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I. INTRODUCTION

ON August 14, 2003, parts of the northeastern United States and southeastern Canada experienced a massive blackout when electricity transmission failed throughout a regionally interconnected grid of power stations. Analysts do not yet have a definitive reason for the events that led to the failures, but a combination of automatic equipment functioning and human reactions, precipitated the events that followed. Electricity consumers experienced a loss of service ranging from a few hours to over a day. Some adversely affected customers in New York chose to utilize a reimbursement request for food spoilage to attempt to recover loss.[1] Others who suffered different losses, or felt the $350 reimbursement cap was inadequate, have chosen to file a lawsuit against the electricity provider.[2] Additionally, claims may be made for more remote losses, such as lost wages or lost profits. This note explores the potential liability power utilities can expect to face with respect to claims for loss from consumers based on common law and statutory authority in the United States and Canada.

II. CHRONOLOGY OF THE 2003 BLACKOUT

The Joint U.S./Canada Power Outage Task Force was created by the U.S. Department of Energy and the Canadian Natural Resources Ministry to investigate the blackout of 2003. Preliminary investigations have traced the events surrounding the blackout period but have not identified an actual cause or assigned any blame as yet.[3] However, a brief outline of what occurred is relevant to the issues that impact liability, because action or non-action by utility companies and their employees during similar events have been deemed negligent by courts in the past. The 2003 blackout was largely due to what is known as a "voltage collapse"; these can occur when a temporary disconnect occurs at a point along the power

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1. Fred A. Bernstein, *True or False: Con Ed to Pay For Blackout Food Spoilage*, N.Y. TIMES, Sept. 11, 2003, *available at* http://www.pulpny.org.
2. CBC News, *Blackout Lawsuit Blames Energy Company* (Aug. 19, 2003), *at* http://www.cbc.ca/stories.
3. U.S. Department of Energy Report, *Initial Blackout Timeline: August 14, 2003 Outage Sequence of Events* (Sept. 12, 2003), *at* http://www.energy.gov.

lines and a domino effect of voltage dips eventually results in a system overload if a relay station cannot compensate for the loss.[4] "Reactive power" is the energy needed to maintain a minimum amount of voltage to allow continuous transmission of electricity throughout a system.[5] Reactive power is strongest near load centers such as points of transmission, but cannot travel over long distances.[6] A temporary disconnect due to an overloaded line requires a shunt to other lines, which consume their reactive power.[7] This can result in a harmful drop in overall voltage levels. On August 14, 2003, various factors, including a brush fire and a tree that grew too close to a power line, caused disconnects at stations around Ohio.[8] Although these lines reconnected, the temporary disconnects led to a reduction in supply along the grid and a general westward shift of energy demand that drew more heavily on Michigan providers.[9] Eventually, the alternative paths were so few and the voltage so low that the system reversed direction of the power flow and attempted to complete the loop in the opposite direction – through Pennsylvania and New York to Ontario, and finally back through Michigan and Ohio.[10] However, the automatic disconnects continued along the circuit as centers continued to "shed load" by shunting off to other lines as individual power stations went down.[11] New York suffered a major split in the transmission system, which triggered an automatic disconnect in Ontario.[12] Minutes later, Michigan and Ontario connections separated. As a result, almost 95 percent of consumers in that province were not provided with expected power.[13] Large areas of New York were also without power at this time as well, but some power was still provided by lines tied into generating stations at Niagra, St. Lawrence, and Québec.[14]

Much of this cascading loss of power occurred due to automatic system shutdowns that are in place as safety measures installed to prevent overloads at points along the transmission grid.[15] However, other contributing events led to these shutoffs.[16] A plaintiff wishing to recover for any injury suffered as a result of the blackout would need to show a duty existed requiring the utility to take reasonable care. Recovery can occur if the utility is found negligent by failing to properly maintain or care for the physical environment around the lines, such as where trees have grown too close. A plaintiff could also allege, *inter alia*, negligence in training or supervision of workers monitoring grid activity.

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4. *Id.* at 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 4.
9. *Id.* at 5-6.
10. *Id.* at 7.
11. *Id.*
12. *Id.*
13. *Id.* at 11-12.
14. *Id.* at 13.
15. *Id.*
16. *Id.*

III. COMMON LAW SOURCES OF LIABILITY

Utility companies have a common law duty to exercise reasonable care in providing services to customers.[17] However, the scope of that duty can be interpreted differently depending on which party is affected and what their actual relationship with the provider is. In the words of New York's highest court, this is "fundamentally a policy question, with the objective being to 'fix[ ] the [entity's] orbit of duty' so as to 'limit the legal consequences of wrongs to a controllable degree.'"[18] Today's society relies so extensively on electricity that it is considered an absolute necessity.[19] Nonetheless, the standard set forth by Judge Cardozo requiring a "primary and immediate" connection remains to create a duty between parties.[20] An individual without privity of contract may not claim a right to the services provided from that contract, even if the services are utilities considered necessary for the benefit of the public.[21] Courts have reached a similar conclusion even when a party's rent went toward utilities that are then contracted for directly by the landlord.[22] Where tenants must contract with the landlord in order to receive electrical service, they may not sue the utility directly. At the same time, the duty of an electricity provider to maintain service to customers may not be offset by an indemnity clause with a line servicer that would excuse the provider's liability for negligent acts.[23] Further, a utility may not rely on an industry-wide practice as custom if it results in an insufficient standard of care.[24] Such reasoning follows from Judge Learned Hand's logic in *The T.J. Hooper*, a famous admiralty case that determined:

> [A] whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[25]

In addition to common law duties, Canadian statutes provide an important source of regulation for energy providers in the provinces by mandating a specific standard of care that may be enforced by the courts. The Utilities Commission Act specifies that a utility must issue service and insure that they "maintain its property and equipment in a condition to enable it to provide" a level of service that can be viewed as "in all re-

17. *E.g.*, Saratoga Utils. v. Long, [1998] B.C.D. Civ. LEXIS 13985 at *2; Langley v. Pac. Gas & Elec. Co., 41 Cal. 2d 655, 660-61 (Cal. 1953).
18. Milliken & Co. v. Consol. Edison Co. of N.Y., Inc., 644 N.E.2d 268, 270 (N.Y. 1994).
19. Lee v. Consol. Edison Co., 407 N.Y.S.2d 777, 787-88 (N.Y. Civ. Ct. 1978).
20. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1927).
21. *Id.* at 897-98.
22. *Milliken*, 644 N.E.2d at 271.
23. Richardson-Wayland Elec. Corp. v. Va. Elec. & Power Co., 247 S.E.2d 465, 467 (Va. 1978).
24. *Lee*, 407 N.Y.S.2d at 782.
25. The T.J. Hooper v. N. Barge Corp., 60 F.2d 737, 740 (2nd Cir. 1932).

spects adequate, safe, efficient, just and reasonable."[26] There is further support in Canadian common law for this proposition. Utilities are subject to requirements to provide and maintain electrical service to their customers.[27] An inability to maintain such a duty is only acceptable where a cause beyond the control of the utility occurs.[28] However, it remains unanswered whether a utility can be negligent in providing otherwise adequate safeguards for a situation, such as a temporary outage, which is seen in the industry as inevitable.[29]

IV. UTILITY TARIFFS

An additional limitation on liability of utilities can come in the form of rate schedules or tariffs that are set by regional or local public utilities commissions. Tariffs will often specifically excuse service providers from liability for interruptions in power when due to ordinary negligence. The terms of tariffs have been challenged in the courts, and opinions have gone in both directions, because there is a strong public policy component when attempting to limit citizens' access to legal redress for loss. For example, a Virginia trial court upheld the exemption provided to an electricity distributor for acts of negligence, recognizing such an act as a valid burden-shifting action that relieves municipalities from overburdening liability, and acknowledging that consumers retain the right to sue in cases of gross negligence.[30] A Florida appellate court further explained that a limitation of liability is viewed as a bargained-for element of the rate offered to customers; without an exemption, utilities companies would have to increase the rates to cover potential losses stemming from any temporary power outages.[31]

This logic was also used in a Canadian case where a gas utility contracted to supply gas to an electric power plant on an "interruptible" basis.[32] The B.C. Court of Appeals viewed the "interruptible" designation as an indication of the customer's priority with respect to re-establishing service after an outage and that the designation was reflected in the rate paid by the buyer.[33] These decisions then, reflect the desire of courts to limit multiple plaintiff suits against power companies on the assumption that temporary power interruption can be included in customers' contracts and be reflected in the rates charged by providers. New York has gone the opposite direction, however, and noted the public policy implication of limiting an ability to sue to recover losses. A tariff with an ex-

26. Utils. Commission Act, R.S.B.C., ch. 473, § 38 (1996) (Can.).
27. Placer Dev. Ltd. v. B.C. Hydro & Power Auth., [1983] B.C.D. Civ. LEXIS 10063 at *4.
28. *Cf.* Electricity Act, 1998, S.O., ch. 15, Sched. A, § 30 (1998) (Can.) (disallowing action for breach of contract where utility interrupts service due to emergency).
29. *E.g.*, Koch v. Consol. Edison Co., 468 N.E.2d 1, 8 (N.Y. 1984).
30. Wampler Foods, Inc. v. City of Harrisonburg, 49 Va. Cir. 149, 152-53 (Va. Cir. Ct. 1999).
31. Landrum v. Fla. Power & Light Co., 505 So. 2d 552, 554 (Fla. Dist. Ct. App. 1987).
32. B.C. Gas Util. Ltd. v. B.C. Util. Comm'n., [1995] A.C.W.S.J. LEXIS 49384 at *2.
33. *Id.* at 13.

culpatory clause limiting liability can be viewed as an adhesion contract because although the public has knowledge of the terms, it has no bargaining power in the face of a monopoly on a necessity, and there is no protection for the consumer from a negligent act by the provider "to protect himself from danger incident to error likely to arise."[34]

V. CONTRACTUAL AGREEMENTS

Direct contractual agreements form the most clearly interpretable standard for courts because they do not contain the difficulty of weighing policy considerations. A direct contract for service between a utility company and a consumer creates privity between the parties, and the courts will view this relationship as the basis for direct duty. New York last faced a major blackout in 1977, and its courts issued several opinions dealing with the liability of a contractual electricity provider. *Lee v. Consolidated Edison* held that Consolidated Edison ("Con Ed"), which is also the current supplier of electric power to New York, was liable based on the theory of *res ipsa loquitur* and on the defendant's failure to meet the burden of showing that their negligence was not a cause of the blackout where they were best placed to do so.[35] The opinion noted that Con Ed was negligent both in allowing the blackout and in failing to restore power adequately.[36] Specific acts indicating negligence were:

(1) an incorrect relaying operation;
(2) failure to shed load when directed to do so;
(3) unsuccessful manual load shedding by either human or machine error;
(4) failure of personnel who were in decision-making positions;
(5) reliance on inadequate backup power;
(6) provision of incorrect or insufficient data to power pool authorities;
(7) improper design of emergency planning;
(8) inadequate testing procedures;
(9) failure to consider emergency procedures during the occurrence; and
(10) lack of proper planning for a blackout as it occurred.[37]

These are many of the same acts alleged in a lawsuit already filed over the 2003 blackout.[38] Further, similar acts stemming from the same incident were later found to actually constitute gross negligence by the highest court in New York.[39] These included failure to heed the directions by the power pool authorities to shed load and failure to maintain certain equipment so that it was operable at the time of the blackout.[40] A case in

34. Lee v. Consol. Edison Co., 407 N.Y.S.2d 777, 787-88 (N.Y. Civ. Ct. 1978).
35. *Id.* at 780-81.
36. *Id.* at 781.
37. *Id.* at 781-82.
38. *Blackout Lawsuit Blames Energy Company*, *supra* note 2.
39. Food Pageant, Inc. v. Consol. Edison Co., 429 N.E.2d 738, 741 (N.Y. 1981).
40. *Id.* at 741.

Maryland considered, and rejected a claim under the Uniform Commercial Code claiming raw electricity was a "good" as required by the UCC.[41] The court went on to recognize the contractual relationship between the parties and held that there was a "breach of duty which is continuing in nature."[42] A tariff limiting the utility's liability was then examined by the court, because it did not explicitly address ordinary or gross negligence; instead, the company was exempt from suit unless "willful default or neglect" occurred.[43] The court construed "willful" to extend to "neglect" as well as "default" so as to read a gross negligence standard into the language bringing it more in line with other tariffs, such as those in New York.[44]

A contractual basis for liability is also more desirable because specific standards can be included and courts have an easier time determining negligence. One example is an instruction to follow the direction of power pool authorities. Because the contract language required a utility to assist grid managers during an emergency, the court in *Food Pageant v. Consolidated Edison* was able to find gross negligence by employees that failed to comply.[45] The same agreement is not referenced in the facts of the *Lee* case, which failed to find gross negligence. The *Lee* court strongly considered the importance of the contractual relationship between the consumers affected and the utility, as well as numerous submissions from the Public Service Commission and the utility. As such, it seems likely that had a contract specified a need to communicate with the grid in a certain manner, a legitimate basis would have existed for a different holding.[46] However, in another New York case, Con Ed claimed no liability because they supplied power to a secondary electricity provider who directly contracted with customers.[47] Here, the court believed that both parties, as well as the New York Legislature, anticipated that Con Ed would be ultimately responsible for providing "sufficient energy to meet the requirements of [the] affected customers."[48] Thus, the consumers were held to be third party beneficiaries of the contract between utilities and were able to recover from losses stemming directly from Con Ed's gross negligence.[49] Support for this proposition can be found in an unpublished California opinion where the electric company claimed that because it was tied in to a grid system, events beyond its control could "cascade into [its] service area" and open them up to suit from its custom-

41. Singer Co v. Baltimore Gas & Elec. Co., 558 A.2d 419, 426 (Md. Ct. Spec. App. 1989).
42. *Id.*
43. *Id.* at 427.
44. *Id.*
45. *Food Pageant*, 429 N.E. 2d at 741.
46. Lee v. Consol. Edison Co., 407 N.Y.S.2d 777, 787-88 (N.Y. Civ. Ct. 1978).
47. Koch v. Consol. Edison Co., 468 N.E.2d 1, 8 (N.Y. 1984).
48. *Id.* at 7.
49. *Id.* at 3.

ers.[50] The court did not fully embrace this argument, since events beyond a supplier's control can always happen, but do not absolve liability. Further, the utility failed to notify the customer of whatever difficulties of control they later claimed at trial effectively waiving this claim.[51] Even more persuasive to the court was the accepted proposition that one may not voluntarily relinquish control they otherwise should exercise and then later claim that nonperformance under another contract was beyond their control.[52] The court stated that an event that "could have been *prevented* by foresight and sufficient expenditure" is to be considered within a party's control even where other circumstances indicate a lack of control over certain aspects causing the event.[53] This analysis has even been extended to acts of God in the context of these cases. A loss is not considered an act of God, even if a natural phenomenon, if the loss suffered can be viewed as "the result of any person's aid or interference. . .or if injury might have been prevented by human prudence and foresight."[54] Thus, if preparations could be made by a utility to adequately protect against what would otherwise be considered an act of God, they may not escape a liability claim.

VI. POLICY GUIDELINES

Public policy considerations weigh heavily in assigning liability after a blackout because of the tremendous monetary implications of consumer claims. Most blackouts involve many households; the 2003 Northeast blackout examined here involved power companies running almost 200,000 megawatts of generation, servicing twenty-two states and one province and affected an estimated fifty million people.[55] However, courts may hesitate to open floodgates of litigation for incidents that result in minor losses, albeit ones on a grand scale when aggregated. The results of the cases examined have been split based on individual fact determinations, but policy considerations were overwhelmingly involved as well. As previously noted, there is, or ought to be, consideration of consumers' rights and some reluctance to bar the courthouse doors and potentially eliminate redress for their injuries. The dissenting opinion in a case heard by New York's highest court advocated such a pro-plaintiff position. Judge Meyer felt the majority's policy argument did not balance competing interests at all.[56] However, it is also recognized that other risk-spreading mechanisms are appropriately at work in these scenarios.

50. Mobil Oil Corp. v. S. Cal. Edison Co., No. B145834, 2003 Cal. App. Unpub. LEXIS 595, at *7 (Cal. Ct. App. Jan. 21, 2003).
51. *Id.* at *23-24.
52. *Id.* at *31.
53. *Id.* at *30-31.
54. Lee v. Consol. Edison Co., 407 N.Y.S.2d 777, 787-88 (N.Y. Civ. Ct. 1978).
55. MISO Press Release, *8,700* Megawatts of Power Restored in Midwest ISO Region (Aug. 15, 2003), *at* http://www.midwestiso.org/admin/news/files/Restore_2.pdf; PJM Interconnection Press Release, PJM Media Briefing: Power Outage Update (Aug. 15, 2003), *at* http://biz.yahoo.com/prnews/030815/sff016_1.html.
56. Strauss v. Belle Realty, 482 N.E.2d 34, 38-41 (N.Y. 1985).

As discussed, rate determinations consider the potential liability that utilities can bear and are adjusted appropriately. The *Lee* court also expressed regret for loss on the part of individual citizens and opined that, instead of bringing lost wages suits against utilities, recompense could be awarded from employers who are "probably better able to bear such economic loss" and arguably should have done so.[57] Further, it is recognized that claims can quickly become speculative when taken beyond actual economic loss of tangible items, such as food spoilage. Private lawsuits for lost profits must prove loss with "certainty and specificity" and not all plaintiffs will be able to carry this burden successfully.[58] In regard to the public sector, lost revenues attributable to interrupted power should be considered part of operation costs for municipal and public benefit corporations.[59] Additionally, municipalities generally desire to be insulated from sprawling suits and may attempt to do so by limiting their liability via contract. When a public utilities commission sets rates it is affirmatively acting to "shift[ ] the burden of such loss to the consumers."[60] Further, in a situation where the city is operating the utility itself, its obligation to supply power is derived from its contract with its customers and thus subject to a breach of contract claim only.[61]

VII. CONCLUSION

The 1977 New York power outage spawned many suits that lasted for years, and the same protracted litigation will likely occur here. The 2003 blackouts have already provoked litigation. The success of these suits will largely hinge on the facts at issue; that is, whether tariffs explicitly limited liability by the utilities, and whether specific damages can be proven. However, the overarching concern is the vast pool of plaintiffs that will emerge and the realization that even in a technological age these failures can and will occur. The interaction of multiple companies to operate power grids that span countries and affect countless consumers makes the issue one that the courts will find difficult to handle fairly. There is no insurer who adequately protects against these losses, and the courts have stated that they will make the ultimate policy decision here. Based on existing precedent, litigants may have an uphill battle to assert their rights successfully.

57. *Lee*, 407 N.Y.S.2d at 786.
58. Koch v. Consol. Edison Co., 468 N.E.2d 1, 8 (N.Y. 1984).
59. *Id.*
60. *Wampler Foods, Inc.*, 49 Va. Cir. at 152.
61. *Id.*