# THE DUTY OF A PUBLIC UTILITY TO MITIGATE "DAMAGES" FROM NONPAYMENT THROUGH THE OFFER OF CONSERVATION PROGRAMS

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As an almost inflexible proposition, a party who has been wronged by a breach of contract may not unreasonably sit idly by and allow damages to accumulate. The law does not permit him to recover from the wrongdoer those damages which "he should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."[1]

## I. INTRODUCTION

One goal of poverty lawyers should be to apply "established" legal theory in ways which redound to the benefit of their clients. Recognizing that most basic contract law was not established with the lives of poor people in mind, it thus becomes both the province and the responsibility of poverty lawyers to seek creative applications. This article attempts to meet that obligation. It examines the social problem of low-income households' inability to pay for public utility service and illustrates how attorneys can utilize contract law's mitigation of damages principle to benefit low-income households.

This article does not examine the law as it necessarily "is," but rather as it "might be,"[2] and poverty advocates are urged to seek their own state-specific applications.

The article seeks to synthesize the concerns over the social problem of inability to pay with the concerns of whether utilities adequately seek to protect themselves, and their remaining ratepayers, from the costs of such nonpayment. It suggests that utilities have not only an opportunity to provide social benefits while controlling costs through the offer of low-income conser-

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[1] JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS § 14-15, at 610 (1987) (citing RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981)).

[2] *See infra* notes 119-180 and accompanying text.

vation programs,[3] but also a duty enforceable at law to offer such programs in order to "mitigate the damages" of nonpayment.

### A. *What is a "Public Utility"*

This article applies the common law of contract to the regulation of "public utilities." While most know who their public utility is, they may not know how to describe the concept of a "public utility." If a company is a "public utility," a basic common law "duty to serve" attaches. This duty requires the provision of service to all who seek it, without discrimination, under reasonable rules and at reasonable rates.[4] The "duty to serve" is judicially enforceable: violation of the duty is a tort giving rise to actions for damages,[5] as well as breach of contract.[6] This duty to serve is unique to "public utilities."[7]

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[3] For a description of what is contemplated by the term "conservation programs," see *infra* text accompanying note 81.

[4] Snell v. Clinton Elec. Light, Heat & Power Co., 63 N.E. 1082 (Ill. 1902). "There is no statute regulating the manner under which electric light companies shall do business in this state. They are therefore subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges." *Id.* at 1083. The fundamental common law "rule" requires a utility to serve on reasonable terms all those who desire the service it renders. 64 AM. JUR. 2D *Public Utilities* § 16 (1972). If a member of the public has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of a utility to provide the service. Annotation, *Liability of Gas, Electric or Water Company for Delay in Commencing Service*, 97 A.L.R. 838, 839 (1935). *See also*, 26 AM. JUR. 2D *Electricity, Gas and Steam* § 110 (1966) (delay in commencing electric service); 26 AM. JUR. 2D *Electricity, Gas and Steam* § 216 (1966) (delay in commencing gas service). According to the Missouri courts, "a public utility is obligated *by the nature of its business* to furnish its service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination." Overman v. Southwestern Bell Tel. Co., 675 S.W.2d 419, 424 (Mo. App. 1984) (quoting 73B C.J.S. *Public Utilities* § 8 (1983)) (emphasis added); Arizona Corp. Comm'n v. Nicholson, 497 P.2d 815, 817 (Ariz. 1972) (citations omitted). In short, under the common law, 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. For excellent discussions of the scope and ramifications of this duty, see Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911); Comment, *Liability of Public Utility for Temporary Interruption of Service*, 1974 WASH. U. L.Q. 344, 346 n.10 (1974); Gustavus H. Robinson, *The Public Utility Concept in American Law*, 41 HARV. L. REV. 277 (1928).

[5] *See* Smith v. Tri-County Elec. Membership Corp., 689 S.W.2d 181 (Tenn. App. 1985) (citing Capital Elec. Power Ass'n v. Hinson, 92 So. 2d 867 (Miss. 1957)); Roger D. Colton, *Utility Disconnections as a Tort: Gaining Compensation for the Harms of Unlawful Utility Shutoffs*, 22 CLEARINGHOUSE REV. 609 (1988).

[6] "[I]t is generally held that the failure or breach of duty to supply service to one

Though common, this definition, (that a "public utility" includes all companies to whom a common law duty to serve attaches) appears to be somewhat circular in that the duty to serve does *not* attach unless the company is a public utility. However, no one has ever succeeded in reaching a precise definition of a "public utility."[8]

In general, the principal determinative characteristic of whether a company is a public utility is that of service to, or readiness to serve,[9] an indefinite public which has a legal right to demand and receive its services or commodities.[10] There are multiple factors that might be considered in any inquiry into

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legally entitled thereto is a tort, even if it is also a breach of contract." 64 AM. JUR. 2D *Public Utilities* § 28 (1972). *See* DeLong v. Osage Valley Elec. Coop. Ass'n, 716 S.W.2d 320 (Mo. App. 1986); Wink Gas Co. v. Huskey, 42 S.W.2d 819 (Tex. Civ. App. 1931). This observation extends not only to the disconnection of service, but to a delay in the connection of service as well. "Where there has been a negligent delay in acting upon an application for the service of a public utility, the utility will be liable on the theory of tort for such damages . . . or, in the absence of affirmative negligence, may be held liable as for a breach of contract." 64 AM. JUR. 2D *Public Utilities* § 30 (1972). These conclusions have been reached with regard to public utilities furnishing water, gas and electricity, 64 AM. JUR. 2D *Public Utilities* § 28 (1972), as well as for telephones, 86 C.J.S. *Telegraphs, Telephone, Radio and Television* § 272(a) (1954); South Central Bell Tel. Co. v. Epps, 509 So. 2d 886 (Miss. 1987). Note, however, that the *Epps* case was presented as a breach of contract case. 509 So. 2d at 891. In *Epps*, the Mississippi Supreme Court expressly held that "[t]elephone [c]ompanies are characterized as 'public service corporations' or 'public utilities' . . . ." *Id.* at 890. The plaintiff in *Epps* was awarded $75,000 in compensatory damages. *Id.* at 894-95. *See also* Cumberland Tel. and Tel. Co. v. Hubart, 42 So. 349, 350-51 (La. 1906).

[7] ELLSWORTH NICHOLS, PUBLIC UTILITY SERVICE AND DISCRIMINATION 121, 123 (1928) ("One of the distinctions between a public utility business and other kinds of business is the duty to serve which attaches to the former. In other kinds of business, obligations rest upon contract, but a different rule applies to a business devoted to public use . . . . The duty to serve, therefore, is now regarded as a necessary incident to the public utility business . . . . Without going into a detailed discussion of all the decisions, we can safely announce the rule that a public utility must render safe, reasonable and adequate service.").

[8] Among the industries defined to be public utilities at one time or another include innkeepers and blacksmiths. *See* Jacob Geffs, *Statutory Definitions of Public Utilities and Carriers: Part I*, 12 NOTRE DAME LAW. 246 (1937); Jacob Geffs, *Statutory Definitions of Public Utilities and Carriers: Part II*, 12 NOTRE DAME LAW. 373 (1937).

[9] *Compare* Gilman v. Somerset Farmer's Co-op. Tel. Co., 151 A. 440 (Me. 1930) (where cooperative telephone company furnished service primarily to its own stockholders, but also offered its service to the general public through pay stations, the court determined that only because of and to the extent of its public offering could it be deemed a public utility) *with* Dickinson v. Maine Pub. Serv. Co., 223 A.2d 435, 438 (Me. 1966) ("A member must be a customer, but he is more than a customer. Qualifications and limitations in respect to membership are fixed by the by-laws.").

[10] 64 AM. JUR. 2D *Public Utilities* § 1 (1972) (citations omitted).

whether this "holding out" test has been met.[11]

Ever since the first public utility commission was created in New York in 1907,[12] utility regulation has become largely the job of administrative agencies.[13] Although most administrative action is thought to be in the realm of rate regulation, issues such as the control of service disconnections for nonpayment, the collection of deposits, and the imposition of late charges have spawned much administrative litigation.[14] Moreover, many public utilities (municipals, including not only municipal gas and electric companies, but municipal water companies), and Rural Electric Cooperatives (RECs) are simply not within the jurisdiction of state public utility commissions.[15]

The regulation of public utilities has been established because of their monopoly control over an essential public resource.[16] The next section examines the ways in which the public depends upon public utility service of all types.

### B. *The Essential Nature of Public Utility Service*

The use of public utility service pervades the life of every individual. Each

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[11] *See* Radcliffe Park, Comment, *Public Utilities—Duty to Serve—Liability for Inadequate Service*, 1938 WIS. L. REV. 182 (1938) ("The phrase now used suggests correctly that whether a public utility has 'held itself out' is a question of fact to be determined by the varying circumstances of each case—by what the utility has done as well as what it has said."). *See also* Annotation, *Membership Corporation or Association or Cooperative Group Furnishing to its Members Electric, Telephone, or Other Service Commonly Supplied by Public Utility, as Subject to Governmental Regulation or to Jurisdiction of Public Service Commission*, 132 A.L.R. 1495, 1498 (1940) ("The most important test used in determining whether a membership corporation or association or a co-operative group furnishing to its members a service commonly supplied by a public utility is in fact a public utility . . . is the fact or willingness to serve the entire public within the area in which the facilities of the organization are located. If it confines its service to its own stockholders or to members of its own group, and does not serve or hold itself out as willing to serve the public, it is not ordinarily considered a public utility.").

[12] Francis X. Welch, *The Effectiveness of Commission Regulation of Public Utility Enterprise*, 49 GEO. L.J. 639, 643 (1961).

[13] *See* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19-36 (1941); IRSTON R. BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION 173-75 (1942).

[14] *See* William H. Danne, Annotation, *Right of a Public Utility to Deny Service at One Address Because of Failure to Pay for Past Service Rendered at Another*, 73 A.L.R.3D 1292 (1976); Annotation, *Right to Cut Off Water Supply Because of Nonpayment of Water Bill or Charges for Connections, etc.*, 28 A.L.R. 472 (1924); Annotation, *Right to Cut Off Supply of Electricity or Gas Because of Nonpayment of Service Bill or Charges*, 112 A.L.R. 237 (1938).

[15] CHARLES F. PHILLIPS, THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 561 n.114 (1984).

[16] 1 A.G.J. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATIONS 1-2 (1969).

time a person walks into a heated room, eats food that has been either refrigerated or cooked, or uses a light, that person is most likely relying on some sort of public utility. Electricity, natural gas, telephone, water and sewer companies are all examples of "public utilities" that have become indispensible in American society.

Public utility service is an essential aspect of modern life. The Supreme Court has recognized that the denial of heat and water can be devastating, if not fatal, to a household's inhabitants.[17] Substantial concern has also been voiced regarding households that are unable to afford essential utilities.[18] According to a Maine study,

> as many as one out of every five Maine residents may not be able to afford necessary heating and utility expenses during the winter months. The problem is income. These Maine households living near or below poverty do not have the income, from any source, to meet all their basic needs.[19]

A Utah study confirmed that on a national scale, households with incomes in the lowest 20 percent bracket paid almost one-fourth of their gross income for basic energy needs.[20] According to the Utah report, "all available [fuel assistance programs] by no means provide a satisfactory solution to the problem . . . . Under the present system where essential utility service costs more than low-income ratepayers can afford, large arrearages, threats of termination of

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[17] Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978).

[18] *See* Rajnish Barua, et al., *Energy Needs and Costs of Low-Income Households: A Preliminary Profile of Delaware LIHEAP Clients*, DIV. OF COMMUNITY SERVS. (Ctr. for Energy & Urb. Pol'y Res., Univ. of Del., Newark, Del.), July 1987; Roger D. Colton & Roberta Leviton, *Poverty and Energy in North Carolina: Combining Public and Private Resources to Solve a Public and Private Problem*, ENERGY ASSURANCE STUDY COMM'N: N. C. GEN. ASSEMBLY (Nat'l Consumer L. Ctr., Boston, Mass.), May 1991; Economic Opportunity Research Institute, *An Evaluation of Innovative Partial Payment Programs for Low Income Utility Customers*, (Iowa Util. Ass'n, Des Moines, Iowa), Jan. 1988; Eunice S. Grier & George Grier, *Too Cold - Too Dark: Rising Energy Prices and Low Income Households*, (Community Servs. Admin., Wash., D.C.); Charles E. Hill, *Energy and the Poor: The Forgotten Crisis*, (Nat'l Consumer L. Ctr., Wash., D.C.), June 1989; Wayne Lee Hoffman, *Providing Energy Assistance to the Poor: Choices Relevant to Design of Future Programs*, (The Urb. Inst. Working Paper, Wash., D.C.), Oct. 1979; *Low-Income Energy Assistance Programs*, FUEL OIL MKTG. ADVISORY COMM. (U.S. Dep't of Energy, Wash., D.C.), July 1980; Charles T. Unseld, et al., *The Impact of Rising Energy Costs on the Elderly Poor in New York State*, (N.Y. State Energy Off., Welfare Res., Inc., Albany, N.Y.), Jan. 1978.

[19] *Ready for Winter?*, Final Report of the Blue Ribbon Commission on Energy Policy for Maine's Low-Income Citizens 1 (Nov. 1990) (on file with the *Boston University Public Interest Law Journal*).

[20] Shirley A. Weathers, *Utility Ratepayers, Winter Heating Costs, and the Unaffordability Gap*, REP. TO THE UTAH COMMITTEE OF CONSUMER SERVICES (Utah Issues Info. Program), Oct. 1987, at ii.

service, actual shutoff, and the adversarial collection efforts will continue."[21] Low-income households must obtain protection from the threatened or actual disconnection of service by utilities.

Due to the essential nature of these services, public utilities have been made subject to an array of state customer service regulations. For example, regulations exist which constrain the timing and reasons for the disconnection of service, prescribe shutoff notice requirements, and dictate procedures for allowing a scheduled shutoff to be disputed as unjustified. In addition, customer service regulations govern the collection of deposits, the imposition of late payment charges and the offer of deferred payment plans.[22]

### C. *The Costs to a Utility of Not Mitigating Damages*

Recently, concern has been raised over the costs which non-paying customers impose on a utility and its remaining ratepayers.[23] Traditional credit and collection techniques which include disconnection of service and demands for deposits may cost the utility more than they save.[24] As the Pennsylvania Public Utility Commission's (PUC) Bureau of Consumer Services (BCS) found in its recent report based on an investigation into the control of uncollectible accounts,

> ratepayers are already bearing significant costs attributable to the problems of payment-troubled customers and uncollectible balances. Further, BCS believes that incorporating the following recommendations into utility operations will lead to a more rational and cost effective use of existing resources. Over time, proper implementation of the recommendations may result in a reduction of total utility costs.[25]

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[21] *Id.* at ii-iii.

[22] *See* Michael Foley & Ann Thompson, *Survey of Electric and Natural Gas Utility Uncollectible Accounts and Service Disconnections for 1990*, (Nat'l Assoc. of Regulatory Util. Comm'rs, Wash., D.C.), Jan. 29, 1992. For a discussion of the substantive law of utility shutoffs, see *Compendium and Analysis of State Regulations and Law Regulating Utility Service Terminations and Disputes*, (Nat'l Consumer L. Ctr., Boston, Mass. & Pub. Util. L. Project of N.Y., Albany, N.Y.), July 1982; *see also Model Residential Utility Service Regulations*, (Nat'l Consumer L. Ctr., Boston, Mass. & Pub. Util. L. Project of N.Y., Albany, N.Y.), 1984.

[23] *See* Roger D. Colton, *A Cost-based Response to Low-income Energy Problems*, 127 No. 5 PUB. UTIL. FORT. 31 (Mar. 1, 1991).

[24] *See* Roger D. Colton, *Determining the Cost-Effectiveness of Utility Credit and Collection Techniques*, (Nat'l Consumer L. Ctr., Boston, Mass.), July 1990.

[25] Mitchell Miller, et al., *Final Report on the Investigation of Uncollectible Balances: Docket No. 1-900002*, BUREAU OF CONSUMER SERVICES, (Pa. P.U.C., Harrisburg, Pa.), Feb. 1992, at 6 (recommendations excluded). The Bureau set forth 83 recommendations on how that state's utilities could seek to control uncollectible accounts while maintaining essential public service. Among the recommendations made were: that each utility adopt income-based "customer assistance programs," through which utility rates are set equal to an affordable percentage of income, *id.* at 115-143; that utilities engage in "early identification" efforts through which to determine what cus-

The offer of conservation programs to low-income households may help ameliorate these cost impacts of nonpayment. Indeed, it is expected that the offering of conservation programs[26] will result in a net savings to the utility as compared to a collection scheme involving only the disconnection of service at some set value of arrears.[27] This result is possible even where the investment, risk, transaction and monitoring costs of conservation exceed the sum of the amount owed by any particular customer plus the costs of effecting termination and collecting on past arrears.

Costs associated with termination include the transaction costs of: providing notice, disconnecting service, engaging in collection activity, and writing off uncollectible debt.[28] In addition, utility terminations can generate hidden costs. Terminated customers may go underground (changing names on accounts, moving to new addresses, whether within or outside the jurisdiction of the utility) or they may enlist advocates to fight the termination. All of these activities impose costs on the utility, as well, in the form of increased legal, transaction, and monitoring costs. These include the costs associated with approving and starting up new accounts, greater scrutiny of new accounts, and increased collection costs and legal fees. In addition, the company may have lost forever a potentially profitable account. A utility with a reputation as a hard-core collector of fees risks loss of good will and encourages subversive behavior as well.[29]

Moreover, when a utility disconnects service, it foregoes the possibility of collecting future revenue from that particular household.[30] Yet, it is likely that the utility will, directly or indirectly, be supplying its services to the estranged customer again at a different location or through a third party's account. To the extent that service cutoffs and reinitiations impose transaction costs on customers as well as public utilities, those customers will have less money to pay for the necessities of life, including utility bills.[31] In the absence of substantive changes in the household's payment pattern or energy usage, the cycle

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tomers might pose future payment problems, *id.* at 85; and that utilities waive unnecessary and counter-productive expenses imposed on low-income households, such as security deposits, *id.* at 99, and late payment fees, *id.* at 93-96. In addition, the Bureau recommended expanded federal funding of low-income weatherization and expansion of utility-financed low-income conservation programs. *Id.* at 62-66 & 78-79.

[26] For a description of what is contemplated by the term "conservation programs," see *infra* text accompanying note 81.

[27] *See* Maureen Quaid & Scott Pigg, Measuring the Effects of Low-Income Energy Services on Utility Customer Payments (1991) (on file with the *Boston University Public Interest Law Journal*); *see also* Arthur Allen Leff, *Injury, Ignorance and Spite: The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

[28] *See* Colton, *supra* note 24, at 21-28.

[29] *See* Leff, *supra* note 27, at 35-36.

[30] *See* Colton, *supra* note 24, at 21-27.

[31] *See* Roger D. Colton, *The Forced Mobility of Low-Income Households: The Indirect Impacts of Shutoffs on Utilities and Their Customers*, (Nat'l Consumer L. Ctr., Boston, Mass.), Feb. 1991.

that leads to arrears, consequent termination, and subsequent reinstatement of service (whether legitimately or through underground strategies) continues.[32]

In addition to the costs imposed on the utility itself, the disconnection of utility service imposes external costs on society as a whole. Terminated customers may, for a time, struggle to survive without utility service to the detriment of the health of the household and safety of the neighborhood.[33] Eventually, families are forced to move to obtain service,[34] and costs inevitably result as schools and neighborhoods are disrupted and properties deteriorate.[35] For many low-income families, the costs of moving and subsequently reinitiating utility service will be absorbed by public assistance funds or will be drawn from family reserves for other necessities, again implicating health and safety costs which may ultimately be borne by society. Furthermore, the termination and collection process imposes transaction costs on the judicial system, furthering the societal interest in ending the cycle.[36]

### D. *The Contractual Relationship Between Utility and Customer*

The question posed by this article is whether all of these various costs can be integrated into some formal theory of the law. While public utility consumers, society at large, and individual utilities would all profit from the utility's adoption of conservation programs, only the utility is uniquely positioned to realize these gains. The utility is in this unique position because it has the resources and information necessary to acquire profit, and because it deals with sufficient numbers of low-income consumers to allocate risk over all sectors of customers. Accordingly, requiring conservation programs in mitigation of nonpayment of utility bills is not only commercially reasonable, but advisable from a legal standpoint.[37]

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[32] *See* Pennsylvania P.U.C. v. Columbia Gas Co., Case No. R-891468, (Pa. P.U.C., Sept. 19, 1990) (Decision and Order), at 158-59.

[33] For a discussion of external costs imposed by housing units in disrepair, see Richard Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); *cf.* MOHAN MUNASINGHE & GUNTER SCHRAMM, ENERGY ECONOMICS, DEMAND MANAGEMENT AND CONSERVATION POLICY 196 (1983) (discussing external costs associated with various energy conservation plans and the relation of such costs to the economic cost-benefit analysis of alternative plans).

[34] *See* Liz Robinson, *An Examination of the Relationship between Utility Terminations, Housing Abandonment, and Homelessness*, ENERGY COORDINATING AGENCY OF PA., (Inst. for Pub. Pol'y Stud., Temple Univ., Phila., Pa.), June 1991.

[35] For a judicial recognition of costs associated with relocation, see Pennell v. City of San Jose, 108 S. Ct. 849, 858 n.8 (1988); *see also* James Geoffrey Durham & Dean E. Sheldon, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 8 n.41, 25-31 (1986).

[36] *See* Leff, *supra* note 27, at 5-10.

[37] *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 35 at 133 (1935) (if the nonbreaching party is able to pay the amount required to avoid

There is little question that the provision of utility service is a commercial relationship governed by the law of contract.[38] The Uniform Commercial Code (UCC) governs the contractual relationship,[39] and the breach or denial of service gives rise to an action for breach of contract.[40]

Basic contract principles were applied to utilities in *Meridian Light and Railway Co. v. Steele*.[41] In *Meridian*, appellee Steele entered into a contract with a utility company to furnish service to her home. Later, when Steele moved to a new residence, she entered into a contract with the utility agreeing to pay any arrearage which she had incurred at her former residence, or face termination. The court held that the contract signed by Steele, "in so far as she may be bound to pay the arrearages on her former residence before installment of lights in her present residence was without consideration and void."[42]

Similarly, the contract doctrine that prohibits imputing the debts of one person to a third party has been applied to cases involving utility companies.[43] An express contract between a utility company and one of its customers will not support liability by parties other than those who have contracted.[44] Thus, when an applicant for service enters into an express contract for service, in which the utility company agrees to provide service and the applicant agrees to pay for the service provided, liability for that service cannot be transferred to a person who is not a party to the express contract.[45]

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further damage, business prudence would require it do so); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 92 Cal. Rptr. 111 (Cal. Ct. App. 1971).

[38] *See* Cat Hill Water Co. v. Public Serv. Comm'n, No. A.90-09-10, 1991 WL 302547 (Del. Super. Ct. Dec. 23, 1991); Williams v. City of Mount Dora, 452 So.2d 1143 (Fla. Dist. Ct. App. 1984); *In re* Appeal of Pennichuck Water Works, 419 A.2d 1080, 1082-83 (N.H. 1980); 64 AM. JUR. 2D *Public Utilities* § 28 (1972).

[39] *See* Jane P. Mallor, *Utility "Services" Under the Uniform Commercial Code: Are Public Utilities in for a Shock?*, 56 NOTRE DAME LAW. 89 (1980); Gary D. Spivey, Annotation, *Electricity, Gas, or Water Furnished by Public Utility as "Goods" Within Provisions of U.C.C. art. 2 on Sales*, 48 A.L.R.3D 1060 (1973).

[40] *See* 64 AM. JUR. 2D *Public Utilities* § 28 (1972). *See, e.g.*, DeLong v. Osage Valley Elec. Coop. Ass'n, 716 S.W.2d 320 (Mo. App. 1986).

[41] 83 So. 414 (Miss. 1920).

[42] *Id.* at 415.

[43] *See* Annotation, *Making Payment for Water or Light a Charge Upon the Property or Against the Present Owner or Occupant, Irrespective of the Person Who Enjoyed the Service*, 13 A.L.R. 346 (1921); *supplemented*, 55 A.L.R. 789 (1928), *superseded*, 19 A.L.R.3D 1227, 1231 (1968). The annotation goes on to state: "in this connection, it is irrelevant whether the supplier and collecting authority is a municipality or a public utility company, since the results, all other things being equal, are the same in either case." 19 A.L.R.3D at 1231.

[44] *See, e.g.*, New York Tel. Co. v. Teichner, 329 N.Y.S.2d 689, 692 (N.Y. Dist. Ct. 1972).

[45] "Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations." Gold v. Gibbons, 3 Cal. Rptr. 117, 118 (Cal. Dist. Ct. App. 1960).

The Ohio courts have adopted a similar view of the utility-consumer relationship. In *Cincinnati Gas and Electric Company v. Sinkfield*,[46] a Cincinnati utility sought to hold the plaintiff liable for the debts incurred by a prior occupant of the plaintiff's present property. Although the plaintiff, Sinkfield, had been a co-owner of the property at the time the bills were incurred, he was not an occupant of the premises nor a customer of the utility at that time. The Ohio court held:

> Liability for unpaid utility services may not properly be predicated upon ownership of the property receiving the service; rather, the relationship between a utility and its customer is one of contract. The Public Utilities Commission of Ohio, in resolving utility service disputes . . . has held that even a consumer of utility services is not liable for unpaid bills in the absence of a contractual relationship.[47]

The only party responsible for the payment of bills in Ohio, the court said, "is a 'customer,' defined in the Ohio Administrative Code 4901:1-18-02 as 'any person who enters a contractual agreement with the company to receive electric or gas service.' "[48]

Contract law is directly applicable to the commercial relationship between a utility and its customers. Utility companies have an obligation to mitigate damages by offering conservation and weatherization services.[49] In particular, the following analysis will examine the obligation of a public utility to mitigate damages through the offer of conservation measures when faced with nonpayment either by an individual or by an entire class of its customers.

## II. The Mitigation of Damages Generally

One of the basic principles of contract law is the duty of parties to mitigate the damages which flow from a breach. The relationship between a utility and its customers is, in fact, one of standard contract law. Indeed, documents such as the utility's tariffs, its franchise, and its certificate of public convenience and necessity represent components of the standard contract between the company and its customers.[50]

### A. *Common Law Mitigation of Damages Requirement*

There are few principles in the law of remedies as well established as that of

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[46] No. C-860323, 1987 WL 9464 (Ohio App. April 8, 1987).

[47] *Id.* at *2 (citations omitted).

[48] *Id.*

[49] For a description of what is contemplated by the term "conservation programs," see *infra* text accompanying note 81.

[50] *See, e.g.*, Sommer v. Mountain States Tel. and Tel. Co., 519 P.2d 874 (Ariz. 1974); Sherwood v. County of Los Angeles, 21 Cal. Rptr. 810 (Cal. Dist. Ct. App. 1962); Cullinane v. Potomac Elec. Power Co., 147 A.2d 768 (D.C. 1959); Illinois Bell Tel. Co. v. Miner, 136 N.E.2d 1 (Ill. App. Ct. 1956); Carroway v. Carolina Power & Light Co., 84 S.E.2d 728 (S.C. 1954).

a claimant's duty of mitigation.[51] Under the duty of mitigation doctrine, a breaching party is responsible only for those consequences for which her breach was the proximate cause.[52] Accordingly, she cannot be held liable for consequences that the claimant could have avoided through reasonable conduct.

This analysis focuses on the mitigation principle in the context of a public utility's action to terminate a nonpaying customer's service in order to collect unpaid arrears. In particular, this article examines whether the mitigation principle requires a utility to offer an energy conservation program to its customers prior to termination or else be barred from seeking to collect the arrears which those mitigation measures would have prevented.

The conclusion below is that the application of "traditional" mitigation doctrine might not impose an obligation on a utility to engage in efforts to mitigate damages prior to the disconnection of service to a nonpaying customer. Specialized contract principles *do* exist, however, upon which such an obligation may be predicated. Before turning to the specific applications it is helpful to undertake a general overview of the doctrine of mitigation.

### B. *General Approaches to Mitigation Principles in Breach of Contract Actions*

A public utility, in seeking to collect delinquent bills, is responding to its customer's breach of contract. Under this contract, the utility agrees to supply service in exchange for the customer's promise to pay as charges become due. The utility claiming breach of contract by the customer's nonpayment is entitled to compensation for all those consequences which are reasonably foreseeable results of the breach, and which the utility could not have averted by reasonable efforts on its own part.[53]

Courts have developed three relatively well-defined approaches to applying the mitigation principle in basic breach of contract situations.

#### 1. Restrictive view

Some courts hold to a "bright-line" rule under which an aggrieved party is *never* required, as part of its "duty" to mitigate,[54] to further deal with the party in breach.[55] Under this restrictive view, the utility company seeking pay-

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[51] *See supra* note 1 and accompanying text.

[52] E. ALLAN FARNSWORTH, CONTRACTS § 12.12 at 897 (2d ed. 1990).

[53] *See* Warren v. Stoddart, 105 U.S. 224 (1881).

[54] Although courts frequently speak in terms of a non-breaching party's "duty" to mitigate, the only sanction for failure in this duty is that the party will be foreclosed from recovering damages which mitigating measures would have averted. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.15 (1990).

[55] 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1043 (1964) (stating that courts have held that it is not necessary to deal with breaching party, even on terms that would eliminate loss). *See* United States v. Sabin Metal Corp., 151 F. Supp. 683,

ment of its bill would be required to take all reasonable measures to avoid the adverse consequences of the breach, short of engaging in further dealings with the delinquent customer.[56]

In 1931, the Texas Court of Civil Appeals applied a restrictive application of the duty to mitigate in a dispute between a utility company and a customer.[57] The customer had separate accounts with the utility for his home and his place of business. The business account was in arrears, but the residential account was not. When the customer offered to pay his residential account, the utility refused the payment and terminated the residential service. As a result, the customer incurred actual damages of $1,000. The utility company contended that the customer could have mitigated these damages by paying the disputed business account, thus maintaining his residential service, and then sued the utility for overpayment. The court rejected the utility company's arguments,[58] finding that one party to a contract cannot compel the other to do something not required by the contract in order to reduce the damages the nonbreaching party would suffer.[59]

2. Flexible view

The second analysis adopts a flexible approach to the requirement of damage mitigation. In *Schultz v. Town of Lakeport*,[60] a California court, faced with a dispute similar to that in *Stanley*, applied this second approach. The "flexible approach" represented by this California decision requires a nonbreaching party to expend effort or money in order to mitigate damages caused by the breach, but only if: (1) the expenditure is small in comparison to the foreseeable losses; (2) the effort required is slight; and (3) the likelihood

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(S.D.N.Y. 1957), *aff'd per curiam*, 253 F.2d 956 (2nd Cir. 1958); Cappole v. Marden Orth & Hastings Coop., 138 N.E. 499, 500 (Ill. 1917); Nylen v. Park Doral Apartments, 535 N.E.2d 178, 183 (Ind. Ct. App. 1989); W-V Enters., Inc. v. FSLIC, 673 P.2d 1112 (Kan. 1983); Iseman v. Kansas Gas & Elec. Co., 567 P.2d 856 (Kan. 1977); Home Life Ins. Co. v. Clay, 773 P.2d 666 (Kan. Ct. App. 1989); Hector, Inc. v. United Savings & Loan Ass'n, 741 P.2d 542, 546 (Utah 1987).

[56] CORBIN, *supra* note 55, at 272.

[57] Southwestern Gas & Elec. Co. v. Stanley, 45 S.W.2d 671 (Tex. Civ. App. 1931).

[58] *Id.* at 674. Perhaps underlying this rejection of the utility argument was the basic law that a utility may not disconnect service at one address for nonpayment at a separate address. That doctrine has been expressly held to prohibit the disconnection of service at a residential address for nonpayment of a business bill. *See* Texas Cent. Power Co. v. Perez, 291 S.W. 622 (Tex. Civ. App. 1927), *aff'd*, 70 S.W.2d 413 (Tex. 1934).

[59] *Stanley*, 45 S.W.2d at 674. In general, courts are divided on the similar issue of whether a buyer who agreed to purchase on credit is required to deal on cash terms as part of its duty to mitigate. *See* CORBIN, *supra* note 55, at 274; Annotation, *Duty to Minimize Damages By Accepting Offer Modified by Party Who Has Breached Contract of Sale*, 46 A.L.R. 1192, 1194-95 (1927).

[60] 54 P.2d 1110 (Cal. 1936); *see also* 3 E. ALLAN FARNSWORTH, *supra* note 54, § 12.12, at 230-31 (1990).

is great that the expenditure of time and money would result in a net gain to the party harmed by the breach.[61] Under the flexible approach, the nonbreaching party need not accept additional obligations if so doing would result in humiliation or inconvenience; neither must the nonbreaching party accept an offer conditioned on the abandonment of any right of action for the prior breach.[62] Although the court reached the same result as the *Stanley* court, it did so on the fact-specific basis that the amount the utility demanded to restore service ($134) exceeded what reasonable mitigation measures would have required.[63]

3. Reasonableness view

A third approach holds that the question of the obligation to mitigate is a question of fact to be determined based on general "reasonableness" considerations.[64] This approach counsels that the reasonableness of the nonbreaching party's actions are assessed in light of the totality of circumstances relevant to the contract in dispute at the time and place of its breach. Thus, in *Ashley v. Rocky Mountain Bell Telephone Company*,[65] the court held it to be the responsibility of an aggrieved customer to pay a disputed bill and then to sue later for damages, stating that to do otherwise would result in a greater injury of possible termination of service.[66] In other words, if essential utility service

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[61] Tel-Ads, Inc. v. Trans-Lux Playhouse, Inc., 232 F. Supp. 198 (D.D.C. 1964); Tampa Elec. Co. v. Nashville Coal Co., 214 F. Supp. 647 (M.D. Tenn. 1963); Unverzagt v. Young Builders Inc., 215 So.2d 823 (La. 1968); *see* MCCORMICK, *supra* note 37, at 133-36.

[62] Publicker Chemical Corp. v. Belcher Oil Co., 792 F.2d 482 (5th Cir. 1986); Teradyne, Inc. v. Teledyne Indus., 676 F.2d 865, 870 (1st Cir. 1982); Paragould v. Arkansas Light & Power Co., 284 S.W. 529 (Ark. 1926); Farmer's Coop. Ass'n v. Shaw, 42 P.2d 887 (Okla. 1935); Key v. Kingwood Oil Co., 236 P. 598, 599-600 (Okla. 1924); City Nat'l Bank v. Wells, 384 S.E.2d 374 (W. Va. 1989); *see* FARNSWORTH, *supra* note 52, at § 8.15; CALAMARI & PERILLO, *supra* note 1, at 612.

[63] *Schultz*, 54 P.2d at 1113; *see* Coulter v. Sausalito Bay Water Co., 10 P.2d 780, 784 (Cal. Dist. Ct. App. 1932) (plaintiff is not required to incur more than slight expense in attempting to prevent the foreseeable damages flowing from a utility shutoff); Severini v. Sutter-Butte Canal Co., 210 P. 49 (Cal. Dist. Ct. App. 1922); Lyntel Prods. v. Alcan Aluminum Corp., 437 N.E.2d 653 (Ill. Ct. App. 1981); *Key*, 236 P. at 598 (customer should have mitigated by purchasing oil from breaching supplier at higher-than-contract price and sued for excess).

[64] Annotation, *Duty to Minimize Damages By Accepting Offer Modified by Party Who Has Breached Contract of Sale*, 46 A.L.R. 1192 (1927); Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 467 F.2d 588, 595 (4th Cir. 1972); Lawrence v. Porter, 63 F. 62 (6th Cir. 1894); Hussey v. Holloway, 104 N.E. 471 (Mass. 1914); *Key*, 236 P.2d at 599-600.

[65] 64 P. 765 (Mont. 1901).

[66] *Id.* at 767; *see* Holly v. City of Neodesha, 127 P. 616 (Kan. 1912). *But see* Schultz v. Town of Lakeport, 54 P.2d 1110, 1114 (Cal. 1936); Annotation, *Measure and Amount of Damages for Breach of Duty to Furnish Water, Gas, Light or Power Ser-*

were terminated, the household would risk damages to health, property and perhaps even life. If that threat could be avoided through the payment of money, later to be recouped, the obligation to do so existed.

4. Discussion

At first glance, it may seem that there is little substantive difference between the flexible and the reasonableness approaches. Any reasonableness determination must include a consideration of factors such as the costs and inconvenience of mitigation versus the likelihood of savings. There *is* a difference, however, in the focus and emphasis which would be applied to the conduct of the utility as the nonbreaching party. More importantly, in practice, some courts place such a gloss on the flexible approach that it becomes strikingly similar to the analysis under the restrictive approach. Such applications require the nonbreaching party (i.e., the utility) to expend no more than a minimal amount under any circumstances, and in some instances require no expenditure at all unless a net cost reduction is a virtual certainty.[67]

Problems exist with each of these three approaches. The restrictive and flexible approaches appear to place undue emphasis on injury to the emotions of the non-breaching party, an emphasis which is markedly out of step with modern commercial relations.[68] The reasonableness approach fails to appropriately take into account the fact that, in many cases, requiring mitigation may divest the injured party of a cause of action and allow the party in default to impose a unilateral modification of the contract terms.[69]

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*vice*, 108 A.L.R. 1174 (1977) (no duty for customer to pay a disputed bill as mitigation measure).

[67] *Coulter*, 10 P.2d at 784; *see* American Railway Express Co. v. Judd, 104 So. 418 (Ala. 1925); CORBIN, *supra* note 55, § 1042 (stating that it is never necessary for nonbreaching party to spend time or money unless advantage to be derived is almost certain). However, courts may grant more latitude on the definition of "certainty of savings" where a large loss could have been avoided by the expenditure of a little time or effort.

[68] *See* MCCORMICK, *supra* note 37, at 143 ("[T]he person wronged may well fling away prudence and follow pride."); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (contract law not designed to consider morality of breach, hurt feelings or pride); Apex Mining Co. v. Chicago Copper & Chem. Co., 340 F.2d 985, 988 (8th Cir. 1965) ("[I]t savors of oppression to compel a performing party to a contract to enter into new relations with a person who has willfully broken his obligation, solely to protect the latter from loss."). To the extent these approaches reflect common law doctrines that continued dealings with the breaching party orders an unfair modification of the contract, they are likewise anachronisms in modern commerce. U.C.C. § 1-207. As discussed below, a more plausible basis for decisions exempting dealings with the party in breach from mitigation analysis is a fear of encouraging strategic behavior by the party in breach. *See infra* notes 121, 153 and accompanying text. *But see* CHARLES FRIED, CONTRACT AS PROMISE 14-17, 131-32 (1981).

[69] *See* Hamilton v. McKenna, 147 P. 1126 (Kan. 1915); *Holly*, 127 P. at 620;

None of the three approaches discussed above adequately addresses the utility's duty to minimize losses caused by its delinquent customers, even though under either the "flexible" or "reasonableness" approach, a public utility *may* be required to provide conservation or payment plans to delinquent customers rather than terminate service. Instead, the proper analysis should consider the unique position of each party to the contract relationship at issue. Only under such a "totality of the circumstances" approach does the potential value of mitigation measures such as payment plans and conservation programs become relevant, both to the utility and to society as a whole.[70]

In the sections below, this article first submits a proposed duty to offer conservation programs to the rigors of a traditional analysis of a utility's duty to mitigate damages. The article next argues that if courts or regulators are instead presented with a mitigation analysis appropriate to the peculiar relationship of a utility and its customers, the imposition of a duty to mitigate will be viewed more favorably.

### C. *Evaluating a Public Utility's "Duty" to Mitigate by Offering Conservation Programs Under Traditional Mitigation Analysis*

Traditional mitigation analysis is an argument of limited efficacy to advocates who are urging conservation programs as an alternative to utility termination. Under traditional consumer analysis, it is unlikely that a court or commission would deem a public utility "unreasonable" in choosing not to implement a conservation program to mitigate damages arising from a contract breach attributable to nonpayment. This conclusion is examined in more detail below.

#### 1. Limits of traditional mitigation analysis

At least four historical limitations exist regarding the traditional duty-of-mitigation analysis used in basic consumer law situations. Unfortunately, if limited to traditional mitigation analysis, application of these limitations

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*Ashley*, 64 P. at 767-68 (all holding that where utility refuses service except at an excessive rate, the overcharge should be paid to obtain service and suit entered for the excess payments. Of course, in many cases, the amount will not justify the costs and risks of a suit; the aggrieved customer is left a right without a remedy.); *see also* Severini v. Sutter-Butte Canal Co., 210 P. 49, 50 (Cal. Dist. Ct. App. 1922) (utility customers should have paid disputed amount to maintain service, and thus would be limited to lost interest of $1.53).

[70] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (3d ed. 1986) (mitigation doctrine designed to deter incentives given by award of damages to engage in inefficient behavior); *see also* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 572 (1980) (damages in contract law designed to promote efficient behavior); MUNASINGHE & SCHRAMM, *supra* note 33, at 177-78. *But see* FRIED, *supra* note 68, at 16.

restricts the ability of a court or public utility commission (PUC) to promote reasonably prudent behavior on the part of public utilities and their customers within the context of the most appropriate ways to react to nonpayment.[71]

- First, asserting mitigation is traditionally considered a defensive rule only.[72] This may be a major limitation on the application of the mitigation principle in support of terminated utility customers. Mitigation may be an exclusively defensive response to a suit for past-due payments to a utility company. Accordingly, while mitigation may be used to reduce the dollars sought by the utility as damages arising from nonpayment, the defense is perhaps unavailable to enjoin the service termination in the first instance.[73]
- Second, the traditional mitigation principle does not comprehend all benefits to all parties that would result from the adoption of the suggested conservation measures; instead, mitigation savings are assessed only against the consequential damage incurred by the utility as a result of the terminated customer's nonpayment.[74]
- Third, most courts hold that there is no duty to anticipate payment default so as to mitigate damages *prior* to the default.[75] Under this rea-

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[71] Other limits on imposition of such a "duty," discussed above in more detail, are not treated here. In particular, court rulings which abrogate the duty in cases where the court finds that personal animosity would result in humiliation to the nonbreaching party, who is forced to resume intensive interpersonal relations with the party in breach, is not relevant to a utility's relation with its customers. Likewise, the rule that a party is not required to undertake obligations which would result in a waiver of its legal rights to later sue for damages arising out of the original breach is inapplicable to the subject of this discussion. Advocates should, however, emphasize in arguments to courts and PUCs that neither of these concerns are implicated. Also, specific limitations applied in particular jurisdictions are not discussed in detail in this section, which is directed to infirmities inherent in traditional mitigation analysis.

[72] CALAMARI & PERILLO, *supra* note 1, § 14-15; *see* Halliburton Oil Wall Cementing Co. v. Millan, 171 F.2d 426, 430 (5th Cir. 1948); Penna v. Atlantic Macaroni Co., 161 N.Y.S. 191 (N.Y. 1916).

[73] *See* FRIED, *supra* note 68, at 13. Mitigation-bottomed arguments may, however, be useful in negotiations with the utility prior to shut-offs. This also may suggest that the duty to mitigate does not arise until after the customer has breached his contract by being *significantly* delinquent in payments. *See also* Southwestern Gas & Elec. Co. v. Stanley, 45 S.W.2d 671, 674 (Tex. Civ. App. 1931); Texas Cent. Power Co. v. Perez, 291 S.W. 622 (Tex. Civ. App. 1927), *aff'd* 70 S.W.2d 413 (Tex. 1934).

[74] Indeed, a utility might argue that the company's duty to mitigate damages requires it to cease all relations with a consumer as soon as the consumer fails to pay her bills in a timely fashion.

[75] *Stanley*, 45 S.W.2d at 674. However, a few courts have included within mitigation analysis measures by the plaintiff which would have obviated the other party's breach. *See Penna*, 161 N.Y.S. at 193. However, there are principles in contract law which do govern the anticipation of a breach of contract. *See, e.g.*, U.C.C. § 2-609 (adequate assurance within context of anticipatory breach); RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (anticipatory breach). Anticipating contract breaches, in other words, is not a foreign concept in the law of contract. *See also* E. Allan Farns-

soning, a public utility would not be required to offer a conservation program to low-income consumers to avert possible nonpayment where they may be at risk of default, or even to those consumers clearly at risk.

•Fourth, and perhaps most significantly, courts traditionally tend to limit mitigation analysis to the effects of mitigation on only the parties at issue. Due to this tendency, courts have failed to develop an analysis which considers the reasonableness of action within the context of the relationship between a utility and its entire customer base, and thus have failed to provide proper incentives to either the utility or its customers to pursue all commercially reasonable mitigation measures.

2. Applying traditional analysis

Although the factors of cost, effort and risk generally lean in favor of including conservation measures within a utility's duty of mitigation, it would appear under traditional mitigation analysis that many courts or regulators will not impose such a duty on a utility because of the constant supervision required. Moreover, in many cases, the consequential damages to the utility flowing from the particular breach may not appear to justify *requiring* the utility to choose to incur the cost, effort and risk involved with these recommended programs.[76] In other words, a court or PUC that is limited by the constraints imposed by traditional mitigation analysis is unlikely to find a utility to have been unreasonable in failing to undertake such a course of action.

This result seems anomalous in light of the evidence that the offering of conservation programs as an alternative to shut-offs produces significant benefits for both the customer and the utility, as well as for society as a whole.[77] Moreover, there is no inherent limitation mandating that a court or PUC consider *only* the transaction before it in determining *the duties* of the parties; courts in tort and contract cases often look beyond the situation before them in determining a party's duty.[78]

Whether a public utility would be *ordered*[79] to offer conservation measures

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worth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1184 (1976); Southern Nat'l Bank v. TRI Fin. Corp., 317 F. Supp. 1173, 1185 (S.D. Tex. 1970).

[76] *See* Coulter v. Sausalito Bay Water Co., 10 P.2d 780, 784 (Cal. Dist. Ct. App. 1932).

[77] *See* POSNER, *supra* note 70, at 80 (purpose of contract law remedies is to encourage those investments which would only prove profitable over the long run).

[78] *See* Duncan Kennedy, *Form and Substance In Private Law Adjudication*, 89 HARV. L. REV. 1685, 1777 (1976) (many commentators argue that an examination of the societal wealth-increasing effects of a rule of law is the *only* valid basis upon which to determine where to place duty); Shavell, *supra* note 70, at 489; Posner, *supra* note 70, at 114; *cf.* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (arguing that judges should define rights through a process that must be guided by normative regimes external to the Constitutional text).

[79] This entire section considers not whether a utility *should* undertake these efforts

in order to mitigate the damages resulting from nonpayment is a decisive question. Where the utility knows, or has reason to know, that the income of a consumer is simply inadequate to meet the demands for each month's current bill payment, it is reasonable for a court or PUC to direct the utility to take action which would reduce the customer's overall bill *ab initio*, such as through the offer of conservation measures.[80] Otherwise, the utility risks a denial of the "damages" that could have been avoided had it taken reasonable action. To impose such an obligation would not be contrary to that which is imposed in any other comparable commercial contract transaction.

Energy conservation programs are one way for a public utility to mitigate the damages arising from nonpayment of bills. Consumer conservation programs, broadly defined to include weatherization plans, energy audits, equipment upgrades and similar measures, were designed to reduce the consumer's energy usage by offering services, education and investment towards long-term energy savings. These programs serve the salutary purposes of: (1) conserving scarce natural resources, and (2) decreasing energy costs for low-income consumers who would otherwise lack the resources or incentives to invest in such measures.[81] Nonetheless, it is not clear, as discussed above, whether under traditional mitigation analysis a public utility would be *directed* to offer such programs in mitigation of nonpayment.

a. Potential for savings

Energy conservation programs offer benefits to public utilities because more affordable energy bills may avert the cycle of high arrearages which lead to uncollected bills, resulting in increased administrative costs due to account collection, service termination, and service reinstitution.[82] In a recent study of low-income energy services in Wisconsin and Washington State, for example, the authors found that weatherization programs dramatically reduced arrearages for low-income customers and could significantly lower administrative collection costs and uncollected debts of utilities.[83] The study concluded: "In

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in mitigation, but rather whether a court or commission could find, as a matter of law, that the utility should be *directed* to undertake such efforts, even if the utility opposes such efforts.

[80] For a description of what is contemplated by the term "conservation programs," see *infra* text accompanying note 81.

[81] *See* Roger D. Colton, *Discrimination as a Sword for the Poor: Use of an "Effects Test" in Public Utility Litigation*, 37 WASH. U. J. URB. & CONTEMP. L. 97, 125-129 (1990); *see also* Roger D. Colton & Michael F. Sheehan, *A New Basis for Conservation Programs for the Poor: Expanding the Concept of "Avoided Costs,"* 21 CLEARINGHOUSE REV. 135 (June 1987).

[82] Colton & Sheehan, *supra* note 81, at 139. Of course, conservation programs offer many other benefits to the utility, but we are here concerned with benefits of conservation programs compared to a regime of service terminations. *See* MUNASINGHE & SCHRAMM, *supra* note 33, at 190-96.

[83] Quaid & Pigg, *supra* note 27, at 1.

low-income households occupied by payment-troubled customers, the delivery of energy services can benefit not only customers, but utilities as well. Program investments can yield conserved energy resources *and* the financial benefits of long-term reductions in uncollectible revenues and collection costs."[84]

Wisconsin Gas Company recognized the legitimacy of special low-income conservation and weatherization programs when it implemented a pilot program explicitly designed to use conservation measures as a means to reduce the costs associated with delinquent payments and bad debt. According to Wisconsin Gas, the purpose of the study was "to examine the effects of Wisconsin Gas Company's Weatherization Program on the arrearages of low-income customers."[85]

The Wisconsin Gas results were dramatic. For single family homes, Wisconsin Gas experienced an overall therm savings[86] of 23.4 percent.[87] Moreover, therm savings based on heat load were computed, producing "[a]n overall single family heat load savings rate of 30.7 percent . . . ."[88] Two-family homes generated similar results.[89]

Wisconsin Gas found that not only did the program reduce energy consumption for participating households, but the households recognized significant *arrears savings* from the program as well. According to the utility, its conservation program reduced the number of members of the study group who would have had arrears of $100 by 300 percent[90] and the number of households having *any* arrears by 400 percent.[91] The Company concluded that "[t]his reflects favorably on weatherization potential as an arrears eliminator."[92] Indeed, Wisconsin Gas found that it received a 20 percent return on its weatherization investment in the first year of the program, *strictly* from the reduced nonpayment, *before* consideration of traditionally avoided costs.[93] In sum, Wisconsin Gas concluded: "The study indicates that single family dwellings generated on average $353 less *annual* arrears after weatherization. For the two-family group, weatherization reduced arrears $502 *annually*."[94]

Participants in an energy education program offered by Niagara Mohawk

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[84] *Id.* at 7.

[85] WISCONSIN GAS COMPANY, WEATHERIZATION ARREARS SAVINGS 1 (1988).

[86] Quantities of natural gas are measured in therms, just as quantities of electricity are measured in kilowatthours (kWh).

[87] WISCONSIN GAS COMPANY, *supra* note 85, at 3. While the savings ranged widely between units, the company noted that 64 percent of the single family homes fell in the 10 percent to 35 percent savings range. *Id.*

[88] *Id.* Again, while the savings ranged widely between units, approximately 60 percent of the single family homes fell in a range of 25 percent to 50 percent savings.

[89] *Id.* at 5. Over 70 percent of the dwellings fell in the 10 percent to 35 percent savings range.

[90] *Id.* at 3.

[91] *Id.* at 6.

[92] *Id.*

[93] *Id.*

[94] *Id.* (emphasis added).

Power Company, in conjunction with its company-financed weatherization program, improved their payment patterns in two ways.[95] Through the Niagara Mohawk program, different groups of households received different conservation services. One group (Group 1), a "control group," received no services at all in order to allow comparisons to be made to households who had received no energy conservation assistance. A second group (Group 2) received weatherization provided by the New York State Weatherization Assistance Program (WAP). These services included efforts to reduce heating energy.[96] In addition, two other groups (Groups 3 and 4) received electric (non-heating) conservation, in-home energy and money management sessions, and an affordable payment plan in addition to the WAP heating services.[97]

Niagara Mohawk found that its conservation efforts resulted in reductions in arrears and the costs associated with those arrears.

> First, through the affordable payment plan —which guaranteed that [customers'] utilities would not be shut off as long as they made a mutually agreed-upon payment amount— they increased the frequency of their monthly utility payments to almost 100 percent. In contrast, Groups 1 and 2 participants made their monthly utility payments about 50 percent of the time.[98]

Second, although the monthly payment amount was as low as $10 per month for participants with very low incomes (and as high as $190), the program's participants "increased the average amount of total dollars paid to the utility over the pre-treatment period."[99]

According to the company's evaluation, while all low-income households incurred new arrears, those who had received the weatherization and electric conservation services had fewer new arrears than those who did not.[100] Moreover, the company found that the new arrears for these households likely arose because the provision of conservation services was matched with a decrease in fuel assistance. "If households had received in the post-treatment period the same number of [fuel assistance] dollars they received in the pre-treatment period, they would *not*, on average, have built up new arrears to the company."[101]

Finally, consider a plan by Connecticut Light and Power (CL&P), a Connecticut subsidiary of Northeast Utilities (NU). This Connecticut utility cre-

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[95] Merrilee Harrigan, *Evaluating the Benefits of Comprehensive Energy Management for Low-Income, Payment-Troubled Customers*, FINAL REPORT ON THE NIAGARA MOHAWK POWER PARTNERSHIPS PILOT (The Alliance to Save Energy, Wash., D.C.), May 1992.

[96] *Id.* at 19.

[97] *Id.*

[98] *Id.* at 2; *see id.* at 47-61.

[99] *Id.* at 2.

[100] *Id.* at 58.

[101] *Id.* at 55 (emphasis added).

ated a broad-based residential conservation and weatherization program.[102] The plan, begun in 1988, implemented a pilot weatherization program directed at low-income customers who could not pay their bills.[103] One specific component of the program, known as Plan E4, was directed to low-income, payment-troubled households. It provided for a maximum investment in energy efficiency of $1500.[104] The participants' annual income had to be at or below 200 percent of the Federal Poverty Level and their utility account had to be "seriously delinquent."[105] An account having $200 or more in arrears qualified.[106] The CL&P program included 49 measures which were made available to its residential customers, 47 of which were made available through Plan E4.[107] The measures included ways to reduce electric usage, including heating consumption, water heating consumption, and lighting consumption.[108]

In NU's December 1991 evaluation of the CL&P low-income weatherization program, the utility found:

> Overall, the data indicated an improvement in the average *monthly* change in arrearage of $9.73 for the 1989 participants and $18.77 for 1990 . . . . Only Plan E4 was specifically targeted to payment-troubled customers, with the express purpose of reducing arrearages . . . . [This plan] was highly successful in this regard. The average [monthly] improvement in arrearages among plan E4 participants was approximately $40.00 for 1989 and $28.00 for 1990.[109]

Despite the intuitive appeal of the argument that a utility can reduce its own costs by affirmatively offering conservation programs to consumers at risk of termination, it is unlikely under traditional mitigation doctrine governing typical consumer transactions that courts or PUCs would *require* the utility to offer such programs. This failure is due largely to a self-imposed limitation in the judicial system which focuses the vision of the judicial body on the effects of its decision: (1) on the parties before it, and (2) on the particular dispute at hand.

b. Costs

The cost of conservation measures can range from the nominal (for mere advice and information) to substantial expenditures for insulation, equipment and repairs. To gain the benefits of a conservation program, a utility is advised

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[102] *Program Evaluation: Weatherization Residential Assistance Partnership (WRAP) Program*, (ICF Resources, Final Report: Vol. I, Fairfax, Va.), Dec. 1991.

[103] *Id.* Other programs, directed toward other populations, were implemented at the same time.

[104] *Id.* at 1-9.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1-7. Plan E4 did not include furnace replacement or sidewall insulation.

[108] *Id.* at 1-6 to 1-7.

[109] *Id.* at 4-30.

to combine education with a successful method of making payments on time for improvements that will realize savings over time. Such measures may require more than the minimal expenditure which courts have required of non-breaching parties in the traditional mitigation context.[110] Moreover, while studies conclude there is a cost-savings *over time* to utilities which offer such programs, it is possible that such expenditures cannot be justified in response to the damages flowing from the *particular* individual breach complained of in the case before the court.[111] In any event, it may be difficult to use traditional mitigation analysis to persuade a court or PUC to find a utility "unreasonable" in refusing to make such expenditures.[112]

c. Effort

The effort required to realize gains from a conservation program may be significant.[113] To be effective, such a plan requires monitoring energy use in the future. Moreover, the capital investment in conservation programs could be substantial.

These mitigation efforts are justified only when outweighed by the unmitigated costs flowing from the instant breach. In the ordinary case, these costs would include excess arrearages accruing between the initial nonpayment and the termination of service. "Excess" is defined as that portion of the arrears that would not have been incurred if the conservation program were instituted, and the costs of the actual process of termination, including the costs of necessary notice, and service calls.

Again, the standard by which the court will test the utility's action under traditional mitigation analysis would not be whether the utility has made the "right" choice, in the court's opinion, but rather whether the utility made a "reasonable" choice in not attempting to avert these costs (in light of the predictability of the savings likely to result).[114]

d. Risk

Under traditional mitigation analysis, it might be difficult to prove with the required degree of certainty[115] that savings would arise from offering conservation measures in any given instance. In one study, a sampling of low-income

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[110] Haukland v. Muirhand, 206 N.W. 549, 552 (Mich. 1925); Southwestern Gas & Elec. Co. v. Stanley, 45 S.W.2d 671, 674 (Tex. Civ. App. 1931).

[111] If, however, there were a *class* of customers who routinely did not pay, and the utility, in advance, knew or should have known that this class imposed a cost on all ratepayers because of nonpayment, this argument would not apply.

[112] McCORMICK, *supra* note 37, at 133-34 (choice need not be best, only reasonable).

[113] *Id.* at 135; Halliburton Oil Wall Cementing Co. v. Millan, 171 F.2d 426, 430 (5th Cir. 1948); City Nat'l Bank v. Wells, 384 S.E.2d 374, 384 (W. Va. 1989).

[114] *See supra* note 112 and accompanying text.

[115] See *supra* notes 62 & 66, for a discussion of the certainty required.

customers was given a combination of conservation measures, including weatherization, energy assistance, education sessions, and a budget plan. The program reduced substantially the number of households in arrears from 58 percent to 18 percent of the subject group.[116] Even among this group, however, it may have been difficult to make a case that any particular *individual* participant would have avoided default by reason of the plan. While it is likely that the availability of a conservation plan would result in a net savings to the utility as compared to service disconnections of all those in default,[117] it would be difficult to prove cost-savings on a case-by-case basis with the requisite degree of certainty, (i.e., that *any specifically-identified household* would be able to cure *its* default by reason of a conservation plan).[118]

Accordingly, if viewed on a case-by-case basis, it is likely that courts or commissions would not, using traditional mitigation analysis, *require* a public utility to offer a conservation plan as part of its duty to mitigate its damages in any particular case.

## III. An Appropriate Mitigation of Damages Rule for Utilities

The doubtful outlook expressed above regarding the likelihood of a court or regulatory order directing a public utility, faced with nonpayment, to implement mitigation measures is limited to an application of traditional mitigation analysis. In this sense, "traditional" analysis is meant to encompass only that analysis which is otherwise applied to traditional one-shot consumer transactions. This analysis, however, is inappropriate to the utility customer service situation.

Accordingly, this section argues for a mitigation analysis that considers the reasonableness of the nonbreaching party's failure to act in light of the effects of inaction on the utility's business as a whole, and the external costs resulting from the inaction. Under such a rule, courts and PUCs can avoid the existing disincentives to prudent behavior caused by the restraints of present mitigation rules.[119]

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[116] Quaid & Pigg, *supra* note 27, at 5; *see* Haukland v. Muirhand, 206 N.W. 549, 552 (Mich. 1925).

[117] Quaid & Pigg, *supra* note 27, at 5-6.

[118] *Id.* at 6-8.

[119] *See* Farnsworth, *supra* note 75, at 1184-99 (stating that traditional damages rules assume a free market and suggesting that those rules may be inapplicable in other contexts. Contract damage rules *are* sometimes adjusted for peculiar markets). For example, the general rule against specific performance gives way when the subject of the contract is unique, or "in other proper circumstances." U.C.C. § 2-716. In construction contracts, rules requiring merely substantial performance of contract terms have been adopted. Farnsworth, *supra* note 52, at § 8.15.

### A. *Looking Beyond "Traditional" Mitigation Analysis: The Unique Context of Consumer-Utility Contracts and Implications for the Mitigation Doctrine*

A consumer-utility contract differs from the one-shot commercial transaction upon which traditional contract law is predicated.[120] Regarding mitigation undertaken in response to a breach of a contract for utility service, consumer-utility contracts differ in at least four essential ways.

First, except for certain specific contractual relations (for example employment or franchise arrangements), it strains credulity to believe that courts or PUCs would refuse to impose a duty of mitigation that comprehends further dealings between the original parties to the contract in breach solely because further dealings would result in "humiliation" for the utility.[121] A contract between a utility and a customer does not involve intense personal relations,[122] nor opportunity for strategic behaviors,[123] that have urged courts to narrowly apply a duty of mitigation which would require further dealings with the party in breach.

Second, a utility, as a monopolistic provider of an essential resource, cannot assume that a service termination will end permanently the terminated consumer's use of the utility's service. Indeed, as discussed above, it seems more reasonable to assume that the consumer will "go underground" — find someone else in whose name she can maintain service, move elsewhere and initiate service, or "double-up" — than to assume she would do without the service or move to a home outside of that utility's service territory.[124]

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[120] *See* Farnsworth, *supra* note 75, at 1184 (traditional rules for contract remedies contemplate a one-shot transaction in a free market, and those rules may be inapt in other contexts).

[121] *See supra* notes 62 & 66 and accompanying text.

[122] Nor is there a threat that the nonbreaching party (i.e., the utility) would have materially changed its position in reliance on a reasonable expectation of future contract compliance.

[123] What is more likely driving those judicial decisions which decline to impose a duty to mitigate is a notion of deterring opportunities for strategic behavior as opposed to protection of nonbreachers against humiliation. For example, a seller who agrees to sell to a buyer on credit, and who likely has extracted concessions from the buyer in return, presents a real threat of using mitigation doctrine to force the buyer to renegotiate a cash deal at the time of performance. The seller can shift the loss to the buyer, assuming either that the buyer is not able to sufficiently quantify the losses he has suffered, or that those losses do not justify the costs of a court action. A utility customer, by contrast, lacks sufficient bargaining power to force terms on a utility, and typically faces sufficient risks to health and safety from a utility shut-off to render strategic behavior unlikely.

[124] This conclusion seems reasonable. The availability of public utility services is essential not only to modern convenience, but to modern health and welfare as well. The United States Supreme Court noted in *Memphis Light, Gas & Water Division*, that "utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety." Memphis Light,

Third, even if a utility could accurately, and costlessly, exclude once-terminated customers, recent studies indicate that offering some combination of deferred payment plans and conservation programs would be more profitable as an across-the-board policy than termination.[125] Nevertheless, courts and PUCs cannot assume that utilities would, of their own accord, engage in such behavior without incentives because: (1) utilities are not subject to ordinary market forces and can pass on losses to their customers without incurring costs; and (2) undertaking only limited mitigation obligations may result in the utility recouping its full loss from other ratepayers rather than incurring the cost and risk of offering ameliorative programs.[126]

Finally, because of its position as a monopolistic provider of a necessary resource, a utility company is uniquely positioned to secure the gains that would be produced by offering conservation programs. Not only is a utility in a position to spread the costs and risks of such a regime over its customer base,[127] its monopolistic position assures that it will capture the profits produced by such activities.

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Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978). Similarly, an Ohio federal district court has stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." Palmer v. Columbia Gas Co. of Ohio, 342 F. Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); *see* Stanford v. Gas Serv. Co., 346 F. Supp. 717, 721 (D. Kan. 1972). An excellent canvass of cases is found in *Montalvo v. Consolidated Edison Co. of New York*, 441 N.Y.S.2d 768, 776 (N.Y. 1981) (the poor in particular are vulnerable to the loss of utility service). *See also* Comment, *Cash Deposits - Burdens and Barriers in Access to Utility Services*, 7 HARV. C.R.-C.L. L. REV. 630 (1972); Note, *Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers*, 78 YALE L.J. 448 (1969); Comment, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745 (1971).

[125] Quaid & Pigg, *supra* note 27, at 7; WISCONSIN GAS COMPANY, *supra* note 85, at 6; Kathryn Wertheim Hexter, et al., *Coordinating Ohio's Percentage of Income Payment Plan and Home Energy Assistance Program: A Guidebook*, (Cleveland State Univ., Cleveland, Ohio), Sept. 1989 [hereinafter Cleveland State Univ.].

[126] By analogy, a terminated employee may be unlikely to incur the costs and trouble of looking for a replacement job, *ceteris paribus*, if she knows that she can recoup her full wages, without deduction, in a court suit if she does not pursue new employment. *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 980 (1983) (stating that "[t]his is a classic 'moral hazard': the party whose rights are 'insured' by the performance obligation is unwilling to adopt precautions that benefit the insuror.").

[127] It is not unfair to require a utility to develop such across-the-board policies, especially in the usual case in which a customer is not terminated under an individualized scrutiny of her personal situation, but as a result of an across-the-board policy which terminates service at a particular point in time after notice, or at a particular level of arrears.

1. Contract rules appropriate to specialized contractual relations

There is a solid basis for the application of a specialized mitigation analysis in utility-consumer disputes. This analysis considers the costs and benefits of conservation programs against the effects of such measures on the utility's total customer base. Moreover, consumer dependency on monopoly-supplied energy service is always a significant factor.

In other contexts, courts have developed contract rules appropriate to specialized contractual relations. The development of the law of contracts has proceeded on the implicit assumption that most contracts involve a discrete one-time transaction between parties possessing roughly equal bargaining power, set against a backdrop of viable substitute markets.[128] Where certain types of contractual relationships no longer meet these conditions, the common law has carved out niches reflecting the new relationship rather than rewriting the entire common law of contracts.[129] Courts have developed specialized rules for contractual relations in situations where it is particularly appropriate to require a duty to mitigate damages, notwithstanding the doctrine applied in the general consumer context.

The imposition of a particularized duty to mitigate has been found appropriate in situations in which it is apparent that the contract comprehends a specialized contract subject or a continuous contractual relationship.[130] For example, the doctrine of substantial performance in construction contracts requires the nonbreaching party to mitigate by accepting a deficient performance coupled with money damages.[131] The imposition of a duty to mitigate should be found appropriate, as well, in situations where the parties stand in grossly unequal bargaining positions,[132] or more precisely, where one party is uniquely positioned to affect the post-breach modifications which would result in cost savings to all, or where one party is less risk averse than the party in breach.[133]

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[128] *See* Northwest Lumber Sales v. Continental Forest Prods., 495 P.2d 744 (Or. 1971); Farnsworth, *supra* note 75, at 1188.

[129] *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 617 (1983).

[130] *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

[131] FARNSWORTH, *supra* note 52, at § 8.15; Goetz & Scott, *supra* note 126, at 985; *see also* KEITH COLLIER, CONSTRUCTION CONTRACTS 151-52 (1979).

[132] *See* Anthony T. Kronmen, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Ian R. MacNeil, *Contracts: Adjustment of Long-Term Economic Relationships Under Classical, NeoClassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 876-86 & 900 (1978); Frank I. Michelmen, *Norms and Normativity in Economic Theory of Law*, 62 MINN. L. REV. 1015, 1016-37 (1978).

[133] This is so because the court cannot assume that the parties would place the burden of post-contracting modification on the party best suited to effect it. *See* Goetz & Scott, *supra* note 126, at 972-73 & 1018-23. By contrast, threat of bad faith extortion by a party with superior bargaining power threatening breach is a factor permitting no

Finally, the imposition of a duty to mitigate has been found appropriate in situations where the parties cannot turn to viable markets for substitute performances.[134] Seemingly contradictory common law decisions consistently have identified an absence of alternative performance as a major variable justifying a duty to deal with the breacher.

Each of these conditions applies to a contract between a public utility and its customers. A utility contract contemplates a long-term relationship between the utility and its customers. More importantly, because a utility is a monopolistic supplier of an essential element of health, life and safety, a utility consumer has few alternatives: seeking alternative suppliers, substitute performance, and doing without, are not viable alternatives.[135]

2. Applying specialized rules to mitigation of damages

In establishing remedies for breach of contract, the common law invests courts with the ability to direct parties' behavior towards mutually profitable and allocatively efficient decisions.[136] In particular, precise mitigation rules are *required* to reach such optimal results where the parties do not have viable markets for substitute performance.[137]

In these situations, by precise application of mitigation doctrine, courts and PUCs can provide contracting parties with proper incentives to share information. The utility customer may be able to tender a substitute performance, such as through a deferred payment plan, which might be acceptable to the utility. If, however, the utility does not share the availability of such plans with the consumer, both sides will suffer.[138] Absent such information sharing, a consumer is unlikely to inform the utility about a pending inability to meet her obligations because she may feel the utility unlikely to compromise. Another reason to withhold information is the threat that the utility (as well as a court) might deem the act of sharing that information a breach in

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duty to mitigate. *Id.* at 1006.

[134] Holly v. City of Neodesha, 127 P. 616, 620 (Kan. 1912); Ashley v. Rocky Mountain Bell Tel. Co., 64 P. 765, 767 (Mont. 1901); Goetz & Scott, *supra* note 126, at 969, 984 & 1004 (a casual review of various contract rules reveals a noticeable sensitivity to the character of the market); *see also* John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 277-79 (1972); Farnsworth, *supra* note 75, at 1188.

[135] Indeed, Professors Goetz and Scott find that courts have consistently imposed a duty to deal with the breacher in disputes over specialized service contracts such as those for utility service. Goetz & Scott, *supra* note 126, at 1005 n.99.

[136] *See* Barton, *supra* note 134, at 277-82; MUNASINGHE & SCHRAMM, *supra* note 33, at 198-99.

[137] *See supra* note 119 and accompanying text (more specialized transactions simply require more varied and complex mitigation incentives to encourage optimal contractual behavior).

[138] Goetz & Scott, *supra* note 126, at 982.

itself.[139]

Courts have also required contracting parties to engage in mitigation efforts to discover alternatives to contract breach that are beneficial to each party.[140] Occasionally courts will require the nonbreaching party to suffer the consequences of its failure to take actions that might have avoided the breach.[141]

In utility-consumer disputes, placing a burden on the utility to offer some type of conservation program in appropriate cases would encourage the utility to offer information regarding acceptable substitute performances. Such a duty would also encourage the consumer to share information as to her ability to meet the altered contractual obligations.[142] An outstanding example of this principle in action is the common utility practice, whether favored by self-interest or required by regulation, of offering balanced billing plans which apportion a consumer's high winter heating bills over an annual period.[143]

Even to those courts reluctant to rely on theories of economic efficiency to inform contractual analysis,[144] a utility's duty to mitigate by offering conservation programs could be justified based upon protecting the contracting parties' expectation interests. One may assume that the parties' contract contemplated, at least absent specific disclaimers to the contrary, "that a non-breaching party should be required to accept an offer in mitigation which would impose additional burdens not contemplated by the contract, but which would reduce joint damages."[145] The burden of responding, therefore, to post-contracting changes in the contractual relationship would fall on the party best able to suggest the mutually profitable substitute, or to alter the relationship to the benefit of each party.[146]

Thus, it would appear that the utility, as contrasted to the customer, is in the best position to make the most cost-effective adjustments after a breach. Accordingly, if fully aware of all relevant information at the time of contracting, it is likely that the parties will agree *at that time* that the utility

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[139] *Id.* at 983.

[140] *Id.* at 973-82; *see* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW § 3.2 (1987).

[141] Penna v. Atlantic Macaroni Co., 161 N.Y.S. 191 (N.Y. 1916); *see also*, Delafield v. J.K. Armsby Co., 116 N.Y.S. 71 (N.Y. App. Div. 1909), *aff'd*, 199 N.Y. 518 (N.Y. 1910); MCCORMICK, *supra* note 37, at 127.

[142] *See* CHARLIE HARAK, THE RIGHT TO LIGHT (AND HEAT) HANDBOOK 40-41 (1984); Robert A. Hillman, *Keeping the Deal Together After Material Breach - Common Law Mitigation Rules, the UCC and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 561 (1976).

[143] A Budget Billing Plan involves dividing the estimated annual bill of a customer by twelve months, thus billing the customer in twelve equal installments.

[144] *See* Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 981-83 & 985 n.8 (Mass. 1979).

[145] Hillman, *supra* note 142, at 600.

[146] *See* Goetz & Scott, *supra* note 126, at 981-82 & 1012 (specialized contracts also require mitigation by internal adjustments affected by nonbreacher's rearrangement of his own affairs).

should make the healing adjustments in the event of a breach.[147]

Given this background, one would expect the common law to have developed well-defined mitigation rules appropriate to each particular class of contracts. Indeed, courts have developed situation-appropriate rules for certain contractual relationships.[148] In fact, some commentators have noted the incipient stage of the development of a mitigation doctrine which is appropriate for dealing with adjustments during the course of the contract to avoid the necessity of breach. In particular, in specialized service contracts, such as utility contracts, and in construction contracts, courts have imposed a duty to deal with the party in breach so as to encourage pre-breach adjustments in the contractual relationship.[149] Another example is the option offered by the Uniform Commercial Code (UCC) to demand assurances, rather than to suspend performance, and thereby treat the contract as having been breached.[150]

Others less optimistically point to a state of law which is, at present, in disarray.[151] In particular, two distinct types of concerns continue to stand as obstacles to the development of a fluid and consistent doctrine of mitigation. First, a host of predominantly pretextual arguments exist which do not advocate requiring further dealing with the breacher. As Professor Hillman notes, these arguments are based on the notion that courts simply do not like breachers.[152] These pretextual arguments emphasize that the contract was of

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[147] *Id.* at 979-81. Further, because the consumer is far more averse to the risk of service termination, the parties would rationally have placed the burden on the utility to explore the possibility of substitute performance.

[148] *Id.* at 1018 n.133 (the tenant, the bus passenger, and the runner of a construction project can all overcome reluctance of a potential plaintiff [nonbreaching party] by offering additional compensation in advance [of breach]). Goetz and Scott note, for example, that in construction contracts, a party tendering substantial, but nevertheless deficient performance has breached his contract, but does not lose all his contractual rights. The injured party must mitigate by accepting the substandard performance plus a monetary allowance. *Id.* at 985 & n.43. Professor Hillman notes that in responses to breaches of service contracts, courts generally hold that the nonbreacher must accept new offers from the breacher, at least where the new term is not onerous and acceptance would avert a large loss. Hillman, *supra* note 142, at 573-74.

[149] Goetz & Scott, *supra* note 126, at 1004-05 n.99 ("[T]he common law has created appropriate rules of thumb in regard to a post-breach mitigation duty to deal with breacher that accommodates certain specialized environments . . . . As the market for substitute performances thins, the judicial decisions become increasingly [more apt to impose a duty to mitigate by further dealing with the party in breach] . . . . Courts have consistently imposed a duty to deal with the breacher over specialized service contracts.").

[150] U.C.C. § 2-609. *See also supra* text accompanying note 77.

[151] Hillman, *supra* note 142, at 554-55 (courts have not applied consistent principles, nor reached consistent results, nor even proposed consistent policies or goals regarding instances when a nonbreaching party is required to further deal with the breacher incident to its duty of mitigation).

[152] *Id.* at 559 & n.31; *see also* FRIED, *supra* note 68, at 14-17 (examining the perceived moral implications of breach).

an intensely personal nature, and that continuation would involve undue humiliation for the nonbreacher;[153] that acceptance of the offer threatens to act as a waiver of the nonbreacher's rights to seek damages for breach;[154] or that the breacher has proved herself to be an unreliable party and the nonbreacher should not be required to expose herself to further risk.[155]

A second set of arguments concerns the commercial reality that placing the burden of post-breach adjustment on one party or the other will result in manipulative behavior by the party not bearing the burden. This argument posits that forcing the parties to deal may result in wasted resources in the form of excessive monitoring costs.[156]

None of these factors seems relevant to the situation in which a consumer seeks the installation of conservation measures prior to having utility service disconnected after nonpayment. If a utility is "required" to offer conservation programs,[157] the danger of a consumer employing strategic measures to impose additional terms is absent. A consumer has scant bargaining power by which to coerce a utility. Moreover, a consumer is unlikely to rely on the gambit of the loss of her home energy service in order to gain some benefit from the utility.[158] As a result, the consumer has little to gain through manipulative behavior.

More importantly, offering conservation programs will be profitable to the utility as well as to the consumer. Accordingly, "capitulating" to the con-

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[153] Hillman, *supra* note 142, at 569; *see* Stanley Manly Boys' Clothes v. Hickey, 259 S.W.2d 160, 162 (Tex. 1924). Professors Goetz and Scott generously propose that these arguments are merely stand-ins for more cogent arguments that, in certain personal service contracts, further dealings would require the nonbreacher and the courts to absorb excessive costs in monitoring and enforcing the [altered] contractual terms. Goetz & Scott, *supra* note 126, at 1009.

[154] For an early critical assessment of the artificiality of this argument, see Note, *Obligations of Aggrieved Contracting Parties to Accept New Offers of Defaulter To Obviate Avoidable Damages*, 33 HARV. L. REV. 854, 855 (1933) (it is not sound law to support fear that acceptance of an offer might subject nonbreacher to risk of implicitly waiving his contract rights).

[155] This argument is especially inapplicable in the context of a utility's duty to mitigate by offering conservation programs: the implicit assumption of such a duty is that it is the contract itself, not the breaching party, that is unreliable. The mutual profitability of such measures lies in the premise that the original contract imposes unreasonable obligations on the consumer.

[156] *See* Goetz & Scott, *supra* note 126, at 972 (mitigation rules inevitably encourage strategic behavior by both parties; legally regulating one aspect will exacerbate the other).

[157] A utility may not be "required," in the strict sense of the word, to implement conservation programs as a mitigation measure. Instead, a utility regulator may simply hold that if a utility does *not* implement such programs, the company forfeits the right to seek to recover in rates the damages which such conservation measures would have avoided.

[158] *See supra* note 123 and accompanying text.

sumer's demand for the installation of conservation measures prior to her breach will not represent any loss to the utility.[159]

3. Applying a customized mitigation of damages doctrine

It is possible to apply a customized mitigation of damages doctrine to the context of utility-consumer disputes. As suggested above, the usual impediments for courts to impose a duty to mitigate by further dealing with the breacher are not present in the utility-consumer dispute. In particular, there is little threat of manipulative behavior by the defaulting consumer,[160] no intense personal relations are involved, the monitoring and enforcement costs for the amended contract are not stifling, no reputational or other intrinsic values are threatened, and the added benefits justify the costs involved.

In deciding whether to require mitigation within the utility-consumer context, courts and utility regulators can be guided by Professor Hillman. Hillman offers four questions, the affirmative answers to which, he proposes, should lead courts to "require" the mitigation at issue.[161] His questions, with proposed responses, are offered here.

*1. Can the injured party comply with the next offer?* Any relatively minor costs or efforts required would not strain the utility's resources.

*2. Is the aggrieved free to pursue his right under the original contract?* Notwithstanding the installation of conservation measures, the utility retains all other rights to collect that it would otherwise have had under the law.

*3. Can the breaching party provide adequate assurance that she will perform her (amended) obligations?* The answer to this question, which may be determinative, is two-headed. First, on the usual premise that the court or PUC would require evidence that the *particular* defaulting-consumer would be able to meet her (amended) obligations,[162] the answer will be fact-dependent

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[159] Indeed, such pre-breach negotiations to avert breach should, on the stated hypothesis of mutual savings, be encouraged by the utility, so that it can avoid the costs associated with any breach. *See* Bonebrake v. Cox, 499 F.2d 951, 957 (8th Cir. 1974) (U.C.C. requires notice in order to enable a party to adjust or to suggest opportunities for substantive performance to reduce mutual loss or avoid breach).

[160] *See supra* notes 123 & 156-158 and accompanying text. Goetz and Scott view the threat of strategic behavior by breachers as the most serious obstacle to context-appropriate mitigation analysis. Goetz & Scott, *supra* note 126, at 1006-07.

[161] Hillman, *supra* note 142, at 599. Actually, Professor Hillman proposes five questions, one of which is irrelevant to present purposes: Is the breacher's offer the best available? This question is irrelevant because a utility is, in this context, a "lost-volume" seller. Its failure to serve the consumer in breach does not free resources that permit it to serve another consumer. *Id.* at 582-83 (sellers should not be able to proceed under U.C.C. § 2-708(2) for lost profits as a lost-volume seller where the breacher stands ready to deal on terms which would be profitable to the seller).

[162] Under traditional analysis, the party in breach bears the burden of proving that mitigation would, with the requisite degree of certainty, result in a savings. Redmond v. Department of Educ., 519 P.2d 760, 770 (Alaska 1974).

on the considerations outlined above.[163] On the other hand, a court or PUC should be urged to assess the profitability of mitigation measures over the entire spectrum of a utility's customer base against that of an across-the-board program of scheduled terminations.[164] The answer, based on the empirical evidence presented,[165] is that pretermination payment plans and conservation programs are more profitable than a general policy of disconnection.

*4. Can acceptance of the new offer reduce damages?* By hypothesis, yes. The discussion above indicates that the pursuit of conservation measures will reduce the arrears, collection costs, and bad debt associated with nonpayment.[166]

In addition to Professor Hillman's considerations, a court or PUC should not ignore the likelihood that the utility will find itself providing service to the consumer post-breach, irrespective of any particular disconnection of service. This may occur either on the utility's own terms (through negotiation of a payment plan) or on the terms of an "underground" consumer who connects service in another name, moves to a new address without acknowledging the past debt, or moves into another household which retains service in its own name.

Relying on efficiency and distributional grounds, Professor Hillman's analysis, and pursuant to traditional analysis of the rationale advanced by courts in *failing* to impose a duty to deal with breachers, a mitigation requirement in the utility-consumer context is consistent with the individualized mitigation requirements that courts have imposed regarding comparable specialized contracts.[167] Filling in the content of such a requirement is the subject of the remainder of this article.

### B. *Elements of Mitigation Analysis Appropriate to Utility-Consumer Contracts*

Limited and narrowly drawn mitigation requirements appropriate for typical one-shot market transactions[168] between parties of equal bargaining power are glaringly inadequate in the context of consumer-utility transactions. Requirements can be established, within the law, applicable to utility-consumer transactions which create proper incentives for profitable and mutually beneficial behavior by all parties.

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[163] *See supra* notes 116-118 and accompanying text.

[164] The customer base should be the standard as the termination schedule is not individually bargained-for, *ab initio*, nor is the termination made upon a particularized consideration of the individual's circumstances. While the consumer may not be able to prove that, in her case, ameliorative programs would benefit the utility more than termination, it is likely that she could show that such a program would be more profitable to the utility than its present, across-the-board program.

[165] *See supra* notes 82-84 and accompanying text.

[166] *Id.*

[167] *See supra* notes 128-135 and accompanying text.

[168] Goetz & Scott, *supra* note 126, at 986-87.

1. Information sharing

Proper elements of a mitigation analysis should include a requirement akin to a court-imposed *dis*incentive to reach mutually profitable solutions.[169] Such a disincentive, Professors Goetz and Scott point out, can be found in the rule derived from *Hadley v. Baxendale*.[170] The case states that responsibility for the consequences of breach is set by the parties' knowledge at the time of the initiation of the contract.[171] This "rule" acts as a disincentive to share information acquired *after* formation of the contract regarding: (1) how the parties could keep the contract together; (2) what impediments to meeting obligations are presented to the consumer; (3) what performance would be feasible to the consumer; and (4) what substitute performance alternatives would be acceptable to the utility.[172] No reason exists to create and maintain such a disincentive in the consumer-utility context.

Accordingly, an ideal mitigation doctrine within the utility-consumer context is premised on appropriate incentives for the parties to share information and to act upon that information. In particular, the utility should be required to share information, at least to the extent to allow it to determine if a mutually profitable solution exists.[173] If the consumer is allowed to prove that a solution exists in mitigation, a utility may have an incentive to cooperate.[174] Furthermore, if the court or commission requires the utility to prove that it exhausted possible ameliorative arrangements, the court or commission will be assured that its judicial intervention is not standing in the way of an ideal solution.[175]

2. Acting on shared information: the "best efforts" standard

Assuming the utility has a duty to share information with, and perhaps to discover information from, the consumer, a court or PUC will have to decide to what extent it will require the utility to actually *engage* in institutionally

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[169] *Id.*

[170] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[171] 9 Ex. at 354, 156 Eng. Rep. at 151.

[172] Goetz & Scott, *supra* note 126, at 987; *see* Clive M. Schmitthoff, *The Duty to Mitigate*, 1961 J. BUS. LAW 361, 362-63 (1961).

[173] *See* Goetz & Scott, *supra* note 126, at 981 (the duty is imposed on the utility in the first instance because it has greater access to information and is risk averse to the risk of breach).

[174] If the utility is assured of recouping all arrears, without risk, it has no incentive to take on the risk and effort these programs entail. *See supra* notes 125-126 and accompanying text; *see also*, Goetz & Scott, *supra* note 126, at 1010 (substantial performance doctrine in construction contracts encourages cooperation by softening the breacher/nonbreacher distinction).

[175] Goetz & Scott, *supra* note 126, at 973 ("Courts should require each party to extend whatever efforts in sharing information and undertaking adaptations that are necessary to minimize the joint costs of readjustment [after breach]."); *see* SHAVELL, *supra* note 140, at § 3.2.

profitable and allocatively efficient behavior. The court or PUC must further decide what standard it will employ to assess the reasonableness of the utility's actions. A "rule of reason" approach seems best suited in this regard.[176]

A rule of reason approach would assess the reasonableness of the utility's actions in light of all the circumstances of the contractual relation:[177] the utility's resources, the consumer's particular situation, the availability of alternative services, and the degree to which standard contract terms are imposed. In the typical situation, where the utility maintains monopoly power over a necessary and irreplaceable resource, and where none of the dangers of imposed mitigation are present, the standard should be appropriately high.

Commentators have suggested that such conditions require a "best efforts" standard, similar to the standard implied in promotional and requirements contracts.[178] This standard approaches a fiduciary duty applied in other contract law areas which is consistent with the duty imposed on utilities as monopolistic power holders.[179] This standard would require the monopolistic provider of a product essential to public health and safety to use due care in attempting to discover alternative performances, such as conservation programs that would allow the customer to maintain service. Moreover, the utility would be barred from recovering any expenses which could have been avoided by such performance if it failed to offer the option to its customer.[180]

## IV. Applications of a Mitigation Doctrine for Utilities

### A. *The* Central Maine Power *Case Involving Nonpayment Mitigation*

The issue of a utility's obligation to mitigate the damages associated with nonpayment by offering conservation measures was raised before the Maine Public Utilities Commission (PUC) in a 1991 rate case involving Central Maine Power Company (CMP).[181] In that proceeding, the staff of the PUC

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[176] Compare a "rule of thumb" approach. The concept and name of this latter approach is developed in Goetz & Scott, *supra* note 126, at 984-85 (citing the substantial performance doctrine in construction contracts as one version of a rule of thumb courts have approved in contract remedies law).

[177] This approach is suggested by a "best-efforts standard" proposed by Goetz and Scott. *Id.*

[178] *Id.* at 985, 1015-16 n.126 (courts should impose a best efforts obligation whenever a single party controls the instrumentality necessary to achieve a cooperative goal). Moreover, Goetz and Scott state that the concept of "best efforts" implies a duty to seek to discover exactly what contingencies may require adjustment, as well as a duty to act on information known or discovered. *Id.* at 1015-16.

[179] *See* McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974); Carroll v. Local No. 269, 31 A.2d 223 (N.J. Ch. 1943); Trigg v. Tennessee Elec. Membership Corp., 533 S.W.2d 730, 734 (Tenn. App. 1975).

[180] *See* Goetz & Scott, *supra* note 126, at 1013-14; *see also* Delafield v. J.K. Armsby, 116 N.Y.S. 71 (N.Y. App. Div. 1909), *aff'd* 199 N.Y. 518 (N.Y. 1910).

[181] In re Central Maine Power Co. Proposed Increases in Rates, Case No. 90-076,

testified that CMP was not effective in its marketing of "energy management services" to low-income customers.[182] According to information presented in the proceeding, there is a positive correlation between high arrears balances and high usage.[183] The company, the PUC staff argued, "should pursue the implications of the [recent study of payment plans] and undertake a marketing effort that targets high use, low-income customers at the time they negotiate a payment arrangement."[184]

The state Office of Public Advocate agreed, suggesting that CMP could significantly reduce its write-offs and collection costs by providing energy management services to high usage customers on special payment arrangements.[185] The Public Advocate said that the utility could save as much as $2 million a year "if CMP ha[d] been successful in delivering its Insulation Plus and Bundle Up programs to its special payment arrangement . . . customers."[186]

The Maine PUC acted favorably regarding the CMP's poor marketing and implementation history. According to the Commission:

> The successful marketing of energy management programs to low-income customers, particularly low-income customers on special payment arrangements, has a clear benefit above and beyond the capacity or energy savings generally associated with demand-side management programs. Low income customers that see a reduction in their bills will be able to manage their bills better. The Company's carrying costs associated with late-paid bills and uncollectibles, which are generally passed on to other ratepayers, should be reduced.[187]

The PUC directed the company to take remedial action and ordered CMP to provide, within one year, "extensive information concerning what measures it is taking to improve its performance in this area as well as a description of what improvements have taken place."[188] The PUC then warned, in classic mitigation language: "Should CMP fail to accomplish a significant improvement in this area, we will consider evidence and argument that we should impose a disallowance of some of CMP's uncollectible expense as imprudent."[189]

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(Me. P.U.C., May 15, 1991) (supplemental order).

[182] *Id.* at 1. The company had 21,376 special payment arrangements in 1989, but installed or accomplished only 194 energy management service measures (water heater wraps, Insulation Plus, residential audits, etc.). In addition, of the 15,600 low-income customers who used electricity as the primary heating source, the company completed only 19 of its low-income Insulation Plus weatherization programs.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* at 7.

[188] *Id.* at 8.

[189] *Id.* Compare this language to the standard rule regarding mitigation. *See supra* note 1 and accompanying text.

This favorable action by the Maine PUC illustrates how the contract doctrine of mitigation can and should be applied to all public utilities, particularly those utilities which provide service to an identifiable group of nonpaying customers who routinely impose costs on the utility as a result of their inabilities to pay.

### B. *The Unique Ohio Context*

In Ohio, natural gas and electric utilities have a class of low-income customers taking service pursuant to the state's Percentage of Income Payment Plan (PIPP). These households do not pay their current bills, when due, and are unlikely ever to pay those bills. As explained more fully below, the utilities know from the commencement of service that PIPP households will be unable to compensate the utility for the "full" costs of their consumption.

Ohio utilities are under an obligation to provide continuing service even to low-income households who have an acknowledged inability to pay their monthly bill in full.[190] Under the Ohio PIPP, low-income households may retain their service if they pay a designated percentage of their income toward their utility bill each month.[191] As long as the households make their PIPP payments, they are protected from the disconnection of service. While households continue to "owe" the remainder of their bills, utilities may not disconnect service for nonpayment of that remainder.[192]

After the Ohio PIPP was adopted, Marsha Ryan, the head of the Public Utility Commission of Ohio's consumer service division, reported:

> A percentage of income plan was not new to Ohio. At the time the [PIPP] was being conducted, the rules of the [Ohio PUC] required each natural gas or electric company under its jurisdiction to offer a plan whereby a delinquent customer could retain service *during the winter* if he/she paid 15 percent of his/her income to the utility threatening disconnection.[193]

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[190] *See* In re Investigation into Long-Term Solutions Concerning Disconnection of Gas and Electric Service in Winter Emergencies, No. 83-303-GE-COI (Ohio P.U.C., Nov. 23, 1983) (opinion and order) [hereinafter Opinion and Order].

[191] *Id.* at 12-14.

[192] *Id.* at 14.

> A point should be made about what PIP is and what it is not. PIP is a payment plan; it is not debt forgiveness. To the extent that a particular customer's payments are less than the bill and arrearages that have accrued, that customer is responsible for the arrearage. PIP only prohibits a utility from using disconnection as a method of debt collection. The utility may collect the debt by whatever other legal means it has available.

Marsha Ryan & Steven Deerwester, *Heat or Eat? - Ohio's Percentage of Income Plan*, PROCEEDINGS OF THE FIFTH NAT'L ASSOC. OF REGULATORY UTIL. COMM'RS (NARUC) BIENNIAL REGULATORY INFO. CONFERENCE (The Nat'l Regulatory Res. Inst., Ohio State Univ., Columbus, Ohio), Sept. 1986 at 1671.

[193] Ryan & Deerwester, *supra* note 192, at 1669 (emphasis in original).

This requirement was part of Ohio's "1/6 plan," under which a delinquent customer would pay either 1/6th of the arrears plus the current bill *or* monthly payments equal to 15 percent of the total monthly household income, whichever was greater.[194]

For Ohio's PIPP participants, monthly payments toward home energy bills are set at a pre-determined percentage of income.[195] During the heating months, PIPP households are required to pay ten percent of their income toward their primary heating source (usually natural gas) and five percent toward their secondary energy source (usually electricity).[196] During the non-heating months, PIPP households are required to pay either these income percentages, or their actual bills, whichever is higher. Ultimately, Ohio's PIPP households pay approximately ten percent of their annual income for gas bills and approximately 12 percent for electric bills.[197]

Each year, Ohio's PIPP participants create a "debt" of roughly $46 million owed to the utility companies.[198] This "debt" represents the difference between the full amount billed by the utility company and the payments that are actually made (from the households' own funds or on the households' behalf from fuel assistance).[199] "It is this gap which is of concern to state program administrators, the Public Utilities Commission, the utilities, and low-income advocates."[200] As the study concluded: "[a] concern common among all states is that, unless an extraordinary amount of money is available for energy assistance there will always be a shortfall between what low-income households can afford to pay for energy and what they use."[201] As of April 1989, Ohio PIPP participants owed the participating Ohio utility companies a total of $213 million.[202]

The most recent data available[203] shows that there are more than one-quar-

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[194] *Id.* at 1669-70.

[195] Opinion and Order, *supra* note 190, at 13.

[196] Cleveland State Univ., *supra* note 125, at 7.

[197] *Id.* at 2.

[198] *Id.* at 8.

[199] Federal fuel assistance is provided through the Low-Income Home Energy Assistance Program (LIHEAP). 42 U.S.C. § 8621 (1989 & Supp. I 1991). In addition, limited funds have been made available through a state-funded supplement to LIHEAP. Cleveland State Univ., *supra* note 125, at 8.

[200] Cleveland State Univ., *supra* note 125, at 8.

[201] *Id.* at 1.

[202] *Id.* at 25. This includes all debts which were accumulated prior to joining the PIPP and the debt accumulated while on the PIPP. *Id.* at 25-26. Moreover, the evidence tends to demonstrate that the accumulation of arrears for these households occurred at a lesser rate under PIPP than before PIPP, indicating that, while the households did not pay their *entire* bills under PIPP, they paid a greater portion of their bills with PIPP than without. Roger D. Colton, *Ohio's Percentage of Income Payment Plan: Problems and Potentials*, PA. OFF. OF CONSUMER ADVOC. (Nat'l Consumer L. Ctr., Boston, Mass.) May 2, 1991.

[203] Bryan Gates, *"09" Disconnect Report*, OHIO UTIL. "36" REP. ON DISCONNEC-

ter million PIPP customers statewide in Ohio. Among Ohio's largest utilities, from two to five percent of all residential customers participated in the PIPP program in the 1991-1992 program year.

| COMPANY | TOTAL RESIDENTIAL CUSTOMERS[204] | PIPP CUSTOMERS [205] | PERCENT PIPP IS OF TOTAL RESIDENTIAL [206] |
|---|---|---|---|
| CLEVELAND ELECTRIC ILLUMINATING | 657,289 | 30,059 | 4.6% |
| COLUMBUS SOUTHERN POWER | 504,681 | 15,215 | 3.0% |
| OHIO POWER | 562,567 | 28,659 | 5.1% |
| OHIO EDISON | 813,500 | 38,611 | 4.7% |
| TOLEDO EDISON | 255,563 | 9,188 | 3.6% |
| CINCINNATI GAS & ELECTRIC | 532,731 | 10,706 | 2.0% |
| DAYTON POWER & LIGHT | 428,644 | 12,303 | 2.9% |
| COLUMBIA GAS | 1,089,793 | 37,458 | 3.4% |
| EAST OHIO GAS | 971,043 | 44,687 | 4.6% |
| TOTAL | 5,815,811 | 226,886 | 3.9% |

While the arrears incurred by Ohio PIPP customers are troubling, the amount might be controlled by proper attention from the utilities. One study conducted by Cleveland State University specifically examined Ohio PIPP households with high arrears. The Cleveland State study found that "the vast majority (80-90%) of PIP[P] households are managing to keep their debt at reasonable levels."[207] The study concluded, however, that a percentage of participants (11-12%) are "accumulating debt at a very rapid pace."[208] According to Cleveland State, "[t]his small group accounted for 40% and 34% of total gas and electric PIP[P] debt respectively."[209] Cleveland State described these customers:

> The high debt segments are a relatively small percent of the total population. This small group has tended to accumulate debt at a high rate in the past; they begin the program with 2.6 times higher debt, they have accumulated 3 times as much total net debt, and their annual increase in debt is 3 times greater than the majority of the PIP households.[210]

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TIONS FOR NON-PAYMENT (Consumer Servs. Div., Off. of the Consumers' Couns., Columbus, Ohio), 1992.

[204] *Id.* at Table 2.

[205] *Id.* at Table 3.

[206] *Id.* at Table 6.

[207] Cleveland State Univ., *supra* note 125, at 4.

[208] *Id.*

[209] *Id.* at 2.

[210] *Id.* at 41-43.

Accordingly, this group's "annual usage (and their annual bills) are 1.6 times higher than the mid-range segments."[211] Ultimately, the study reported that "[t]argeting weatherization and energy education to the high-debt group seems to hold the greatest potential for minimizing the growth in debt."[212] Nonetheless, utility programs directed toward providing conservation education and weatherization assistance to PIPP households are not common in Ohio.

The Ohio context places the duty to mitigate damages in a favorable light. Accordingly, low-income advocates should consider not whether the offer of energy conservation measures to PIPP participants is good public policy, but rather whether there is a contractual *duty* on the part of Ohio utilities to offer conservation programs to households who participate in the state's Percentage of Income Payment Plan. The utility companies have an obligation to provide such conservation measures as a means to "mitigate the damages" caused by the nonpayment of PIPP participants' full bills. Recovery of any monetary damages (caused by unpaid bills of PIPP participants) that could reasonably have been reduced, or avoided altogether, as a result of reasonable utility efforts at mitigation, should not be permitted.

## V. CONCLUSION

Public utilities should be held to their contractual duty to mitigate damages within the context of collecting unpaid bills from low-income consumers. Unfortunately, many low-income households today cannot pay their utility bills in a full and timely fashion. Indeed, in some states, by design, the excess of bills over a predetermined portion of the participants' incomes are deemed unaffordable. Households often continue to owe these bills, but are not disconnected for nonpayment.

"Traditional" mitigation analysis offers limited efficacy to an advocate urging conservation programs as an alternative to the termination of service by public utilities. The limited applicability arises under traditional analysis because: (1) the duty to mitigate is considered a defensive argument only; (2) traditional analysis has limited its reach to ameliorative behavior *following* the breach; and (3) any mitigation savings would be assessed against only those damages claimed by the utility as a result of the particular breach which would have been averted by the proposed action. Under traditional consumer analysis, it is unlikely that a utility would be deemed unreasonable in failing to mitigate the damages arising from nonpayment through the offer of a conservation program to low-income, payment-troubled households. The cost and effort of such a mitigation measure would be viewed in light of the likelihood of avoiding those damages arising in each individual case coming before the court or commission. Whether conservation programs would be profitable over the range of customers would not be considered if definite proof that the utility

[211] *Id.* at 43.
[212] *Id.* at 105.

would realize savings in individual cases could not be advanced.

There is, however, a powerful argument that "traditional" mitigation analysis does not address the peculiar aspects of a utility's relationship with its customers, particularly within the framework of relationships with low-income, payment-troubled customers. The most significant of these is that utilities hold a monopolistic stranglehold on a resource which is essential to daily health, safety and well-being. Other factors which might lead to a greater judicial acceptance of imposing a duty to mitigate in the low-income context include: (1) continuous contractual relations over a long period of time; (2) the parties' grossly unequal bargaining positions; and especially (3) the parties' lack of viable substitute markets. Due to these factors, courts and the state utility commissions should adopt a mitigation analysis in utility-consumer disputes that looks beyond the instant breach to the overall prudence of the utility's action.

Finally, recent studies indicate that even from the narrow perspective of limiting costs to the utility, reasonable behavior would demand offering conservation programs to at-risk consumers. Traditional contract rules which impede such commercially rational behavior are in need of reassessment. In their stead, the specialized rules of requirements contracts can be relied upon to impose a duty of mitigation on utilities serving payment-troubled households.