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USING STATE UTILITY COMMISSION REGULATIONS TO CONTROL THE "UNREGULATED" UTILITY

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INTRODUCTION

Poverty advocates concerned with utility problems sometimes face client problems involving service disconnections, deposit demands, late payment charges, and the like from "unregulated" utilities. These unregulated companies often include both Rural Electric Cooperatives (RECs) and municipal utilities. More than 1,000 RECs[1] and 2,010 local Public power agencies[2] exist in the United States today. These companies provide service to nearly 27.5 million customers.[3] By 1977 nearly 20 percent of all electric customers in the country were served either by local public power agencies or by RECs.[4] In addition, municipal water and sewer companies and local water districts are generally exempt from state Public Utility Commission (PUC) regulations.

The assumption by many is that because RECs are exempt from the jurisdiction of state PUCs, the regulations promulgated by such commissions are not applicable to actions seeking customer service protections for REC member-consumers.[5] When one takes a journey through the law which governs the "unregulated" REC, however, one finds that proposition to be totally incorrect. Indeed, state PUC regulations, while perhaps not directly applicable as an extension of PUC jurisdiction, are quite useful in establishing appropriate protections for REC customers. Consider that PUC regulations:

- Can be imported as implied terms of the contract between an REC and its customers under the Uniform Commercial Code (UCC) "usage of trade" or "trade code" provisions;[6]

- Can set the benchmark for "reasonable commercial standards" under UCC's "good faith" provisions for merchants;[7]

- Can set the standard of fairness for determining whether an REC has violated its state Unfair and Deceptive Acts and Practices (UDAP) statute;[8] and

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[1] As of August 1991, 1,053 RECs borrowed funds from the Rural Electrification Administration (REA) Rural Electrification Admin, 1990 Statistical Report, Rural Electric Borrowers, Aug. 1991, at xix, Tbl. 6.
[2] American Public Power Association, 50 Pub. Power 56 (Jan-Feb) 1992 [hereinafter Pub. Power]
[3] RECs serve roughly 11 million customers, of which 9.961 million are residential. Rural Electrification Admin., *supra* note 1, at ix, Tbl, 1. Public power agencies provide electric service to roughly 16.321 million ultimate customers (i.e., those not involving sales or resale). Public Power, *supra* note 2, at 56.
[4] James F. Fairman & John C. Scott, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 Hastings L.J. 1159, 1162, n.18 (1977).
[5] Charles Phillips, The Regulation of Public Utilities, 561 (1984).
[6] *See, infra* notes 10, 28-43, and accompanying text.
[7] *See, infra* notes 44-53 and accompanying text.
[8] *See, infra* notes 55-60 and accompanying text.

- Can set the standard of care by which to determine whether an REC has acted "reasonably" in assessing its conduct for tortious behavior.[9]

State PUC regulations constraining the actions of utilities subject to PUC jurisdiction, therefore, should be the first place an advocate should look to when seeking protections for customers of unregulated RECs as well. These regulations should be invoked because the existence of PUC regulations on point will strengthen the arguments raised under other applicable consumer protection laws, and demonstrate the reasonableness of a consumer's request for relief. They should be invoked also because, in the event that no other common-law, statutory, or constitutional protection is available, numerous methods exist, as summarized immediately above, to import the PUC regulation into the laws constraining REC activities. If a specific activity is not addressed by the common law or a specific consumer law or a specific consumer protection statute, the specific language of the PUC regulations may nonetheless be applicable to the REC.

TRADE CODES AND THE UNIFORM COMMERCIAL CODE

The UCC can be used to import the rules and regulations of the state PUC into the governance of REC customer service practices. The contract between an REC and its customers "includes that part of their bargain that may be found in. . . usage of trade. . . . These sources are relevant not only to the interpretation of express contract terms, but may themselves constitute terms." (emphasis added).[10]

The admissibility of usage of trade flows from the fact that there is a "justifiable expectation that [the usage of trade] will be observed."[11] As the Ninth Circuit stated, "A party is always held to conduct generally observed by members of his chosen trade because the other party is justified in so assuming unless he indicates otherwise."[12] In other words, when an electric customer enters into a contractual agreement with an REC,

> The "agreement".. . is not just the stark words of [the contract], but is those words as construed in the commercial setting in which they arose and were used. The course of dealing and trade usage supplement, qualify and explain the meaning of the basic standard terms.[13]

In such a situation, it matters not whether the parties to the contract expressly negotiated the limitation of the usage trade.[14] A party is bound so long as he knew or should have known of the usage.[15]

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[9] See, *infra,* notes 60-70 and accompanying text.
[10] White & Summer Uniform Commercial Code § 3-3, at 131 (3d ed. 1988 & Supp 1991).
[11] Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 785 (9th Cir. 1982)
[12] *Id.*, at 791.
[13] Ebasco Serv., Inc. v. Pennsylvania Power & Light Co., 460 F. Supp. 163 (E.D. Pa. 1978).
[14] *Id*., at 210.
[15] *Id. see also,* Western Indus. Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1202 (7th Cir. 1984); United States ex rel. Union Bld. Materials v. Haas & Haynie Corp., 577 F.2d 568, 573 (9th Cir. 1978); Mountain Fuel Supply Co. v. Central Eng'g, 611 P.2d 863, 869 (Wyo. 1980); Wright v. Commercial & Sav. Bank, 464 A.2d 1080, 1084 (Md. Ct. Spec. App. 1983).

The role of usage of trade is to "fill gaps" in the written agreement between the two parties to the contract.[16] The UCC rejects "any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon."[17] Instead, contracts are to be read "on the assumption that . . . the usage trade were taken for granted when the document was phased. Unless carefully negated, they have become an element of the meaning of the words.[18] The theory is that "where a contract is made as to a matter about which there is a well-established custom, the same is understood as forming a part of the contract."[19]

UCC Section 1-205(2) defines "usage of trade" as follows:

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, Vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.[20]

There is no need for the usage of trade to be universal, so long as there is a "regularity of observance."[21] Indeed the usage is binding if "currently observed by a great majority of decent dealers, even though dissidents ready to cut corners do not agree."[22] The "regularity" need not be established with mathematical precision.[23] It must simply be "so generally known that the parties may be presumed to have known it."[24] There must be a dominant pattern [that] has been fairly evidenced."[25]A usage of trade includes "any practice or method of dealing"[26]

The REC need not even be aware of the usage of trade in order for that usage to be binding.[27] Such a usage is binding "if it is a usage of the vocation or trade in which the parties are engaged

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[16] Latex Glove Co. v. Gruen, 497 N.E.2d 466, 470 (Ill. App. Ct. 1986) ("trade usage is used to fill a gap in the contract, such as terms regarding delivery, credit and quality of performance"). *See e.g.*, GNP Commodities v. Walsh Heffernan Co., 420 N.E.2d 659 (Ill. App. Ct. 1985) (trade usage permits delay of inspection of meat until buyer is prepared to resell); Barliant v. Follent Corp., 483 N.E 2d 1312 (Ill. App. Ct. 1985) (trade usage requires cash customers to add 10 percent of their order's cost to cover mailing expenses); URSA Farms Coop. Co. v. Trent, 374 N.E.2d 1123 (Ill. App. Ct. 1978) (quality of product and delivery time established by custom).

[17] State *ex rel*. Yellowstone Park Co. v. District Court, 502 P.2d 23, 26 (Mont. 1972).

[18] Campbell v. Hostetter Farms, 380 A.2d 463 (Pa. Super. Ct. 1977) (quoting Comment 2 of the Official Comment to U.C.C. δ 2-202). See also Venturi v. Adkisson, 552 S.W.2d 643, 645 (Ark. 1977) ("[T]he evidence offered would have been admissible as an aid to interpretation of the contract and the measuring of its terms if the jury should find that the contract was upon the term as appellant's witnesses expressed it, *because that evidence was that the custom was of such widespread usage that it could be presumed that the contract was made with reference to it*." (citations omitted) (emphasis added).

[19] Murphy v. Reed, 193 S.W.2d 947,949 (Mo. Ct. App. 1946).

[20] U.C.C. §1-205(2) (1992).

[21] Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 791 (9th Cir.1982).

[22] *Id*. at 792.

[23] *Id*. at 793.

[24] United States ex rel. Union Bldg. Materials v. Haas & Haynie Corp., 577 F2d 568, 573 (9th Cir. 1978) (with citations)

[25] Mountain Fuel Supply Co. v. Central Eng'g, 611 P.2d 863, 869 (Wyo. 1980) (*citing*, Hartwig Farms v. Pacific Gamble Robinson, 625 P.2d 171, 174 (Wash. App. 1981)).

[26] U.C.C. 1-205 (2) (1992)

[27] "It is not the law . . .that the buyer must know of the custom; if he should have known, he is bound." Western Indus. Inc. v. Newcor Canada Ltd., 739 F2d 1198, 1202 (7th Cir. 1984).

or is a usage of which the parties are or should be aware" (emphasis added).[28] If a practice is "widespread and general in its scope and application," knowledge of it is to be imputed to the REC.[29] However, the party sought to be bound by the trade usage must be in "a position to know of that usage."[30]

Usage of trade may add express terms to the contract agreement between the REC and its customers. They may:

> Import an additional term imposing a duty on one party to give a notice to the other in a given situation, even though the express agreement is silent on the matter. Or they may impose a duty on one party to seek a given remedy within a given time period, even though the express agreement is silent on remedies.[31]

A particular usage of trade, if demonstrated, "would be sufficient to supplement the terms of the agreement between both parties."[32] As stated by a New Mexico court of appeals, "evidence as to usage of trade is admissible in construing a written contract (whether or not the language is ambiguous) to add to, subtract from or qualify the terms of the agreement or to explain their meaning. . . . "[33]

In regard to utility customer service practices, particularly, one important twist with the use of the "usage of trade" doctrine is the impact of the existence of "trade codes." Proof of a "trade code" may establish a usage of trade.[34] Written rules or "laws" might be proof of "customs" even if not binding on the court.[35]

Government agency regulations may be construed to establish such a trade code. For example, Federal Trade Commission (FTC) regulations, if otherwise applicable, could be relied upon to establish a trade code binding upon merchants.[36] The Occupational Safety and Health Administration (OSHA) regulations also are "evidence of the custom in the construction industry."[37]

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[28] White & Summers, supra note 10, at 3-3, p. 132. *Accord*, Meske v. Bartell Drug Co., 593 P.2d 1308, 1313 (Wash. 1979) (party knew or should of known of the usage trade).
[29] *See, eg*., Murphy v. Reed, 193 S.W. 2.d 947, 949 (Mo. Ct. App. 1946).
[30] United States *ex rel*. Union Bldg. Materials v. Haas & Haynie Corp., 577 F2d 568, 573 (9th Cir. 1978)
[31] White & Summers, *supra* note 10, at δ 3-3,p. 133.
[32] Wright v. Commercial & Sav. Bank, 464 A2d 1080, 1083 (Md. App. 1983). *See also,* Advance Process Supply v. Litton Indus. Credit, 745 F.2d 1076, 1079 (7th Cir. 1984) (*citing*, Columbia Nitrogen Corp. v. Royster, 451 F2d 3, 9-10 (4th Cir. 1971)); Camargo Cadillac v. Garfield Enters., 445 N.E.2d 1141, 1145 (Ohio App. 1982) (terms of contract may be "explained or supplemented" by usage of trade) (citing Ferdinand Tinio, Annotation, *The Parol Evidence Rule and Admissability of Extrinsic Evidence to Establish and Clarify Ambiguity in Written Contract*, 40 A.L.R.3d 1384 (1971)).
[33] State *ex rel*. Nichols v. Safeco Inc. Co., 671 P2d 1151, 1155 (N.M. Ct. App. 1983); s*ee also,* American Machine & Tool v. Strite-Anderson Mfg., 353 N.W.2d 592, 597 (Minn. Ct. App. 1984) ("the trend has been for judges, looking beyond written contract terms, to reach the 'true understanding' of the parties, to extend themselves to reconcile trade usage . . . with seemingly contradictory express terms, They have permitted usage of trade to add terms, cut down or subtract terms, or lend special meaning to contract language").
[34] Tomlinson Lumber Sales v. J.D. Harrold Co., 117 N.W.2d 203, 206 (Minn. 1962).
[35] *See, e.g.,* Tamarkin v. Children of Israel, 206 N.E.2d 412 (Ohio 1965).
[36] Kawin v. Chrysler Corp., 636 S.W.2d 40, 44, 50 (N.C. App. 1982).
[37] Cowan v. Laughridge Constr. Co., 291 S.E.2d 287 (N.C. App. 1982).

In this respect, the use of OSHA regulations is instructive. Even if not binding on a court in any particular situation, OSHA standards have been found to be a "guide for the determination of standards of care."[38] The use of OSHA standards in this respect has been within the context of establishing standards of care in tort litigation. However, the distinction between reliance on usage of trade to establish a standard of care for tort purposes, and reliance on that same usage of trade to imply a contract term incorporating the standard of care, is almost nonexistent. Therefore in these circumstances, and particularly for "public service corporations" (which include RECs), the tort cases provide valuable guides to contract claims.

Moreover, it is not determinative that the regulation has not been established for the precise class before the court. Thus, the fact that the state PUC regulations have been established to govern the conduct of investor-owned utilities does not make them irrelevant to determining a usage of trade to govern the conduct of RECs as well.[39] As the court stated in Dunn v. Brimer, "[w]here the statute does set up standard precautions, although not only for the protection of a different class of persons, or the prevention of distinct risk, this may be a relevant fact, having a proper bearing upon the conduct of a reasonable man under the circumstances. . . ."[40] Whether by a trade code or otherwise, the person seeking to invoke the usage of trade has the burden of proving it.[41] Through the usage of trade doctrine, certain responsibilities, that might not otherwise be imposed through specific applications of common law principles, can be placed on RECs.

Regularity in meter reading is one such example. Usage of trade may well establish that an REC may not rely upon repeated estimates of meter readings, as opposed to actual readings. If a substantial "makeup bill" arises as a consequence of repeated prior underestimates, the REC may be required to offer an installment payment plan for that bill.

Makeup bills for underpayment attributed to slow meters is a second type of billing situation that can be limited by reference to standard operating procedures established by usage of trade. These procedures might limit the amount of back-billing that is permitted, as well as create a right to enter into a payment plan of a length at least equal to the number of months over which the back-bill accrued.

Deferral of service disconnections in the event of medical emergencies is a third example of a trade practice that may be implied in the contract between an REC and its customers based on

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[38] National Marine Serv. Inc. v. Gulf Oil Co., 433 F. Supp. 913, 919 (E.D. La 1977) (*citing*, Buhler v. Marriott Hotels, 390 F. Supp. 999 (E.D. La. 1974); *accord*, Knight v. Burns, Kirkly & Williams Constr. Co., 331 So. 2d 651 (Ala. 1976). *See generally,* John Ludington, Annotation, *Violation of OSHA Regulation as Affecting Tort Liability* Safety and Health Act of 1970 and the Law of Torts, 38 LAW & CONTEMP. PROBS. 612 (1974); Barbara Lynn, *The Occupational Safety and Health Act of 1970: Its Role in Civil Litigation*, 28 SW L.J. 999 (1974).

[39] *See, e.g*., Dunn v. Brimer, 537 S.W.2d 164, 166 (Ark. 1976); Beard v. Atchison, Topeka & Santa Fe R.R., 84 Cal. Rptr. 449, 455, 458 (Cal. Ct. App. 1970).

[40] Dunn, 537 S.W.2d at 166 (*quoting,* PROSSER, THE LAW OF TORTS, at 202 (4th ed. 1971)).

[41] Wright v. Commercial & Sav. Bank, 464 A.2d 1080, 1083-84 (Md. App. 1983) (citing T & L Leasing Corp. v. General Elec. Corp., 516 F. Supp. 1131, 1134 (E.D. Pa. 1981) (usage of trade a fact issue); First Fed. Sav. & Loan Ass'n of Siox Falls v. Union Bank & Trust, 291 N.W.2d 282, 286 (S.D. 1980); Western Indus. Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1202 (7th Cir. 1984); Tobias v. North Dakota Dep't of Human Servs., 448 N.W.2d 175, 180 (N.D. 1989); *see generally* W. Harold Bigham, Presumptions, Burden of Proof and the Uniform Commercial Code, 21 Vand. L. Rev. 177 (1968).

usage of trade. Deferrals of 30, 60, 90 or more days in the event of the existence of a medical emergency could be sought.

Prohibition of disconnections "after hours," on weekends, or on holidays is a fourth example of a provision that might be read into an REC contract based on usage of trade. This prohibition is universal, or nearly so, within the public utility industry.

Protection from winter shutoff is another example of contract terms that could be implied as a usage of trade. While specific protections may be left to the court to determine, it is not necessary to establish the usage of trade with mathematical precision; a consumer is entitled, at least, to the minimum protections available in the trade.[42]

Imposing statutes of limitations is another example of a contract term that could be implied on the basis of usage of trade. Particularly in light of the equitable basis for statutes of limitations,[43] looking to PUC regulations that might have established such a period of repose for utility debt collection efforts would be reasonable.

Determining the entire scope of the customer service regulations that might be imputed to contracts between RECs and their customers based on the usage of trade is, of course, quite impossible. The conclusion must be simply that, even when RECs are not subject to PUC regulations, the regulations, as well as the utility behavior that is prompted by those regulations, are nonetheless relevant to establishing the duties of the REC. Such regulations may establish specific terms of the contract between an REC and its customers through the application of UCC section 1-205.

PUC REGULATIONS AND THE UCC STANDARDS OF "GOOD FAITH"

The PUC regulations, which codify universally accepted regulatory standards regarding investor-owned utilities, may be relevant also in establishing the standards for assessing REC actions through the requirement that all merchants abide by reasonable commercial standards in the conduct of their affairs. In this regard, while the PUC regulations would not be directly applicable to the REC, they would be evidence of what "reasonable commercial standards" might be.

A fundamental policy of the UCC is that all parties must act in good faith. Good faith has been called "the single most important concept intertwined throughout the entire Code."[44] As one

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[42] "In a case of well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern [of usage] has been fairly evidenced, the party relying on the usage is entitled. . .to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement. . . .Summers and White write that a usage, under the language of 1-205(2), need not be 'certain or precise' to fit within the definition of 'any practice or method of dealing.'" Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 793 (9th Cir. 1982) (citations cited).

[43] *See generally,* Roger Colton, *Statutes of Limitations: Barring the Delinquent Disconnection of Utility Service,* 23 Clearinghouse Rev. 2 (May 1989).

[44] Bank of Indiana v. Holyfield, 476 F. Supp. 104 (SD. Miss. 1979); *In re* Jackson, 9 U.C.C. Rep. Ser. 1152 (W.D. MO. 1971); Schroeder v. Fageol Motors, Inc., 544 P2d 20, 24 (Wash. 1975).

aspect of the equitable conscience of the UCC, it authorizes a court to police the transaction for unreasonableness and to reach a decision based as much on equities as on the written agreement. UCC section 1-203 provides that "[e]very contract or duty within this Act impose an obligation of good faith in its performance or enforcement."[45] For all parties, good faith, as defined in section 1-201 (19), requires a subjective "honesty in fact in the conduct or transaction concerned."[46]

Merchants, however, are held to a higher standard. Section 2-103 provides that "'[g]ood faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[47] Indeed, comment 19 to section 1-201 explains that "wherever a merchant appears in the case, an inquiry [by the court] . . . .is necessary to determine his good faith."[48] Merchants must perform their obligations within the spirit as well as the letter of the contract and the law.

The key question, however, is whether a consumer has an independent cause of action for a merchant's failure to observe reasonable commercial standards of fair dealing. The courts differ on this issue. Some courts have held expressly that a seller may not be sued for failure to act in good faith.[49] Under this view, the principle of good faith helps merely to define the standard for executing other obligations, such as warranties and remedies. Without an independent claim, a seller's bad faith in a sales transaction may escape UCC redress.

On the other hand, some courts have found an independent cause of action for breach of the "good faith" duty.[50] Section 1-106(2) expressly provides that "[a]ny right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect."[51] Furthermore, both comment 3 to section 2-314 and comment 4 to section 2-313 rely on good faith to establish independent obligations of a seller—the former to disclose known defects, the latter to set contractual obligations commensurate with price.[52] An independent

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[45] U.C.C. §1-203 (1992)

[46] Bowling Green, Inc., v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. 1970) (applying Massachusetts law); Corporation Venezolano de Pomento v. Wintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978); Farmers Coop. Elevator, Inc., Duncombe, Iowa, v. State Bank, 236 N.W.2d 674 (Iowa 1975); Eldon's Super Fresh Stores, Inc., v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 207 N.W.2d 282 (Minn. 1973); Lawton v. Walker, 343 S.E.2d 335 (Va. 1986); Mattek v. Malofsky, 165 N.W.2d 406 (Wis. 1969).

[47] U.C.C. §1-203 (1992).

[48] U.C.C. §1-201, Comment 19 (1992).

[49] Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167 (8th Cir. 1987) (applying South Dakota law); Betterton v. First Interstate Bank of Arizona, N.A., 800 F.2d 732 (8th Cir. 1986) (applying Arizona law); Chandler v. Hunter, 340 So. 2d 818 (Ala. Civ. App. 1976); Super Glue Corp. v. Avis Rent-A-Car System, Inc., 517 N.Y.S.2d 7624 (N.Y. App. Div. 1987).

[50]Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 661 F. Supp. 1448 (D. Wyo. 1987) (applying Colorado and Wyoming law); *In re* Martin Specialty Vehicles, Inc., 87 B.R. 752 (Bankr. D. Mass. 1988); Rigby Corp. v. Boatman's Bank and Trust Co., 713 S.W.2d 517 (Mo. Ct. App. 1986) (contract, not tort, remedy for breach of "good faith" duty); *see also,* Northern Illinois Gas Co. v. Energy Coop., Inc. 461 N.E.2d 1049 (Ill. App. Ct. 1984); Webcor Elecs., Inc. v. Home Elecs., Inc., 754 P.2d 491 (Mont. 1988) (if jury finds both fraud and breach of implied covenant of good faith and fair dealing, plaintiff can pursue punitive damages).

[51] U.C.C. §21-106(2) (1992).

[52] U.C.C. §2-314, comment 3, §2-313, comment 4 (1992).

contractual "good faith" obligation is consistent with the common law in at least some jurisdictions.[53]

It is reasonable to raise standards of conduct established by PUC regulations as a measure of the reasonable commercial standards to be observed by RECs. Whether these standards can, by themselves, serve as a cause of action will depend upon the laws of each state.

PUC REGULATIONS AND UDAP "UNFAIRNESS"

A majority of UDAP statutes prohibit "unfair practices."[54] The classic definition of unfairness is derived from the U.S. Supreme Court's "S. & H. decision."[55] In that case, the necessary elements of "unfairness" were articulated to be as follows:

- Whether the practice offends public policy; whether it is within the penumbra of some common-law, statutory, or other "established concept" of unfairness;
- Whether the practice is immoral, unethical, oppressive, or unscrupulous; and
- Whether the practice causes substantial injury to consumers.[56]

Under this standard, existing PUC regulations could well serve as an "established concept of unfairness" even though the REC is not directly subject to PUC regulations.[57] A REC practice should be found to be "unfair" particularly when it violates PUC regulations, is oppressive, and causes substantial injury. And, in analyzing the unfairness concept, it is always important to keep in mind the monopoly enjoyed by the REC.[58] This status makes the REC's practices particularly oppressive and capable of causing injury; consumers have no alternative place to turn for energy.

More recently, the FTC and some states have enacted a modified unfairness definition blending three elements: (1) substantial consumer injury, (2) not outweighed by benefits to competition, and (3) which consumers cannot reasonably avoid.[59] Because of an REC's monoploy position, it should not be difficult for consumers to meet the "reasonably avoid" standard. Moreover, it will be relatively easy to demonstrate that there are no countervailing benefits to competition. The

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[53] *See e.g.,* Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (insurer breached implied "good faith" covenant in fire insurance contract by unreasonably withholding payment due under policy).

[54] Nat'l Consumer Law Ctr., Unfair and Deceptive Acts and Practices, app. A (state-by-state, statute-by-statute analysis of state Unfair and Deceptive Acts and Practices Laws).

[55] F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

[56] *Id*. at 244-45.

[57] *Compare,* notes 60-70, *infra*, and accompanying text regarding use of PUC regulations to establish standard of "duty" for tort action. *Compare*, notes 34-41, *supra*, and accompanying text regarding the use of PUC regulations to establish implied contract terms pursuant to the UCC's "usage of trade" provision.

[58] *See e.*g., Western Colorado Power Co. v. Public Util. Comm'n, 411 P2d 785, 795 (Colo. 1966) ("[A]n electric consumer located in an area exclusively served by such co-operative must take (the co-op's) service, if indeed service is to be received at all. The form of organization delivering service makes no difference whatever to these customers. . . .").

[59] *See,* Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988); American Fin. Servs. Ass'n. v. FTC, 767 F.2d 957 (D.C. Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986).

issue will thus boil down to whether substantial consumer injury arises because of the REC's practice.

A person seeking to challenge a particular REC practice can thus seek to have declared "unfair" even those REC practices that are not specifically proscribed by state or federal statute, or by the common law. Is it unfair to disconnect service if there is a medical emergency? Is it unfair to refuse to offer adequate deferred payment plans? Is it unfair to disconnect service after 4:00 p.m. on Fridays, on weekends, or on holidays? Is it unfair to disconnect heating service in the middle of winter?

PUC REGULATIONS AND TORTIOUS BREACH OF THE DUTY OF CARE

When faced with an unregulated REC's collection activities that would have been unlawful had that REC been subject to regulation, the existence of certain state PUC shutoff regulations can be used as evidence of the proper standard of care[60] in a tort action.[61] This argument would posit that the state regulations set out an industry standard reflecting the proper duty of care.[62]

The argument is based upon the legal reasoning that, for regulated utilities, the disconnection of service in violation of state statute or administrative regulation[63] is negligence *per se.*[64] This reasoning stems from *Martin v. Herzog,*[65] in which New York's highest court held that violation of a statute setting highway safety standards was negligence *per se*. According to the court, "[n]o license should have been conceded to the triers of fact to find it anything else."[66] The court reasoned that "to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of

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[60] One need not, however, rely only upon regulations. For example, further evidence of a municipal utility's standard of care would be found in the cases holding that municipal utilities must comport with the requirements of due process before disconnecting utility service. *See e.g.,* Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (Clearinghouse No. 12,216). For a discussion of what process is "due" under the terms of *Craft, see*, Note, *Constitutional Law—Due Process—Supreme Court Recognizes Entitlement Statute of a Claim to Continued Utility Service—Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 1978,* 12 Creighton L.Rev. 1243 (1979).

[61] There would exist no sovereign immunity problems in suing a municipal utility in tort. As stated in McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.100 (3d ed. 1983): "It frequently has been reiterated that a municipality functions in a corporate or proprietary capacity in the operation and maintenance of public utilities. . . .Consequently, municipal ownership of public utilities, in the usual and common acceptation of that term, must of necessity carry with it the same duty, responsibility and liability on account of tortious conduct that is imposed upon and attaches to private owners of similar enterprises. . . .[T]his rule has been frequently applied with respect to municipal light and power plants, gasworks, and waterworks." *See also, Id.* at §53.02.

[62] *See, supra note* 34. *See also, supra* notes 36-40 and accompanying text.

[63] It is likely that no distinction would be made between a state statute and a state agency regulation. Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions,* 28 Tex. L.Rev. 143 (1949). *See also,* Hasson v. Stafford, 472 F.2d 88 (3d Cir. 1973). No distinction has been made, for example, between a state statute and a municipal ordinance. *See,* Donald Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky,* 37 Ky. L.J. 358 (1949). Moreover, the case law is clear that an administrative regulation has the same force and effect as a statute. *See e.g.,* Whitley County Rural Elec. Membership Corp. v. Lippincott, 493 N.E.2d 1323, 1327 (Ind. App. 1986).

[64] The negligence *per se* rule is not universal. In Vermont, for example, violation of a safety statute creates only a rebuttable presumption of negligence. *See, e.g.,* Sheehan v. Nims, 75 F.2d 293 (2d Cir. 1935). Moreover, in Arkansas, violation of a statute is only evidence of negligence. *See e.g.*, Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597 (Ark. 1938).

[65] 126 N.E. 814 (N.Y. 1920).

[66] *Id.,* at 815.

another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those in organized society are under a duty to conform,"[67] In such a situation, the debate as to whether the prescribed safeguards are reasonably necessary is ended by legislative fiat. The above New York holding has been adopted by the Restatement of Torts[68] and is clearly the majority rule in this country.[69]

The advantage of arguing that violation of shutoff regulations is evidence of negligence is that it eliminates the need to establish independently the standard of care by which to determine whether negligence occurred.[70] If there is no question of whether the REC did, in fact, violate the prerequisites to a utility shutoff, the issue of negligence will be more easily resolved. What has happened is that the entity prescribing the prerequisite—whether it be the legislature or the state utility commission—has already performed the function of establishing the proper standard of care.

CONCLUSION

The assumption at the beginning of this article was that because REC's are exempt from the jurisdiction of state PUCs, the regulations promulgated by such commissions were not applicable to actions seeking customer service protection for REC member-consumers. As we have seen, that assumption is clearly wrong. While perhaps not directly applicable as an extension of PUC jurisdiction, state PUC regulations are quite useful in establishing appropriate protections for REC customers.

State PUC regulations can be useful in controlling REC actions because they (1) can be imported as implied contract terms under UCC "usage of trade" or "trade code" provisions; (2) set the benchmark for "reasonable commercial standards" under the UCC's "good faith" provisions for merchants; (3) set the standard of care for determining whether an REC has acted "reasonably," in assessing its conduct for tortious behavior; and (4) set the standard of fairness for determining whether an REC has violated its state UDAP statute. They should be pleaded and used accordingly.

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[67] *Id.*

[68] Restatement (SECOND) of Torts, §874A (West 1979).

[69] Some statutes, however, specifically address themselves to the liability question, either establishing or negating that violation of the statute creates liability per se. *See, e.g.* Section 24 of the Federal Consumer Product Safety Act; *see also* Fleming James Jr., *Statutory Standards and Negligence in Accident Cases,* 11 La. L. Rev. 95, 103 (1950).

[70] *See generally* Stephen Weiner, *The Civil Jury and the Law-Fact Distinction,* 54 Cal. L. Rev. 1867, 1885-86 (1966).