

REGULATING UTILITIES

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I. INTRODUCTION

Lawmakers have a duty to act in the best interests of their constituents. Bearing this obligation in mind, legislators collectively attempt to codify public policy by enacting statutes and adopting regulations. Although legislators deal with a myriad issues, their treatment of utility companies serves as the basis of this discourse. This paper includes a sampling of rules, laws and regulations from various states in addition to defenses available to utilities.¹ In short, the purpose of this paper is to survey the protections for the utility industry and the public, enacted by legislative bodies.

II. EXCAVATION ACTS

Anyone who performs work on or around a gas, water, electric or telephone utility line risks harming themselves and hindering a utility's service to the general public. Due to this type and related injuries, lawsuits are often filed against utilities. In fact, utilities have been subjected to liability for personal injuries attributable to its service lines whether or not it was aware of persons in the vicinity. For personal safety and protection of the utility, statutes have been enacted which govern work on or around utility lines.

A. Purposes of Underground Utility Facility Damage Prevention Acts

The purposes of the Illinois Underground Utility Facilities Damage Prevention Act are as follows: (i) to prevent negligent or unsafe excavation or demolition operations, (ii) to protect persons

¹ Defenses available to utilities include the following, which will be discussed at length: (i) Overhead Power Line Acts, (ii) Excavation Acts, (iii) Anti-Indemnity Statutes, (iv) Tariffs, (v) Limitations of Liability, (vi) General Tort Principles, and (vii) Additional Alternative Defenses.

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and property, and (iii) to preserve utility services.² This rationale
is typical and has been cited by other legislatures enacting similar
laws.³

B. Inquiry requirements

In Wyoming, excavators have an affirmative duty to search for underground utility lines before performing an excavation.⁴ This requirement has been expanded by the Connecticut legislature such that: “[n]o person ... shall engage in excavation ... at or near the location of public utility facilities ... without having first ascertained the location of all underground facilities of public utilities in the area of such excavation ... in the manner prescribed in this chapter and in such regulations as the department shall adopt pursuant to Section 357.”⁵ Louisiana Revised Statute 40:1749.13 similarly provides that: “except as provided in this section, no person shall excavate or demolish in any street, highway, public place or servitude of any operator, or near the location of an underground facility or utility, or on the premises of a customer served by an underground facility or utility without having first ascertained...the specific location of all underground facilities or utilities in the area which would be affected by the proposed excavation or demolition.”⁶

Wyoming statute § 37-12-302(b) contains a penalty provision, stating that a person who fails to inquire “and whose excavation causes injury or damage to an underground facility, shall be liable for all damages, including personal injury and property damages, caused by the excavation.”⁷

² 220 ILL. COMP. STAT. 50/1 (West 1996).

³ See *infra*.

⁴ WYO. STAT. ANN. § 37-12-302(b) (1998).

⁵ CONN. GEN. STAT. § 16-346 (2000).

⁶ LA. REV. STAT. ANN. § 40:1749.13 (West 2000); *BellSouth Telecom., Inc. v. Indus. Enter., Inc.*, 690 So. 2d 145 (La. App. 1st Cir. 1997).

⁷ WYO. STAT. ANN. § 37-12-302(K) (1998); see *Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1205 (10th Cir. 2000).

C. Notice requirements

In Ohio, a governmental agency serves as an intermediary between utilities and excavators. Under Ohio law, a developer or excavator must notify the Ohio Utilities Protection Service (“OUPS”) prior to any excavation.⁸ OUPS, in turn, must notify all of the underground utility providers in the area of the proposed excavation.⁹ Utilities must then notify the developer or excavator of their underground utility facilities at the proposed excavation site.

Connecticut has a similar statutory provision which reads in pertinent part: “[a] person, public agency or public utility responsible for excavating ... at or near the location of public utility facilities ... shall notify the central clearinghouse of such proposed excavation, ... orally or in writing, at least two full days, excluding Saturdays, Sundays, and holidays, but not more than thirty days before commencing such excavation.”¹⁰ Additional issues may impact liability if a statute has a third party entity as an intermediary. For example, if an intermediary is a governmental entity, the issues of sovereign immunity may shield it from potential lawsuits for its failure to perform its duty.

In *BellSouth Telecomm., Inc. v. Industrial Enters., Inc.*, the Louisiana Court of Appeals held that in addition to notice, it was necessary to obtain a response from the notified utility before commencing excavation.¹¹ In that case, an excavator was liable to a local telephone exchange carrier for negligently damaging the carrier’s underground cables during the course of an excavation was performed in violation of Louisiana Underground Utilities and Facilities Damage Prevention Law.¹² After the excavator contacted the regional notification center and gave notice of its intent to excavate, the excavator proceeded with its excavation *before*

⁸ OHIO REV. CODE ANN. § 3781.27(A) et seq. (West 2001).

⁹ *Id.* § 3781.27(B).

¹⁰ CONN. GEN. STAT. § 16-346 (2000); *AT&T Communications v. Corsetti Constr., Inc.*, 1996 WL 555219, (Conn. Super. Ct. 1996).

¹¹ *See BellSouth Telecom., Inc.*, 690 So.2d 145.

¹² *Id.*; LA. REV. STAT. ANN. § 40:1749.13 (West 2000).

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receiving information regarding the approximate location and type
of underground facilities.¹³ Thus, damages were attributable to the
excavator.

D. Notification

In Ohio, notification by OUPS often takes the form of painted markings on the ground surrounding the proposed excavation.¹⁴ The markings indicate the location of underground utility facilities.¹⁵ Different colors of paint identify different utilities.¹⁶ The failure to provide such notice is deemed to be notice that no utility lines are present.¹⁷ Further, compliance with the statute requiring an excavator to notify utility company of excavation “at least forty-eight hours but not more than ten days before commencing excavation” fulfills an excavator’s duty to inform.¹⁸ In other words, if a utility properly notifies OUPS and informs them of its intention to dig in 5 days and if no markings appear at the specified site on the specified date, a utility may assume that no utility lines are present and be afforded legal protection.

E. Notice directly to utility

Virginia’s Underground Utility Damage Prevention Act, requires excavation or demolition work to be preceded by at least forty-eight (48) hours advance notification to all entities furnishing or transporting materials or services by means of underground

¹³ See *BellSouth Telecoms., Inc.* 690 So.2d 145.

¹⁴ *Ohio Bell Tel. Co. v. Ohio Edison Co.*, 2000 WL 1803710 (Ohio Ct. App. 2000).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ OHIO REV. CODE ANN. § 3781.29(A)(1) (Anderson 2001).

¹⁸ *Ohio Edison Co. v. Wartko Constr.*, 658 N.E.2d 1118 (Ohio Ct. App. 1995). OHIO REV. STAT. ANN. §§ 3781.28(B)(1), 3781.29(A)(1) (Anderson 2001).

utility lines.¹⁹ The requirements of the North Carolina Act are similar: “a person planning to excavate shall notify each utility owner having underground utilities located in the proposed area to be excavated....”²⁰

F. Authority of the public utility commission

Rhode Island’s General Laws specifically enumerates the powers of the Public Utilities Commission. Specifically, the Public Utilities Commission has authority to review city ordinances that regulate the excavation of city streets to the extent that the ordinance affects the placing and maintenance of utility equipment.²¹ The Public Utilities Commission also has control over the means by which utilities connect their services by lines, pipes, wires, or other implements to buildings occupied by utility customers.

In sum, in order find out where utility lines are located prior to excavation, some specific procedure must be followed. This process varies from state to state. It must be assumed, however, that utility lines are present in the proposed area of excavation since the procedure typically involves notification of the proposed excavation site to public utilities, governmental agencies or both.

G. Exemptions from notice requirement

The North Carolina Underground Damage Prevention Act, obligates a utility to provide line location information to an excavating party upon request.²² The act does not allow the utility to charge the excavator for such services.²³ The legislature

¹⁹ VA. CODE ANN. § 1950, 56-265.14 et seq. (Michie 2000); *Chesapeake & Potomac Tel. Co. v Properties One*, 439 S.E.2d 369, 370 (1994).

²⁰ N.C. GEN. STAT. § 87-102(a) (1989).

²¹ R.I. GEN. LAWS §§ 24-5-1, 24-5-1.1, 39-1-30, 45-15-8 (1956).

²² N.C. GEN. STAT. § 87-102 et seq. (2000).

²³ *Id.*

intended the act to serve as mechanism for orderly preservation of utility services to customers at no direct cost to the public.²⁴

North Carolina law exempts several excavations from the notice requirement, including: (i) agricultural tilling, (ii) certain excavations by the State, (iii) pole replacements, (iv) where there exists an emergency involving danger to life, health, or property requiring immediate correction, (v) to continue the operation of a major industrial plant, and (vi) in order to assure the continuity of utility services.²⁵

H. Requirements of utilities

Ohio law states that: “within forty-eight hours of receiving notice each utility shall locate and mark the approximate location of its underground utility facilities at the excavation site.²⁶ If the utility cannot accurately mark the approximate location, the utility shall mark the approximate location to the best of its ability, notify the excavator that the markings may not be accurate, and provide additional guidance to the excavator in locating the facilities as needed during the excavation”.²⁷

I. Excavation contract and bid document requirements

Texas law requires that the following must be included in excavation contracts in which a contractor is employed and in which a trench excavation will exceed a depth of five (5) feet: (1) a reference to the Occupational Safety and Health Administration (“OSHA”) standards for trench safety in effect during the period of construction of the project; (2) a copy of special shoring requirements, if any, of the state or political subdivision in which the construction project is located, with the separate payment noted for the special shoring requirements; (3) a copy of any geotechnical

²⁴ See *Cont'l Tel. Co. v. Gunter*, 394 S.E.2d 228, 230 (1990).

²⁵ *Id.*; N.C. GEN. STAT. § 87-106 (2000).

²⁶ OHIO REV. CODE ANN. § 3781.29 (West 2001).

²⁷ *Id.*

information that was obtained by the owner for use in the design of the trench safety system; and (4) a separate pay item for trench excavation safety protection.²⁸ Further, a municipality may adopt an ordinance that refuses a building permit to one who fails to certify in writing that the aforementioned requirements of have been satisfied. A municipality, in lieu of or in addition to the written certification, may require an applicant for a building permit to produce for inspection or file with the municipality a copy of a contract that complies with the above, as a condition precedent to the issuance of a building permit.²⁹

J. Requirements of person or entity performing excavation

Ohio law sets forth specific regulations governing the actual excavation process. Specifically, when making excavations, the excavator shall maintain reasonable clearance between any underground facility and the cutting edge or point of powered equipment.³⁰ Also, when approaching underground utility facilities while excavating with powered equipment, an individual other than the equipment operator is required to look for any sign of the underground utility lines.³¹ Finally, the excavator must conduct the excavation in the vicinity of the underground utility facility in a careful and prudent manner, excavating by hand, if necessary, to determine the precise location of the facility and to prevent damage.³²

K. Court ordered injunctions to stop excavation

In Illinois, the court's authority under the Underground Utility Facilities Damage Prevention Act, to enter an injunction

²⁸ TEX. HEALTH & SAFETY CODE § 756.022 (Vernon 2000).

²⁹ *Id.*

³⁰ OHIO REV. CODE ANN. § 3781.30 (West 2001); *East Ohio Gas Co. v. Kenmore Constr. Co.*, 2001 WL 302818 (Ohio Ct. App. 2001).

³¹ *Id.*

³² *Id.*

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preventing negligent or unsafe excavation or demolition that is likely to result in damage to an underground utility or community antenna television system facilities is not limited solely to specific job sites identified in advance.³³ Instead, it includes future work at unidentified sites.³⁴

L. After actual damage occurs

Texas law sets forth the following procedure in the event that damage occurs in the excavation process:

- (a) If an excavation operation results in damage to an underground facility, the excavator shall immediately contact the underground facility operator to report the damage.
- (b) If the excavator is not certain of the operator's identity, the excavator shall contact a notification center to report the damage, and the notification center shall immediately notify all other affected notification centers. Immediately on receiving notification, each notification center shall contact each member operator that has underground facilities in or near the area in which the damage occurred.
- (c) Only the operator or a person authorized by the operator may perform repairs, and the repairs must be made in an expeditious manner.
- (d) An excavator shall delay backfilling in the immediate area of the damage until the damage is reported to the operator and a repair schedule is mutually agreed to by the excavator and the operator.

³³ 220 ILL. COMP. STAT. 50/1 (West 1996).

³⁴ *Illinois Bell Telephone Co. v. Lake County Grading Co. Of Libertyville, Inc.*, 728 N.E.2d 1178 (2000).

- (e) If damage endangers life, health, or property because of the presence of flammable material, the excavator shall keep sources of ignition away.³⁵

M. Burden of proof

A utility, as the aggrieved party, has the burden to prove by a fair preponderance of the evidence that a city ordinance governing excavation of city streets was unreasonable or caused undo burden.³⁶ A mere incidental burden on the business and services of a utility, whether financial or otherwise, is not enough to support the Public Utilities Commission's nullification or modification of a city ordinance.³⁷ The burden, specifically, must have a substantial adverse impact upon the business of the utility.³⁸ If a utility succeeds in doing so, then the burden shifts to the city to show that the ordinance was not unreasonable or burdensome.³⁹ This would require evidence of the costs incurred by the city as a result of the utilities' excavating and faulty restorations, which is what appears to have prompted the ordinance to be enacted.

N. Potential comparative negligence of utility

Under Louisiana law, an excavators' violation of Louisiana's Underground Utilities and Facilities Damage Prevention Law does not preclude him or her from presenting comparative negligence defense.⁴⁰ This may be based, for

³⁵ Tex. Util. Code § 251.159 (Vernon 2000).

³⁶ *In re Ordinance Adopted by the City of Providence*, 745 A.2d 769 (R.I. 2000) (ordinance governed timing of excavation, type of material that had to be used to repair holes, fees charged, insurance required and myriad of other obligations of utility).

³⁷ *Id.*; R.I. GEN. LAWS § 39-1-30 (2003).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *BellSouth Telecomms, Inc. v. Johnson Bros. Corp.*, 106 F.3d 119 (5th Cir. 1997).

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example, on alleged inaccuracy of a utility plat provided by a
utility.⁴¹

O. Excavators assume risk

There is no duty to warn of known or obvious dangers. The risk of striking underground utility lines during excavation is an obvious danger.⁴² In *Schaub Equipment Rental, Inc.* the court held that defendants, who were under a regulatory obligation to ascertain the location of utilities before undertaking an excavation, appreciated this risk.⁴³

P. Vicarious liability to landowner in case of excavation contractor negligence

In Virginia, a contractor's failure to comply with statutory notification procedures, per se, will not render a landowner vicariously liable for damages resulting from excavation on his or her property.⁴⁴ Generally, one who employs an independent contractor is not liable for injuries to another resulting from the contractor's negligence.⁴⁵ Courts recognize exceptions to this rule, however, under some circumstances. For example, an employer can be vicariously liable for an independent contractor's negligence under the doctrine of respondeat superior, in cases where negligent hiring and dangerous instrumentalities are involved.⁴⁶ In sum, the extent to which a landowner may be held vicariously liable with respect to the negligence of an excavation contractor depends on several factors, including the legality of the contractual agreement, the specific manner in which the excavation is performed, and the negligence of the landowner.

⁴¹ LA REV. STAT. ANN. § 38:2223 (West 2000).

⁴² *Schaub Equipment Rental, Inc. v Marzec*, 186 A.D.2d 990 (N.Y. App. Div. 1992).

⁴³ *Id.*

⁴⁴ *See Philip Morris, Incorporated v. Emerson*, 368 S.E.2d 268, 278 (1988).

⁴⁵ *Id.*

⁴⁶ *Kesler v. Allen*, 353 S.E.2d 777 (VA. 1987).

Q. Sovereign immunity

A city may be sued successfully under the various excavation acts.⁴⁷ In *Southwestern Bell Tel. v. City of Pawhuska*, the utility brought a claim against the city of Pawhuska, Oklahoma, under the Underground Facilities Damage Prevention Act.⁴⁸ Southwestern Bell claimed that one of the utility's underground cables was damaged while the city was repairing a broken water line.⁴⁹ Despite the fact that the court ruled in favor of the city, it held that in the absence of proper notification as prescribed by statute, "[the city] would be responsible for the damage to underground facilities of an operator it did not notify."⁵⁰

III. OVERHEAD POWERLINE ACTS

A. Preliminary definitions

Texas statutes define "[h]igh voltage" as "more than 600 volts measured between conductors or between a conductor and the ground," and "[o]verhead line" as a "bare or insulated electrical conductor installed above ground but does not include a conductor that is de-energized and grounded or that is enclosed in a rigid metallic conduit."⁵¹

B. Restrictions on activities near overhead lines

The Texas Health and Safety Code require a person responsible for temporary work near high voltage overhead lines to give notice to operator of lines.⁵² Further, a responsible party must

⁴⁷ See, e.g., *Southwestern Bell Tel. v. City of Pawhuska*, 964 P.2d 220 (Okla. Civ. App. 1998).

⁴⁸ *Id.*; OKLA. STAT. ANN. Tit. 63 § 142.6 (West 2000).

⁴⁹ *Id.*

⁵⁰ *Southwestern Bell Telephone*, 964 P.2d at 222; See also OKLA. STAT. ANN. Tit. 63 § 142.6(A) (West 2000).

⁵¹ TEX. HEALTH & SAFETY CODE ANN. § 752.001 (Vernon 2000).

⁵² TEX. HEALTH & SAFETY CODE ANN. § 752.003 (Vernon 2000).

indemnify an operator of high voltage powerlines for all liability that an operator incurs as result of contact with a line and all damages to facilities where the responsible party failed to notify the operator of work to be done near a line at least forty-eight (48) hours prior to commencement of such work.⁵³ A responsible party must also indemnify an operator in the foregoing manner if the party fails to arrange for de-energization of a line as required by statute and then brings any part of tool, equipment, machine, or material within six feet of the line.

C. Policy considerations

The enumerated policy behind the statutes governing activities near high voltage powerlines is to ensure, to the extent possible, the safety of persons engaged in such activities.⁵⁴ In *Chavez v. City of San Antonio*, the court specifically referenced its intent to prevent persons from coming into contact, either directly or indirectly, with high voltage overhead lines.⁵⁵ The purpose of statutorily imposed indemnification is to place liability for losses resulting from noncompliance on party responsible for having workers near a line.⁵⁶

D. Regulations concerning powerlines and negligence

Negligence is the most common cause of action asserted by plaintiffs in cases involving injuries caused by powerlines. In order to maintain a cause of action for negligence, a plaintiff must show: (i) duty, (ii) breach, (iii) causation, and (iv) damages.⁵⁷ In considering whether a breach has occurred, the applicable standard

⁵³ TEX. HEALTH & SAFETY CODE ANN. §§ 752.004, 752.004(A)(2), 752.008 (Vernon 2000).

⁵⁴ See *Chavez v. City of San Antonio*, 21 S.W.3d 435 (Tex. App. 2000).

⁵⁵ *Id.*

⁵⁶ TEX. HEALTH & SAFETY CODE ANN. §§ 752.004, 752.008 (Vernon 2000).

⁵⁷ *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

of care required of a utility company may be determined by statute or regulation. For example, Rule 24 of the Illinois Commerce Commission provides that in order to “promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electrical supply lines, such parts should be arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons.”⁵⁸ A state highway or railroad commission may also issue regulations, which may be used in a similar fashion.⁵⁹ Specifically, commissions frequently regulate the proximity of power poles to roadways.⁶⁰ Negligence of a power company may also be predicated on a violation of the public utilities code.⁶¹ Public utilities’ codes provide specific distances at which transmission wires should be hung, the proper distance between power transmission poles and the distance at which a wire may cross a street or highway.⁶²

The National Electric Safety Code governs the installation, operation, inspection and maintenance of overhead electrical transmission lines.⁶³ National Electric Safety Code §232 specifically indicates, for example, that the twenty (20) foot minimum height requirement for powerlines is not necessarily applicable when vehicles higher than 14-feet operate within the vicinity of the powerlines.⁶⁴ In such cases, the powerlines must be at least six feet higher than the maximum operating height of vehicles.⁶⁵

In *Arkansas Valley Electric Coop. Corp. v. Davis*, a 16-year-old was injured after coming into contact with a 7,200-volt

⁵⁸ *Woody v. South Carolina Power Co.*, 24 S.E.2d 121, 124 (1943).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ W. J. Dunn, *Liability of Electric Power Company for Injury or Death Resulting From Contact of Crane, Derrick, or other Movable Machine with Electric Line*, 69 A.L.R.2d 93 (1960).

⁶² *See id.*

⁶³ 3 National Electric Safety Code § 232 (1961).

⁶⁴ *Id.*

⁶⁵ *Id.*

electric power line.⁶⁶ The pole had fallen to the ground due to a break near the ground.⁶⁷ The plaintiffs introduced testimony that the utility pole was at 25 percent strength at the time it broke, and that the pole was buried at a depth of 58 inches underground, rather than 60 inches underground.⁶⁸ Both of these items violated the National Electric Safety Code standards.⁶⁹ In consideration of these violations, the court held that the electric company was negligent.⁷⁰

The National Electric Code sets forth similar installation and maintenance standards of how a customer should install and maintain his own equipment and wiring. These are typical examples of codes that have frequently been incorporated into municipal building codes, state codes, utility regulations and federal laws.⁷¹ Both codes, incidentally, are updated periodically by the National Fire Protective Association, which is a non-governmental association that monitors and enacts prospective code and safety standards.

Violations of rules set forth by the various states' Public Utilities Acts may also form the basis of a negligence action.⁷² In *First Trust & Savings Bank of Kankakee v. Commonwealth Edison Co.*, an action was brought against the power company when decedents died as a result of injuries which occurred when an antenna that decedents were attempting to remove made contact with overhead power lines.⁷³

Here, the Illinois Court of Appeals held that the power company did not have a legal duty to guard against contact of

⁶⁶ *Electric Coop. Corp. v. Davis*, 800 S.W.2d 420 (1990).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See National Occupational Health and Safety Act of 1970, 29 USC §§ 951-955 (West 2001); U. S. Department of Labor, Bulletin Number 216 (rev. 1968).

⁷² 77 ILL. COMP. STAT. ANN. §111 2/3 (West 1981).

⁷³ In *First Trust & Savings Bank of Kankakee v. Commonwealth Edison Co.*, 490 N.E.2d 255 (1986) cert. denied 479 U.S. 916 (1986).

antenna with overhead power lines strung over private property.⁷⁴ Specifically, the court dismissed the case for failure to state a cause of action: that defendant was negligent in maintaining its power lines by failing to insulate adequately, failing to maintain the lines at an adequate height, and failing to warn of the danger posed by the lines.⁷⁵ In other words, the power company met the minimum standard, and therefore owed no duty to the plaintiff. Further, the court held that compliance with the rule regarding minimum clearance of power lines suspended over areas accessible to pedestrians took precedence over general safety rules regarding a general duty to install and maintain lines “so as to reduce hazards to life as far as practicable.”⁷⁶

E. Negligence for noncompliance with standard industry practice

Standard industry practice may also dictate the applicable standard of care. Consensus standards provide the underlying basis for accepted industry practice, and take the form of formal documents prepared by recognized industry and governmental experts as well as experts from nonprofit professional associations. Two such professional associations are the Underwriters' Laboratories, and the National Electric Contractors Association.⁷⁷ Other documents may also dictate the applicable standard of care, including: (i) documents from the National Safety Council's Accident Prevention Manual, (ii) Rural Electrification Administration Bulletins (REA), (iii) insurance company safety manuals, (iv) electrical utility company design standards, and (v) safety rules and regulations promulgated by electric companies.⁷⁸

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 256.

⁷⁷ Bill Wishland, *Electric Company's Failure To Exercise Reasonable Care Regarding Powered Transmission* 17 Am. Jur. POF 2d 643 (1978); Richard C. Tinney, *Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line*, 33 A.L.R.4th 809 (1984).

⁷⁸ *See Dehn v. Otter Tail Power Co.* 251 N.W.2d 404 (1977).

The fact that a utility has followed standard industry practice and its own safety rules and regulations, however, does not necessarily prove due care.⁷⁹ In *Black v. Public Service Electric & Gas Co.*, the court stated that adherence to the National Electric Safety Code is only a “relevant factor” in determining due care, and that a negligence suit may be actionable despite compliance.⁸⁰ Here, an electric utility erected both voltage wires and a supporting pole near the plaintiff’s barbed-wire fence.⁸¹ . Later, an un-insulated guy wire from the pole came into contact with the fence thereby causing a fire and damaging the plaintiff’s property.⁸² The utility produced evidence proving that such construction complied with both the applicable safety rules and standard construction practices.⁸³ The court held that under such circumstances, the defendant utility was not absolved from liability merely because the construction had complied with safety rules and standard construction practices.⁸⁴ The court specifically stated that danger should be anticipated when high tension, un-insulated wires are strung or maintained in such a position that contact during the ordinary course of operation by a utility may occur between them and cranes or other machinery in the vicinity.⁸⁵

F. Defenses

The standard defenses asserted by electric companies when defending personal injury actions are generally statutory and code compliance, industry standard, assumption of risk, contributory negligence, comparative negligence, worker’s compensation limits, and additional alternative defense theories, which are discussed later. Although Texas is no longer a contributory negligence state, the contributory negligence doctrine is applicable to several states.

⁷⁹ *Black v. Public Service Electric & Gas Co.*, 265 A.2d 129 (1970).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 134.

Under the contributory negligence doctrine, there can be no recovery of damages for injuries negligently inflicted on one person by another, if the injured person, by his own negligence or by the negligence of another legally imputable to him, proximately contributed to his injury.⁸⁶ In short, contributory negligence on the part of the plaintiff is a complete defense in an action based on the negligence of the defendant.⁸⁷ Similarly, the Restatement (Second) of Torts §479 (1965) says that except where the defendant has the “last clear chance,” the plaintiff’s contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.⁸⁸ The last clear chance or discovered peril doctrine can be summarized as follows: [t]he party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it.”⁸⁹

In *Mann v. Hart County Elec. Membership Corp.*, the court stated: “[w]here the second actor, after having become aware of the existence of a potential danger created by the negligence of the first actor, acts negligently in respect of the dangerous situation and thereby brings about an accident with injurious consequences to others, the first actor is relieved of liability, because the condition created by him was merely a circumstance and not the proximate cause of the accident.”⁹⁰ In that case, the plaintiff was a passenger on a sailboat.⁹¹ Although the owner of the boat was aware of the risks associated with sailing under power lines, he proceeded to do so.⁹² The boat’s mast struck the electrified lines, thereby killing both passengers.⁹³ The court held that the owner’s

⁸⁶ 57A Am. Jur. 2d Negligence § 842 (1989).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Womack v. Stephens*, 550 S.E.2d 18 (N.C. Ct. App. 2001).

⁹⁰ *Mann v. Hart County Elec. Membership Corp.*, 349 S.E.2d. 215 (1986).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

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negligence superseded the electric company's negligence and
proximately caused the plaintiff's injuries.⁹⁴

Johnston v. New Omaha Thomson-Houston Electric Light Co.
applies the contributory negligence doctrine to children.⁹⁵ In
Johnston, the court held that a 12-year-old should possess
sufficient knowledge that a wire carrying electrical current is
capable of causing shock or injury should one come in contact with
it.⁹⁶ Because the boy was of sufficient age, intelligence and
experience to understand the risk of climbing to the top of the tree
in proximity to overhead power lines, the court ruled him guilty of
contributory negligence, and therefore, dismissed the case.⁹⁷

Contributory negligence must be distinguished from
assumption of risk. The defense of assumption of risk does not
necessarily put the plaintiff's due care at issue. Instead, the inquiry
focuses on the plaintiff's knowledge and appreciation of the
danger, and his or her willingness to be exposed to it.⁹⁸

Where worker's compensation serves as the exclusive
remedy, plaintiff may be estopped from asserting a cause of action
against a utility. This defense is clearly illustrated by Virginia
statutory and case law. Section 65 of the Virginia Code states that
where an independent contractor is performing work which is a
part of trade, business or occupation of the owner, the employees
of the independent contractor are statutory employees of the owner
under Virginia law.⁹⁹ As a result, they are limited to compensation
and benefits under the Workmen's Compensation Act of Virginia,
and are precluded from instituting or maintaining a common law
suit against the owner.¹⁰⁰

⁹⁴ *Id.*

⁹⁵ *Johnston v. New Omaha Thomson-Houston Electric Light Co.* 113
N.W. 526 (1907).

⁹⁶ *Id.*

⁹⁷ *Id.*; *See also Suarez v. Omaha P.P. Dist.*, 352 N.W.2d 157 (1984)
(injured 12 year old testified he knew before he climbed tree that power lines
were strung though, the court, however, held to appreciate danger to himself.)

⁹⁸ *Id.*

⁹⁹ VA. CODE ANN. §§1950, 65.1-29, 65.1-40 (Michie 2000).

¹⁰⁰ *Id.*

On the other hand, a general contractor's status as a "statutory employer" may lessen restrictions on an injured employee's right to recover, and consequently on an employer's liability, under the Workmen's Compensation Act.¹⁰¹ The decisive factor in making the statutory employer determination is whether the work being performed by the injured worker was part of the trade, business or occupation of the general contractor.¹⁰² If the general contractor is deemed a statutory employer, he is immune from a common law action brought by the injured workman.¹⁰³ If the work being performed was not a part of the general contractor's trade, business or occupation, then the general contractor is not a statutory employer, and is not liable for workmen's compensation.¹⁰⁴ Further, an injured workman's right to maintain a common law negligence action against the employer remains available.¹⁰⁵

In *Snowden v. VEPCO*, work was performed by plaintiffs as employees of a subcontractor, as part of the defendant utility's business.¹⁰⁶ The defendant utility contracted with the general contractor, who subcontracted with the plaintiffs' employer to drive steel piles into the ground.¹⁰⁷ Here, the court determined that the utility was a statutory employer.¹⁰⁸ Therefore, when a crane owned and operated by subcontractor came into contact with an overhead power line, the plaintiffs were limited to exclusive rights and remedies for injuries sustained.¹⁰⁹

The High-Voltage Safety Act, GA. CODE ANN. requires notice to be given before work is performed near high voltage lines, and makes owners and operators of lines immune from

¹⁰¹ VA. CODE ANN. §§1950, 65.1-29, 65.1-40 (Michie 2000); *Slusher v. Paramount Warrior, Inc.*, 336 F.Supp. 1381, 1384 (W.D.Va. 1971).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; VA. CODE ANN. § 1968, 65.1-5 (Michie 2000); *Farish v. Courion Indus., Inc.*, 722 F.2d 74 (4th Cir. 1983).

¹⁰⁶ *Snowden v. VEPCO*, 423 F.Supp. 266 (E.D.Va. 1976).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; VA. CODE ANN. §§ 65.2-100, 65.1-40 (Michie 2000).

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liability if no notice is given.¹¹⁰ The act does not require an owner
or operator of power lines to advise the public that a particular line
is high-voltage despite that the public might not be aware of the
voltage of particular lines.¹¹¹

The Texas notice requirement may also give rise to a
defense. In *Chavez v. City of San Antonio ex rel. City Public
Service Board of San Antonio*, a tree trimmer could not recover
from the operator of power lines for injuries he sustained when a
tree limb came into contact with the high voltage lines.¹¹² The
court based its decision on the statutory requirement that requires
notification to an operator of power lines at least forty-eight (48)
hours in advance of work to be done proximate to the lines.¹¹³ The
tree trimmer failed to fulfill statutory duty to notify and arrange for
de-energization of line.¹¹⁴ Thus, due to noncompliance with
notification requirements the court held that the operator was
entitled to indemnification for all liability and damages.¹¹⁵

G. Punitive damages

Generally, the principles governing recovery of compensa-
tory damages in cases involving utility-based injuries are the same
as for personal injury or wrongful death actions.¹¹⁶ Punitive
damages are imposed for the purpose of punishment and

¹¹⁰ GA. CODE ANN. §§ 46-3-34(b), 46-3-39(a) (2000); *Santana v. Georgia
Power Co.*, 498 S.E.2d 521 (1998).

¹¹¹ *Id.*

¹¹² *Chavez v. City of San Antonio ex rel. City Public Service Board of San
Antonio*, 21 S.W.3d 435 (Tex. Ct. App. 2000).

¹¹³ *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 752.004(a)(2), 752.008
(Vernon 2000).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Bill Wishard, *Electric Company's Failure to Exercise Reasonable Care
Regarding Downed Transmission Line or Pole*, 17 Am. Jur. POF 2d 643 (1978).

deterrence.¹¹⁷ This remedy is so extraordinary or harsh, however, that it should be applied only sparingly.¹¹⁸

Where a utility acts with wanton or willful misconduct, the power company may be liable for punitive damages.¹¹⁹ For common law punitive damages claims, the evidence must meet the “clear and convincing” standard of proof.¹²⁰ In negligence cases, punitive damages are awardable only if the defendant knew or had reason to know there was a high degree of probability that the action would result in injury at the time of the negligent act.¹²¹ Punitive damages cannot be collected, however, unless the defendant showed complete indifference to or conscious disregard for the safety of others.¹²² Accordingly, the plaintiff must prove by a preponderance of the evidence conduct on the part of the defendant that is more egregious than that on which the claim of negligence is based.¹²³

In *Ellis v. Kerr-McGee Chemical*, an automobile passenger brought a negligence action against the utility, which owned the pole, the manufacturer of the pole and the utility pole inspector for injuries received when a utility pole fell on her car.¹²⁴ There, the utility in question conducted only one documented inspection of the pole over the twenty-six (26) year period prior to the injury.¹²⁵ Since the pole was wood and wood is subject to decay over a period of time, the court held that the potential danger was obvious.¹²⁶ Accordingly, the court held that the utility was liable

¹¹⁷ *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177 (Mo. Ct. App. 1997).

¹¹⁸ *See Ellis v. Kerr-McGee Chemical*, 1999 WL 969278 (Mo. Ct. App. E.D. 1999).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Litchfield v. May Dept. Stores*, 845 S.W.2d 596, 599 (Mo. Ct. App. 1992).

¹²⁴ *Ellis v. Kerr-McGee Chemical*, 1999 WL at 969278.

¹²⁵ *Id.*

¹²⁶ *Id.*

due to negligence. Finally, it is significant that the utility in this case acted in accordance with industry standards.¹²⁷

Here again, the court held that mere compliance with industry standards is insufficient, per se, to support a finding that a defendant has not breached its duty of care.¹²⁸ Thus, the jury was free to conclude that compliance with industry standards did not shield the utility from liability and that the industry standards were insufficient under the circumstances.¹²⁹

IV. WATER UTILITIES

A. Generally

Supplying the American public with water began in 1652 as a business opportunity for private enterprise.¹³⁰ By the mid-1800s, however, private companies could not lay pipelines in lower income areas, offer reasonable prices, and at the same time continue to profit.¹³¹ Accordingly, by the mid-1800s, the water industry was primarily owned by the government.¹³² At present, the industry is changing.¹³³ Water suppliers are currently under pressure to decrease spending, “cut operating costs, repair aging infrastructure, and meet all the new environmental rules.”¹³⁴

The government presently controls eighty-five percent of the public water supply industry.¹³⁵ Thus, without government support, changes cannot be made.¹³⁶ It is worth considering, however, that the private sector may be best suited to meet these

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Leonard S. Hyman et al., *The Water Business: Understanding the Water Supply and Wastewater Industry* 133, 155-56 (1998).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Martin Hubert, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 55 (1999).

¹³⁵ *Id.*

¹³⁶ *Id.*

challenges since private ownership arguably cultivates the imagination, initiative, and investment needed to push utilities to a higher level of development.¹³⁷ The successful deregulation of certain utilities in Texas proves that this solution merits investigation.

B. American Water Works Association Requirements

All cast iron piping is made according to specifications adopted by the American Water Works Association (“Association”).¹³⁸ The Association is a group comprised of thousands of water utilities that, in part, allows pipe purchasers to obtain a standardized product with confidence regardless of manufacturer.¹³⁹ There are four types of piping systems in water utilities. Transmission lines are very large pipes that carry water from its source to the water works for treatment, or from the water works or pumping station to a community distribution system. Distribution mains are pipes with diameters of about 4 inches that pick up water from transmission lines and distribute it throughout the community. Service lines are pipes with smaller diameters, usually less than 2 inches, which carry water from the distribution main to a customer’s home or business. Finally, aboveground “flanged” pipes are used in water treatment plants and pumping stations.¹⁴⁰

C. Texas

In Texas, the past two decades have seen incredible changes in every public utility *except* water.¹⁴¹ Fortunately, Senate Bill 1 (“S.B. 1”) will facilitate such change in Texas.¹⁴² S.B. 1 is a

¹³⁷ *Id.*

¹³⁸ *United States v. Amsted Indus. Inc.*, No. 71-C-3124, 1974 WL 914 (N.D. Ill. July 19, 1974).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2.

¹⁴¹ Leonard S. Hyman et al., *The Water Business: Understanding the Water Supply and Wastewater Industry* at 133, 155-56.

¹⁴² *Id.*

comprehensive water resource planning, management, and development bill that signaled an important change in Texas's strategy for meeting its water needs.¹⁴³ The Bill combines local control with statewide oversight to "develop a consensus-based plan" by vesting various agencies and water districts with planning and regulatory power.¹⁴⁴

The Bill is ordered as follows. Article 1 delineates the planning process by which each agency and water district is required to submit a plan for approval before its implementation.¹⁴⁵ Article 2 encourages water marketing by enhancing the Texas Water Bank, an entity in which surface and groundwater rights may be deposited.¹⁴⁶ Article 2 also addresses reuse of groundwater and surface water, distinguishing between direct and indirect reuse.¹⁴⁷ Article 3 focuses on enforcement, emergency transfers, and dam safety, providing mechanisms to enable timely relief during drought and giving those adversely affected by an emergency transfer the right to recover the fair market value of damages suffered.¹⁴⁸ Article 4 deals with surface water and groundwater supplies.¹⁴⁹ Articles 5 and 6 provides for financial assistance to small communities as well as to fund local water-related projects.¹⁵⁰ Article 7 addresses data collection and management.¹⁵¹ Article 8 establishes an Interim Committee on Water Resources Development and Management to study water supply and wastewater infrastructure.¹⁵²

¹⁴³ John R. Pitts & Janet L. Hamilton, *Texas Water Law for the New Millennium*, 14 NAT. RESOURCES & ENV'T, Summer 1999, at 35.

¹⁴⁴ *Id.*

¹⁴⁵ 1997 TEX. GEN. LAWS 3610-18 (S.B. 1, Article 2).

¹⁴⁶ C. Richard Bath, *A Commentary on Texas Water Law and Policy*, 39 NAT. RESOURCES J. 121, 123 (1999).

¹⁴⁷ John R. Pitts & Janet L. Hamilton, *Texas Water Law for the New Millennium*, 14 NAT. RESOURCES & ENV'T, Summer 1999, at 36.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See supra* note 147 p 36.

¹⁵² *Id.*

D. Nebraska

In Nebraska, local ordinances also control. Specifically, rather than state statutes, local regulations govern the enforcement of the liens created under the water statutes.¹⁵³ Specifically, NEB.REV.STAT.ANN. § 17-925.01 provides that:

“any city...or...village is hereby authorized...to levy a tax...for the purpose of creating a fund to be used for the maintenance and repairing of any...water utilities in such city or village. In lieu of the levy of such tax, the...city.....or...village may establish by ordinance such rates for such sewer service as may be deemed by them to be fair and reasonable.”¹⁵⁴

For example, the Tecumseh City Code §3-121 provides that arrearages for water service may be certified to the county clerk:

“to be collected as a special tax in the manner provided by law...[and] if a customer shall for any reason remain indebted to the Municipality for water service furnished, such amount due, together with any rents and charges in arrears, shall be considered a delinquent water rent which is hereby declared to be a lien upon the real estate for which the same was used.”¹⁵⁵

E. California

In California, water utilities must own and install service connections and meters at their expense.¹⁵⁶ This includes all connections from the main line to the curb or property line of the premises supplied.¹⁵⁷ As each new consumer is added, even

¹⁵³ NEB.REV.STAT.ANN. § 17-925.01 (Michie 2000).

¹⁵⁴ *Id.*

¹⁵⁵ Tecumseh City Code §§ 3-121.

¹⁵⁶ CAL. CODE REGS. tit. 36 § 157 (1931).

¹⁵⁷ *Id.*

though the company pays for the service connection and meter, the company benefits.¹⁵⁸ Thus, there is no reason for allowing an additional rate.¹⁵⁹ With respect to economics, California courts have opined that the water utilities capital structure is relatively stable.¹⁶⁰ With respect to the rate of return, the court held that the public utilities commission will consider that the water utilities capital structure is less risky than most utilities.¹⁶¹

Water utilities deal in a basic commodity without competition and their rates are protected by public utilities commissions. Consequently they are a less risky investment than industrial companies, and a lower return is normally expected and accepted by investors.¹⁶² Finally, water utilities in California are also charged, in part, with protecting the public from fire. Specifically, statutes award jurisdiction to the public utilities commission in order to promulgate rules and regulations setting standards for adequate fire protection service to be furnished by water utilities under the commission's jurisdiction.¹⁶³

F. Montana

In Montana, cities and towns are responsible for regulating publicly-owned water utilities.¹⁶⁴ The Montana Public Service Commission, an executive branch of the state, is responsible for regulating privately-owned water utilities.¹⁶⁵ Customers of privately-owned water utilities in Montana own the water service lines running between their premises and the water main in the public street.¹⁶⁶ Before 1987, these customers assumed

¹⁵⁸ CAL. CODE REGS. tit.42 § 506 (1913).

¹⁵⁹ *Id.*

¹⁶⁰ *In re: Citizens Utilities Co. of Cal.*, No. 79699, 52159, 1972 WL 30004 (Cal.P.U.C., Feb 08, 1972).

¹⁶¹ *Id.*

¹⁶² *Washington Water & Light Co. Authorized Water Rate Increase*, 1972 WL 30035 (Cal.P.U.C. April 4, 1972).

¹⁶³ 73 CAL.PUB.UTIL.CODE 7 (West 1972).

¹⁶⁴ MONT.CODE ANN. §§ 69-7-101 to 201 (1989).

¹⁶⁵ *Id.* §§ 69-3-101, 69-3-102 (1989).

¹⁶⁶ *Id.* §§ 2-15-2601, 2-15-2602 (1989).

responsibility for the maintenance of the service lines on their property.¹⁶⁷ As a result, they were held liable for costs and damages arising out of repairs on their property, as well as for repairs in the public street.¹⁶⁸

In 1989, the Montana legislature passed MONT.CODE ANN. § 69-4-511 (1989). The statute specifically provides that:

“(1) A property owner is responsible for the costs of constructing privately supplied water service pipelines from the main to his premises and for maintaining service pipelines from his property line to his premises. The private water service provider is responsible for the cost of maintaining water service pipelines from the main to the owner’s property line, except that the property owner shall pay for pipe and other supplies used in maintaining water service lines between the main and his property line.

(2) A property owner is not liable for any injury or property damage associated with excavation in maintaining water service pipelines if the excavation does not occur between his property line and his premises.”¹⁶⁹

This statute holds privately owned water utilities liable for most repairs of lines between customers’ property and the utility’s main line and mandates that privately owned water utilities reimburse customers for costs of these repairs. Further, by exempting customers from liability for injuries caused by repair of their lines past their property boundaries, the statute apparently imposes liability for damages arising from these repairs upon privately owned water utility.

¹⁶⁷ MONT. ADMIN. R. 38.5.2502(5)(1987).

¹⁶⁸ MONT. CODE ANN. § 69-7-101 to 201 (1989).

¹⁶⁹ *Id.*

V. PUBLIC UTILITIES & TARIFFS

A. Generally

A tariff is defined as “A public document setting forth services of a common carrier being offered, rates and charges with respect to services, and governing rules, regulations, and practices relating to those services.”¹⁷⁰

Besides governing a rate structure, the tariff may include limitations of liability for damage to the customer it serves. Overreaching by the utility in its tariff may subject it to criticism by the court—“[w]hen 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.”¹⁷¹ Tariffs which purport to limit a utility’s liability for gross negligence or willful or wanton misconduct have been held to be unreasonable.¹⁷²

B. Recent developments in Texas

In Texas, certain utilities are, by definition, recognized as monopolies in the area they serve.¹⁷³ These utilities are regulated by a public agency that serves as a substitute for competition by approving rates, operations, and services to consumers.¹⁷⁴ While Texas’ electricity market was deregulated on January 1, 2002,¹⁷⁵ its reliance on tariffs to limit its liability is as strong as ever.

¹⁷⁰ *Black’s Law Dictionary* 1457 (6th ed.1990).

¹⁷¹ *See Shawnee Milling Co. v. Postal Telegraph Cable Co.*, 101 Kan. 307, 166 P 493 (1917); *McNally Pittsburg Mfg. Corp. v. Western Union Tel. Co.*, 186 Kan. 709, 353 P. 1992, 204 (1960).

¹⁷² *Id.*

¹⁷³ *See* Texas Public Utility Regulatory Act, TEX. UTIL. CODE §11.002 (Vernon Supp. 1998).

¹⁷⁴ *Id.*

¹⁷⁵ *See* TEX. S.B., 7, 76th R.S. (1999).

1. *Grant v. Southwestern Electric Power Co.*

a. Generally

In *Grant v. Southwestern Electric Power Co.*, an electric utility consumer sued an electric utility company for negligence alleging that electrical problems caused personal injuries and property damage.¹⁷⁶ In that case, the court specifically addressed the relationship between public utility tariffs filed with the Public Utility Commission (“PUC”) and their effect on economic damages and personal injury awards.¹⁷⁷

b. Personal injury damages

As a matter of first impression, the court in *Grant* held that a tariff provision limiting liability for personal injuries was reasonable as a matter of law.¹⁷⁸ The court based this holding on its analysis of the filed-rate doctrine and on the extent to which a utility tariff is subject to the Uniform Commercial Code (“UCC”).¹⁷⁹

The filed-rate doctrine states that courts will presume that a tariff approved by a regulatory agency is reasonable.¹⁸⁰ Since the personal injury tariff made basis of *Grant* was approved by the PUC, a regulatory agency, the court held that the tariff was presumed to be reasonable.¹⁸¹ As an aside, it is noteworthy that the court mentioned in dicta that the tariff was “narrowly drawn, and provided a remedy for utility’s gross negligence or willful misconduct, such that it did not violate public policy.”¹⁸² Through

¹⁷⁶ *Grant v. Southwestern Electric Power Co.*, 73 S.W.3d 211 (Tex. 2002),

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 219.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Since the court utilizes the filed-rate doctrine in a case involving a water utility in *Lone Star Caliper Co. v. Talty Water Supply Corp.*, the extensive scope of the doctrine is noteworthy.

¹⁸² *Id.*

this statement, the court seems to imply, to some degree, that it might not issue opinions pertaining to tariffs that are overly broad in scope. Nonetheless, with respect to the filed-rate doctrine, the court held that the tariff provision limiting liability for personal injuries in *Grant* was reasonable.¹⁸³

The court's analysis also hinges on the extent to which a utility tariff is subject to the UCC. Since the court held that a utility tariff pertaining to personal injury damages was not subject to the UCC, it was deemed acceptable.¹⁸⁴ The court's rationalization for this conclusion is threefold. First, applying the UCC to utility tariffs would impair the comprehensive statutory scheme that regulates the sale of electricity to Texas consumers.¹⁸⁵ Second, this application is expressly prohibited by the UCC.¹⁸⁶ Third, applying the UCC to utility tariffs would impede the PUC's authority to approve and determine a utility's rates, operations, and services.¹⁸⁷ Since the UCC is inapplicable to utility tariffs, the court held that the tariff provision limiting liability for personal injuries in *Grant* was appropriate. As an aside, it is noteworthy that opinions previous to *Grant* held that Article 2 of the UCC did, in fact, govern utility tariffs.¹⁸⁸ In sum, the court in *Grant* held that the tariff provision limiting liability for personal injuries was legal due to the filed-rate doctrine and the court's ruling pertaining to the narrowed scope of Article 2 of the UCC.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 218-19.

¹⁸⁵ Effective January 1, 2002, Texas electric companies were deregulated. See TEX. S.B. 7, 76th R.S. (1999). At present, the PUC's regulatory role is limited to its obligation to ensure that all customers demanding less than one megawatt of service have access to electricity until 2007. See *Reliant Energy, Inc. v. Pub. Util. Comm'n of Tex.*, 62 S.W.3d 833 (Tex. Ct. App. 2001); Tex. Util. Code Ann. § 39.051 (Vernon 1998); See White, Gaye, *Annual Survey of Texas Law: Energy Regulation*, 56 SMU L. Rev. 1589, 1589-1590 (2003).

¹⁸⁶ *Id.*; TEX. BUS. & COM. CODE § 2.102 (Vernon 2002).

¹⁸⁷ See *Grant* at 218-19; Tex. Util. Code 31.001 (b) (Vernon 2002).

¹⁸⁸ See, e.g., *Grant v. Southwestern Electric Power Co.*, 20 S.W.3d 764 (Tex.App.—Texarkana, 2000. pet. granted.)

c. Economic damages

In *Grant*, the court explicitly refused to entertain specific requests by the parties to discuss the effect of this opinion on economic damages.¹⁸⁹ The court makes a bold statement, however, by failing to rule in this regard. The *Grant* ruling mandates that courts presume that approved tariffs are reasonable through its ratification of the filed-rate doctrine. When this holding is taken in concert with the concurrent and narrowing of the scope of the UCC, the vehicle through which courts formerly asserted control over utilities, tariffs and the Public Utility Commission in Texas, the Supreme Court's decision to uphold the power of state regulatory agencies becomes increasingly clear.

2. *Houston Lighting & Power Co. v. Auchan USA, Inc.*

The limitation of liability clause in a tariff approved by the Public Utility Commission of Texas, and granted to Houston Lighting & Power Company, was the basis of litigation in *Houston Lighting & Power Co. v. Auchan USA, Inc.*¹⁹⁰ In *Auchan*, a grocery store lost over \$275,000 worth of inventory due to the failure of a transformer. Auchan sued the utility, asserting that the tariff was an unreasonable limitation on liability.¹⁹¹ It is noteworthy that unless found to be unreasonable, filed tariffs govern a utility's relationship with its customers and have the force and effect of law.¹⁹² The Texas Supreme Court held that the tariff provision limiting liability for economic damages caused by an electric utility's ordinary negligence was reasonable on its face, and thus

¹⁸⁹ See *Grant* at 222-23.

¹⁹⁰ *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668 (Tex. 1999).

¹⁹¹ *Id.*

¹⁹² *Henderson v. Central Power & Light Co.*, 977 S.W.2d 439, 446 (Tex. Ct. App, pet. denied).

could be applied to the economic loss caused by the power failure.¹⁹³

The United States Supreme Court addressed limitations of liability by a utility company in 1894.¹⁹⁴ In *Primrose v. Western Telegraph Co.*, a telegraph company attempted to limit its liability for improperly transmitted messages.¹⁹⁵ In that case, the court held that the limitation of liability should be valid, in the absence of willful misconduct or gross negligence.¹⁹⁶ Decisions of other jurisdictions also influenced the decision of the court in *Auchan*. While some jurisdictions require a plaintiff to show gross negligence or wanton or willful misconduct by the utility to recover damages beyond those provided in the tariff, other jurisdictions have held exculpatory provisions to be invalid.¹⁹⁷

Public policy reasons in favor of liability limitations also support the holding of *Auchan*. First, without a proper limitation of liability for ordinary negligence, utilities would be likely be forced to raise rates charged to their customers.¹⁹⁸ Second, it has been argued that a majority of the losses would be absorbed by a finite number of large industrial customers.¹⁹⁹ Third, a potential outage in a major city could give rise to a significant amount of potential liability to a utility.²⁰⁰ Fourth, utilities are unique. While an unregulated business may set prices according to changing market conditions, utilities have no such flexibility.²⁰¹ Their financial freedom is limited due to the fact that they must charge rates as mandated by the Public Utility Commission of Texas.²⁰² By limiting liability, utilities would be afforded the latitude necessary to compensate them for their inability to vary prices as often as they might otherwise prefer.

¹⁹³ See *Auchan*, 995 S.W.2d at 669-71.

¹⁹⁴ See *Primrose v. Western Telegraph Co.*, 154 U.S. 1 (1894).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Auchan*, 995 S.W.2d at 672.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; 7 TEX. P.U.C. BULL. at 59.

²⁰⁰ *Id.* at 674.

²⁰¹ *Id.*

²⁰² *Id.*

VI. CONCLUSION

In order to properly assess a scenario involving a utility, one must read and evaluate applicable rules, regulations, case law and statutes. Laws concerning utilities have changed over time and will continue to do so. As legislators attempt to codify public policy via statutes and regulations in the future, they should continue to act with eyes towards the protection of the public as well as the utility industry.

