

Liability of Electric Utility in the USA for Outage or Blackout

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Introduction

In the 1930s, an interruption of electricity to a home or small office for a few minutes was an annoyance or inconvenience. Since 1980, the proliferation of computers and smart appliances in homes and offices makes an interruption in electricity less tolerable, because of the greater dependence on continuous electricity.

My search on 9 May 2011 of all federal and all state cases in the Westlaw database for the query:¹

(electric! power) /s (outage black-out)

found 1687 documents, too many to read in my unpaid time. So I have done more selective searches, or broad searches in only a few states (e.g., Massachusetts, New York, Pennsylvania).

This essay follows my previous essay on whether electricity is a product or service, at: <http://www.rbs2.com/utility.pdf>.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm>. From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at <http://www.rbs2.com/advice.htm>.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the

¹ The term `electric!` will return: electricity, electrical, electric, Westlaw automatically includes plurals so `outage` includes outages.

conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

Outages Are Expected

At most locations in the USA, the total duration of outages is less than a half-hour per year, which gives the electric utility more than a 99.994% availability. Such a high availability means that users will *expect* continuous electric power.

Outages are unavoidable in electrical utility systems. Overhead distribution wires will break as automobile drivers crash into wooden utility poles, or from the weight of ice on each wire during winter storms. Wind can blow tree branches into the wires, which will short circuit the distribution line, causing upstream fuses or reclosures to interrupt the electric current. Distribution transformers or high-voltage switchgear will sometimes fail. For these reasons, no reasonable utility will guarantee continuous electricity to its customers. Indeed, tariffs that are approved by the state public utility commission and are part of the contract with the utility customer commonly specify that the utility is not liable for outages, except for “gross negligence” or other technical legal phrase that discourages plaintiffs.

Rarely, there will be blackouts (i.e., outages with a duration of many hours, sometimes more than a day) over a wide geographical area, often as the result of some catastrophic failure in the high-voltage transmission network. The following three blackouts are famous in the USA:

- 9 Nov 1965 New York State, New England states, New Jersey
- 13 July 1977 New York City
- 14 Aug 2003 New York State, Ohio, Michigan, New Jersey, Pennsylvania

While blackouts are rare events, each one affects many millions of people for tens of hours. The total damage from one blackout is astronomical. The likelihood of future blackouts motivates electric utilities to be very careful in writing contracts and tariffs, to limit their liability for outages.

limited legal duty to provide continuous electricity

An electric utility typically attempts to limit its legal duty for providing continuous service (i.e., no outages) by inserting a sentence in its tariff. Historically, tariffs that limit liability of electric utility for outages are derived from similar tariffs for telephone companies. In both telephone and electric power, the justification for limitation of liability is to provide lower cost of electric energy to customers. The following is a chronological list of some major court cases in the USA that discuss the limitation of liability for outages in an electric utility’s tariff.

- *Lee v. Consolidated Edison Co. of New York*, 413 N.Y.S.2d 826, 828 (N.Y.Sup. 1978) (“We do not find the exculpatory clause in question to be violative of public policy. In fact, similar provisions have been repeatedly sustained by the appellate courts of this state as reasonable limitations on the liability of a public service corporation, so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence [citations omitted].”);
- *Landrum v. Florida Power & Light Co.*, 505 So.2d 552 (Fla.App. 1987) discussed at page 21, below;
- *Computer Tool & Engineering, Inc. v. Northern States Power Co.*, 453 N.W.2d 569 (Minn.App. 1990) (upheld tariff: “The Company will endeavor to provide continuous service but does not guarantee an uninterrupted or undisturbed supply of electric service. The Company will not be responsible for any loss or damage resulting from the interruption or disturbance of service for any cause other than gross negligence of the Company. The Company will not be liable for any loss of profits or other consequential damages resulting from the use of service or any interruption or disturbance of service.”);
- *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 986 P.2d 377 (Kan. 1999) discussed at page 28, below;
- *Auchan USA, Inc. v. Houston Lighting & Power Co.*, 995 S.W.2d 668 (Tex. 1999) discussed at page 33, below;
- *Grant v. Southwestern Electric Power Co.*, 73 S.W.3d 211 (Tex. 2002) discussed at page 36, below;
- *Blake v. Public Service Co. of New Mexico*, 82 P.3d 960, 963-964 (N.M.App. 2003) (in a streetlight case: “W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 93, at 671 (5th ed.1984) (stating that tort liability for interruptions of service would be ruinous for utilities who must provide continuous service to all who apply for it under all kinds of circumstances, and that expense of litigation and settling claims could be a greater burden to the rate payer than is socially justified).”).

During the 1960s and 1970s, New Mexico followed old common law that prevented a utility from disclaiming liability for negligence. *Southwestern Public Service Co. v. Artesia Alfalfa Growers' Association*, 353 P.2d 62 (N.M. 1960). Discussed at page 11, below.

Against the general rule stated above, Missouri requires the utility to use “reasonable care” to prevent outages. *National Food Stores, Inc. v. Union Elec. Co.*, 494 S.W.2d 379 (Mo.App. 1973). Discussed at page 14, below.

utility's tariff is law, not contract

A tariff is of higher rank than a contract. A tariff is a kind of governmental regulation, which is part of the law. This rule makes it more difficult for plaintiff to argue that the tariff is unenforceable.

- *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486, 496 (5th Cir. 1966) (“First, a tariff, required by law to be filed, is not a mere contract. It is the law. *Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co.*, 5 Cir., 1962, 303 F.2d 692, 696 & n. 12, *cert. denied*, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276; ...”), *cert. denied*, 385 U.S. 1008 (1967). Cited with approval in *DFW Metro Line Services v. Southwestern Bell Telephone Co.*, 901 F.2d 1267, 1268, n. 4 (5th Cir. 1990) (*per curiam*), *cert. den.*, 498 U.S. 985 (1990).
- *Lee v. Consolidated Edison Co.*, 413 N.Y.S.2d 826, 828 (N.Y. Sup.Ct. 1978) (“Once accepted by the [Public Utilities] Commission, the tariff schedule (including the limitation of liability provision) takes on the force and effect of law and governs every aspect of the utility's rates and practices”);
- *General Telephone Co. of Northwest, Inc. v. City of Bothell*, 716 P.2d 879, 883 (Wash. 1986) (“Once a utility's tariff is filed and approved, it has the force and effect of law. *Moore v. Pacific Northwest Bell*, 34 Wash.App. 448, 455, 662 P.2d 398 (1983); *Allen v. General Tel. Co.*, 20 Wash.App. 144, 151, 578 P.2d 1333 (1978).);
- *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997) (“In *Shoemaker v. Mountain States Telephone & Telegraph Co.*, 38 Colo.App. 321, 323, 559 P.2d 721, 723 (1976), the court of appeals held that a tariff limiting a utility company's liability to a customer had the effect of law and therefore extinguished the customer's conflicting common law remedies.”);
- *Southwestern Bell Telephone Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex.App.–Houston 1996) (“Filed tariffs govern a utility's relationship with its customers and have the force and effect of law, until suspended or set aside. See *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156, 162–163, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922). ‘The filed rate doctrine says, in essence, that any rate filed with and approved by the appropriate regulatory agency has the imprimatur of government and cannot be the subject of legal action against the private entity that filed it.’ ”);
- *Cisneros v. Central Power & Light Co.*, 24 S.W.3d 378, 380 (Tex.App.–Corpus Christi 1999) (“Unless found to be unreasonable, filed tariffs govern a utility's relationship with its customers and have the force and effect of law.”);

- *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002) (“Thus, under the doctrine, filed tariffs govern a utility’s relationship with its customers and have the force and effect of law until suspended or set aside. See *Keogh*, 260 U.S. at 162–63, 43 S.Ct. 47; *Carter v. AT & T Co.*, 365 F.2d 486, 496 (5th Cir. 1966); *Metro-Link Telecom*, 919 S.W.2d at 692.”);
- *Adams v. Northern Illinois Gas Co.*, 809 N.E.2d 1248, 1263 (Ill. 2004) (“Once the Commission approves a tariff, it ‘is a law, not a contract, and has the force and effect of a statute.’ *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.*, 67 Ill.App.3d 435, 439, 23 Ill.Dec. 749, 384 N.E.2d 543 (1978), *aff’d*, 78 Ill.2d 56, 34 Ill.Dec. 328, 398 N.E.2d 3 (1979).”);
- *Estate of Pearson ex rel. Latta v. Interstate Power and Light Co.*, 700 N.W.2d 333, 342 (Iowa 2005) (“Once a utility files a tariff with the regulatory authority, it has the force and effect of law. *Woodburn v. N.W. Bell Tel. Co.*, 275 N.W.2d 403, 405 (Iowa 1979); *Coon Valley Gravel Co. v. Chi., R.I. & P.R. Co.*, 241 Iowa 487, 489, 41 N.W.2d 676, 677 (1950).”);
- *In re Verizon New England, Inc.*, 972 A.2d 996, 998 (N.H. 2009) (“ ‘[T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC, do not simply define the terms of the contractual relationship between a utility and its customers.’ *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566, 419 A.2d 1080 (1980) (citations omitted). ‘They have the force and effect of law and bind both the utility and its customers.’ *Id.* Because a tariff has the same force and effect as a statute, we interpret a tariff in the same manner that we interpret a statute. See *Laclede Gas Co. v. Public Service Com’n*, 156 S.W.3d 513, 521 (Mo.Ct.App. 2005).”).

Legal Problems for Plaintiff

There are a variety of legal problems that make litigation over electrical outages especially difficult for plaintiffs. Plaintiffs who sue an electric utility in tort may be surprised to learn that their claims for economic losses are barred, as explained below.

electric utility *not* an insurer

It is often said that a defendant in tort is not an insurer — meaning that the defendant will *not* be ordered to pay for every loss. Instead, the defendant generally only pays for damages attributable to the *negligence* of the defendant. In cases involving products liability, the defendant only pays for damages attributable to a *defective* product. In contract cases, the defendant only pays for damages attributable to breach of some contract or breach of a warranty. See, e.g., in alphabetical order by name of state:

- *Baltimore Gas and Elec. Co. v. Flippo*, 705 A.2d 1144, 1153 (Md. 1998) (“Although an electric company is not an insurer, it owes a duty to exercise reasonable care ...”);
- *Hughes v. Omaha Public Power Dist.*, 735 N.W.2d 793 (Neb. 2007) (“However, power companies are not insurers and are not liable for damages in the absence of negligence. [citations omitted]”);
- *Manley v. New York Telephone. Co.*, 100 N.E.2d 113, 116 (N.Y. 1951) (“The defendant is not an insurer, *Storm v. New York Tel. Co.*, 270 N.Y. 103, 200 N.E. 659 [(1936)], and the mere fact that an accident has happened and that injury followed does not give rise to a presumption of negligence on the part of the one charged, ...”);
- *Derrick v. Harwood Electric Co.*, 111 A. 48, 50 (Pa. 1920) (“... while an electric company is not an insurer, ...”); *Felger v. Duquesne Light Co.*, 273 A.2d 738, 740 (Pa. 1971) (“Although a supplier of electricity is not an insurer against all injury, it owes the highest degree of care to all parties who might be harmed. [citations omitted]”);
- *Bearden v. Lyntegar Elec. Co-op., Inc.*, 454 S.W.2d 885, 887 (Tex.Civ.App. 1970) (“While a public utility is not an insurer of continuous service, it will be liable for damages which result from its negligence.”).

economic loss doctrine

The biggest loss during an outage is typically that employees are unable to do their work, because computers and other machines are not functioning. An employer needs to pay wages to idle employees during an outage. After electric power is restored, an employer may need to pay overtime to employees to clear the backlog of work. Unfortunately, the doctrine of economic loss in tort law prevents an employer from recovering for such losses. Tort law focuses on injury to people or damage to property, and ignores economic losses. See, e.g., *Village of Deerfield v. Commonwealth Edison Co.*, 929 N.E.2d 1 (Ill.App. 2009) (food spoilage and mold remediation costs are recoverable); *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933 (Ind.App. 1996); *FMR Corp. v. Boston Edison Co.*, 613 N.E.2d 902 (Mass. 1993).

Again, the electric utility is *not* an insurer. If users of electricity want protection against consequential losses during an outage, they should purchase business interruption insurance from their insurance agent. However, cases involving the blackout of Aug 2003 show that some insurance companies were putting exclusions in their insurance policies to prevent payments for electric power outages.

To avoid the economic loss doctrine, a plaintiff needs to sue under contract law (e.g., breach of warranty in the Uniform Commercial Code). But suing under contract law is only possible in states that recognize electricity as a “good” or product. In states that hold that low-voltage electricity is a service, a tort for negligence is the only possibility.

outage is not a product?

In states that recognize low-voltage electricity as a product, a judge could hold that an outage is *not* a product, since no energy is delivered to the customer during an outage. See, e.g., *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933, 937 (Ind.App. 1996), which is discussed at page 33, below.

user’s mitigation of damages

There are various devices that users can connect inside their premises to avoid — or to mitigate — damages from electrical outages:

1. An *uninterruptible power supply* (UPS) allows small loads (e.g., a personal computer or other critical item consuming less than about 1000 watts of power) to be operated continuously from batteries during interruptions in electric utility power that last less than a few minutes.
2. For continuous electricity during longer outages or to operate larger loads, the user will need to install a local *generator* powered by a diesel or gasoline engine.

It is sometimes said that a user has a duty to mitigate damages. This is technically wrong, because there is no legal duty. Instead, a user can not be reimbursed for damages that the user could have avoided, by doing what a reasonable person would have done.² This rule of law is formally known as the doctrine of avoidable consequences.

Note that the doctrine of avoidable consequences “normally³ comes into action when the injured party’s carelessness occurs *after* the defendant’s legal wrong has been committed. Contributory negligence, however, comes into action when the injured party’s carelessness occurs *before* defendant’s wrong has been committed or concurrently with it.” *Ostrowski v. Azzara*, 545 A.2d 148, 152 (N.J. 1988). The use of uninterruptible power supplies is good engineering practice, because it significantly increases the reliability of the user’s electronic equipment for a small cost to the user. Furthermore, interruptions of electric power for less than a few seconds are both common and foreseeable. So, regardless of whether a judge says “avoidable consequences” or “contributory negligence”, a plaintiff can not recover for damages that the plaintiff could have avoided by good engineering practice by the plaintiff. Put another way, a user who chooses to operate a computer without an uninterruptible power supply has assumed the risk that work may be lost or files corrupted by an outage.

In my reading of cases about liability of electric utilities for outages (as well as other disturbances), I am surprised that utilities rarely mention assumption of risk by plaintiff, negligence by plaintiff, or the doctrine of avoidable consequences. Such legal arguments have a bad flavor of “blame the victim”. Perhaps utilities do not need these legal arguments, given limitations of liability for ordinary negligence in their tariff, the great difficulty of plaintiff proving gross negligence by the utility, and the doctrine of economic loss.

² *In re Hannaford Bros. Co. Customer Data Security Breach*, 4 A.3d 492, 496-497 (Me. 2010); RESTATEMENT (SECOND) OF TORTS § 918 (1979); W. Keeton, D. Dobbs, R. Keeton, D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS, § 65 at pp. 458-59 (5thEd. 1984).

³ Standler’s comment: As an example of not normal, see *Waterson v. General Motors Corp.*, 544 A.2d 357, 372-373 (N.J. 1988) (failure to wear seat belt before automobile accident was not contributory negligence, but would reduce plaintiff’s damages under doctrine of avoidable consequences); *Spier v. Barker*, 323 N.E.2d 164, 167 (N.Y. 1974) (same).

Life-Support

Most electrical outages cause principally economic loss (e.g., paying idle employees during an outage, lost profits). There is one class of outages that could result in death of people: when electric power is used to operate life-support equipment. The most common example of life-support equipment is a ventilator for a paralyzed patient who can not breath unassisted. On 11 May 2011, in an attempt to find such cases, I searched all federal and all state cases in Westlaw for the query:

```
(electric! power) /p (outage black-out interrup!) /p  
(ventilator life-support "iron lung" breathing)
```

I found only two relevant cases, neither of which involved the death of a person as a result of an outage.

- *Virginia Birth-Related Neurological Injury Compensation Program v. Williamson*, Not Reported in S.E.2d, 2005 WL 756265 (Va.App. 2005) (reimbursement for backup generator);
- *Sheffler v. Commonwealth Edison Co.*, 923 N.E.2d 1259, 1263-64 (Ill.App. 2010) (son requires ventilator to breathe, during outage a utility customer service representative gave “curt treatment”).

I suggest that the lack of litigation in this area is the result of electric utilities being emphatic that (1) a utility can not guarantee continuous electric power, and (2) a utility can not guarantee that power will be restored before a local generator at a patient’s home runs out of fuel.

Cases

Artesia Alfalfa (N.M. 1960)

Southwestern Public Service Co. v. Artesia Alfalfa Growers' Association, 353 P.2d 62 (N.M. 1960).

In 1957, plaintiff (Artesia Alfalfa Growers') owned three-phase electric motors that sustained \$5735 damage allegedly as a result of unbalanced three-phase voltages owing to negligence of electric utility. The trial court found that the utility had supplied excessive voltage (116% of nominal) and unbalanced voltage. 353 P.2d at 65-66, 71-72.

The utility raised an order of the Public Service Commission as a defense. The relevant parts of the order said:

6. Continuity of Service: Company will use reasonable diligence to supply steady and continuous service but will not guarantee the service against irregularities or interruptions. Company will not be liable to customer for any damages occasioned by irregularities or interruptions. * * *

13. Customer's Installation: Customer's Responsibility: Customer shall assume all responsibility on Customer's side of Point of Delivery for service supplied or taken, as well as for the electrical installation, appliances and apparatus used in connection therewith, and shall save Company harmless from any and all claims for injury or damage to persons or property occasioned by or in any way resulting from such service, or the use thereof, on the Customer's side of Point of Delivery.

Artesia Alfalfa, 353 P.2d at 64, quoting General Order No. 2 of the New Mexico Public Service Commission. The New Mexico Supreme Court held that the Public Service Commission had no authority to limit liability of a utility. 353 P.2d. at 67-68.

There was also a contract between the parties that was raised by the utility as a defense.

¶7. The Customer assumes the responsibility of the electric power and energy delivered hereunder after it leaves the Company's lines, and beyond the point of delivery of power and energy hereunder and hereby agrees to protect and save the Company harmless from injury and damage to person or property occasioned by such power and energy beyond the said point of delivery. Unless otherwise provided in this agreement said point of delivery shall be the meter terminals. The Company shall not be liable to the Customer, or any person, by reason of the failure to deliver electrical energy as a result of fire, breakdown, acts of God or any other conditions beyond the control of the Company. The Company does not guarantee that the supply of electrical energy will be free from temporary interruption, and any and all temporary interruptions shall not constitute a breach of this contract, and the Company shall not be liable to the Customer for damage resulting from such temporary interruption, but will use its best efforts to restore the service as soon as is can reasonably do so.

Artesia Alfalfa, 353 P.2d at 65. Although this is *not* a case involving an outage, I have included this case here because of the wording in the contract attempts to disclaim liability for any "temporary interruptions."

The New Mexico Supreme Court held:

Appellant relies upon paragraphs 2 and 7 of the contract dated September 26, 1952, which provisions of said contract are referred to in the cases as being a hold-harmless agreement. The rule is well established that a provision in a contract seeking to relieve a party to the contract from liability for his own negligence is void and unenforceable, if the provision is violative of law or contrary to some rule of public policy. Under this limitation the courts are in complete accord in holding that a public service corporation, or a public utility such as an electric company, cannot contract against its negligence in the regular course of its business, or in performing one of its duties of public service, or where a public duty is owed, or where a public interest is involved. *Oklahoma Natural Gas Co. v. Appel*, Okl. 1954, 266 P.2d 442; *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 301, 73 P. 39 [(Colo. 1903)]; Note, 175 A.L.R. § 23, p. 39 & n. 20.

Artesia Alfalfa, 353 P.2d at 69.

A subsequent paragraph discusses *Collins v. Virginia Power & Electric Co.*, 168 S.E. 500 (N.C. 1933) which held that the utility could not exempt itself from negligence. The New Mexico Supreme Court then quoted CORBIN ON CONTRACTS and the RESTATEMENT (FIRST) OF THE LAW, CONTRACTS, §§ 574-575 as stating a utility that was engaged in public service could not exempt itself from liability for negligence.

The unanimous New Mexico Supreme Court concluded:

Applying the principle of law involved, we hold that appellant, Southwestern Public Service Company, cannot validly contract against its liability for negligence in the performance of a duty of public service, since such stipulation would be in contravention of public policy.

Artesia Alfalfa, 353 P.2d at 71.

In 1983, a New Mexico state court clarified the distinction between (1) “the rule [in *Artesia Alfalfa*] was approved by a statutorily created body, the Public Service Commission, whose authority was delegated by the Legislature” and (2) “a tariff adopted by the Corporation Commission whose rate-making authority is legislative in nature and constitutionally derived.” *Coachlight Las Cruces, Ltd. v. Mountain Bell Telephone Co.*, 664 P.2d 994, 998 (N.M.App. 1983). A tariff can validly limit liability for ordinary negligence. *Coachlight*, 664 P.2d at 999.

Blackout of 1965

The blackout of November 1965 does not appear to have produced any litigation that is reported in Westlaw. I searched all federal and all state cases for the query:

(electric! power) /p (outage black-out interrupt!) & (Nov! /3 1965)
but I found no cases involving liability of a utility for the blackout.

Bearden v. Lyntegar Electric Co-op. (Tex.Civ.App. 1970)

Bearden v. Lyntegar Electric Co-op., Inc., 454 S.W.2d 885 (Tex.Civ.App. 1970).

In August 1968, there was an electric outage for more than eight hours at Bearden's farm. Bearden kept hogs inside a climate-controlled building. Without electric power for the air conditioner, 142 hogs died of suffocation and the other hogs lost weight.

Plaintiff filed litigation and relied on *res ipsa loquitur*. The trial court sustained "defendant's plea of privilege", to be sued in different county. 454 S.W.2d at 886. On the issue of *res ipsa loquitur*, the Texas intermediate appellate court wrote:

The interruption of electrical service is not such an event that occurs without a cause. When a power failure occurs, 'there is a defect somewhere. Where and what it is known only to the experts in the use and management of electricity.' *Texas Power & Light Co. v. Bristow*, 213 S.W. 702, 705 (Tex.Civ.App., writ ref'd). (The injury in this case was a death that resulted from an excessive current of electricity.) In the case at bar the plaintiff has produced evidence that the power outage was not caused by lightning or the equipment under the plaintiff's control. These circumstances and 'the character of the accident * * * lead reasonably to the belief that in the absence of negligence, it would not have occurred * * *.' *Id.* Secondly, the plaintiff produced evidence that the power outage was caused by factors which were under the sole 'management and control of the defendant.' Thus, the plaintiff has established a *prima facie* case of negligence under the doctrine of *res ipsa loquitur*. '(W)here plaintiff has established a presumptive or *prima facie* case of negligence, by virtue of the doctrine of *res ipsa loquitur*, it is incumbent upon defendant, if he wishes to avoid the effect of the doctrine, to introduce evidence to explain, rebut, or otherwise overcome the presumption or inference that the injury complained of was due to negligence.' *Wichita Falls Traction Co. v. Elliott*, 125 Tex. 248, 81 S.W.2d 659, 664—665 (1935). Here the defendant did not introduce any evidence 'to explain, rebut, or otherwise overcome the presumption or inference that the injury complained of was due to negligence.' When the plaintiff made out his *prima facie* case of negligence, the burden of producing evidence shifted to the defendant. The defendant did not go forward with any evidence and thus the plaintiff's controverting plea should be sustained. *Bearden*, 454 S.W.2d at 887-888.

The theory of *res ipsa loquitur* is based partly on the theory that the defendant has superior knowledge or means of information to determine the cause of the defect. *Owen v. Brown*, 447 S.W.2d 883 (Tex. 1969); *Welliver v. Lone Star Gas Co.*, 260 S.W.2d 70 (Tex.Civ.App., writ ref'd). Lyntegar had the control and management of the instruments used to transmit electricity to the plaintiff. The outage was caused by some defect or incident on its lines. Lyntegar is the only party which knows, should know, or has the means of determining the reason for the power outage. Yet Lyntegar failed to introduce any evidence to explain the cause of the outage. Nor did Lyntegar offer any reason for its failure or inability to offer any evidence to rebut the presumption of negligence. *Bearden*, 454 S.W.2d at 888.

There is no mention of any tariff in this case. The appellate court remanded for a trial on the merits. The final result is not known.

National Food Stores v. Union Elec. (Mo.App. 1973)

National Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379 (Mo.App. 1973).

Missouri seems to have a common-law duty for an electric utility to use “reasonable care” to provide continuous electric energy.

Generally speaking, an electric power company which undertakes to supply current, although not an insurer of service, has an obligation to provide a patron with adequate and continuous service, arising either from express contract, a regulatory enactment, or implied contract and the supplier is, ordinarily at least, subject to a duty to exercise reasonable care to fulfill such obligation. [citing 26 Am.Jur.2d, Electricity, § 112]

National Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379, 381 (Mo.App. 1973).

Whatever the law may have been in 1973, the current law in most states is that an electric utility is not liable for outages unless the utility was either “grossly negligent” or engaged in willful misconduct.

The Missouri court wrote:

Public utilities occupy a unique position in our society. They furnish indispensable services while enjoying a privileged legal status. As consumers, our dependency upon their services is almost total. As such it is essential that such companies conduct themselves in a manner that does not take advantage of our dependency on them nor of the privileged status granted to them by the state legislature. While we do not propose that public utilities, in this instance an electrical company, are insurers or guarantors of the safety of persons or of their property, [citations to three cases], we hold there is as a matter of law a duty on Union Electric to protect its customers from foreseeable damage from failure of electrical service.

National Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379, 383 (Mo.App. 1973).

In any event, it is not the interruption of service that National is complaining about, but rather the failure to give notice of an interruption of service. The right to interrupt service is granted, but the crucial point is that Union Electric cannot divorce itself from the consequences of its own failure to use ordinary care to avoid harm to its consumers.

National Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379, 384 (Mo.App. 1973).

Part quoted with approval by Illinois Supreme Court in *Adams v. Northern Illinois Gas Co.*, 809 N.E.2d 1248, 1272 (Ill. 2004).

In 1992, the Missouri Supreme Court cited the rule in *National Food Stores* without criticizing it.

Furthermore, in 1973, the Court of Appeals, Eastern District, held that an electric company is required to exercise *reasonable care* in fulfilling the obligation to provide adequate and continuous service arising from either contracts or regulatory enactments. *National Food Stores, Inc. v. Union Electric Co.*, 494 S.W.2d 379 (Mo.App. 1973).

....

We hold that, in the absence of a contrary provision in a contract, a plaintiff seeking recovery in tort for wrongful termination of electrical service is required to show that defendant acted negligently in its failure to supply electrical service. In the alternative, a plaintiff may show the termination was an intentional wrongful act, i.e., with knowledge that plaintiff was entitled to receive service under the contract.

Haynam v. Laclede Elec. Co-op., Inc., 827 S.W.2d 200, 203-204 (Mo. 1992).

U.S. v. Consolidated Edison Co. (S.D.N.Y. 1975)

U.S. v. Consolidated Edison Co. of New York, Inc., 452 F.Supp. 638 (S.D.N.Y. 1977),
aff'd, 580 F.2d 1122 (2dCir. 1978).

This case involves litigation by the U.S. Government to recover costs of generating and transmitting “200 megawatts of power”⁴ to Con Ed during a power crisis from 28 July 1970 until 1 October 1970. The Government relied on two successful legal theories: quasi-contract and contract by estoppel. The interesting part for this essay is the remark in the fact section of the trial court's opinion:

As Mr. [Bertram] Schwartz [, then a Con Edison assistant vice-president and now senior vice-president,] stated, Con Edison certainly needed the 200 MW; even with that additional power, the utility was not able to supply uninterrupted service. Although Con Edison maintains that it is not legally obligated to supply electricity to the public, Schwartz did concede that Con Edison has a duty to supply electricity. [Charles] Luce [, Con Edison's Chairman and Chief Executive Officer,] testified that “we are held responsible for supplying energy to New York City.” (Tr. 798)

452 F.Supp. at 647.

These remarks by management at Con Ed may *not* be in the context of a legal duty to supply continuous electrical energy, but may be in the context of explaining the purpose of the electric utility.

These remarks were repeated in the legal analysis section of the trial court's opinion:

The evidence at trial demonstrates that Con Edison had a duty to provide electricity; the government undertook to provide electricity in a true emergency situation with a clear intent to be compensated for its costs; and the service supplied were necessary for public health and safety.

Con Edison argues that the doctrine of emergency assistance does not apply since it had no legal duty to provide electricity and since the power crisis was not the type of emergency required by the emergency assistance doctrine. The court finds to the contrary. Charles Luce testified that Con Edison is held responsible for providing electricity to New York; Bertram Schwartz, while refusing to admit of a legal duty, conceded that Con Edison was under a duty to make best efforts to provide power.

452 F.Supp. at 656.

⁴ Power is a *rate* of delivering energy. The court later gives costs in kilowatt-hours. 452 F.Supp at 644, 647, etc. The delivery interval from 28 July to 1 Oct is 65 days, or 1560 hours, so 200 megawatts for 65 days delivers 312 gigawatt-hours of energy.

The U.S. Court of Appeals affirmed:

Con Edison's claim that it has no absolute duty to supply electricity to New York area customers misconceives both the nature of the duty which must be implicated to fall within the purview of Section 115 and the nature of the duty which the AEC performed in this case. Con Edison asserts in this regard that it is liable for damages to its customers only from intentional wrongful cutoffs or accidental cutoffs when it has acted with gross negligence.[FN10] However, Section 115 of the Restatement certainly does not require either by its terms or under the case law interpreting it, that a duty must be absolute to fall within its parameters. Duty is a flexible concept. Its existence depends on calibrating legal obligations to factual contexts. One may have only a duty to avoid gross negligence, but that is a duty nonetheless and one potentially cognizable by the emergency assistance doctrine.

FN10. Under New York law, Con Edison is not liable for damages resulting from ordinary negligence. In July, 1970, the New York State Public Service Commission approved as part of Con Edison's rate schedule an exemption for ordinary negligence in the valid exercise of Con Edison's powers and also for interruption of services from causes beyond Con Edison's control. This exculpation has been upheld by several New York courts. E. g., *Newman v. Consolidated Edison Co.*, 79 Misc.2d 153, 360 N.Y.S.2d 141 (Sup.Ct. 1973); *Devers v. Long Island Lighting Co.*, 79 Misc.2d 165, 359 N.Y.S.2d 940 (Sup.Ct. 1974). But see *Danna v. Consolidated Edison Co.*, 71 Misc.2d 1029, 337 N.Y.S.2d 722 (Civ.Ct. 1972).

[omitted paragraph discussing *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2dCir. 1977), *cert. denied*, 434 U.S. 859 (1977).]

Similarly, Con Edison had, if not an absolute, at least a manifest, duty to provide its customers with electricity. See, e. g., *Park Abbott Realty Co. v. Iroquois Natural Gas Co.*, 102 Misc. 266, 168 N.Y.S. 673 (Sup.Ct. 1918) (utility must use best efforts), *Aff'd* 187 App.Div. 922, 174 N.Y.S. 914 (4th Dep't 1919). And as the district court found, based on the testimony of Con Edison's own officials, Con Edison has a general responsibility to provide electricity, one founded in its monopoly and the public service nature of its business. See *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522, 535-36, 43 S.Ct. 630, 67 L.Ed. 1103 (1923); *Munn v. Illinois*, 94 U.S. 113, 124-30, 24 L.Ed. 77 (1876). Moreover, under the statutory law of New York Con Edison has a duty to "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. . . ." N.Y.Pub.Serv.Law s 65(1) (McKinney 1955). Distinguishing its general duty to provide service from an absolute legal duty to pay damages to individual customers in particular circumstances would be hypertechnical and would ignore Con Edison's overriding responsibilities to the public. See *People ex rel. Cayuga Power Corp. v. Public Service Commission*, 226 N.Y. 527, 532, 124 N.E. 105, 106 (1919) (Cardozo, J.) (emphasizing that "(t)he duty to serve the public goes hand in hand with the privilege of exercising a special franchise . . .").

The nature of Con Edison's duty to its customers aside, Con Edison also misperceives the nature of the duty which the AEC actually performed in this case. Con Edison improperly focuses exclusively on the Con Edison-customer relationship rather than on the Con Edison-AEC relationship. While Con Edison may be liable to its customers for damages from wrongful intentional cutoffs or accidental cutoffs when it has acted with gross negligence, that limitation on Con Edison's duty relates solely to damage claims between Con Edison and its

customers for failure to supply electricity; it does not foreclose liability arising from a relationship between Con Edison and its supplier of electricity.
580 F.2d at 1127-1128.

I am not sure that these remarks about the legal duty of a utility are useful in cases involving a user suing Con Ed for an outage or blackout. It is obvious that an electric utility is in the business of supplying electrical energy to their users, but that does not create a legal duty to avoid every outage. Nonetheless, I quote this seldom-cited case and leave it to the reader to determine the significance of the remarks about duty.

Blackout in New York City, July 1977

An approximately 25-hour blackout in New York City on 13-14 July 1977 resulted in approximately 550 cases against the electric utility being filed in New York City courts.⁵ The following list includes the first and last cases in the Westlaw database arising out of this blackout, as well as most of the significant appellate decisions.

- *Shankman v. Consolidated Edison Co.*, 404 N.Y.S.2d 787 (N.Y. City Civ. Ct. 1978) (in small claims court: applied *res ipsa loquitur*, called tariff a contract of adhesion, rejected tariff's limitation of liability to gross negligence, scheduled for trial), *appeal dismissed*, 420 N.Y.S.2d 960 (N.Y. Sup. 1979);
- *Food Pageant, Inc. v. Consolidated Edison Co., Inc.*, 429 N.E.2d 738 (N.Y. 1981) (Affirming jury verdict for plaintiff in the amount of \$40,500, as a result of utility's "gross negligence" during 13 July 1977 blackout.);
- *Koch v. Consolidated Edison Co. of New York, Inc.*, 468 N.E.2d 1 (N.Y. 1984) (Mayor sued electric utility for blackout, held city was third-party beneficiary of contract between PASNY and Con Ed, remand for trial the claims for looting and vandalism by rioters during blackout), *cert. den.*, 469 U.S. 1210 (1985);

⁵ *Goldstein v. Consolidated Edison Co. of New York, Inc.*, 462 N.Y.S.2d 646, 648, n.* (N.Y.A.D. May 1983) ("We are advised that approximately 285 blackout cases are pending against Con Ed, seeking total damages in excess of \$200 million."); *Shaid v. Consolidated Edison Co. of N.Y.*, ... 467 N.Y.S.2d 843, 850 (N.Y.A.D. Oct 1983) ("... Con Ed was probably well advised to avoid a joint trial of all 550 or so actions commenced against it from among its more than three million black-out households.").

- *Strauss v. Belle Realty Co.*, 469 N.Y.S.2d 948 (N.Y.A.D. 2 Dept. 1983) (During blackout caused by gross negligence of electric utility, tenant fell on stairs in common area of apartment building. “Strauss [the plaintiff-tenant] concedes that he was not a customer of Con Ed in the basement location where the accident occurred.”), *aff’d*, 482 N.E.2d 34 (N.Y. 1985) (Held utility owed no duty to tenant, because tenant did not purchase electricity from utility.). See my discussion at page 18, below.
- *Longo v. New York City Educational Const. Fund*, 493 N.Y.S.2d 561 (N.Y.A.D. 1 Dept. 1985) (dismissed on rule stated in *Strauss*);
- *Goldstein v. Consolidated Edison Co. of New York, Inc.*, 499 N.Y.S.2d 47 (N.Y.A.D. 1 Dept. 1986) (dismissed on rule stated in *Strauss*);
- *Kirsch Beverage Corp. v. Consolidated Edison Co. of New York*, 516 N.Y.S.2d 29, 30 (N.Y.A.D. 2 Dept. 1987) (“... plaintiff recovered the [\$103] value of the syrups used to make its product that were spoiled by the lack of refrigeration” during 13 June 1977 blackout. Appellate court affirmed.);
- *Grow Tunneling Corp. v. Consolidated Edison Co. of New York*, 600 N.Y.S.2d 30 (N.Y.A.D. 1 Dept. 1993) (Reversing jury verdict of \$29,202 plus interest for damages during 13 July 1977 blackout, because lost profits were “speculative and uncertain”).

Strauss v. Belle Realty Co. (N.Y. 1985)

Strauss v. Belle Realty Co., 469 N.Y.S.2d 948 (N.Y.A.D. 2 Dept. 1983), *aff’d*, 482 N.E.2d 34 (N.Y. 1985).

The facts are relatively simple. Strauss was a tenant in an apartment building owned by Belle Realty, one of the two defendants. The landlord paid Con Ed for electric power in common areas of building, while each tenant paid Con Ed directly for electric power in his/her apartment. Strauss, who was 77 y old, fell on stairs in common area of building during the blackout on 13 July 1977 and he was seriously injured. Strauss sued his landlord for defective condition of stairs and railing and sued Con Ed for the blackout.

“Strauss concedes that he was not a customer of Con Ed in the basement location where the accident occurred.” 469 N.Y.S.2d at 949. “... Strauss argued that he was a regular user of the common areas who relied on a constant supply of electricity to those areas and paid rent to a landlord who in turn used part of the rent money to pay for electricity supplied to the common areas.” *Ibid*. Strauss argued that Con Ed was negligent, and he was a “third-party beneficiary of Con Ed’s contract with Belle Realty Company to supply electricity to the common areas of the apartment building.” *Ibid*.

The intermediate appellate court held Strauss was not a third-part beneficiary of landlord's contract with Con Ed. 469 N.Y.S.2d at 950-951

The intermediate appellate court dismissed the negligence count against Con Ed:

The complaint also fails to state a cause of action in negligence because Con Ed did not owe a duty to plaintiff in any compensable legal sense [citation omitted].

....

It is unfortunate that a plaintiff's remedies must be restricted in situations where a foreseeable injury has resulted from negligent conduct, but compensation is not necessarily available for every wrong. As a practical matter, legal consequences must be limited to a controllable degree. [citation omitted]

Strauss v. Belle Realty Co., 469 N.Y.S.2d 948, 951 (N.Y.A.D. 1983).

This sounds like an apology to Strauss for the court protecting the big utility at the expense of an ordinary citizen.

The intermediate appellate court mentioned the utility is not an insurer, and then wrote to explain why the court was protecting the utility:

Plaintiff's argument that Con Ed is in a position to compensate all those injured as a consequence of the blackout by adjusting its rates for all who use its services is best addressed to the Legislature. The law is not in the field of insurance (*Shubitz v. Consolidated Edison Co. of N.Y.*, 59 Misc.2d 732, 736, 301 N.Y.S.2d 926, [(N.Y.Sup. 1969)]), and it is not the role of the judiciary to place a public utility in that field. The numerous viable actions which have resulted from the blackout demonstrate that Con Ed has not received blanket immunity to run its business in a haphazard fashion. The reasonable limitations that have evolved in restricting the rights of recovery must be applied, however, and in this instance they mandate a dismissal of the complaint as against Con Ed.

Strauss v. Belle Realty Co., 469 N.Y.S.2d 948, 952 (N.Y.A.D. 1983).

One judge on the three-judge panel dissented:

In essence, Con Ed equates the question of duty in negligence with that of privity in contract. My colleagues in the majority employ this equation by discussing at length whether or not plaintiff was an intended or incidental beneficiary of the contract for electricity between Belle Realty and Con Ed. The fact is that this is not a contract action at all. There is nothing in the complaint which would indicate that plaintiff is attempting to sue in contract as an intended third-party beneficiary. This is a tort suit pure and simple.

Strauss v. Belle Realty Co., 469 N.Y.S.2d 948, 954 (N.Y.A.D. 1983) (Gibbons, J., dissenting).

The dissent continues:

In such circumstances, I can perceive of no public policy justification for excusing Con Ed from liability on the alleged basis that plaintiff was not a member of a class to whom Con Ed owed a duty of care.

To hold otherwise, results in a very anomalous situation. For example, if plaintiff fell in his darkened apartment, a duty would be found, because he himself paid the electric bill to Con Ed. What sense does it make to say that when he, quite foreseeably, steps outside his apartment door into the common areas of his building, a duty does not exist? And what about

his landlord? If an employee of Belle Realty was injured in the hallway outside plaintiff's apartment, there would be no question that there was a duty. Yet, the holding of the majority would result in the absence of a duty were the employee to step into plaintiff's apartment and then fall.

Strauss v. Belle Realty Co., 469 N.Y.S.2d at 957-958 (N.Y.A.D. 1983) (Gibbons, J., dissenting).

Strauss appealed to the highest court in New York State, which — in a 5 to 2 decision — affirmed the court below, on grounds of public policy:

But while the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, “to limit the legal consequences of wrongs to a controllable degree”, and to protect against crushing exposure to liability. “In fixing the bounds of that duty, not only logic and science, but policy play an important role”. The courts’ definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied. [all citations in this paragraph to cases omitted]

Strauss, 482 N.E.2d 34, 36 (N.Y. 1985).

We conclude that in the case of a blackout of a metropolis of several million residents and visitors, each in some manner necessarily affected by a 25-hour power failure, liability for injuries in a building’s common areas should, as a matter of public policy, be limited by the contractual relationship.

Strauss, 482 N.E.2d 34, 35 (N.Y. 1985).

I think *Strauss* was wrongly decided. As the dissenting judge at the intermediate appellate court noted, privity of contract is *not* a requirement for tort claims. Furthermore, the electric utility is a monopoly, so it is the *only* source of supply. It should not matter whether the landlord paid for the electricity in common areas and then recovered that cost in rent charged to tenants like Strauss, or whether Strauss paid the utility directly. Either way, the one utility is paid for continuous electrical energy.

If a court really wanted to deny recovery to Strauss, the court should have ruled that Strauss assumed the risk when he descended stairs in a dark basement. Nothing was said in these opinions about Strauss carrying a flashlight to illuminate the stairs and basement, in order to avoid the hazard of darkness.

collateral estoppel & res judicata

Incidentally, during the litigation, another case held Con Ed was “grossly negligent” in causing the blackout. *Food Pageant v. Consolidated Edison Co.*, 429 N.E.2d 738 (N.Y. 1981). Strauss successfully argued that this holding in *Food Pageant* collaterally estopped Con Ed from denying negligence in his case. *Strauss*, 469 N.Y.S.2d at 949; see also *Royal Farms, Inc. v. City of New York*, 480 N.Y.S.2d 140, 141 (N.Y.A.D. 2 Dept., 1984) (“Special Term correctly held that defendant Consolidated Edison Company of New York, Inc. (Con Edison) is precluded, pursuant to the doctrine of collateral estoppel, from contesting the issue of its gross negligence in causing the blackout which occurred on July 13, 1977 (*Shaid v. Consolidated Edison Co. of N.Y.*, ...

467 N.Y.S.2d 843 [, 850 (N.Y.A.D. Oct 1983) ('The issue of gross negligence in the electric power blackout is a highly technical question.')]]; *Goldstein v. Consolidated Edison Co. of N.Y.*, 93 A.D.2d 589, 462 N.Y.S.2d 646, *aff'd*, 62 N.Y.2d 936, 479 N.Y.S.2d 213, 468 N.E.2d 51).”).

What about early cases in which plaintiff's claims against Con Ed had already been dismissed because of plaintiff's inability to prove gross negligence or because of a judge's erroneous decision that there was no gross negligence by Con Ed? In those early cases, the judge's decision was res judicata that prevented plaintiff from resuming the case after *Food Pageant* found gross negligence. *Royster v. Consolidated Edison*, 452 N.Y.S.2d 146 (N.Y.City Civ.Ct. 1982). Plaintiffs' lawyers want to file early in an attempt to get a judgment paid before Con Ed is bankrupt, but early filers do not obtain the benefit of later court decisions.

Landrum v. Florida Power & Light (Fla.App. 1987)

Landrum v. Florida Power & Light Co., 505 So.2d 552 (Fla.App. 3 Dist. 1987), *review denied*, 513 So.2d 1061 (Fla. 1987).

Plaintiff alleged that the electric utility negligently terminated service to their home. As a result of no electricity, plaintiff used a candle for illumination. The candle caused a fire in the home, and plaintiffs sued the utility.

The trial court dismissed the complaint, because it “failed to state a cause of action for negligence because FP & L's tariff operates as a limitation of liability for ordinary negligence.” The appellate court affirmed.

The tariff said:

Continuity of Service. The company will use reasonable diligence at all times to provide continuous service at the agreed nominal voltage, and shall not be liable to the customer for complete or partial failure or interruption of service, or for fluctuations in voltage, resulting from causes beyond its control or through the ordinary negligence of its employees, servants or agents

Landrum, 505 So.2d at 553, n.1.

The Florida appellate court cited *Food Pageant, Inc. v. Consolidated Edison Co.*, 429 N.E.2d 738 (N.Y. 1981); *Lee v. Consolidated Edison Co.*, 413 N.Y.S.2d 826 (Sup.Ct. 1978); and three trial court opinions from New York as authority for “the complaint fails to state a cause of action for negligence because FP & L's tariff operates as a limitation of liability for ordinary negligence.” *Landrum*, 505 So.2d at 553.

The Florida appellate court said:

It is well established that a limitation of liability contained in a tariff is an essential part of the rate, and that the consumer is bound by the tariff regardless of his knowledge or assent thereto. E.g., *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094 (1921); *Florida Power Corp. v. Continental Laboratories, Inc.*, 243 So.2d 195 (Fla. 4th DCA 1971). Tariffs are even recognized as having the force and effect of law. *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967). The justification for an electric company filing a tariff, as in this case with the Public Service Commission, is to regulate the rate practices for the services furnished. *Florida Power & Light Co. v. State ex rel. Malcolm*, 107 Fla. 317, 144 So. 657 (1932). For example, it has been reasoned that “[a] broadened liability exposure must inevitably raise the cost and thereby the rates, of electric service.” *Lee*, 413 N.Y.S.2d at 828 (citing *Abraham v. New York Tel. Co.*, 85 Misc.2d 677, 681, 380 N.Y.S.2d 969, 972 (Sup.Ct. 1976)). As stated by the United States Supreme Court, “[f]or all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the [utility] of the expense of insuring itself against liability for damage ... and is a reasonable rate so computed.” *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 418, 79 S.Ct. 1210, 1215, 3 L.Ed.2d 1334, 1340-41 (1959). Therefore, a tariff validly approved by the Public Service Commission, including a limitation of liability for ordinary negligence, resulting in the interruption of the regular supply of electric service, is valid. *LoVicko*, 420 N.Y.S.2d at 825-26; *Lee*, 413 N.Y.S.2d at 828; see 73B C.J.S.2d Public Utilities § 6 (1983).

Because we hold that the FP & L tariff operates as a bar to liability for ordinary negligence, we decline to address the foreseeability issue as it relates to negligence. We distinguish the case of *Southeast Bank, N.A. v. J.A.M.A. Mobile Home Parks Ltd.*, 490 So.2d 1057 (Fla. 1st DCA 1986) (owner and operator of trailer liable for defective wiring which caused termination of electricity necessitating use of a candle which started fire), relied upon by appellants, on the basis that in *Southeast Bank*, there was no tariff to consider and no potential liability of a power company.

We uphold the trial court's conclusion that the complaint fails to state a cause of action for ordinary negligence on the ground that the FP & L tariff precludes such a finding. Gross negligence, which is not covered by the FP & L tariff, has been defined as “a course of conduct ... such that the likelihood of injury to other persons or property is known by the actor to be imminent or ‘clear and present’....” *Glaab v. Caudill*, 236 So.2d 180, 184 (Fla. 2d DCA 1970) (quoting *Carraway v. Revell*, 116 So.2d 16, 23 (Fla. 1959)). We decline to hold that a mistaken interruption in electrical power is sufficient to state a cause of action for gross negligence. See *Glaab v. Caudill*, 236 So.2d at 180; 38 Fla.Jur.2d Negligence § 3 (1982); cf. *Bromer v. Florida Power & Light Co.*, 45 So.2d 658 (Fla. 1949) (en banc) (suit for breach of implied contract for failure to furnish a continuous 220 voltage failed to state a cause of action where negligence insufficiently alleged; public utility “not required to become an insurer” absent an express duty). *Contra Veals v. Consolidated Edison Co.*, 114 Misc.2d 626, 452 N.Y.S.2d 153 (Civ.Ct. 1982) (wrongful “shut-off” of power constituted gross negligence where electric bill had been paid).

Landrum, 505 So.2d at 554.

Singer v. Baltimore Gas and Elec. (Md.App. 1989)

Singer Co., Link Simulation Systems Div. v. Baltimore Gas and Electric Co., 558 A.2d 419 (Md.App. 1989).

Industrial user sued electric utility for a series of outages, each with a duration from minutes to seven hours. As in many cases involving outages, the loss to the customer is greater than no work during the duration of the outage. "Upon the restoration of electric power after an outage, four Singer employees usually were required to devote approximately two hours to restore the simulator computer facility; another four employees usually were required to devote approximately three hours to repair and restart the simulator equipment." 558 A.2d at 422-423. In this way, a one-minute outage could cause at least three hours of recovery effort. The utility admitted there were defects on a section of an underground high-voltage cable.

The user sued the utility for breaches of the Uniform Commercial Code (UCC) implied warranties of merchantability and fitness for a particular use. The trial court rejected the claim and the appellate court affirmed, because electricity was *not* a "good" under the UCC. The appellate court then discussed the tariff that limited recovery for outages:

The case at bar involves the extent of BG & E's liability for failure to supply electricity to a customer. In that regard, Section 2.5 of BG & E's Tariff, as approved by the Public Service Commission, provides as follows:

[BG & E] is not liable for any loss, cost, damage or expense to any Customer occasioned by any failure to supply electricity according to the terms of the contract or by any interruption or reversal of the supply of electricity, if such failure, interruption or reversal is due to storm, lightning, fire, flood, drought, strike, or any cause beyond the control of [BG & E], or any cause except willful default or neglect on its part.

Initially, then, we are called upon to construe the phrase "willful default or neglect" in the context of its usage in Section 2.5 of the Tariff.

....

In construing the phrase in question, we are cognizant that the term "neglect," standing alone, denotes negligence. See Black's Law Dictionary 930 (5th Ed.1979). Accordingly, any construction of Section 2.5 which predicates BG & E's liability for power interruptions upon "willful default" or "neglect" would effectively result in BG & E being held liable for power interruptions resulting from ordinary negligence. We recognize, however, that power outages are oftentimes an inevitable consequence of supplying electrical power and that the extent of a utility's liability exposure and utility rates are inextricably intertwined. Thus, we believe such a construction would severely undermine the public policy consideration of maintaining utility rates at reasonable levels. Accord *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417, 79 S.Ct. 1210, 1214, 3 L.Ed.2d 1334 (1959); *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571, 41 S.Ct. 584, 586, 65 L.Ed. 1094 (1921); *Waters v. Pacific Tel. Co.*, 12 Cal.3d 1, 6-7, 114 Cal.Rptr. 753, 756, 523 P.2d 1161, 1164 (1974); *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga.App. 798, 800, 204 S.E.2d

457, 459-60 (1974); *Lee v. Consol. Edison Co.*, 98 Misc.2d 304, 305, 413 N.Y.S.2d 826, 828 (App.Term 1978); *Abraham v. New York Tel. Co.*, 85 Misc.2d 677, 680-81, 380 N.Y.S.2d 969, 972 (N.Y.County 1976). Furthermore, as it is beyond cavil that the singular purpose of Section 2.5 is to limit BG & E's liability for power outages, we are convinced that such a construction would be inconsistent with common sense. For these reasons, we construe Section 2.5 as limiting BG & E's liability to those instances where it is sufficiently established that a power interruption was due to the utility company's "willful default" or "willful neglect." We believe this interpretation comports with well settled principles of statutory construction and effectuates the rationale for limiting the utility company's liability with respect to power outages.

We shall now undertake to define "willful default" and "willful neglect" as those phrases are used in Section 2.5. In that regard, we note the general rule that terms used in a provision, not there specifically defined, should be construed as having their ordinary commonly accepted meanings. *Baltimore Gas & Elec. Co. v. Bd. of Comm'rs*, 278 Md. 26, 31, 358 A.2d 241 (1976); *Scoville Serv., Inc. v. Comptroller of the Treasury*, 269 Md. 390, 395, 306 A.2d 534 (1973); *Gaspin v. Browning*, 265 Md. 552, 555, 290 A.2d 507 (1972); *Arundel Supply Corp. v. Cason*, 265 Md. 371, 377, 289 A.2d 585 (1972). A primary meaning of the word "willful" in *Black's Law Dictionary* is "[i]ntending the result which actually comes to pass; designed; intentionally; not accidental or involuntary." *Black's*, supra, at 1434. A primary definition of the term "default" is "the omission or failure to perform a legal or contractual duty." *Id.*, at 376. *Accord Easterwood v. Willingham*, 47 S.W.2d 393, 395 (Tex.Civ.App. 1932). Thus, we conclude that the phrase "willful default" means an intentional omission or failure to perform a legal or contractual duty. We further believe that the phrase "willful neglect" suggests intentional, conscious, or known negligence—a knowing disregard of a plain or manifest duty. See *Black's*, supra, at 1435; *Puget Sound Painters, Inc. v. State*, 45 Wash.2d 819, 822, 278 P.2d 302, 303-04 (1954).

Singer Co., Link Simulation Systems Div. v. Baltimore Gas and Elec. Co., 558 A.2d 419, 427-428 (Md.App. 1989).

FMR Corp. v. Boston Edison Co. (Mass. 1993)

FMR Corp. v. Boston Edison Co., 613 N.E.2d 902 (Mass. 1993) (two cases each involving an electrical outage, one in 1983 and the other in 1987).

In 1993, the Massachusetts Supreme Court discussed a case involving liability for an electrical outage.

1. Negligence claims for economic damage. We have recently affirmed that purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage. *Garweth Corp. v. Boston Edison Co.*, 415 Mass. 303, 613 N.E.2d 92 (1993). We see no reason to abandon this long-standing rule. See *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 107, 533 N.E.2d 1350 (1989); *Stop & Shop Cos. v. Fisher*, 387 Mass. 889, 893-894, 444 N.E.2d 368 (1983); *Marcil v. John Deere Indus. Equip. Co.*, 9 Mass.App.Ct. 625, 630-631, 403 N.E.2d 430 (1980). We continue to align ourselves with the majority of jurisdictions which have considered the issue. See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-875, 106 S.Ct. 2295, 2299-2304, 90 L.Ed.2d 865 (1986); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51-53 (1st Cir. 1985); *State ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020 (5th Cir. 1985), cert. denied sub nom. *White v. M/V Testbank*, 477 U.S.

903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986); *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 756 F.Supp. 620, 629 (D.Mass. 1991), modified, 973 F.2d 988 (1stCir. 1992); RESTATEMENT (SECOND) OF TORTS § 766C (1979).

2. *Contractual right to recover damages.* The plaintiffs argue that they are entitled to prevail on their contract claims that Edison breached its contract to supply electricity and is, therefore, liable. As support for this theory, they rely on the tariff filed by Edison with the Department of Public Utilities as creating by implication a contract with Edison. Condition number 14 of the tariff contains an exculpatory provision exempting Edison from liability for power outages, interruptions, or inadequate supplies of electricity if Edison's failure "is without wilful default or gross negligence." Even if, as the plaintiffs contend, Edison committed gross negligence, there is nothing in the tariff that creates a right to recover for economic loss absent physical damage. The judge below correctly reached the conclusion that the principles precluding recovery in negligence for economic losses bar this action and "[c]ouching the allegations in terms of breach of contract ... does not change the prohibition." See *Stop & Shop Cos. v. Fisher*, supra 387 Mass. at 893-894, 444 N.E.2d 368; *New England Power Co. v. Riley Stoker Corp.*, 20 Mass.App.Ct. 25, 35, 477 N.E.2d 1054 (1985); *Marcil v. John Deere Indus. Equip. Co.*, 9 Mass.App.Ct. 625, 632 n. 6, 403 N.E.2d 430 (1980). Furthermore, it must be understood that the extensive legislative regulation of Edison's rates and practices takes the furnishing of electricity out of the realm of contract law. *Boston Edison Co. v. Boston*, 390 Mass. 772, 776-777, 459 N.E.2d 1231 (1984). The tariff in question does not create a contract. The judges correctly granted summary judgment. *FMR Corp. v. Boston Edison Co.*, 613 N.E.2d 902, 903-904 (Mass. 1993). Cited with approval in *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 876 (9thCir. 2007) ("Most courts that have applied the economic loss doctrine beyond product liability cases have done so to bar recovery of economic loss in negligence and strict liability.").

Milliken & Co. v. Consolidated Edison (N.Y. 1994)

Milliken & Co. v. City of New York, 619 N.Y.S.2d 714 (N.Y.A.D. 1 Dept. 1994), affirmed as modified sub nom., *Milliken & Co. v. Consolidated Edison Co. of New York, Inc.*, 644 N.E.2d 268 (N.Y. 1994).

In August 1983, a water main in New York City ruptured and flooded a subbasement of a building where Con Ed maintained a substation. The flood interrupted electric power to Manhattan's garment district for four days. The four-day outage was bad enough, but it occurred during the semiannual Buyer's Week, which caused some vendors to lose business for the next six months.

Several tenants of buildings affected by the outage sued Con Ed, and also sued the city for causing the flood. Unfortunately, the tenants were not customers of Con Ed, instead the building owners contracted with Con Ed for electrical energy. On that authority of *Strauss*, 482 N.E.2d 34 (N.Y. 1985), Con Ed has no liability to noncustomers, so the trial court dismissed plaintiffs' claims.

The intermediate appellate court went through some legal contortions to try to distinguish (1) the garment-industry tenants from (2) tenants in an apartment building.

The plaintiffs in the consolidated actions before us fall into that category of identifiable and more or less permanent establishments in the area that might reasonably be recognized as reliant upon Con Edison's services for their commercial existence, as opposed to the more transient mass of potential plaintiffs who were the subject of the Court's caution in *Strauss*. It is their identifiable and definable nature that preserves these tenants' standing within the orbit of duty owed by Con Edison.

Milliken & Co. v. City of New York, 619 N.Y.S.2d 714, 716 (N.Y.A.D. 1994).

Note the invented "permanent" businesses vs. the "transient mass" of people. Strauss was not some homeless bum who moved from city to city, he was a 77 y old retired person. New businesses often fail within a few years, while there are people who live their entire lives (sixty to ninety years) in one city — businesses are not necessarily more permanent than people.

... we hold that Con Edison's zone of duty encompasses those tenants who can prove a relationship with the utility by having assumed an obligation in their leases to reimburse the landlord for electrical power on an apportioned basis, despite a lack of direct metering.

Milliken & Co. v. City of New York, 619 N.Y.S.2d 714, 715 (N.Y.A.D. 1994).

In *Milliken & Co. v. Consolidated Edison Co. of New York, Inc.*, 644 N.E.2d 268 (N.Y. 1994), the highest court in New York State reversed the intermediate appellate court and reaffirmed the rule in *Strauss*. This is a straightforward, unremarkable decision.

The original opinion of the intermediate appellate court was issued on 9 Dec 1993 and published at 605 N.Y.S.2d 682. Five days *after* the New York Court of Appeals decision in this case, the intermediate appellate court vacated their original opinion and issued the opinion quoted above. Although the revised opinion was issued on 6 Dec 1994, it is effective retroactively (*nunc pro tunc*) a year earlier, on the date of their original opinion.

Forte Hotels v. Kansas City Power & Light (Mo.App. 1995)

Forte Hotels, Inc. v. Kansas City Power & Light Co., 913 S.W.2d 803 (Mo.App. W.D. 1995).

In March 1991, there was an 18-hour outage at a hotel reservations center in Kansas, which prevented the hotel chain from processing reservations.

... one of KCP & L's underground electrical cables failed at an office building in Mission, Kansas, causing a power outage inside the building. When one of KCP & L's linemen attempted to unbolt the failed cable from the bushing where it was bolted to the transformer, the transformer's ceramic electrical bushing broke. As a result, poly-chlorinated biphenyl (PCB) oil flowed out of the transformer and onto and under the concrete pavement inside the office building's underground garage. Because of the broken electrical bushing, the transformer had to be replaced, and the PCB oil spill had to be cleaned up to meet applicable EPA standards. Electrical service was restored ... after an outage of approximately eighteen hours.

Forte Hotels, 913 S.W.2d 803-804.

The hotel chain sued the utility, alleging “negligence and breach of contract” and “seeking lost revenue, lost labor and other damages”. The trial court granted summary judgment for the utility because of its tariff. The hotel chain appealed.

The relevant parts of the tariff say:

§ 7.06 CONTINUITY OF SERVICE:

The Company will use reasonable diligence to supply continuous electric service to the Customer but does not guarantee the supply of electric service against irregularities or interruptions. The Company shall not be considered in default of its service agreement with the Customer and shall not otherwise be liable for any damages occasioned by any irregularity or interruption of electric service.

§ 7.12 LIABILITY OF COMPANY:

The Company shall not be considered in default of its service agreement and shall not otherwise be liable on account of any failure by the Company to perform any obligation if prevented from fulfilling such obligation by reason of any delivery delay, breakdown, or failure of or damage to facilities, an electric disturbance originating on or transmitted through electric systems with which the Company's system is interconnected, act of God or public enemy, strike, or other labor disturbance involving the Company or the Customer, civil, military or governmental authority, or any cause beyond the control of the Company.

Forte Hotels, at 804.

Although the litigation was in a Missouri state court, “[t]he parties agree that Kansas substantive law is applicable, so a choice of law analysis will not be undertaken.” *Forte Hotels*, at 804. The Missouri appellate court described Kansas law:

But while the Kansas Supreme Court acknowledged, in *Shawnee Milling Co.*, 166 P. [493] at 494–95 [(Kan. 1917)], that “liabilities are a proper element of consideration in rate making,” it nevertheless adopted a reasonableness test. The Court found such exculpatory clauses which relieve public utilities “from exercising their employment with diligence, skill, and integrity contravene[] public policy as well as the law....” *Id.* at 495 (quoting Jones' TELEGRAPH AND TELEPHONE COMPANIES (2dEd. 1916) § 317).

Forte Hotels, at 805.

The Kansas Supreme Court has been consistent in its treatment of exculpatory provisions in cases involving public utilities. Reading *Shawnee Milling Co.* and *McNally* [v. *Western Union Tel. Co.*, 353 P.2d 199 (Kan. 1960)] together, it is apparent that, when a public utility tariff is involved, it does not matter whether the limiting language appears in the contract or in the tariff — in either case, the analysis is the same. Both cases apply a rule of reasonableness, and both cases look with disfavor on contractual or tariff provisions which purport to absolve public utilities from liability for negligence. Clearly, the case at bar involves just such a tariff provision. KCP & L does not cite, and this court has not found, any statutory provision authorizing KCP & L's limitation of its liability. Consequently, the reasonableness of the tariff provision purporting to limit KCP & L's liability is a matter for judicial determination. *McNally*, 353 P.2d at 204.

Forte Hotels, at 806.

The court tersely said:

Applying the analysis of Shawnee Milling Co. here, this court concludes that the KCP & L tariff provisions unreasonably limit the amount of KCP & L's liability and that the tariff provisions are therefore unenforceable.

Forte Hotels, at 806.

The same Missouri intermediate appellate court that decided *Forte Hotels*, four years later decided a similar case, *Danisco Ingredients*, which I discuss next, even though it is out of chronological sequence. Note that *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 999 S.W.2d 326, 333 (Mo.App.W.D. 1999) clarifies part of *Forte Hotels*: Kansas will permit a tariff to disclaim liability for ordinary negligence.

Danisco v. Kansas City Power & Light (Kan. 1999)

Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 999 S.W.2d 326 (Mo.App.W.D. 1999); *Danisco Ingredients USA, Inc. v. Kansas Power & Light Company*, 986 P.2d 377 (Kan. 1999) (answering certified question).

Danisco manufactured food additives at a plant in Kansas. They complain of three outages by the electrical utility during the 1993 year. The first outage was caused by a fault in the utility's underground cable. The second outage was caused by failures of the utility's equipment. The second outage lasted five hours, but Danisco spent 75 hours recovering from this outage, putting the production line out of service for a total of 80 hours.

Danisco sued the utility in a Missouri state court, although Kansas law applied. Danisco claimed economic loss and property damage. The trial court granted summary judgment to Danisco on authority of *Forte Hotels*. The utility appealed.

The tariff was identical to that in *Forte Hotels*, quoted at page 27, above.

The utility argued that public policy considerations of liability for outages in electrical service were not considered in either *Forte Hotels* or the telephone/telegraph cases cited in *Forte Hotels*. *Danisco*, 999 S.W.2d at 329.

The Missouri court certified questions to the Kansas Supreme Court:

We also reject KCP & L's argument to the extent that it claims that the Kansas courts would uphold the tariff even in the face of willful and wanton misconduct. Every case cited above has noted approvingly the rule that a utility cannot limit its liability for its own gross negligence or willful or wanton misconduct. Even *Burdick* [*v. Southwestern Bell Tel. Co.*, 9 Kan.App.2d 182, 675 P.2d 922 (1984)] noted that the case before it did not involve willful misconduct, just simple negligence. Controlling precedent thus requires us to conclude that

the tariffs are invalid to the extent that they purport to relieve the company of liability for gross negligence or willful and wanton misconduct.

In light of the additional briefing on this issue in this case, briefing which was not available in *Forte Hotels*, however, we agree with KCP & L that the public policy considerations which will determine the reasonableness of KCP & L's limitation of liability for simple negligence in this case, involving an electric utility serving hundreds of thousands of customers, are different than those which were at issue in *Shawnee Milling* and *McNally*. We continue to believe that *Burdick* misinterpreted the latter two cases, and that it is inadequate to guide us in our resolution of the instant case.

Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 999 S.W.2d 326, 331, again at 340 (Mo.App.W.D. 1999) (certification order to Kansas Supreme Court in 1998).

The Kansas Supreme Court began its response by discussing the law in other states:

Generally, other jurisdictions have held that rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services are reasonable and will be upheld. [citing thirteen cases] The theory underlying the enforcement of liability limitations is that because a public utility is strictly regulated its liability should be defined and limited so that it may be able to provide service at reasonable rates. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. at 109, 825 P.2d 588. See *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1, 7, 114 Cal.Rptr. 753, 523 P.2d 1161 (1974) (stating that “[r]easonable rates are in part dependent upon such a rule [limiting liability]”). As the court in *Landrum v. Florida Power & Light Co.* stated: “[a] broadened liability exposure must inevitably raise the cost and thereby the rates, of electric service.” 505 So.2d at 554.

The same cannot be said, however, where the promulgated rules purport to limit liability beyond that caused by ordinary negligence. It is true that a few jurisdictions have allowed public utilities to enact rules which limit their liability for even gross negligence. See *Professional Answering Serv. v. Chesapeake Tel.*, 565 A.2d at 63-65; *In re Ill. Bell Switching*, 161 Ill.2d at 244, 204 Ill.Dec. 216, 641 N.E.2d 440. However, the majority of jurisdictions have held limitations on liability to be unenforceable with regard to claims of gross negligence or willful and wanton conduct. [citations to six cases] Other jurisdictions have predicated the reasonableness of a limitation on liability on whether it purports to limit more than ordinary negligence. See *Computer Tool & Engineering v. NSP*, 453 N.W.2d at 573 (finding that limitation of liability was reasonable because it was narrowly tailored and did not attempt to exonerate power company from injuries not caused by disturbances in power, gross negligence, or willful or wanton acts); *Lee v. Consolidated Edison*, 98 Misc.2d at 306, 413 N.Y.S.2d 826 (exculpatory clause is reasonable “so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence”).

Danisco Ingredients USA, Inc. v. Kansas Power & Light Company, 986 P.2d 377, 383-384 (Kan. 1999).

The Kansas Supreme Court said:

A public utilities' liability exposure has a direct effect on its rates, and this court, as well as the majority of jurisdictions addressing the question of such a liability limitation, has concluded that it is reasonable to allow some limitation on liability such as that for ordinary negligence in connection with the delivery of the services. See *Landrum v. Florida Power & Light Co.*, 505 So.2d at 554. However, consistent with our prior case law in *Telegraph Co. v. Crall*, 38 Kan. 679, 17 P. 309, and the law of the majority of jurisdictions which have addressed the

question, any attempt to limit liability for greater than ordinary negligence is not reasonable and, is therefore, unenforceable.

Danisco Ingredients USA, Inc. v. Kansas Power & Light Company, 986 P.2d 377, 385 (Kan. 1999).

The Kansas Supreme Court concluded:

Other jurisdictions addressing this question have held that limitations on liability contained in tariffs should be enforced insofar as they are lawful and declared invalid only insofar as they seek to limit liability for greater than ordinary negligence. See *Sou. Bell Tel. Co. v. Invenchek*, 130 Ga.App. at 800-01, 204 S.E.2d 457; *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d at 603; *Behrend v. Bell Tele. Co.*, 242 Pa.Super. at 74-75, 363 A.2d 1152. We agree and believe that such a rule is sound as a matter of law and public policy. It is clear that KCP & L overreached in attempting to insulate itself from its own willful or wanton activity. However, what is also clear is that the rates eventually approved were in part dependent upon the utility receiving some protection from liability. Giving consideration to the role played by the KCC in the rate-making process, its intent and responsibility to insure reasonable rates to customers, and the intent of KCP & L to provide reasonable service with its need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable profit, we believe it reasonable and sound public policy to interpret the tariffs in question as limiting the liability of KCP & L to its customers for its ordinary negligence only.

Therefore, in answer to the questions posed by the Missouri Court of Appeals, we hold that even though it is not reasonable to allow a tariff to become effective to the extent that it relieves KCP & L from liability for its willful or wanton misconduct, the Missouri Court of Appeals, Western District, should strike down so much of the tariffs as purport to limit liability for gross negligence or willful or wanton misconduct and enforce the tariffs as they relate to a limitation of liability for ordinary negligence only.

Danisco Ingredients USA, Inc. v. Kansas Power & Light Company, 986 P.2d 377, 386 (Kan. 1999). Reading the entire case, it is clear that the phrase “willful or wanton misconduct” standing alone is code for “gross negligence or willful or wanton misconduct”.

The Missouri court then concluded:

In accordance with the Kansas Supreme Court's response to our certified questions, we hold that the trial court did not err insofar as it held invalid KCP & L's purported disclaimer of its liability for willful and wanton misconduct. Such a disclaimer is not reasonable or enforceable under Kansas law. However, the trial court did err in refusing to give effect to so much of the tariff as disclaimed liability for KCP & L's own simple negligence. The Kansas Supreme Court has held that such a disclaimer is reasonable and sound public policy in light of the oversight provided by the KCC and the KCC's intent and responsibility to insure reasonable rates for reasonable service. The Kansas Supreme Court has also held that it would give effect to such a disclaimer of liability for ordinary negligence even though contained in a tariff that purported to also disclaim liability for willful and wanton misconduct. To the extent our decision in *Forte Hotels* holds to the contrary, it is no longer to be followed.

For these reasons, we hold the disclaimers of liability contained in Rules 7.06 and 7.12 are valid and enforceable insofar as they disclaim liability for simple negligence, but we find them to be void and unenforceable, as against public policy, insofar as they purport to limit KCP & L's liability for its own willful and wanton misconduct.

Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co., 999 S.W.2d 326, 333 (Mo.App.W.D. 1999).

The final result is not known.

Bamberger v. Indianapolis Power & Light Co. (Ind.App. 1996)

Bamberger & Feibleman v. Indianapolis Power & Light Co., 665 N.E.2d 933 (Ind.App. 1996).

Two law firms sued a electric utility in tort for losses sustained as a result of two-day electricity outage. Trial court granted summary judgment for the utility, because of economic loss rule. Appellate court affirmed.

Bamberger and Cannavo next contend the trial court erred when it held as a matter of law that they could not recover on a negligence theory. IPL responds that summary judgment was properly entered in its favor because economic losses that do not result from physical harm to person or property are not recoverable in a negligence action. We agree that the damages which the law firms allege to have incurred are not recoverable.

....

A duty in negligence may arise by statute or by operation of law. *South Eastern Ind. Natural Gas Co. v. Ingram*, 617 N.E.2d 943, 951 (Ind.Ct.App. 1993), trans. denied. Indiana Code § 8-1-2-4 imposes upon IPL a duty to furnish reasonably adequate service and facilities. IPL concedes that it must exercise "reasonable diligence in providing a regular and uninterrupted supply of energy." In addition, our courts have recognized the common law duty of a public utility to conform its conduct for the benefit of the public, its customers and third persons who, with reasonable foreseeability, might be affected by the utility's provision of service. *Ingram*, 617 N.E.2d at 951.

Despite the existence of a duty to exercise reasonable diligence, IPL maintains that Bamberger and Cannavo did not incur a compensable injury. Indiana recognizes recovery of lost profits in a tort action. *Babson Bros. Co. v. Tipstar Corp.*, 446 N.E.2d 11, 15 (Ind.Ct.App. 1983), trans. denied; *Indiana Bell Tel. Co. v. O'Bryan*, 408 N.E.2d 178, 184 (Ind.Ct.App. 1980). However, when a negligence action is premised on the failure of a product to perform as expected, economic losses are not recoverable unless such failure also causes personal injury or physical harm to property other than to the product itself. *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1091 (Ind. 1993). This principle has been termed the economic loss rule. See *Runde v. Vigus Realty, Inc.*, 617 N.E.2d 572, 575 (Ind.Ct.App. 1993). Economic loss is defined as:

the loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold, and includes such incidental and consequential losses as lost profits, rental expense and lost time.

Martin Rispens, 621 N.E.2d at 1089.

In *Martin Rispens*, a watermelon farmer's crop was ruined due to a fruit blotch allegedly caused by bacteria from watermelon seeds. The farmer sued the seed retailer and seed grower for lost profits and sought recovery on several theories, one of which was negligence. The supreme court held that economic losses were not recoverable in the negligence action. *Id.* at 1089-91.

Our court has been reluctant to extend the economic loss rule to all actions for negligence. See, e.g., *Runde*, 617 N.E.2d at 575. Here, as we have indicated, the factual basis for the claim rests upon the failure to deliver the product, electricity. In *Martin Rispens*, the product was manufactured and delivered, but the fact that the product was in the hands of the consumers did not determine the outcome in that case. Although there is a distinction between electricity that is delivered but fails to perform as expected and electricity that is not delivered at all, the distinction does not matter for purposes of the economic loss rule.

At the heart of the question of whether economic damages can be recovered under a negligence theory is the basic distinction between the theories of tort and contract law. *Runde*, 617 N.E.2d at 574 (citation omitted). Negligence theory protects interests related to safety or freedom from physical harm. This includes not only personal injury but damage caused by defective personal property. *Id.* at 574-75. However, when there is no accident and no physical harm so that the only loss is pecuniary in nature, courts have denied recovery under the rule that purely economic interests are not entitled to protection against mere negligence. *Id.* at 575 (citing W. Prosser, *HANDBOOK ON THE LAW OF TORTS* § 101, at 665 (4th ed. 1971)).

Here, Bamberger and Cannavo seek damages consisting of lost billable hours, lost rental value, and lost use of parking facilities, which are solely economic losses. The law firms do not allege actual physical harm to persons or property. Rather, they contend that they suffered harm to their property interest in the practice of law when an interruption of electrical service prevented them from working. Citing Abraham Lincoln for the maxim that “a lawyer's time and advice are his stock in trade,” Bamberger and Cannavo argue that an impairment of their opportunity to practice law, to provide time and advice for a fee, is tantamount to physical harm to property. The firms cite no authority for that proposition, and we are not persuaded that an intangible property interest in the practice of law can suffer physical harm.

The law firms also characterize the economic loss rule as an “anachronism” and maintain that “had Appellants' luck been star-crossed and persons injured, Appellants could presumably recover.” Our supreme court has rejected this argument and concluded that the economic loss rule, based upon the distinction between contract and tort claims, is neither anachronistic nor turns on luck:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the ‘luck’ of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumers' demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

Martin Rispens, 621 N.E.2d at 1090 (quoting *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965)).

We decline Bamberger and Cannavo's invitation to equate the loss of the opportunity to practice law with physical harm to property. Absent injury to persons or property, Bamberger and Cannavo cannot recover economic damages. The undisputed facts in this action negate the damage element of the negligence claim. The trial court properly entered summary judgment in favor of IPL on that theory.

Bamberger & Feibleman v. Indianapolis Power & Light Co., 665 N.E.2d 933, 937-939 (Ind.App. 1996).

In Indiana, low-voltage electricity is considered a product. The appellate court characterized an outage as the nondelivery of a product:

Both the Indiana Product Liability Act and relevant case law establish that [Indianapolis Power & Light Co.] cannot be liable under the Act for an electrical power outage where, as here, no product was delivered.

Bamberger & Feibleman v. Indianapolis Power & Light Co., 665 N.E.2d 933, 937 (Ind.App. 1996). So the court rules that electricity is a product, but during an outage no product is being delivered, hence there is no products liability. An outage is arguably a defective product, because the acceptable product might be specified as a sinusoidal voltage with a frequency of 60 Hz, a voltage of approximately 120 V rms, and an ability to source at least 200 A rms with less than a ten volt rms decrease in potential. Because an outage is zero volts, the electrical product fails to meet specifications and is therefore defective. However, an outage is not dangerous.⁶ Furthermore, the economic loss rule kills any tort claim for consequential damages from an outage.

The law of contracts, or the Uniform Commercial Code, can protect a buyer who reasonably relies on a promise of a seller to deliver a product as scheduled. However, the utility's tariff typically prevents claims for outages, except when there is gross negligence. Because the plaintiff law firms filed only tort claims, they abandoned the possibility of recovering under contract law.

Auchan v. Houston Lighting & Power Co. (Tex. 1999)

Auchan USA, Inc. v. Houston Lighting & Power Co., 961 S.W.2d 197 (Tex.App. 1996), *rev'd*, 995 S.W.2d 668 (Tex. 1999) (reasonableness of tariff).

In June 1992, a retail supermarket suffered an outage caused by the failure of a distribution transformer. The electric utility took about 15 hours to restore electric power to the supermarket. During the outage, frozen food and other perishables in the supermarket were ruined. The cost of the lost food plus disposal costs and lost profits totalled \$ 276,170. The utility, relying on limitation of liability in its tariff, refused to pay for any damages, except for the cost of repairs of damaged computer equipment.

⁶ An unexpected restoration of electric power at the end of an outage could be dangerous, but that is not an issue in this case.

The supermarket's insurance company paid for \$ 227,498 of the losses, and then filed litigation against the utility for reimbursement. The supermarket joined the litigation, seeking payment of its unreimbursed losses. The complaint alleged "claims of negligence, gross negligence, and breach of contract to supply continuous power." 961 S.W.2d at 199. The trial court granted partial summary judgment for the utility, and the supermarket appealed.

The supermarket presented an expert witness who testified at deposition that the utility could have restored power more quickly. 961 S.W.2d at 202. The intermediate appellate court held such evidence created a fact issue that precluded summary judgment on the reasonableness of the tariff. The intermediate appellate court held that the large amount of lost merchandise, lost profits, and disposal costs that were not reimbursable under the tariff also created a fact issues that precluded summary judgment on the reasonableness of the tariff. 961 S.W.2d at 202-203. The utility then appealed to the Texas Supreme Court.

Houston Lighting and Power's tariff contained the following section:

Company will make reasonable provisions to supply steady and continuous electric service, but does not guarantee the electric service against fluctuations or interruptions. Company will not be liable for any damages, whether direct or consequential, including, without limitation, loss of profits, loss of revenue, or loss of production capacity, occasioned by fluctuations or interruptions unless it be shown that Company has not made reasonable provisions to supply steady and continuous electric service, consistent with the Customer's class of service, and in the event of a failure to make such reasonable provisions (whether as a result of negligence or otherwise), Company's liability shall be limited to the cost of necessary repairs of physical damage proximately caused by the service failure to those electrical facilities of Customer which were then equipped with the protective safeguards recommended or required by the then current edition of the National Electrical Code.

Auchan, 961 S.W.2d at 199, 995 S.W.2d at 669-670.

The Texas Supreme Court wrote:

A number of courts that have considered the validity of tariff provisions that limit a public utility's liability have enforced the tariffs as written. [citing seven cases]

Many jurisdictions require that a plaintiff show gross negligence or willful or wanton misconduct by the utility to recover damages beyond those provided in the tariff. [citing ten cases]

Only a few courts have held that tariff provisions purporting to exculpate a utility from its own negligence or that limit its liability for damages are unreasonable or invalid. See *McNally Pittsburg Mfg. Corp. v. Western Union Tel. Co.*, 186 Kan. 709, 353 P.2d 199, 203-05 (1960) (holding that no Kansas statute gives the Commission authority to limit a utility's liability); *Forte Hotels, Inc. v. Kansas City Power & Light Co.*, 913 S.W.2d 803, 804-06 (Mo.Ct.App. 1995) (applying Kansas law) (holding that the tariff's limitation of liability is unreasonable and unenforceable). But see *Burdick*, 675 P.2d at 925 (applying Kansas law and holding the tariff was reasonable). See *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62, 68-71 (1960) (holding that a regulatory commission cannot absolve a utility of liability for negligence through its tariff because that would contravene public policy). But see N.M. Stat. Ann. § 41-4-8 (Michie 1978) (providing that a New Mexico public utility is immune under that state's Tort Claims Act from liability for damages caused

by a failure to provide an adequate supply of gas, water, electricity, or other services). Cf. K.A. Drechsler, Annotation, Validity of Contractual Provision by One Other Than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence, 175 A.L.R. 8, 39–40 (1948) (stating that public policy prohibits power companies from contracting against their liability for negligence).

For the reasons we consider below, we are persuaded by the weight of authority in other jurisdictions that HL & P's PUC-approved tariff limiting the types of damages for which it will be liable should be given effect and that Auchan's negligence claims for damages other than those provided by the tariff are foreclosed.

Auchan, 995 S.W.2d at 671-672.

The Texas Supreme Court then noted the protecting the utility from liability from ordinary negligence would result in lower rates for customers.

The [Public Utility] Commission concluded that such provisions were not unreasonable as a general proposition because they resulted in lower utility rates, fair and reasonable treatment of all classes of customers, and the protection of a utility from liability for catastrophic loss and potential financial distress.

....

A number of state courts have also concluded that, absent a limitation of liability for ordinary negligence, utilities would be forced to raise rates charged to consumers. [citing thirteen cases]

.... Generally, the only electric utility customers who would suffer substantial economic damages would be commercial or industrial users. Losses paid to those commercial or industrial customers could be passed on to smaller customers, including residential users, in the form of higher rates. This consideration tends to support the conclusion that tariffs that limit economic damages are not unreasonable, even when the damages suffered are substantial.

Auchan, 995 S.W.2d at 673.

Obviously, economic losses (e.g., wages paid to idle employees during an outage, lost profits, etc.) are only applicable to businesses, not homes. But if businesses are not reimbursed for such losses by the utility, then either (1) businesses will increase their prices to recover the loss, or (2) businesses will purchase insurance, and increase their prices to recover the cost of insurance. Either way, the public ends up paying higher prices. Public policy arguments intended to lower costs to the public can only shift costs, because — in the end — someone must pay for losses.

Furthermore, spoiled food is damage to property, *not* an economic loss. The cost of disposing of spoiled food is also not an economic loss.

Finally, the Texas Supreme Court noted:

We express no opinion on whether a utility's tariff may limit its liability for gross negligence or willful misconduct.

Auchan, 995 S.W.2d at 675.

After the trial court granted partial summary judgment, the plaintiffs abandoned their gross negligence claim in order to get a final order that was immediately appealable. 961 S.W.2d at 199. So we will never know if plaintiffs could prove gross negligence and then have the utility pay damages to plaintiffs.

Grant v. Southwestern Electric Power (Tex. 2002)

Grant v. Southwestern Electric Power Co., 998 S.W.2d 383 (Tex.App.-Texarkana 1999), *superseded by*, 20 S.W.3d 764 (Tex.App.-Texarkana 2000), *rev'd in part*, 73 S.W.3d 211 (Tex. 2002).

A tree limb fell on utility's secondary neutral wire, causing voltage fluctuations inside home. Higher than normal rms voltage damaged television, video tape recorder, microwave oven, etc. The day after the utility fixed the problem, the wife experienced a strange personal injury to her face from a "streak of light" that apparently came from the electrical wiring or from an electrical appliance. 998 S.W.2d at 387, 20 S.W.3d at 768. This is *not* a case involving an outage, but I have included it in this essay because the relevant section of the tariff at issue includes outages. Homeowner sued the utility.

"The trial court granted summary judgment in favor of SWEPCO based upon the law and no evidence. SWEPCO moved for summary judgment on two theories: (1) that there was no evidence of negligence, [footnote omitted] gross negligence, or willful misconduct, and (2) that SWEPCO was not liable under its tariff on file with the Public Utility Commission (PUC), regardless of any alleged negligence, for voltage fluctuations due to an accident, a breakdown of power lines, or an act of God." 998 S.W.2d at 387.

Southwestern Electric Power's tariff contained the following section:

Company will make reasonable provisions to insure satisfactory and continuous service, but does not guarantee a continuous supply of electric energy or that the voltage, wave form or frequency of the supply will not fluctuate. The Company shall not be liable for damages occasioned by interruption, failure to commence delivery, or voltage, wave form or frequency fluctuation caused by interruption or failure of service or delay in commencing service due to accident to or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or, without limitation by the preceding enumeration, any other act or things due to causes beyond its control, to the negligence of the Company, its employees, or contractors, except to the extent that the damages are occasioned by the gross negligence or willful misconduct of the Company.

Grant, 998 S.W.2d at 391, 20 S.W.3d at 769-770, part quoted in 73 S.W.3d 214-215.

The intermediate appellate court followed the Texas Supreme Court's decision in *Auchan*. However, "[t]he Supreme Court in *Auchan* did not address either the duty an electric company owes the public or the issue of a tariff attempting to limit liability for personal injuries." 20 S.W.3d at 770. The original appellate opinion of August 1999 was superseded by a second opinion in March 2000.

The intermediate appellate court concluded:

Grant's petition included one cause of action — negligence — with two types of damages — economic and personal injury. The construction of the tariff and the application of *Auchan* are both vital to this case. The Texas Supreme Court ruling in *Auchan* applies only to economic damages occasioned by negligence. Grant's property damages claims based on ordinary negligence are subject to the tariff's limitation of liability, and summary judgment was appropriate.

SWEPSCO filed motions for summary judgment based on both a regular summary judgment standard and a no-evidence summary judgment standard. The liability limitation in the tariff as to personal injuries is prima facie unconscionable. Accordingly, the regular summary judgment against Grant's personal injury claims based on ordinary negligence was error. As for the no-evidence summary judgment motion, Grant presented the trial court with more than a scintilla of evidence that SWEPCO owed her a duty; therefore, a no-evidence summary judgment on this issue was error. The trial court's summary judgment against Grant's personal injury cause of action is reversed and remanded for trial on the merits.

Grant never pleaded gross negligence to the trial court; therefore, gross negligence was not brought in this cause of action.

The summary judgment based on property damages due to ordinary negligence is affirmed. The summary judgment on personal injury is reversed and remanded for trial. *Grant*, 20 S.W.3d at 776.

The utility appealed to the Texas Supreme Court, which ruled that the tariff was valid and enforceable when applied to personal injuries, thereby reversing the court below. The intermediate appellate court chose to enforce the Uniform Commercial Code's limitation of liability instead of the tariff, but the Texas Supreme Court ruled that the tariff, as part of a "regulatory scheme", had precedence over the general provisions of the UCC. *Grant*, 73 S.W.3d at 219.

The Texas Supreme Court then addressed the reasonable of the tariff:

SWEPSCO's tariff provision limiting its personal-injury liability is reasonable because the provision is narrowly drawn and provides a remedy for SWEPCO's gross negligence or willful misconduct. See, e.g., *Landrum*, 505 So.2d at 554; *Computer Tool & Eng'g, Inc. v. Northern States Power Co.*, 453 N.W.2d 569, 573 (Minn.Ct.App. 1990) (A limitation for economic damages did not violate public policy because "liability remains for gross negligence as well as willful or wanton acts."); *Lee v. Consolidated Edison Co.*, 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (1978) (A limitation for economic damages is reasonable "so long as the company has not attempted to absolve itself from its own willful misconduct or gross negligence."). Furthermore, the tariff specifically states that SWEPCO "shall not be liable for damages occasioned by interruption, failure to commence delivery, or voltage, wave form, or frequency fluctuation caused by interruption or failure of service or delay in commencing service...." But it does not exclude personal-injury claims against SWEPCO that arise from SWEPCO's negligence in other contexts. For example, the tariff provision would not shield SWEPCO from liability if an employee, in the performance of his or her duties, injures a person while driving to a job site. Thus, SWEPCO's tariff provision limiting liability does not violate public policy, because it does not purport to relieve SWEPCO from liability under all conceivable circumstances. See *Computer Tool*, 453 N.W.2d at 573.

Grant, 73 S.W.3d at 220.

Two of the nine justices on the Texas Supreme Court thought the majority opinion went too far.

In Texas, absent actual knowledge, utilities are not liable for dangerous conditions on customers' property. [footnote citing *San Antonio Gas & Elec. Co. v. Ocon*, 105 Tex. 139, 146 S.W. 162, 164 (1912).] Because SWEPCO had no actual knowledge of any dangerous condition on Grant's property, it owed her no duty as a matter of law. I therefore agree with the Court's judgment. But I am not prepared to go where the Court boldly goes. Because SWEPCO owed no duty, the Court need not decide whether SWEPCO's tariff, which insulates it from liability for personal injury damages, is enforceable. That question I would not decide today.

Grant, 73 S.W.3d at 223 (Enoch, J., concurring, joined by Justice Jefferson).

I agree with the Court's judgment. But I am unwilling to decide that a utility may, through its tariff, disclaim liability for personal injury damages when precedent is virtually non-existent, our state law otherwise distinguishes economic from personal injury damages, and in order to reach this question, we must skip over a dispositive threshold question, the answer to which is well-settled in Texas. Consequently, I respectfully concur.

Grant, 73 S.W.3d at 225 (Enoch, J., concurring, joined by Justice Jefferson).

I think the concurring opinion has the better argument.

Florida traffic signal cases (1983-2005)

When I was searching for Florida cases involving electric power problems in May 2011, I was surprised to see a line of tort cases in which a traffic signal failed to operate because of an electric outage. When someone was injured in an automobile accident, they sued the electric utility for the outage! Every tort attorney knows about a causal chain, and the original tortfeasor *can* be legally responsible for foreseeable injuries by subsequent actors. But I think the negligence of an automobile driver at an intersection with a black⁷ traffic signal is a superseding event that relieves the electric utility for negligence — the automobile accident is the proximate cause of any injury.

In my view, traffic signals are not installed to prevent accidents, they are installed to regulate flow of traffic more efficiently than four-way stop signs. Indeed, when the traffic light fails during an outage, the law requires motorists to treat the black traffic light as a four-way stop sign. See, e.g., *Metropolitan Dade County v. Colina*, 456 So.2d 1233, 1235 (Fla.App. 1984). Further, violation of a statute is negligence per se. RESTATEMENT SECOND OF TORTS, § 286, 288B (1965) But this bright-line rule about an automobile accident being the proximate cause came to a crashing halt in Florida in 2005, in the *Goldberg* case that is discussed at page 41, below.

Moreover, some courts have held that the city (not the plaintiff) is the customer of the utility for electric power to traffic signals, so any tort duty is owed to city, not to plaintiff. These cases seem wrong to me. Privity of contract is *not* a requirement for tort plaintiffs. The utility should have a duty to general public to maintain power to streetlamps and traffic signals. See RESTATEMENT (SECOND) OF TORTS § 324A (1965).

⁷ I call a traffic signal that has gone dark in an electrical outage a “black” traffic signal.

The same legal issues of duty and proximate causation are present in both cases involving black traffic signals and cases involving failed street lamps at night. See the following cases:

- *Gin v. Yachanin*, 600 N.E.2d 836, 838 (Ohio App. 1991) (traffic signal case, but court also cites street lamp cases. "... the courts have held that when an electric company contracts with a city to provide the electricity for street lights and traffic signals, the electric company assumes no duty to the general public to provide such service.");
- *Vaughan v. Eastern Edison Co.*, 719 N.E.2d 520, 522 (Mass.App.Ct. 1999) (street light case. "The principle also applies to accidents caused by malfunctioning traffic signals.");
- *Levy v. Florida Power & Light Co.*, 798 So.2d 778, 780 (Fla.App. 2001) (traffic signal case. "*Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla.App. 1988) (outage at traffic signal)] is consistent with another line of cases holding that an electric company responsible for maintaining streetlights has no common law duty to motorists or pedestrians injured in vehicular accidents caused, at least in part, by inoperative streetlights.");
- *Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1114 (Fla. 2005) ("... some courts facing different facts have refused to impose a common law duty on electric utilities to ensure the supply of electricity to street lights and traffic signals. [citing cases]").

list of Florida cases (1983-2005):

- *Adoptie By and Through Adoptie v. Southern Bell Telephone & Telegraph Co. [and Florida Power & Light]*, 426 So.2d 1162 (Fla.App. 3dDist. 1983) (terse opinion holds utility not proximate cause);
- *Metropolitan Dade County v. Colina*, 456 So.2d 1233 (Fla.App. 3dDist 1984) (driver's negligence was proximate cause of accident), *petition for review denied*, 464 So.2d 554 (Fla. 1985), *disapproved by Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1117 (Fla. April 2005);
- *Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla.App. 4thDist. 1988) (utility had no duty to plaintiff), *review dismissed*, 541 So.2d 612 (Fla. 1989);
- *Derrer v. Georgia Elec. Co.*, 537 So.2d 593, 594 (Fla.App. 3dDist. 1988) (driver was proximate cause of accident: "Surely, inoperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located; such a bizarre occurrence is, in our view, beyond the scope of any fair assessment of the danger created by the inoperable traffic light."), *review denied*, 545 So.2d 1366 (Fla. 1989), *disapproved by Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1117 (Fla. April 2005);

- *Metropolitan Dade County v. Tribble*, 616 So.2d 59 (Fla.App. 3dDist. 1993) (followed *Colina*, driver is proximate cause of accident), *review denied*, 626 So.2d 210 (Fla. 1993), *disapproved by Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1117 (Fla. April 2005);
- *Martinez v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla.App. 3dDist. June 2001) (utility had no duty to pedestrian struck by automobile, where streetlight had failed), *quashed and remanded*, 863 So.2d 1204 (Fla. 18 Dec 2003) (remanded for consideration of recent case of *Clay Elec. Co-op., Inc. v. Johnson*, 873 So.2d 1182 (Fla. 2003));
- *Johnson v. Lance, Inc.*, 790 So.2d 1144 (Fla.App. 1stDist. July 2001), *aff'd sub nom. Clay Elec. Co-op., Inc. v. Johnson*, 873 So.2d 1182 (Fla. 18 Dec 2003) (electric utility does have duty to pedestrians to maintain streetlamp. Applied Restatement (Second) of Torts § 324A (1965).);
- *Levy v. Florida Power & Light Co.*, 798 So.2d 778 (Fla.App. 4thDist. Sep 2001) (car hit bicyclist at black traffic signal, court upheld summary judgment for two reasons: utility owed no duty to bicyclist and driver's negligence was proximate cause of accident), *review denied*, 902 So.2d 790 (Fla. Apr 2005);

other states

There are similar cases in other states, of which the following are significant:

- *Prager v. Motor Vehicle Acc. Indemnification Corp.*, 425 N.Y.S.2d 631 (N.Y.A.D. 1980), *aff'd*, 422 N.E.2d 824 (N.Y. 1981) (memorandum opinion) (black traffic light was proximate cause of hit-and-run driver striking pedestrian);
- *Todd v. Northeast Utilities*, 484 A.2d 247 (Conn.Super. 1984) (streetlight case, motion to dismiss complaint denied, utility had duty to public);
- *Long v. District of Columbia*, 820 F.2d 409, 417-419 (D.C.Cir. 1987) (utility had duty to traveling public);
- *Gin v. Yachanin*, 600 N.E.2d 836, 838-839 (OhioApp. 1991) (utility had *no* duty to general public);
- *White v. Southern Calif. Edison Co.*, 30 Cal.Rptr.2d 431, 435-439 (Cal.App. 1994) (streetlight case, utility had *no* duty to general public);

- *Rust Intern. Corp. v. Greystone Power Corp.*, 133 F.3d 1378 (11thCir. 1998) (accident in Georgia. Jury found utility 75% responsible, one driver 15%, and the other driver 10% at fault, affirmed);
- *Vaughan v. Eastern Edison Co.*, 719 N.E.2d 520 (Mass.App. 1999) (streetlight case, utility had *no* duty to general public);

Florida Power & Light Co. v. Goldberg (Fla. 2005)

Florida Power & Light Co. v. Goldberg, 856 So.2d 1011, 1033-1034 (Fla.App. 3 Dist. May 2002) (en banc), *quashed*, 899 So.2d 1105 (Fla. April 2005).

This is a landmark case involving the legal obligation of a utility for an outage that affects a traffic signal, with a subsequent automobile accident. There are some unusual facts in this case that may be responsible for a different legal outcome. The accident occurred in the village of Pinecrest, where the village manager had explicitly asked FP&L to notify him of all planned electrical outages. 856 So.2d at 1012. On the day of the accident, a high-voltage wire fell in the backyard of a residence, and the property owner called 911. Pinecrest dispatched a policeman and FP&L dispatched a crew to repair the fallen wire. After approximately an hour, FP&L personnel informed the policeman that he was no longer needed, and the policeman departed. About forty minutes after the policeman departed from the scene, FP&L, “[t]o insure the safety of the repairmen, ... decided to open the fuse to a pole located 100 to 150 feet from the light that controls the intersection of 67th Avenue and 120th Street, one of the major intersections in the Village of Pinecrest.” 856 So.2d at 1012. About 15 minutes after the fuse was opened, there was a fatal automobile accident at the intersection with the black traffic signal. 856 So.2d at 1013.

The trial court awarded plaintiffs, parents of deceased victim, \$37 million. A three-judge panel on the intermediate appellate court affirmed, but reduced the damages to \$10 million. 856 So.2d at 1026-1029. The intermediate appellate court then heard the case en banc, reversed the trial court and ordered a directed verdict for defendant-utility. 856 So.2d at 1033-34. The Florida Supreme Court quashed the en banc opinion, and reinstated the three-judge decision. 899 So.2d at 1108 and 1120.

The trial court denied defendant’s motion for a directed verdict:

The evidence was contradictory as to whether the repair to the line was of the type envisioned in the agreement between the Village of Pinecrest and the defendant. According to the defendant, the repairs here were not covered under the agreement because it was an emergency power restoration, not a scheduled prearranged repair. The jury and the court heard the evidence of what the agreement had been by listening to the testimony of Village personnel and defendant’s representatives. The evidence was conflicting but, if taken in the light most favorable to the nonmoving party, it supported the conclusion that the repairs here were covered by the agreement. In fact, a police officer had responded to the 911 call, only to be sent away by the FPL repairman.

It is undisputed that the Village of Pinecrest was never notified that the power would be shut off by defendant's employees. Likewise, the defendant did not dispute that, if the Village had been notified, it would have dispatched police to direct traffic or placed temporary stop signs. It would be different if power was out due to an act of God or emergency power interruption. However, if the power was intentionally shut down, the Village expected to be notified. The Village's request to be notified was limited to when the defendant turned off the power, a planned outage where the defendant knew in advance they would be turning off power to effectuate repairs then the Village should be notified.

The defendant's failure to warn created a reasonable foreseeable zone of risk to others and will not be sanctioned as a matter of law. The court finds that, even if there was no common law tort duty, there was sufficient evidence of a contractual duty imposed on the defendant by the oral agreement with the Village of Pinecrest for it to deny the motion for directed verdict. 856 So.2d at 1015-1016 (quoting trial court).

The three-judge panel of the intermediate appellate court wrote:

Arenado v. Florida Power & Light, 523 So.2d 628 (Fla. 4th DCA 1988), does not support FPL's position. Here, unlike *Arenado*, FPL's employee took deliberate steps that he knew or should have known would turn off a traffic signal. There was no unspecified mechanical failure causing the light's outage in this case. Moreover, the FPL employee's conduct, in disabling the light, created a foreseeable zone of risk to the driving public — the Goldbergs. See *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001), citing *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). FPL had a duty to exercise reasonable care to protect the motorists it placed at risk by this conduct.

In addition, as the court found based on the facts presented below, FPL assumed the duty. There was sufficient evidence from which a jury could find that FPL and the Village had reached an agreement whereby FPL would notify the Village of planned power outages. FPL breached the agreement when it did not notify authorities of the signal outage. 856 So.2d at 1027.

For two reasons, the en banc intermediate appellate court in the Third District tersely reversed the three-judge panel, which means that the utility won. 856 So.2d at 1033-34.

1. Under *Martinez v. Florida Power & Light Co.*, 785 So.2d 1251 (Fla. 3d DCA 2001), there was no duty by the utility.
2. Under *Tribble*, *Colina*, and *Derrer* (all three are Florida Third District cases), the driver was the proximate cause of the accident, any negligence by the utility was superseded by the driver's negligence.

The Florida Supreme Court held that the electric utility had a duty to plaintiffs:

In denying FPL's motion for a directed verdict, the trial court determined that FPL had a common law duty to warn of the hazardous situation it created when the company intentionally terminated the flow of power which rendered the traffic signal inoperable. In response to FPL's argument that the repairman, Woodard [an FP&L repairman at the scene], did not realize he was deactivating the traffic signal, the trial court determined that there was "ample" evidence that he should have known that the wiring on the pole directly powered the traffic light. In affirming that decision, the initial district court panel determined that "FPL's employee took deliberate steps that he knew or should have known would turn off a traffic signal," and that his action "created a foreseeable zone of risk to the driving public — the

Goldbergs.” *Goldberg*, 856 So.2d at 1027. The district court initially concluded that “FPL had a duty to exercise reasonable care to protect the motorists it placed at risk by this conduct.” *Id.*

We agree that the facts of this case establish that FPL's actions created a foreseeable zone of risk encompassing the motorists utilizing the intersection within this 100 to 150 feet of the critical location at 67th and 120th, and gave rise to a legal duty to warn motorists of the hazardous condition it created by deactivating the traffic signal. See *McCain*, 593 So.2d at 503 (“[T]he trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.”).[footnote omitted] As found by the trial court, there was ample evidence that Woodard should have known that opening the fuse on the utility pole to prevent backfeed to the downed line would terminate power to the traffic signal. Woodard admitted that he knew opening the fuse would cause a power outage “in the area.” He also admitted that from his position at the utility pole, he had an unobstructed view of the traffic signal at 67th and 120th, which was no more than 150 feet away. Woodard testified that he did not actually look in the direction of the signal, but that testimony was undermined by evidence showing that Woodard made two trips to the utility pole on the day of the accident during which he would have had a clear view of the traffic signal in question. [footnote omitted] Indeed, the Goldbergs' traffic signal expert testified that from where Woodard was positioned he should have even seen the traffic light go dark when he terminated power to the parallel line.

899 So.2d at 1110-1111.

The Florida Supreme Court noted that FP&L had safety devices readily available, but chose not to use them.

The record also demonstrates that FPL had the capacity to institute even the most minimal of safety procedures prior to terminating power to the traffic signal. When Woodard arrived on the scene at the Fishbein residence⁸, a uniformed officer from the Pinecrest police was also present. This officer could have and would have easily assisted in making the intersection safe for travel, but Woodard advised the officer that he was no longer needed at the scene. Even in the officer's absence, FPL itself had more than ample, experienced personnel on the scene who were equipped with the items necessary to warn motorists of the inoperable traffic light. Upon analysis, the company had dispatched six trucks and seven repair people to this scene. Woodard, who himself had 32 years' experience with FPL, testified that on the day of the collision, he actually had beacons, hazard lights, flashing beacons, and portable two-way hand radios in his truck, none of which was ever employed and all of which remained unused.

...

The record also reflects that proper safety procedures would have called for FPL to simply notify the local authorities that it had or intended to de-power a traffic signal or take some small steps to warn affected motorists or both. Expert testimony indicated that FPL should have and could have taken any of several minimal steps prior to deactivating the traffic signal, including simply notifying the local police department, placing cones or flares on the road, or notifying the public works department of the need for portable stop signs. As Judge Cope correctly stated in his opinion specially concurring with the initial district court decision [i.e., the three-judge panel], “It does not appear that FPL ever squarely contradicted the plaintiff's expert's assertion” regarding the applicable standard of care. *Goldberg*, 856 So.2d at

⁸ The location of the downed high-voltage wire.

1031.[footnote deleted] Even FPL's senior safety specialist agreed that even in an unplanned outage situation, an FPL employee would have an obligation to protect the public from the hazardous situation created when he knows his actions will terminate power to a traffic signal. 899 So.2d at 1112.

The Florida Supreme Court distinguished many of the previous black traffic signal cases, because in *Goldberg* the utility deliberately disconnected power from the traffic signal.

However, the rule established in those cases [*Arenado v. Fla. Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988) (determining that the utility company had not assumed a duty to the general public to ensure supply of electricity to traffic signals); *Gin v. Yachanin*, 75 Ohio App.3d 802, 600 N.E.2d 836 (1991) (concluding that no duty to the general public emanates from the power company's contract with the local government to provide service to traffic signals and street lights); see also *Martinez v. Fla. Power & Light Co.*, 785 So.2d 1251, 1253 (Fla. 3d DCA 2001) (concluding that the public is only an incidental beneficiary to electric company's agreement with the local government to maintain streetlights)] has no application here, where after determining that no imminent threat existed, an FPL employee chose a deliberate hazardous repair action that he knew or should have known would deactivate a single, nearby, in-sight traffic signal, which controlled a very active intersection, without taking at least some minimal precautions to make safe the resulting hazard. The cases cited by FPL simply reflect the established principle that the power company should not be held responsible every time power to a traffic signal ceases, a concept with which we do not disagree. Certainly, in the event of an emergency mechanical failure, FPL may not know, or know in a timely manner, that service to a traffic signal has been interrupted. Similarly, in a large-scale power outage attendant to a hurricane or other act of God, numerous traffic signals may be deactivated rendering it impractical for FPL to implement safety precautions at all affected intersections. Likewise, an FPL repairman faced with a truly emergent threat, such as downed live wires, may be forced to rapidly deactivate electric lines that power traffic signals without the time or resources to implement safety precautions. 899 So.2d at 1114.

The Florida Supreme Court continued:

Under the facts of this case, it is perfectly reasonable to conclude that FPL owed a duty to warn affected motorists of the danger created and posed by the inoperable traffic signal. The evidence presented at trial indicated that to satisfy a reasonable standard of care would have required FPL to notify the police department, place road flares, direct traffic, or take some other precautions reasonably necessary to alert and protect the safety of passing motorists. Having performed none of these even elementary precautionary measures, FPL breached its duty. 899 So.2d at 1115.

The Florida Supreme Court held that proximate causation was an issue for the jury.

To the extent *Colina*, *Derrer*, and *Tribble* establish that a plaintiff's negligence in entering an uncontrolled intersection always constitutes an intervening and superseding cause as a matter of law, these cases are misdirected and in error. Any such bright-line rule would contravene the well-settled principle that the issue of proximate cause, including whether there exists an intervening and superseding cause, is primarily a question of fact, and that when the facts are in dispute, the issue must be left to the fact finder. 899 So.2d at 1117.

The Florida Supreme Court focused on chaotic behavior of people:

Thus, in the course of human events, it is certainly foreseeable that drivers approaching an intersection with an inoperable traffic light will fail to stop, despite the traffic law requiring drivers to treat the inoperable signal as a four-way stop. See § 316.1235, Fla. Stat. (2003). This is especially true in a case such as this in which the drivers approached an inoperable traffic signal at a busy intersection, during the rush hour, in inclement weather, and where traffic proceeded in one direction in an almost unbroken band. [footnote to Pinecrest, FL traffic homicide detective's testimony: "... It's going to be chaotic. That's why police officers are put in intersections because there's no control."]

899 So.2d at 1118.

Florida statutes require that a black traffic signal be treated as a four-way stop sign. Violation of a statute is negligence per se. RESTATEMENT SECOND OF TORTS, § 286, 288B (1965) I think judges should assume that people will obey the law. When people violate the law, criminal penalties — as well as paying damages in tort — may be appropriate.

Finally, the Florida Supreme Court said:

Indeed, while begrudgingly, FPL's accident reconstruction expert even testified that if the light had been operational, or if someone had been in place to direct traffic, the accident probably would not have happened. When viewed in light of the facts of the case, the negligence displayed by Rosalie Goldberg and Cynthia Sollie cannot be characterized as intervening and superseding causes as a matter of law totally relieving FPL of its responsibility for breaching its duty of care by creating the danger and zone of enhanced risk. This is a case where reasonable persons could certainly differ as to the issue of proximate causation, and therefore, the issue was within the proper province of the fact finder. Either the *Colina* line of cases establishes an erroneous rule of law, or the en banc court erred to the extent it interpreted these cases as creating an absolute bright-line rule governing the proximate cause question presented in cases where the plaintiff displays negligence in entering an intersection with an inoperable traffic signal.

899 So.2d at 1119-1120.

On 17 May 2011, I searched Florida state court cases in Westlaw for the query:

(outage interrupt!) /p (traffic +1 (signal light))

From April 2005 (when the Florida Supreme Court issued *Goldberg*) until May 2011, there is apparently only one traffic signal case in Florida: *Pascual v. Florida Power & Light Co.*, 911 So.2d 152, 155 (Fla.App. 3 Dist. June 2005) (trial court dismissed complaint, reversed under authority of *Goldberg*, 899 So.2d 1105 (Fla. April 2005)). "Under these circumstances, we find that FPL owed no duty to the Plaintiffs to maintain electrical current to the intersection. *Levy v. Fla. Power & Light Co.*, 798 So.2d 778 (Fla. 4th DCA 2001) *rev. denied*, 902 So.2d 790 (2005); *Arenado v. Fla. Power & Light Co.*, 523 So.2d 628 (Fla. 4th DCA 1988)."

Deerfield v. Commonwealth Edison Co. (Ill.App. 2009)

Village of Deerfield v. Commonwealth Edison Co., 929 N.E.2d 1 (Ill.App. 2 Dist. 2009).

A village in Illinois sued an electric utility for “chronic electrical outages” and attempted class-action litigation on behalf of users of electricity in the village. The trial court dismissed the complaint, because the Illinois Commerce Commission had exclusive jurisdiction. The appellate court reversed on that ground. 929 N.E.2d at 6. The interesting part of this opinion is the discussion of the doctrine of economic loss, which is known in Illinois as the *Moorman* doctrine, after *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982).

In count III, plaintiff seeks recovery for the following: “property damage, spoilage of food, costs for clean-up and mold remediation due to flooded basements, costs for temporary housing during outages, and purchase of back up generators and battery powered sump pumps.” Some, but not all, of these damages are barred by *Moorman*.

In determining whether damages constitute purely economic losses, the following principles are relevant. Economic losses have been defined to include “ ‘damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property.’ ” *Moorman*, 91 Ill.2d at 82, 61 Ill.Dec. 746, 435 N.E.2d 443, quoting Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 918 (1966). An additional example of economic loss is “ ‘the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’ ” *Moorman*, 91 Ill.2d at 82, 61 Ill.Dec. 746, 435 N.E.2d 443, quoting Comment, Manufacturers' Liability to Remote Purchasers for ‘Economic Loss’ Damages-Tort or Contract?, 114 U. Pa. L. Rev. 539, 541 (1966). In *Loman v. Freeman*, 375 Ill.App.3d 445, 456, 314 Ill.Dec. 446, 874 N.E.2d 542 (2006), the court explained, “In contrast to a contractual claim, which alleges only economic damages or disappointed commercial expectations, a tort claim alleges the infliction of personal injury or property damage by a sudden or dangerous occurrence.” “Property damage” refers to damage to property other than the defective product itself. *Loman*, 375 Ill.App.3d at 456, 314 Ill.Dec. 446, 874 N.E.2d 542. In this case, the trial court found that the damages plaintiff alleged did not occur as a result of a “sudden or dangerous occurrence.”

We disagree to an extent. It appears to us that the trial court interpreted the term “sudden or dangerous occurrence” too narrowly. We first note that plaintiff alleges food spoilage. In *In re Chicago Flood Litigation*, 176 Ill.2d 179, 201, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997), our supreme court expressly held:

“The trial court ruled that the economic loss rule does not bar recovery in tort for those plaintiffs who lost perishable inventory as a result of interrupted electrical service. The appellate court affirmed. We agree.”

Thus, in accordance with the supreme court's clear holding, this portion of plaintiff's claim is not barred by *Moorman*. Similarly, plaintiff's claims for “costs for clean-up and mold remediation due to flooded basements” involve actual physical damages to property, so they are recoverable.

As for plaintiff's allegation that it suffered “property damage,” we can say only that it is too indefinite for us to determine whether *Moorman* applies. We note that, when encountering a similar allegation in *In re Chicago Flood Litigation*, 176 Ill.2d at 202, 223 Ill.Dec. 532, 680 N.E.2d 265, our supreme court stated, “The conclusory allegation of

unspecified property damage is insufficient to show that their damages are recoverable in tort, and cannot withstand a motion to dismiss.” We do not believe that this would foreclose plaintiff from setting forth damages with more specificity, if it can. As this allegation is currently written, though, it states nothing for which plaintiff can recover.

Plaintiff also seeks recovery for “costs for temporary housing during outages, and purchase of back up generators and battery powered sump pumps.” These are purely economic losses. The purchase of generators and battery-operated sump pumps strikes us as very similar to the concept of “cover” in commercial law. See 810 ILCS 5/2-712(1),(2) (West 2008) (“After a breach within the preceding section the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller”; the buyer may then “recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages”). In essence, by making these acquisitions, plaintiff was obtaining an alternate source of electricity to replace the one ComEd was supposed to provide. Obtaining temporary housing may be a step further removed, but the same concept applies. The residents of Deerfield were to obtain electricity for their abodes from ComEd. When ComEd allegedly failed to provide it, they were forced to find substitute places of residence. Moreover, unlike the earlier claims for compensation, these claims involve no damage to property and thus fall within the *Moorman* doctrine.

Village of Deerfield v. Commonwealth Edison Co., 929 N.E.2d 1, 11-12 (Ill.App. 2 Dist. 2009).

On denial of a motion for rehearing, the appellate court issued a clarification of the above opinion:

Plaintiff, the Village of Deerfield, has filed a petition for rehearing asserting that we misapprehended the *Moorman* doctrine (see *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 91, 61 Ill.Dec. 746 (1982)) in resolving this appeal. After reviewing the petition, we believe that our opinion requires clarification. It is true that a plaintiff may recover in tort for economic losses that accompany personal injury or property damage resulting from a sudden or dangerous occurrence. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 199, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997). Further, as we pointed out, plaintiff did allege that it, or, more specifically, its class members, suffered property damages — food spoilage, for example (*In re Chicago Flood Litigation*, 176 Ill. 2d at 201, 223 Ill.Dec. 532, 680 N.E.2d 265 (holding that damages for loss of “perishable inventory as a result of interrupted electrical service” are recoverable in tort)). Thus, it would appear that plaintiff could recover economic damages because it has alleged property damages.

One concern remains, however. Plaintiff makes allegations on behalf of a class. Only class members who suffered property damage would be eligible to recover for items such as costs of temporary housing, generators, and battery-operated sump pumps. Plaintiff's complaint is quite general; for example, it alleges:

“As a result of [ComEd's] illegal conduct, customers (Plaintiff and Class Members) have incurred substantial damages and losses due to the unreliability of [ComEd's] service (e.g., spoiled food, purchase of electrical generators to deal with [ComEd's] unreliable service, property damage, temporary housing, extra municipal and policing services necessitated by [ComEd's] power outages, etc.).”

Clearly, not every individual class member has experienced each and every articulated damage. The list, being prefaced by “ e.g.,” and followed by “ etc.,” is obviously intended to exemplify damages sustained by class members.

Only class members who have suffered property damage are entitled to proceed under the *Moorman* doctrine. As the supreme court has previously stated:

“Class plaintiffs complain that the application of the economic loss rule to the present case ‘permits identically situated plaintiffs in the same case to be treated differently for recovery of their damages based solely on the fortuity that one may have suffered property damage along with economic damage.’ However, the tort recovery requirement of injury to person or property is not a ‘fortuity.’ ”

In re Chicago Flood Litigation, 176 Ill. 2d at 199, 223 Ill.Dec. 532, 680 N.E.2d 265.

Accordingly, class members who experienced food spoilage or some other properly pleaded property damage may proceed, while those who suffered only economic losses are barred from recovery by *Moorman*.

Village of Deerfield v. Commonwealth Edison Co., 929 N.E.2d 1, 12-13 (Ill.App. 2 Dist. 2010) (supplemental opinion upon denial of rehearing).

On 16 May 2011, Mr. Richard Goldwasser, one of three attorneys for plaintiff, informed me “the case is now pending before the Illinois Commerce Commission”.

A similar case is *Sheffler v. Commonwealth Edison Co.*, 923 N.E.2d 1259 (Ill.App. 1 Dist. 2010), *appeal allowed*, 938 N.E.2d 531 (Ill. 2010). After electrical outages as a result of severe storms in August 2007, plaintiffs filed class-action litigation. The trial court dismissed and the intermediate appellate court affirmed the dismissal. Courts held that complaint should have been filed with Illinois Commerce Commission. Plaintiffs' claims for money damages were barred by the utility's tariff. 923 N.E.2d at 1276-1279.

Blackout of August 2003

After the 1977 blackout in New York City, people sued the electric utility for damages (see page 17, above). But after the Aug 2003 blackout — which affected Ohio, Michigan, Pennsylvania, New York state, and New Jersey — attorneys in New York City often sued either the owner of an apartment building (see *Kopsachilis* and *Viera*, alleging theory of failure to illuminate staircase during electric outage) or an insurance company for denial of a claim (see *Tufo's Wholesale Dairy*). Apparently, plaintiffs' lawyers learned from the 1977 blackout not to sue electric utility companies. At the same time, judges in Ohio — and *Deerfield* in Illinois — learned to pass complaints about inadequate service to the public utility commission.

On 14 May 2011, I searched all federal and all state cases in Westlaw for the query:

(electric! power) /p (outage black-out) & (Aug! /3 2003)

The following list, in chronological order, includes the most interesting cases.

- *Schlesinger v. Con Edison Co. of New York, Inc.*, Unreported Disposition, 2003 WL 22964883 (N.Y.City Civ.Ct., December 16, 2003) (Plaintiff, pro se, filed claim for \$350 for lobster and other seafood for a barbeque at his home. The food spoiled during the blackout, which made his refrigerator nonfunctional for a day. Complaint dismissed because no evidence of negligence by Con Ed. Furthermore, tariff exculpates Con Ed from damages arising from ordinary negligence by Con Ed.);

- *Ippolito v. First Energy Corp.*, Not Reported in N.E.2d, 2004 WL 2495665 (Ohio App. 2004) (Class-action against electric utility, trial court dismissed complaint, and appellate court affirmed. “Plaintiff’s claim arises from the loss of service during the blackout and the alleged damages that resulted from it. The substance of plaintiff’s complaint is that First Energy violated duties imposed by public utilities law and/or First Energy’s provision of electrical service was unreasonable. These matters are within the exclusive jurisdiction of the Public Utility Commission of Ohio.”);
- *Armstrong v. City of New York, Inc. and Con Ed*, Unreported, 2005 WL 742432 (N.Y.Sup. 2005) (Group of clambers sought to recover economic damages from blackout. City was sued because it discharged untreated sewage into river, contaminating clams from 18 Aug until 5 Sep 2003. Complaint against Con Ed dismissed because Con Ed was not negligent, moreover Con Ed has no liability to third-parties under *Strauss.*);
- *Miles Management Corp. v. FirstEnergy Corp.*, Not Reported in N.E.2d, 2005 WL 730095 (Ohio App. 2005) (Group of businesses brought class-action against electric utility, trial court dismissed complaint, and appellate court affirmed. “We conclude that Public Utilities Commission of Ohio is best suited to determine and assess any wrongdoing by defendants according to the laws and regulations it routinely construes and applies.”);
- *Tufo’s Wholesale Dairy, Inc. v. CNA Financial Corp.*, Not Reported in F.Supp.2d, 2005 WL 756884 (S.D.N.Y. April 2005), *Reconsideration Denied*, 2005 WL 3311997 (S.D.N.Y. Dec 2005) (During failure of refrigerators as result of blackout, “Tufo’s dairy products spoiled and had to be discarded.” Plaintiff sued its insurance company for failure to pay claim. Denied summary judgment to defendant. My check of the online docket shows this case was dismissed on 7 June 2006, apparently the parties settled.);
- *Lyle Enterprizes, Inc. v. Hartford Steam Boiler Inspection and Insurance Co.*, 399 F.Supp.2d 821 (E.D.Mich. 2005) (During 38-hour blackout, one supermarket “lost \$102,567 in stock, \$7,000 in lost business income, and incurred \$3,642.92 in expenses related to the loss of power.” Held “equipment breakdown insurance policy” did not cover losses during blackout.);
- *Four Star Bros., Inc. v. Allied Ins. Co.*, Not Reported in F.Supp.2d, 2006 WL 148754 (E.D.Mich. 2006) (Defendant insurance company “denied liability for Plaintiff’s alleged inventory and stock losses totaling approximately \$109,000.” Granted summary judgment for defendant.);

- *Kopsachilis v. 130 East 18 Owners Corp.*, 841 N.Y.S.2d 449 (N.Y.A.D. 1 Dept. Sep 2007) (Three judges on a panel of five decided that a state statute created a duty for continuous illumination of staircase, even during electrical outage.), *rev'd*, 901 N.E.2d 734, 873 N.Y.S.2d 241 (N.Y. Dec 2008) (“The lights were still out when plaintiff was ready to leave the building the next morning. Neither she nor her host had a flashlight, and neither called down to the lobby for help. Plaintiff stood in the hallway outside her host's apartment and opened the door to the fire-stairs, where she could see nothing. She put out her foot to feel for a landing, fell down the stairs and was injured.” Held Multiple Dwelling Law § 37 does not require continuous illumination of staircase during electrical outage.)
- *Viera v. Riverbay Corp.*, 845 N.Y.S.2d 12, 13 (N.Y.A.D. 1 Dept. 2007) (Group of five people descended dark staircase with one flashlight, about three hours after blackout began. One slipped and fell, allegedly as the result of liquid on the stairs that was unknown to apartment landlord. Sued owner of apartment building. Appellate court ordered summary judgment to defendant. “Plaintiff cited no statute or regulation imposing a duty on defendant to illuminate the stairway during a blackout, i.e., an absolute duty to illuminate the stairway.”)
- *Wakefern Food Corp. v. Liberty Mut. Fire Insurance Co.*, 968 A.2d 724, 735-739 (N.J.Super.A.D. 2009) (plaintiffs sued insurance company after claims for food spoilage and business interruption were denied, as result of four-day blackout, appellate court held claims were covered under policy), *certification denied*, 976 A.2d 385 (N.J. 2009);
- *Fruit and Vegetable Supreme, Inc. v. The Hartford Steam Boiler Inspection & Insurance Co.*, 905 N.Y.S.2d 864, 869-871(N.Y.Sup. July 2010) (insured sued insurance company, “Tripping off line” exclusion in insurance policy barred insured's recovery for any spoilage and loss of income during 30 hour blackout.).

Conclusion

In states that hold that electricity is a service, the electric utility is only liable in tort for negligent service. The economic loss rule⁹ in torts alone probably makes futile any litigation to recover damages from outages, since outages rarely cause significant property damage and even more rarely cause personal injury. If the economic loss rule was not enough to discourage plaintiff, a tariff limiting claims for outages to gross negligence, means the plaintiff will need to prove gross negligence, not ordinary negligence. Plaintiff’s attorney’s fees and expert witness fees are likely to exceed any recovery for property damage by the outage. Possible exceptions might be loss of frozen or refrigerated food at a warehouse, or mold remediation expenses after sump pumps fail.

⁹ See page 8, above.

In states that hold that electricity is a good or a product, a plaintiff could sue for breach of warranty. If a tariff limits liability for outages to gross negligence, the plaintiff may also need to prove gross negligence as part of a contract claim. This is a tough slog for plaintiff, but in a proper case may be achievable.

In addition to the above burdens, plaintiffs may be legally required to use technology to avoid consequential damages, such as installing uninterruptible power supplies at critical loads, as explained above at page 8. Treating outages as an engineering problem to be solved with technology is likely to yield a more cost-effective solution for users than litigation against utilities for outages.

This document is at **www.rbs2.com/outage.pdf**
My most recent search for court cases on this topic was in May 2011.
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