

***“WHEN THE LIGHTS GO OUT . . .
IS THE PARTY OVER?”***

***NEW POWER OUTAGE LIABILITY ISSUES
FOR ELECTRIC UTILITIES***

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Following graduation from law school in 1972, Don entered military service as an Assistant Staff Judge Advocate and Area Defense Counsel for the United States Air Force.

Joining Paine, Hamblen, Coffin, Brooke & Miller in 1976, Don has specialized in civil trial litigation, primarily in the defense of personal injury and wrongful death actions. In that capacity, he has been trial counsel in over 100 cases involving a variety of electrical contacts, gas explosions and fires for a number of utility clients to include Avista Corporation and various cooperatives, municipalities and public utility districts in Washington and Idaho. He is a selected member of AEGIS' Electric Service Panel. He has also been lead defense counsel in well in excess of 300 major tort cases where he has been retained to represent non-utility clients at the request of insurance companies or self-insureds.

Named in Washington Law in 1991 as one of Washington State's "ten winningest trial lawyers," Don has also made several presentations at national seminars on various subjects relating to trial practice and the defense of electric and gas utilities. Don is a member of the Spokane County, Washington State, Idaho State, and American Bar Associations. He is also a member of the Washington Defense Trial Lawyers Association, the Idaho Association of Defense Counsel, the Defense Research Institute, and is listed in Who's Who in American Law.

The record of American utilities in providing quality electrical service to a continually expanding population increasingly dependent upon electric service is exemplary. Principles of limited liability for interruption of service and state commission oversight have served the industry and consumers well in providing reliable electric service at affordable rates.

With FERC mandates to “unbundle” electric service while requiring “open access” and independent operation of interconnected transmission systems, new challenges and significant issues have been created affecting the potential liability of participants under tort law.

The scope of this presentation is to highlight new issues facing the electric industry with the event of a power outage, and to advocate consideration of potential solutions. It should be noted that the views expressed here are those of the author, as formulated from 24 years experience in defending electric utilities in tort litigation, to include interruption of service claims. While this representation has included cooperatives, Public Utility Districts (PUDs) and municipalities, along with investor owned utilities, concerns expressed here do not necessarily represent the views of any particular client. Rather, this summary is submitted as an aid to understanding and to provide focal points for discussion and policy consideration.

The Problem

“Electric service is inherently subject to interruption, suspension, curtailment and fluctuation.” This statement prefaces typical tariff language governing rate structure and limiting liability of regulated electric utilities for interruption of electrical service in most states.

Instances of regional outages involving interconnected systems affecting large numbers of customers over a large geographical area are a legitimate concern of utilities, regulators and consumers. These incidents can rapidly occur with the event of equipment failure, excessive heat, wildfire, tree-downed conductors, or other events. The consequence may be cascading outages involving multiple systems and millions or billions of dollars in potential damages. Power outages and rolling brown outs affecting power quality may significantly impact power consumers. Claims for consequential damages, to include lost profits, are a real potential. In the deregulated environment where such events increase spot market pace, losses are likely to occur to bulk users or independent generators and marketers which may experience “lost opportunity costs” from these events.

Consider the March 18, 2000, event in New Mexico. Smoke from a grass fire reportedly short-circuited two transmission lines, leaving a third line to become overwhelmed with cascading consequences, and producing outages extending over half of the state of New Mexico and into El Paso, Texas. More than a million people were left without power. A major Intel chip manufacturing plant was among the affected customers. While the cause of the fire remains under investigation, the cause of the wide spread outage was attributed to the failure of regulators to approve the construction of additional transmission lines previously proposed for that area.¹

¹ *Restructuring Today*, p. 4 (March 21, 2000).

An event of even larger consequence occurred in August 1996, resulting from a tree in Oregon falling over a BPA transmission line. This produced a cascading outage in nine western states and reportedly caused billions of dollars in damages. A similar event, with similar consequences, occurred in the same summer as the result of an incident originating in Wyoming. In the summer of 2000, rolling blackouts in California caused by soaring temperatures and low electricity supplies were estimated to have alone cost Silicone Valley \$75 Million a day.²

Traditionally, contract language, state utility commission approved tariffs, and adherence by state courts to the common law principle that the only legal duty owed by an entity is to its own customers have operated to limit liability of electric utilities for interruption or irregularities in generation, transmission and distribution services.

Tariff limitations of liability, while varying in language and format, generally provide that utilities shall not be liable to customers for service interruptions except in cases of willful misconduct or gross negligence.³ It has been stated that courts are “virtually unanimous” in holding that these tariff limitations not only keep rates low, but recognize that the customers most vulnerable to interruptions are in the best position to protect themselves through back-up generation.⁴ It has also been recognized that given the imagination and resourcefulness of today’s litigants, that absent tariff protection, damages resulting from a single interruption of service event could result in plaintiffs owning the utility company or the imposition of astronomical rates to recoup liability payments.⁵

FERC Orders

With “open access” and the prospect of “deregulation” of the utility industry, one major concern is the potential that transmission providers with assets will be placed at increased risk of public liability for interruptions of service or for delays in restoring service. Federal Energy Regulatory Commission (FERC) Orders 888 and 2000, failed to incorporate any limitations of liability in requiring “open access” and the creation of regional transmission organizations

² Leonard Anderson, Reuters News Service, June 22, 2000.

³ See, *Olson v. Mountain States Telephone & Telegraph Co.*, 580 P.2d 782 (Ariz. App. 1978); *Waters v. Pacific Telephone Co.*, 523 P.2d 1161 (Cal. 1974); *Professional Answering Service, Inc. v. Chesapeake & Potomac Telephone Co.*, 565 A.2d 55 (D.C. 1989); *Landrum v. Florida Power & Light Co.*, 505 So.2d 552 (Fla. App.); *Southern Bell Telephone & Telegraph Co. v. Invenchek, Inc.*, 204 S.E.2d 457 (Ga. App. 1974); *In re Illinois Bell Switching Station Litigation*, 641 N.E.2d 440 (Ill. 1994); *Singer Co. v. Baltimore Gas & Electric*, 558 A.2d 419 (Md. App. 1989); *Wilkinson v. New England Telephone & Telegraph Co.*, 97 N.E.2d 413 (Mass. 1951); *Valentine v. Michigan Bell Telephone*, 199 N.W.2d 182 (Mich. 1972); *Computer Tool & Engineering v. Northern States Power Co.*, 453 N.W.2d 569, 572 (Minn. App. 1990); *Warner v. Southwestern Bell Telephone Co.*, 428 S.W.2d 596 (Mo. 1968); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992); *Lee v. Consolidated Edison*, 413 N.Y.S.2d 826 (Sup. Ct. 1978); *In re Investigation into Limitation of Liability Clauses Contained in Utility Tariffs*, No. 85-1406-AU-COI, Policy Statement at ¶ 4 (Ohio PUC 1987); *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206 (Or. 1980); *Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (Pa. 1976), *vacated*, 374 A.2d 536 (Pa. 1977), *reinstated*, 390 A.2d 233 (Pa. 1978); *Pilot Industries v. Southern Bell Telephone Co.*, 495 F.Supp. 356 (D.S.C. 1979); *Southwestern Bell Telephone Co. v. Rucker*, 537 S.W.2d 326 (Tex. Civ. App. 1976); *Re Liability Limitations, Disclaimers or Indemnity Provisions in Telecommunications Tariff Filings*, 137 P.U.R.4th 436 (W.Va.P.S.C. 1992); *Schaafs v. Western Union Telegraph Co.*, 215 F.Supp. 419 (E.D. Wis. 1963); *Burdick v. Southwestern Bell Telephone Co.*, 675 P.2d 922, 925 (Kan. Ct. App. 1984).

⁴ See, *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206,1211 (Ore. Ct. App. 1980).

⁵ See, e.g., *Illinois Bell Switching Station Litigation*, 64 N.E. 2d 440 (Illin. 1994).

(RTOs).⁶ In so doing, FERC departed from its own long-standing practice of accepting tariff provisions limiting utility liability to gross negligence, willful misconduct, or even greater limitations on liability.⁷

The Edison Electric Institute (EEI), the Coalition for Economic Competition and Kansas City Power & Light advocated to FERC the need for exculpatory tariff language to protect the transmission provider from liability under Order 888. EEI argued that the liability protection should apply in all cases except where gross negligence had been shown. FERC's declination simply stated that such was not "necessary or appropriate at this time," and cited to case authority questioning FERC's ability to do so because such was not ostensibly a "federal concern."⁸

On January 12, 2000, FERC relied upon language in Order No. 888 and particularly Order No. 888-B to order that the New York ISO further could neither incorporate indemnity provisions, nor include the cost of insurance for its own negligence in its proposed departure from the pro forma tariff. FERC suggested that ISOs and their participants "pursue any legal remedies they may have with respect to liability in the appropriate forum."⁹ This reference arguably suggests that the ISO and its participants would have to seek the protection of whatever tariff protection may exist under state law. However, the prospect of separate application to individual states is impractical at best, and raises the potential that liability risk will be different, depending upon state law.

On April 4, 2000, FERC reversed itself upon reconsideration of its previous NY ISO Order to the extent of recognizing that the cost of liability insurance was a cost of doing business, and an appropriately recoverable cost of service. FERC acknowledged that while its previous NY ISO Order followed the language of Order 888 and 888b, the payment for insurance premiums was not the same as directly indemnifying the actual costs of negligence or

⁶ This departure from existing law and practice was asserted as the basis for challenge to both FERC Orders. See, Brief of Investor Owned Utility Petitioners, *Transmission Access Policy Study Group v. FERC*, Case No. 97-1715 (Dist of Columbia CA)[Order 888], and Request for Rehearing of Duke Energy Corporation, Regional Transmission Organizations, Docket No. RM99-2-000. However, it was disregarded by the DC Circuit Court of Appeals in response to FERC arguments that its rulemaking was more limited and directed to limitations to indemnification. See, *Transmission Access Policy Group v. FERC* ___ F.3d ___ (D.C. Cir. No. 97-1715 (June 30, 2000)).

⁷ See, e.g., *Rochester Gas and Electric Corp.*, 33 FERC ¶ 61,317 (1985); *Rochester Gas and Electric Corp.*, 26 FERC ¶ 61,115 (1984); *Central Maine Power Co.*, 65 FERC ¶ 61,192 (1993); *American Electric Power Service Corp.*, 64 FERC ¶ 61,279, *modified on other grounds*, 67 FERC ¶ 61,168 (1993) (FERC set liability limitation for hearing implying no definitive policy on gross negligence standard); *Consumers Power Co.*, 59 FERC ¶ 61,106 (1992); *Cambridge Electric Light Co.*, 72 FERC ¶ 63,017 (1995) (ALJ's decision accepting reciprocal provisions limiting liability to gross negligence); *Municipal Light Boards of Reading and Wakefield*, 53 FPC 1545 (1973); Consolidated Edison of NY, Inc. Rate Schedules Nos.: 117, 119, 120, 121, 122, 134, 136, 143, 157, 158, 164, 170, 177, 178, and 179; New York State Electric & Gas, Corp. Rate Schedules FERC Nos. 128, 165, 181, and 191; New England Power Co., Vol. 3 and Vol. 4 FERC Electric Tariffs (company not responsible for "any interruption or failure").

⁸ See Order No. 888-B at 62,080-081 [citing *Arkansas Louisiana Gas Company v. Hall*, 824 F.2d 417, 427 (5th Cir. 1987)].

⁹ *New York Independent System Operator, Inc.*, ER 00-550-000 Jan. 12, 2000 [90 FERC ¶ 61,015] (citing to Order No. 888-B at 62,080-81).

wrongdoing, and the cost of liability insurance had previously been recognized by FERC as a recoverable cost of doing business.¹⁰

While this more recent FERC decision was a step in the right direction, it still must be recognized that legitimate questions exist as to how much insurance is appropriate, or even commercially available at any price, to cover losses associated with massive outages absent limitations on liability. The risk (and the cost of insuring that risk) is enormous absent limitations on liability. If cost reduction is a legitimate policy goal, care must be taken to make sure that no new liability risks result from deregulation efforts.

Pursuant to the mandate of FERC Order 2000, owners of transmission systems around the United States have been participating in collaborative processes with generators, marketers, industrial load customers, public agencies, distribution utilities and the public in the formation of Regional Transmission Organizations (RTOs). The intent is to form independent entities with responsibility for operation of the transmission grid. As of October 18, 2000, 83 separate FERC filings have resulted, whether by individual utilities or combinations of utilities. Regardless of the form of the response, it can be expected that every responding utility and collaborative entity is struggling with how to protect against the enormous risk of loss associated with an electrical outage. FERC's *pro forma* transmission tariff contains no specific provisions limiting liability for interruption of transmission service, and while requiring the formation of regional transmission entities operating across multiple state lines, FERC has provided little additional guidance on how to address liability.¹¹

State Law Developments

While FERC initiatives directed to the formation of independent regional transmission entities without adequate liability protection have created uncertainties about outage liability risk, developments at the state level have been varied and inconsistent in recent years as illustrated by the following examples:

1. Washington

In *Employco v. City of Seattle*,¹² the Washington Supreme Court struck down a Seattle ordinance, which sought to make Seattle City Light liable only for "gross negligence" for

¹⁰ Order on Rehearing, *New York System Operator, Inc et al*, p.8 (April 4, 2000)[citing by example to *Alabama Tennessee Natural Gas Company*, 48 FPC 774, 780 (1972)].

¹¹ In *Northeast Energy Associates v. Boston Edison*, 91 FERC 61,069 (April 19, 2000)(Docket No. EL 00-50-000) FERC did indicate that an "interconnection agreement" between the parties could lawfully limit the liability of Boston Edison for reimbursement of \$3.7M in "lost opportunity costs" when it temporarily disconnected Northeast Energy's generation plant to accommodate the connection of ANP Blackstone Energy Company's 615 MW generating station. FERC's holding relied upon a contract provision stating "Neither party . . . shall be liable to the other party . . . for claims for incidental, indirect or consequential damages connected with or resulting from performance or nonperformance of this Agreement, including, without limitation, claims in the nature of replacement power, lost revenues, income or profits, reduction in or loss of power generation or equipment used therefor unless caused by gross negligence or willful misconduct."

¹² 117 Wn.2d 606, 817 P.2d 1373 (1991) [The specific facts involved a dig in and consequent two-week outage in downtown Seattle producing multi-million dollar damage claims. The court found the city ordinance, similar to

interruption of service. In *National Union v. Puget Sound Energy*,¹³ a 1999 decision of the Division 1 Washington Court of Appeals, the court used a rationale similar to that used in *Employco* to invalidate Puget's "Continuity of Service" tariff protection. The Court of Appeals held that a triable issue of fact existed as to whether Puget Sound Energy was negligent in failing to timely restore service to Boeing's Renton plant in consequence of the Inaugural Day storm in western Washington on January 20, 1993. In reaching its conclusion the court used general language from a Washington statute and Washington Utility and Transportation Commission (WUTC) regulations¹⁴ to determine that Puget's WUTC approved tariff language was "ambiguous."

2. Kansas

The Kansas Supreme Court in 1999 struck down a Kansas City Power & Light tariff attempting to limit liability for interruptions of service caused by "willful and wanton misconduct." In so doing, the Kansas court did uphold the ability of the utility commission to provide for no liability in the circumstance of "ordinary negligence."¹⁵

The specific facts involved loss of service to a food additive manufacturer and a subsequent suit for lost profits. Included in the suit were allegations of negligence and willful failure to inform the manufacturer of the danger of an outage. It held that the tariff could operate

most state PUC tariff limitations for interruption of service to be in conflict with a Washington statute prescribing procedures for notification and location of underground lines prior to excavation.]

¹³ 94 Wn. App. 163, 972 P.2d 481 (Div I, 1999).

¹⁴ "[T]he WUTC requires electric companies to provide adequate service and minimize service interruptions: 'Maintenance - each utility shall maintain its plant and system in such condition as will enable it to furnish adequate service. Interruptions of service - each utility shall endeavor to avoid interruptions of service, and, when such interruptions occur, to reestablish service with a minimum of delay.'

WAC 480-100-076. If an electric utility violates state law or a WUTC regulation, that utility may be held liable "to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom[.] RCW 80.04.440."

"... statutory duty to provide 'adequate and efficient' electric service, RCW 80.28.010, and regulatory duty 'to avoid interruptions of service, and, when such interruptions occur, to reestablish service with a minimum of delay.' WAC 480-100-076."

"... we do not agree that WAC 480-100-076 should be rewritten to read: 'each utility shall endeavor to avoid [scheduled] interruptions of service, and when such [scheduled] interruptions occur, to reestablish service with a minimum of delay.' Besides conflicting with the plain language of the regulation, this interpretation conflicts with a later provision of WAC 480-100-076 that requires 'all interruptions of service affecting a substantial number of customers' and 'the cause of each interruption' to be recorded. Moreover, this interpretation would exclude all unscheduled interruptions, including equipment failures unrelated to natural causes, from regulation."

¹⁵ The issue had been certified to the Kansas Supreme Court by a Missouri appellate court because of a determination that Kansas law was dispositive. See *Danisco Ingredients USA v. Kansas City Power & Light Co.* 999 S.W.2d 326 (Mo.Ct.App. 1999) LEXIS 391 (July 9, 1999) [The Kansas Supreme Court refused to apply a Kansas City Power & Light tariff attempting to limit liability for interruptions of service if applied to "willful and wanton misconduct". However, it upheld the ability of the utility commission to provide for no liability in the circumstance of ordinary negligence. The specific facts involved loss of service to a food additive manufacturer and a subsequent suit for lost profits. Included in the suit were allegations of negligence and willful failure to inform the manufacturer of the danger of an outage.]

to limit liability for ordinary negligence, but not for gross negligence or willful or wanton misconduct. The actual tariff language made no reference to “ordinary” or “gross negligence” or to “willful or wanton misconduct”, but just said the utility would not be “liable”.¹⁶

3. Idaho

The Idaho Public Utilities Commission has ordered the modification of protective tariffs in Idaho purporting to limit liability for interruption of service to ordinary negligence, holding that such limitations on tort liability on not permitted by Idaho jurisprudence, irrespective of whether included in an agreement with the utility.¹⁷

4. New York

The State of New York has a long history of case law supportive of tariff language limiting liability to gross negligence. Limitation of liability for ordinary negligence has long been upheld upon public policy considerations.¹⁸ However, jury determinations as to what constitutes “gross negligence” have produced conflicting results. In one instance it was held that a jury issue existed as to whether the utility was grossly negligent in failing to prepare for the contingency of its equipment being struck by lightning, with a resulting power blackout and loss of refrigerated meat with a several hour outage.¹⁹ Other reported New York decisions have relied upon a New York statute rendering limitations on liability ineffective for damages resulting from negligence in interrupting the supply of electricity.²⁰

Since 1973 Consolidated Edison of New York has had a unique tariff provision requiring reimbursement to residential customers for losses up to \$100 for food spoilage, and reimbursement of commercial customers up to \$2,000 for spoilage of “perishable merchandise.” The liability is triggered when there is a distribution outage of 12 hours or more, or two outages aggregating 12 hours over a 24 hour period. There are other limitations requiring that claims be made in 30 days of the outage, and further providing that aggregate liability is limited to \$1 Million “per incident.” Where the aggregate is exceeded, payments are pro-rated among timely filed claims. These payments are irrespective of fault and Consolidated Edison is the only utility in New York subject to this tariff provision in New York. Objections were made to this form of tariff liability on the basis of being “unjustly discriminatory” because it only applied to this one utility. However, the New York Public Service Commission rejected such argument on the ground that Con Edison’s rates included costs associated with maintaining “an expensive network distribution system of supposedly high reliability.”²¹

In 1976, the New York Public Service Commission (PSC) expanded Con Edison’s tariff liability for loss of refrigeration in the context of situations where and “intentional disconnection

¹⁶ Id.

¹⁷ *Carson Bradley v. Utah Power & Light Company*, IPUC Case No UPL-E-89-9.

¹⁸ *Lee v. Consolidated Edison of New York*, 98 Misc. 2d 304, 413 N.Y.S. 826 (1978).

¹⁹ *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167, 429 N.E.2d 738, 445 N.Y.S.2d 60 (1981).

²⁰ See, NYCRR 218.1 and *Lanni v. Rochester Gas & Electric. Corp.*, 120 Misc. 2d 644, 466 N.Y.S.2d 248, 249 (1983).

²¹ See, *Opinion and Order Directing the Filing of Tariff Provisions by Consolidated Edison Company of New York, Inc. to Provide Compensation for Losses Due to Distribution System Interruptions*, PSC Opinion No. 73-20.

of service” to a customer is made in error. The same per claim and aggregate claim limits apply; however, the customer has 90 days instead of 30 to make a claim. Recovery is also permitted for spoilage of “food or medicine.” In 1978, this disconnection reimbursement provision was extended to all other New York utilities.

In the aftermath of an outage event in New York on July 6, 1999, and at the urging of the New York PSC, Con Edison reportedly waived the 30 day tariff limitation and the \$1Million aggregate.²² Approximately 48,000 claims aggregating approximately \$5.6 Million resulted from this event, and the New York PSC is presently considering a proposal to raise Con Edison’s aggregate liability limit to \$10 Million.²³ A total of five putative class action suits were filed in New York from this one event, although class certification was ultimately denied in three consolidated class actions brought on behalf of residential and commercial customers.²⁴ In addition, seven commercial actions were filed on behalf of 161 businesses, along with 13 individual suits, to include two by governmental entity plaintiffs (one by Mayor Giuliani on behalf of the City of New York and one by the New York Board of Education.) This litigation continues.

One reported New York decision raising a potentially disturbing distinction in interpretation of the NY tariff involved the circumstances of an alleged surge of power resulting from the alleged connection of 220 volt service to an apartment complex in lieu of 110 volt service. In suit for recovery of property damage claims, a Civil Court for the City of New York held that the electric utility’s tariff applied only to “interruptions” of service, and not to damages caused by “the supply or use of electricity.” While few facts were released, the court held the tariff’s limitation of damages even for ordinary negligence of its employees to be inapplicable.²⁵

²² Supra n. 20. Legislation was also introduced in the 1999 New York legislature which purported to authorized the recovery of damages a municipal corporation for expenditures occasioned by the “gross negligence, recklessness or intentional torts of any utility company” in causing a blackout. This legislation was not enacted and case law evolving in New York following the 1977 blackout would appear to prohibit recovery of such expense against the utility absent legislation. *See Koch v. Consolidated Edison Co. of New York, Inc.*, 62 N.Y.2d 557, 560 (1984) *cert.den.* 469 U.S. 1210 (1985).

²³ Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for Class Certification, *Tegnazian et al v. Consolidated Edison*, Supreme Court of the State of New York County of New York (Index No. 603258/99), pp. 5-9.

²⁴ *Id.* *Tegnazian et al v. Consolidated Edison*, Order of Judge Cozier (Aug 3, 2000). Potentially instructive is that the court denied class certification on the basis that multiple issues would have to be addressed which were not of general concern to the class, and which would require individual inquiry. These would include whether an individual claimant had standing as a customer of the utility; whether there were legally cognizable damages; the nature and amount of those damages; whether any putative class members were misled by alleged deceptive advertising practices under a consumer protection allegation. The court found that while a common issue would potentially exist as to whether Con Ed was grossly negligent in failing to provide service, the proliferation of individual issues met neither the commonality or typicality requirements. The court also found that while the class action complaint did not make any claim for personal injury from the blackout, putative class members could be inadvertently precluded from seeking recovery of personal injury claims by operation of res judicata, such that by limiting their cause of action, these plaintiff’s claims were inadequate to protect the interests of the putative class. The court did note that on the issue of Con Ed’s gross negligence in causing the outage, in the event it lost on that issue in any one case, such would operate to bind Con Ed in subsequent actions by application of the doctrine of collateral estoppel. As of October 5, 2000, Con Ed has reportedly tried 40 claims in small claims court, and has lost 2 small claims cases. Decisions in NY Small Claims courts have no precedential value or collateral estoppel effect.

²⁵ *Higgins v. New York City Housing Authority, et al*, 702 NYS2d 502 (1999).

5. New Jersey

New Jersey has also been active in consequence of the July 1999 outage event. The New Jersey Board of Public Utilities commissioned a consultant and conducted extensive investigation. In an Order issued May 1, 2000 it concluded that:

“... although there have been many changes for public utilities with respect to competition, particularly in the area of supply, the distribution franchise and the obligation to provide safe, adequate and proper service to the customer at just and reasonable rates remain constant.”²⁶

While the New Jersey Board of Public Utilities ultimately concluded, “there is not a prima facie case demonstrating that overall GPU provided unsafe, inadequate or improper service” several areas of “concern” were identified for remedial action. These included: deferment of capital expenditures, inadequate inspection, and “diminished levels of workforce,” for which multiple (18) remedial measures were ordered for distribution and transmission planning and operations.²⁷ While this investigation was in progress, purported class action litigation for amounts approximating \$700 Million were brought against GPU.²⁸

GPU brought a motion to dismiss premised upon the contention that the New Jersey Board of Public Utilities has “primary jurisdiction,” which motion was denied by the trial court. GPU’s motion for discretionary review by a New Jersey appellate court was granted. The New Jersey Board of Public Utilities appeared as *amicus curiae*, contending that by taking these actions, monitoring GPU’s compliance and continuing to establish reliability standards, it had appropriately exercised “essential jurisdiction” over GPU concerning outages.²⁹ At last report, the New Jersey appellate court has ordered remand of the case for trial on plaintiffs’ damage claims.

6. Texas

The Texas Supreme Court held on June 10, 1999, that Houston Lighting and Power was not liable for damages of more than \$250,000 resulting from when a grocery store was without power for 15 hours. In so holding the Texas Supreme Court upheld HP &L’s tariff language as “reasonable.”³⁰ The actual facts involved a transformer failure. It was alleged that the utility was negligent in failing to timely restore service.³¹

²⁶ Order, *In the Matter of the Board’s Review and Investigation of GPU Energy Electric Utility System’s Reliability*, State of New Jersey Board of Public Utilities in Docket No. EA99070485 (May 1, 2000), p. 1

²⁷ *Id* at pp. 3-8.

²⁸ *Muise, et al v. GPU, Inc. et al, and George Tzannetakis et al v. GPU Inc., et al*, New Jersey Superior Court Law Division, Monmouth County, Consolidated Complaints, Docket No MON-L-3587-99.

²⁹ *Op cit* (ft nt 22) at pp. 8-9.

³⁰ The actual tariff language was as follows, in pertinent part: “The Company will not be liable for any damages, whether direct or consequential, including without limitation, loss of profits, loss of revenue, or loss of production capacity occasioned by fluctuations or interruptions unless it be shown that the company has not made reasonable provisions to supply steady and continuous electric service...and in the event of a failure to make such reasonable provisions (whether as a result of negligence or otherwise), Company’s liability shall be limited to the cost of

The Texas court upheld the reasonableness of tariff provisions limiting liability using the following rationale: (1) the customers most likely to suffer substantial economic damages would be large industrial or commercial customers; (2) losses paid to these large customers could be passed along to smaller customers, including residential customers, in the form of higher rates; (3) industrial and commercial customers would be in a better position than the utility to estimate potential damages and obtain insurance protection against those losses; (4) absent a limitation on liability, the risk of staggering loss could be borne by ordinary utility customers; (5) a regulated electric utility, whose rates are set by the Commission could not pick and choose its customers on the basis of potential liability, as would an unregulated business.

The Texas court did note the recent adoption of restructuring legislation in Texas. It stated that it was “cognizant that the relationship among the PUC, utilities and their customers will dramatically change over the next few years” but the court concluded that the issue of how such restructuring may impact future tariffs was not at issue in this case. Such *dicta* raised question as to the continuing viability of tariff protection altogether with the event of deregulation.

7. Maryland

In a class action suit reportedly filed in Montgomery County, Maryland, against Potomac Electric Power (PEPCO) for outages resulting from a January 1999 ice storm, plaintiffs requested \$500 for every day a resident that was without electricity. Plaintiffs also requested unspecified injunctive relief. Plaintiffs’ complaint largely focused on PCO’s response to the event, alleging negligence in failing to timely restore service, and alleging that downsizing of the company caused delays in response. The actual named plaintiffs were without power in their home for four days. *See*, Arlo Wagner, *The Washington Post* (May 27, 1999). The local court ultimately ruled that plaintiffs had one week to file their complaint with the Maryland Public Service Commission or face dismissal. Maryland also has a tariff standard of “willful neglect” before liability can result for interruption of service.

8. Illinois

As reported in the March 23, 2000, edition of *Restructuring Digest* Commonwealth Edison recently paid \$2.3 million to settle class action litigation involving approximately 50,000 customers who went without power during a 1995 heat wave which also produced a fire at a power station. On August 12, 1999, Commonwealth Edison experienced a series of blackouts in the Chicago Loop business area, which reportedly resulted in an estimated \$100 million in losses to approximately 670 businesses.³²

necessary repairs of physical damage proximately caused by the service failure to those electrical facilities of Customer.”

³¹ Mary Flood, *The Wall Street Journal*, (June 23, 1999); *Houston Lighting & Power Co. v. Auchan USA*, No. 97-1052, 42 Tex. Sup. Ct. J. 750, 1999 Tex. LEXIS 56 (June 10, 1999).

³² *Chicago Tribune*, “Downtown Chicago Plunges Into Darkness” (August 13, 1999); “Deliberate Blackout in Chicago Might Spur Claims Against Utility (August 16, 1999).

9. California

As the result of the tree/transmission line contact caused outage in the western United States on August 10, 1996, Mobil Oil brought a breach of contract claims against Southern California Edison (SCE) as the result of a “voltage dip” of less than a minute’s duration. Previous to this event SCE had entered into extensive contract negotiations leading to a Self Generation Deferral Agreement ultimately approved by the California Public Utilities Commission. There was also evidence of substantial communications between Mobil and SCE about Mobil’s concern about reliability; however, it was unclear whether such communications related to the contract or to a Joint Reliability Task Force that had been formed between Mobil and SCE to improve the reliability of delivery of electric power to the refinery, which was SCE’s largest single site customer. There was also evidence that SCE had advised Mobil that it was inevitable that there would be faults on the Edison system that could shut down the refinery.

After a jury was unable to reach a verdict on Mobil’s claims of breach of contract against SCE, the Superior Court for the County of Los Angeles entered an order granting judgment of dismissal of Mobil’s contract claims against SCE, holding that PUC Tariff Rule 14 applied to contracts with the utility unless contracting parties agreed otherwise. Here, the court found PUC Tariff Rule 14 prevented a jury from reading a guaranty of supply into a contract, and dismissed Mobil’s claim as a matter of law.³³

10. Michigan

The Michigan Public Service Commission recently ordered Edison Sault Electric to provide detailed answers to questions on how it intends to provide reliable electrical service to Mackinac Island, while at the same time urging retention of backup generators on the island during their evaluation. This was in the aftermath of a series of widespread and lengthy outages on Mackinac Island during the summer of 2000.³⁴

Sovereign Immunity

Competing public utilities and other governmental entities have limitations on liability not available to investor owned utilities. Vestiges of sovereign immunity still exist to protect governmental entities [*e.g.* Bonneville Power Administration (BPA), Tennessee Valley Authority (TVA), Public Utility Districts (PUDs) and municipalities] from liability. Such liability protection measures are typically unavailable to investor owned utilities.

In Washington, such protection is known as the “public duty doctrine,” which generally provides that (with certain enumerated exceptions) a governmental entity has no liability for

³³ SCE’s Tariff Rule 14 provides: “Shortage and Interruption. The Company will exercise reasonable diligence to furnish a continuous and sufficient supply of electricity to its customers and to avoid any shortage or interruption of delivery thereof. It cannot, however, guarantee a continuous or sufficient supply or freedom from interruption. The Company will not be liable for interruption or shortage of supply, nor for any loss or damage occasioned thereby, if such interruption or shortage results from any cause not within its control.”

³⁴ *Restructuring Today*, p. 1 (October 10, 2000).

breach of a duty owed to the public generally.³⁵ In some jurisdictions, liability may be dependent upon whether the action or inaction complained of, resulted from a “discretionary” (*i.e.* policy) function. Suits against governmental entities may also involve requirements of notice, action within a reduced time frame or a requirement to bring the action at a specific location. These rules are frequently jurisdiction specific and involve definite public policy concerns.

In another litigation resulting from the August 10, 1996, outage which resulted in the interruption of service to nine western states, BPA and Pacific Gas & Electric Company (PG&E) were sued in the United States District Court for the Northern District of California.³⁶ The federal district court disposed of the action against BPA on the basis that BPA owed no duty to a utility consumer with whom it had no contract. However, BPA also presented an extensive and otherwise compelling argument that it was protected by sovereign immunity existing with respect to discretionary functions associated with maintenance of its transmission lines and because plaintiffs claim involved alleged interference with contract rights.³⁷ While not dispositive of this case, such arguments illustrate the potential that BPA’s actions or inaction may be a primary cause for an event, yet may leave only the investor owned entity with assets as the only defendant potentially left available to respond to damage claims.

Reliability Management Standards (RMS)

Compounding concerns about liability for interruptions of service is the fact that various national or regional reliability organizations are being promoted to establish and enforce “reliability management standards (RMS)”³⁸ as a condition of access to, and operation of, transmission systems. For instance, the Western Systems Coordinating Council, the largest of ten regional councils forming the North American Electricity Reliability Council (NERC),³⁹ has now implemented its second phase of RMS standards. Implemented through bilateral contracts between WSCC and participating Control Area Operators, which are in turn required to impose

³⁵ See, e.g., *Honcoop v. State*, 111 Wn.2d 182, 188-91, 759 P.2d 1188 (1988); *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 532-35, 871 P.2d 601, *review denied*, 124 Wn.2d 1029 (1994).

³⁶ *Maxim v. United States of America and Pacific Gas & Electric Company (No. C 97-4417 CAL)*(1998).

³⁷ *Id.* Order on Dismissal Without Leave to Amend (December 4, 1998)[Dismissing only the United States] and Federal Defendant’s Memorandum in Support of Motion to Dismiss, pp. 18-24 (July 20, 1998) [citing applicable provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 28(a) and (h) and interpretative case law to include *Richardson v. United States*, 943 F. 2d 1107, 1110-14) (9th Cir 1991), *cert. den.* 503 U.S. 936 (1992).] *Accord*, *Kentucky Agric. Energy Corp. v. Bowling Green Mun. Util. Bd.*, 735 F. Supp. 226, 229 (W. D. Ky 1989)[dismissing action against Tennessee Valley Authority for damages for interruption of service to plaintiffs with whom TVA had no privity of contract].

³⁸ Discussion of specific adopted and proposed RMS criteria are beyond the scope of this paper, but can be found at <http://www.wscc.com>

³⁹ The following narrative is included in the NERC website: The North American Electric Reliability Council (NERC) helps electric utilities work together to keep the lights on. After a blackout in 1965 that left almost 30 million people in the northeastern United States and southeastern Ontario, Canada without electricity, electric utility leaders vowed to never let it happen again. NERC was formed in 1968 to keep that promise. NERC is a nonprofit corporation owned by ten regional councils. The members of the regional councils are electric utilities, independent power producers, and electricity marketers. The electric utility members are from all ownership segments of the industry investor-owned, federal, state, municipal, rural electric cooperative, and provincial. These members account for virtually all the electricity supplied in the United States, Canada, and a part of Mexico. For more information see <http://www.nerc.com>.

similar standards upon those connecting to their systems, numerous requirements are imposed upon participating utilities and generators. These standards impose requirements for minimum operating reserves, operation transfer limits and equipment requirements. However, the process calls for implementation of many additional requirements which have yet to be developed. Enforcement is dependant upon self-reporting and policing by the WSCC, which can result in the issuance of “citations,” followed by an adjudicative process for assessing the payment of “penalties.” On April 14, 1999, FERC found the first phase RMS standards to be “just and reasonable” and agreed to participate on a limited experimental basis with enforcement of those standards. In turn, FERC deferred to the WSCC in the actual development of reliability standards.⁴⁰

While well intended, a risk posed by this process is that it provides a readily available means for potential litigants impacted by an outage to assess responsibility. RMS not only involves the potential creation of legal duties but involves the required collection and dissemination of information, enables the identification of potentially responsible parties, and also includes an adjudicative process for assessing fault. Should it evolve that state courts, in exercise of their common law tort authority, resolve that a legal duty exists, or should be created for the benefit of third parties, the stage is set for massive tort liability of parties with the occurrence of an outage. At the very least this process provides plaintiffs attorneys and the courts with a simplified roadmap for assessing claims of negligence.

Perhaps the best analogy in the tort arena is in the adjudication of “rules of the road” violations by motorists. A “citation” may be issued for “driving too fast for conditions” or for “failing to stop at a stop sign,” resulting in findings of “guilt,” or pleas of “guilt.” The latter may occur even to obtain the benefit of some reduced fine as levied in a local traffic court. To the surprise of many motorists, where an accident results and has become the subject of a civil tort suit for damages, either of the above dispositions would, under the laws of many states, result in an automatic determination of negligence as a matter of law. At the very least such would constitute evidence of negligence or an admission against interest, which a jury could consider in determining negligence.

All that is necessary for RMS to evolve into a means for assessing liability for interruption of service of interconnected systems is for the state courts in the exercise of common law jurisdiction, or for state legislators to resolve that a legal duty is owed by the transmission or generation operator under the circumstances for which it can be held responsible in damages. With breach of that duty, potentially resolved through the RMS adjudication process, it is foreseeable that damages could result to other entities, to owners of commodity or an ultimate consumer. This could result not only from the precipitating event but also from conditions existing on the lines of neighboring control areas.

Also of particular relevance to traditional state interest is the preference that jurisdictional utilities have expected in meeting native load requirements. Ratepayers in one state have not been charged with the expense of building lines or equipment to serve the needs of customers of other utilities in other states. With RMS, transmission operators and generators may be required

⁴⁰ FERC Docket No EL99-23-000, News Release April 14, 1999.

to implement measures to minimize disturbances in other states, to include conditions and contingencies resulting in jurisdictions where construction of new lines and facilities have met opposition and have not been built. Further, while RMS citations of governmental entities may be valid (provided there was original authority to agree to be so obligated) governmental and investor owned entities may also be held to different standards of tort liability by applications of the law of sovereign immunity.

Interruptions of service are inevitable. As long as there is risk that RMS standards can become a ready basis for liability assessment and there is the potential that only investor owned utilities with assets might be left responsible for damages, there is understandable reluctance to assume such risks. This is particularly true where the RMS standards have yet to be fully developed. Clear limitations on liability must be provided to eliminate this concern, or to at least reduce this issue to an acceptable level of risk for all participants. Even with the formation of RTOs to operate transmission systems, these organizations are typically without assets beyond those of the participants, and any available insurance.

Potential Remedies

Historical tariff limitations on liability, if enforced and respected by the courts, have served the industry well in limiting liability for interruptions of service. Continuation of such liability protection is essential to preserving the availability of insurance and minimizing the cost of insurance (and the resultant cost of energy services to consumers.) Charging those consumers (particularly large customers) with the costs of, and responsibility for, implementing measures appropriate for their own protection with the event of a power outage is an appropriate and legitimate policy objective.

One particularly successful and unique effort among interconnected transmission operators in the Western United States to limit liability has been the Western Interconnected Systems (WIS) Agreement. This agreement operates to limit liability for damages to their own equipment, and provides for the assumption of responsibility for any resulting liability to their own customers on their own system for losses associated with interconnected system failures. An insurance policy, while admittedly limited in amount should public liability exist for a widespread outage, is available to satisfy claims of customers of WIS participants, and is paid for by signatory parties. In the Pacific Northwest, and in other regions, an insured but non-profit Security Coordinator, has also been created to minimize the occurrence of events. However, none of these efforts would be successful without the existence of some limitations on liability, to specifically include tariff protection at the state level.⁴¹

If it is to be federally mandated that “open access” and “deregulation” of the electrical industry is to occur, and/or should it be desirable to substitute mandatory reliability criteria in place of voluntary interconnection standards, the preferred process would be to implement such

⁴¹ In its most recent FERC filing in response to Order 2000, RTO-West proposed, as a requirement of formation, that RTO-West receive a “Continuity of Service” tariff from FERC as a condition of rates. It also has proposed a multiparty agreement containing the essential principles of the existing WIS Agreement in effort to preserve the status quo and provide protection from liability for interruptions of service. Such awaits FERC consideration but can be found at http://208.55.67.64/Doc/ProposalFiling_FERC_RTOWest_Oct23_AttachY_LiabAgr.PDF

through federal enabling legislation, which would specifically address liability for interruption of service. Ideally, this would consist of federally legislated absolute immunity or some form of limited immunity for interruptions of electric service. It could include limitations of liability to gross negligence or willful misconduct, or damage caps on liability. One measure that would potentially promote reliability and RMS would be to limit liability of participants to only the amount of any fines, sanctions or penalties imposed by the reliability organization. While theoretically capable of being acted upon at the state level, some uniformity in state law existing now, and in the future would be required to be effective.

Until there is enabling legislation, FERC and state utility commissions should appreciate the need to preserve the status quo by including limitations of liability in tariffs and by permitting recovery of the costs of insurance for negligence in rates. Cognizance should be taken that with significant risk of massive liability, insurance may not ultimately be available at any price. Further, if rates for electrical service are to successfully be kept at a minimum, the preferred policy approach would be to eliminate exposure for tort liability for service interruption altogether, or at the very least preserve the limitations of liability risk to a level commensurate with present practices in most states. In no event should electric service providers be responsible for consequential damages, or placed at catastrophic risk for the inevitable outage event. Implementation of RMS should also not become the basis for any increase in liability risk, and in no event should investor owned utilities with assets be placed at competitive disadvantage because of liability risk.