliminate the source of discrimination: heavy reliance upon telephone collection techniques.

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185. Chapter 81, § 17.I.2, P.U.C. Rules.

186. National Consumer Law Center, *An Evaluation of Low-Income Utility Protections in Maine: Winter Requests for Disconnect Permission*, at 16-18 (July 1988).

187. *Id.* at 16.

188. *Id.* at 19.

189. Indeed, exactly the opposite was found. On average, the population without phones had $158 in arrears at the time of the original disconnect notice issued by the utility while the population as a whole had $170 in arrears. Similarly, at the time the utility sought permission to disconnect in the winter, the average in arrears for the "no-phone" population was $189 while the average in arrears for the total population was $210. *Id.* at 17.

190. *Id.* at 18.

191. *Id.*

The Maine situation is an excellent example of establishing unintentional discrimination. The Maine utility had, in effect, made the presence of a telephone a prerequisite to maintaining energy service. Using the first statistical test for establishing discrimination,[192] it can then be found that while on average less than one percent of all households lack phone service, roughly 30 percent of all low-income households lack telephone service.[193] The second of the three statistical methods was used as well.[194] As the employment tests in New York[195] and Bridgeport[196] disproportionately excluded minorities, so, too, did the de facto requirement of a telephone disproportionately exclude low-income Maine electric customers from continuing service.

Maine would be well-served to apply to its utility practices the employment practices counsel of the Supreme Court in *Griggs v. Duke Power Company*.[197] What is required, the Court said, "is the removal of artificial, arbitrary and unnecessary barriers."[198] The Court continued to state that the "absence of discriminatory intent does not redeem . . . procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups."[199]

3. Energy Conservation Measures

The Massachusetts Department of Public Utilities (DPU) has in recent years turned its attention to discrimination in electricity[200] conservation programs.[201] Programs offered by utilities in Massachusetts, the DPU found, unreasonably discriminated against the poor. The DPU decided that exclusion of low-income households from receiving

192. *See supra* notes 85-90 and accompanying text.

193. G. Sterzinger, *Telephone Ownership Since Divestiture*, PUB. UTIL. FORT. at 25, 26 (Oct. 2, 1986).

194. *See supra* notes 91-96 and accompanying text.

195. Vulcan Soc'y of N.Y. City Fire Dep't. v. Civil Service Comm'n, 490 F.2d 367 (2d Cir. 1973).

196. Bridgeport Guardian v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973).

197. 401 U.S. 424 (1971).

198. *Id.* at 431.

199. *Id.* at 432.

200. There is no need to limit the analysis to electric programs. The programs which the DPU happened to be examining were electric. *See infra* note 202.

201. Re Western Mass. Elec. Co., 87 Pub. Util. Rep. 4th (PUR) 306 (Mass. D.P.U. 1987) (rate determination proceeding).

the "direct benefits" of conservation programs is "unacceptable."[202]

The seminal case is *Re Western Massachusetts Electric Company*,[203] in which the Hampshire Community Action Commission (HCAC), a local community action agency, challenged both the overall conservation planning of Western Mass Electric Company (WMECO) and the design of specific conservation programs. Both the planning and design components, HCAC argued, were marred by assumptions which, though perhaps unwittingly, nevertheless resulted in the effect of excluding low-income households from conservation programs.[204] This exclusion, HCAC argued, not only denied an opportunity for the poor to reduce their bills by reducing their consumption,[205] but also resulted in the poor paying the costs of the conservation measures while receiving none of the benefits.[206]

WMECO's energy conservation planning resulted in de facto discrimination because of its failure to consider market barriers that were unique to the poor. First, hurdle rates, an annual return on investment required for a household to invest in conservation measures, were set at levels that ignored low-income data.[207] In its conservation planning, WMECO assumed that any measure which met a hurdle rate of 30 percent would be implemented without financial assistance from the utility.[208] According to evidence presented by HCAC, however, low-income hurdle rates reached up to 90 percent. Second, HCAC argued, low-income households do not have access to investment capital for conservation measures, even if those measures are recognized by customers as providing economic benefits.[209] If a household does not have $400 to invest in a new appliance, in other words, it makes no difference that the new appliance would return a savings of $500 to the

202. *Id.* at 417.

203. 87 Pub. Util. Rep. 4th (PUR) 306 (Mass. D.P.U. 1987). *See also* Re Cambridge Elec. Light Co., DPU-87-221-A, 173 (Mass. D.P.U. 1988) (unpublished opinion).

204. "Although WMECO asserts that its programs are designed to be income neutral, HCAC contends that the effect of WMECO's programs, intended or unintended, is to exclude low-income customers." *Id.* at 404.

205. *Id.* at 417.

206. *Id.* at 405. "It is HCAC's position that the exclusivity of the Company's programs has two undesirable results. First, it excludes low-income customers from the direct benefits of energy savings." *Id.*

207. *Id.* at 404.

208. *Id.*

209. *Id.*

household. Finally, low-income persons may have less education, which interferes with their ability to recognize the cost savings that conservation measures might induce.[210]

The Massachusetts DPU agreed that low-income customers of WMECO "receive few of the direct benefits of energy savings made available by Company-sponsored . . . programs."[211] Noting that low-income customers are "systematically excluded from participation" in Company conservation programs, using classic discrimination language,[212] the DPU found that by its actions and inaction, the utility "excludes a specific group of customers from enjoying the direct benefits" of those programs.[213] The remedy, the DPU suggested, was for the utility affirmatively to "take into account and compensate for market failures that affect any customer group's participation" in the company's conservation programs.[214] To eliminate the de facto discrimination, the DPU concluded, "it is appropriate to use factors such as range of income levels, customer rate classes, or levels of electricity use to target a program to a specific group."[215]

In *Re Eastern Edison Company*[216] the DPU also found Eastern Edison to have a potential "bias in the selection process" for conservation programs.[217] The DPU noted "the particularly limited scope of programs" in finding that Eastern Edison was, through its planning and implementation, effectively excluding "hard-to-reach residential customers such as low-income customers and tenants."[218] In *Eastern Edison*, the Department found the lack of information was a source of discrimination.[219] According to the DPU, "a company must have an adequate information base to determine the potential for [conservation]

210. *Id.*

211. *Id.* at 417.

212. *See supra* notes 52-55, 58-64, and accompanying text.

213. *Western Mass.*, 87 Pub. Util. Rep. 4th (PUR) 306 at 417.

214. *Id.*

215. *Id.* at 418.

216. 100 Pub. Util. Rep. 4th (PUR) 379 (Mass. D.P.U. 1988).

217. *Id.* at 418.

218. *Id.* The DPU found that, other than a hot water heater insulation program, "the remaining programs target a very exclusive group of customers." *Id.*

219. *Id.*, at 419. "Lack of information regarding the technical potential of [conservation] in the territory could be an additional source of bias in the process. Finally, the Company did not make any specific effort to consider the barriers to participating in [conservation] programs by certain residential and low-income customers."

within each customer class."[220] To meet the directive that each utility must "take into account and compensate for market barriers that affect any customer group's participation in Company [conservation] programs,"[221] each utility in Massachusetts must now engage in a "systematic analysis" and must "document . . . consideration of program designed to provide direct benefits to all customers including low-income and other residential customers."[222]

Elements of at least two of the three statistical tests for proving de facto discrimination[223] can be found in these conservation decisions. The first factors found persuasive in demonstrating discrimination in conservation planning and implementation look to the low-income population as a whole, and not to particular households. The capital availability factor, for example, is conceptually identical to the high school diploma which the minority class lacked in *Griggs*.[224] In implementing conservation measures, WMECO made its programs available only to customers who could afford to make a substantial financial contribution on their own. This attribute, access to investment capital, was entirely unrelated to the potential for conservation in any given low-income home.[225] Similarly, the exclusion of all measures that met hurdle rates of greater than 30 percent was the same type of exclusionary characteristic as the criminal conviction in *Gregory*[226] or the wage garnishment in *Pike*.[227] Both the inclusive and exclusive aspects of the first statistical test[228] were thus implicated in the WMECO proceeding.

Second, the exclusion of low-income households from particular conservation programs in the WMECO case is an example of the second statistical test. WMECO, for example, offered one comprehensive conservation program to households "having a minimum annual usage of 7,000 KWH."[229] HCAC noted that while the average consumption

220. *Id.* at 419.

221. *Id.* (quoting *Western Mass*, 87 Pub. Util. Rep. 4th (PUR) 306).

222. *Id.*

223. *See supra* notes 108-110 and accompanying text.

224. *See supra* notes 85-87 and accompanying text.

225. Another way to view this is that the requirement for a household to provide its own investment capital did not permit the low-income household to demonstrate the potential for cost-effective conservation in their homes. *See supra* notes 175-179 and accompanying text.

226. *See supra* notes 162-63 and 170-71 and accompanying text.

227. *See supra* notes 89-90 and accompanying text.

228. *See supra* notes 85-90 and accompanying text.

229. *Western Mass.*, 87 Pub. Util. Rep. 4th (PUR) 306, 405.

of households with incomes greater than $15,000 was more than 7,000 KWH, "fewer than one in four households with incomes less than $15,000 have annual consumption over 7,000 KWH."[230] Thus, the usage threshold, like the police testing procedures in New York[231] and Connecticut[232] tended to exclude low-income households at a disproportionate, and thus objectionable, rate.

B. *Differences from the Past: Illustration*

It is possible to take a prior utility discrimination case, lost by low-income advocates, and determine whether a different result might have been attained under the discrimination theory advanced in this Article. In *Jones v. Kansas Gas and Electric Company*,[233] low-income households challenged the utility's billing practices, arguing that those practices "discriminate against low-income families, older persons, welfare recipients and persons on fixed incomes."[234] According to the plaintiffs, because the utilities use "cycle billing," coupled with a short payment period, "these persons are required to pay an excessive late charge."[235] The households had asked the commission to, among other things, allow customers to choose the date on which they were billed.[236]

The Kansas court rejected the discrimination challenge. The court found that "there was no proof that the utilities intentionally designed their billing to discriminate against low-income customers."[237] The court held that its review was "limited to a determination of whether a method is reasonable, not whether it is the most desirable of those possible."[238] Finally, the court found that "allowing consumers to choose the date on which they were to be billed would increase operating costs" to the utility.[239]

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230. *Id.*

231. *See supra* notes 93-96 and accompanying text.

232. *See supra* note 102 and accompanying text.

233. 569 P.2d 597 (Kan. 1977).

234. *Id.* at 604.

235. *Id.*

236. In this way, the billing date and the date on which various public benefit checks (such as AFDC, social security and the like) could be made to more closely coincide. *Id.*

237. *Jones*, 565 P.2d at 605.

238. *Id.*

239. *Id.* at 604.

As is apparent from the discussions above, each of these Kansas decisions would have been erroneous under the discrimination model proposed based upon credit, housing and employment antecedents.[240] Under this model, absent constitutional claims,[241] the fact that there was no "intent" to discriminate is irrelevant. The focus is on the discriminatory results.[242] Under the proposed model, the court would not have been limited to a determination of whether the single alternative could be supported. Rather, it would have a duty to determine if a less discriminatory alternative existed.[243] Finally, the fact that increased costs may be associated with the less discriminatory alternative would not be dispositive. Rather, the discriminatory alternative must be the result of an "irresistible demand."[244] Assuming that the Kansas litigants could have met one of the three statistical tests to make a prima facie demonstration of discrimination, a question which cannot be answered from the facts contained in the reported decision, the merits of the case may well have been decided differently using the discrimination model proposed herein.

CONCLUSION

Discrimination is discrimination whether it be intentional or de facto. The federal government has taken specific actions in the past two decades to enact legislation prohibiting discrimination in such public areas as employment, housing and consumer credit. A body of law has evolved around those statutes, holding that even discrimination with no bad faith or discriminatory intent falls within their limits.

As in these other public areas, one of the basic tenets of utility law is

240. The litigants could have brought an ECOA challenge to the utility billing practices. The ECOA bans discrimination based on the receipt of public assistance, 15 U.S.C. § 1691(a) (2) (1982), and on age, 15 U.S.C. § 1691(a) (1) (1982). The ECOA applies to a utility transaction. *See* Donaghue, *The Equal Credit Opportunity Act and Public Utilities*, 105 PUB. UTIL. FORT. 28 (June 5, 1980). "Discrimination" has been defined to mean to treat less favorably than other applicants, 12 C.F.R., § 202.2(n), a definition which the imposition of a late payment charge seems clearly to meet. Thus, if the utility billing practice was thought to be discriminatory, because it failed to account for the dates on which public assistance and social security checks were received, thus unfairly imposing late payment charges on customers, an ECOA complaint could have been made out.

241. *See supra* note 82 and accompanying text.

242. *See supra* notes 80-81 and accompanying text.

243. *See supra* note 117 and accompanying text.

244. *See supra* note 142 and accompanying text.

the ban on discriminatory actions. Born in the common law, this prohibition has been universally codified in the various regulatory structures that oversee public utility operations. Unlike these other areas, however, public utility law has been remiss in failing to address de facto discrimination.

The argument that de facto discrimination exists can be applied in a variety of ways to protect the interests of the poor in customer service situations. It has been found that, even though lacking in malicious intent, utilities often adopt procedures that have underlying assumptions that exclude the poor: the assumption of a telephone in the household, the assumption of adequate education, the assumption of access to borrowed money. Using an effects test, claims of de facto discrimination may be a powerful tool to move reliance on these assumptions from the realm of being "unfair" to the realm of being "unlawful."

NOTES