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

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May 26, 2007

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

INTRODUCTION

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

[\1\]Restatement, Contracts, § 336(1), cited and quoted in John Calamari and Joseph Perillo, ***Contracts***, at §14-15, p. 538 (1977).

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

A.WHAT IS A "PUBLIC UTILITY"

This article seeks to apply the common law of contract to the regulation of "public utilities." While most people have specific images of who their public utility is, it is difficult to define conceptually what precisely a "public utility" is. The definition often begins with the observation that if a company is a "public utility," a basic common law "duty to serve" attaches. This duty requires the provision of service to all who seek it, without discrimination, under reasonable rules and at reasonable rates.[3] This "duty to serve" is judicially enforceable:

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[2] The law as applied below has not been *rejected*, but rather has never been argued. The single time the theory has been approached, though not explicitly even then, it was adopted by regulators. *See* notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *infra*, and accompanying text.

[3] *See e.g.*, ***Snell v. Clinton Electric Light, Heat and Power Company***, 196 Ill. 626, 58 L.R.A. 284, 63 N.E. 1082 (1902). "There is no statute regulating the manner under which electric light companies shall do business in this state. They are, therefore, subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges." *Id.*, at 1083. The fundamental common law "rule" requires a utility to serve on reasonable terms all those who desire the service it renders. 64 ***Am.Jur.2d***, *Public Utilities*, §16 (1972). If a member of the public has applied for and made the necessary arrangements to receive service, and has paid for or offered to pay the price and abide by the reasonable rules of the company, it is the duty of a utility to provide the service. Annotation, *Liability of gas, electric or water company for delay in commencing service*, 97 ***A.L.R.*** 838, 839 (1935); *see also*, 26 ***Am.Jur.2d***, *Electricity, Gas and Steam*, §110 (1966) (delay in commencing electric service); 26 ***Am.Jur.2d***, *Electricity, Gas and Steam*, §216 (1966) (delay in commencing gas service). According to the Missouri courts, "a public utility is obligated *by the nature of its business* to furnish service or commodity to the general public, or that part of the public which it has undertaken to serve, without arbitrary discrimination." (emphasis added). ***Overman v. Southwestern Bell Tele. Co.***, 675 S.W.2d 419, 424 (Mo. App. 1984), *quoting*, 73B ***C.J.S.***, *Public Utilities*, §8 (1983); *see also*, ***Arizona Corp. Comm'n v. Nicholson***, 497 P.2d 815, 817 (Az. 1972) (citations omitted). In short, under the common law, a utility must make its service available to all members of the public to whom its public use and scope of operation extend, who apply for such service, and who comply with its reasonable rules and regulations. For excellent discussions of the scope and ramifications of this duty, *see generally*, Comment, "Liability of Public Utility for Temporary Interruption of Service," 1974 ***Wash. L. Qtrly*** 344, 346, n. 10 (1974); Robinson, "The Public Utility Concept in American Law," 41 ***Harv. L.Rev.*** 277 (1928); Arterburn, "The Origin and First Test of Public Callings," 75 ***U.Penn. L.Rev.*** 411 (1927); Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 ***Columbia L.Rev.*** 514 (1911).

violation of the duty is a tort giving rise to actions for damages,[4] as well as a breach of contract.[5] This duty to serve is unique to "public utilities."[6]

Though common, this definition --that a "public utility" includes all companies to whom a common law duty to serve attaches-- might be considered somewhat circular in that the duty to serve does *not* attach unless the company is a public utility. However, no-one has ever succeeded in defining precisely what a "public utility" is.[7]

In general, the principle determinative characteristic of whether a company is a public utility is that of service to, or readiness to serve,[8] an indefinite public which has a legal right to

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[4] *See generally*, Colton, "Utility Disconnections as a Tort: Gaining Compensation for the Harms of Unlawful Disconnections," 22 ***Clearinghouse Review*** 609 (1988).

[5] "* * *it is generally held that the failure or breach of duty to supply service to one legally entitled thereto is a tort, even if it is also a breach of contract." 64 ***Am.Jur.2d***, *Public Utilities*, §28 (1972); *see e.g.*, ***DeLong v. Osage Valley Electric Co-op Ass'n***, 716 S.W.2d 320 (Mo. App. 1986); ***Wink Gas Co. v. Huskey***, 42 S.W.2d 819 (Tex. Civ. App. 1931). This observation extends not only to the disconnection of service, but to a delay in the connection of service as well. "Where there has been a negligent delay in acting upon an application for the service of a public utility, the utility will be liable on the theory of tort for such damages* * *or, in the absence of affirmative negligence, may be held liable as for a breach of contract." 64 ***Am.Jur.2d***, *Public Utilities*, §30 (1972); *see e.g.*, ***Smith v. Tri-County Electric Membership Corp.***, 689 S.W.2d 181 (Tenn. App. 1985), *citing* ***Capital Electric Power Ass'n v. Hinson***, 92 So.2d 867 (Miss. 1957). These conclusions have been reached with regard to public utilities furnishing water, gas and electricity, 64 ***Am.Jur.2d***, *Public Utilities*, §28 (1972), as well as for telephones. 86 ***C.J.S.***, *Telegraphs, Telephone, Radio and Television*, §272(a) (1954); *accord*, ***South Central Bell Telephone Co. v. Epps***, 509 So.2d 886 (Miss. 1987). Note, however, that the ***Epps*** case was presented as a breach of contract case. 509 So.2d at 891. In ***Epps***, the Mississippi supreme court expressly held that "Telephone Companies are characterized as `public service corporations' or `public utilities'* * *." *Id.*, at 890. The plaintiff in Epps was awarded $75,000 in compensatory damages. *See also*, ***Cumberland Telegraph and Tele. Co. v. Hubart***, 42 So. 349, 350 - 51 (1906).

[6] "One of the distinctions between a public utility business and other kinds of business is the duty to serve which attaches to the former. In other kinds of business, obligations rest upon contract, but a different rule applies to a business devoted to public use. . .The duty to serve, therefore, is now regarded as a necessary incident to the public utility business.* * *without going into a detailed discussion of all the decisions, we can safely announce the rule that a public utility must render safe, reasonable and adequate service." Nichols, ***Public Utility Service and Discrimination***, at 121, 123 (1928).

[7] Among the industries defined to be public utilities at one time or another include: innkeepers, ferriers, blacksmiths, and the like. *See generally*, Geffs, "Part I: Statutory Definitions of Public Utilities and Carriers," 12 ***Notre Dame Lawyer*** 246 (1937); Geffs, "Part II: Statutory Definitions of Public Utilities and Carriers," 12 ***Notre Dame Lawyer*** 373 (1937).

[8] "The phrase now used suggests correctly that whether a public utility has `held itself out' is a question of fact to be determined by the varying circumstances of each case--by what the utility has done as well as what it has said." Park, "Public Utilities--Duty to Serve--Liability for Inadequate Service," 1938 ***Wis. L.Rev.*** 182 (1938).

demand and receive its services or commodities.[9] There are multiple factors that might be considered in any inquiry into whether this "holding out" test has been met.[10]

Ever since the first public utility commission was created in New York in 1907,[11] utility regulation has become largely the job of administrative agencies.[12] Perhaps most commission action is thought of as ratemaking. However, issues such as the control of service disconnections for nonpayment, the collection of deposits and the imposition of late charges, too, have spawned much administrative litigation. Moreover, many public utilities such as municipals --including not only municipal gas and electric companies, but municipal water companies as well-- and Rural Electric Cooperatives (RECs) are often simply not within the jurisdiction of state public utility commissions.

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

B.THE ESSENTIAL NATURE OF PUBLIC UTILITY SERVICE

It is important for low-income households to gain protections from the threatened or actual disconnection of service today. The use of public utilities pervades the life of every individual. Each time a person walks into a heated room, eats food that has been either refrigerated or cooked, or uses a light, that person is likely relying on some sort of public utility.

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Compare, ***Gilman v. Somerset Farmer's Co-operative Telephone Company***, 129 Me. 243, 247, 151 A. 440 (1930) (where cooperative telephone company furnished service primarily to its own stockholders, but also offered its service to the general public through pay stations, the court determined that only because of and to the extent of its public offering could it be deemed a public utility), *with*, ***Dickinson v. Maine Public Service Co.***, 223 A.2d 435, 438 (1966). ("A member must be a customer, but he is more than a customer. Qualifications and limitations in respect to membership are fixed by the by-laws.")

[9]64 ***Am.Jur.2d***, *Public Utilities*, §1 (1972) (citations omitted).

[10]"The most important test used in determining whether a membership corporation or association or a co-operative group furnishing to its members a service commonly supplied by a public utility is in fact a public utility* * *is the fact or willingness to serve the entire public within the area in which the facilities of the organization are located. If it confines its service to its own stockholders or to members of its own group, and does not serve or hold itself out as willing to serve the public, it is not ordinarily considered a public utility." Annotation, *Membership corporation or association or cooperative group furnishing to its members electric, telephone, or other service commonly supplied by public utility, as subject to governmental regulation or to jurisdiction of Public Service Commission*, 132 ***A.L.R.*** 1495, 1498, (1940).

[11]Welch, "The Effectiveness of Commission Regulation of Public Utility Enterprise," 49 ***Georgetown L.Rev.*** 639, 643 (1961).

[12]*See generally*, Cushman, ***The Independent Regulatory Commissions*** at 19 - 41 (1941); Barnes, ***The Economics of Public Utility Regulation***, at 173 - 175 (1942).

Electricity, natural gas, telephone, water and sewer companies are all among the types of "public utilities" extant in today's world.

Largely because of the essential nature of these services, public utilities have been made subject to an array of state "customer service regulations." Regulations, for example, constrain the timing and reasons for the disconnection of service, prescribe shutoff notice requirements, and dictate procedures for allowing a scheduled shutoff to be disputed as unjustified. In addition, customer service regulations govern the collection of deposits, the imposition of late payment charges and the offer of deferred payment plans.[13]

Public utility service is considered to be an essential of life today. According to the U.S. Supreme Court, the denial of heat and water can be devastating to a household, and might potentially be fatal.[14] Substantial concern has been voiced over the inability of households to pay.[15] According to one Maine study, "as many as one in five Maine residents may not be able to afford necessary heating and utility expenses during the winter months. The problem is income. These Maine households living near or below poverty do not have the income, from

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[13] *See generally*, Standish & Sweet, ***Disconnect Policies in the 50 States: 1984 Survey***, National Regulatory Research Institute (Dec. 1985). For a discussion of the substantive law of utility shutoffs, *see generally*, National Consumer Law Center, ***Compendium and Analysis of State Regulations and Law Regulating Utility Service Terminations and Disputes*** (1982); *see also*, National Consumer Law Center, ***Model Residential Utility Service Regulations*** (1984).

[14] ***Craft v. Memphis Gas Light and Water Division***, 436 U.S. 1, 18 (1978).

[15] *See e.g.*, Charles Hill, ***Energy and the Poor: The Forgotten Crisis*** (May 1989). *See also*, notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *infra*, and accompanying text; Bass S. and Rowland R. (1980), ***The Elderly have Spoken: Is Anybody Listening--The Impact of Fuel Costs on the Elderly***, Boston: University of Massachusetts at Boston; Barua R., *at al.* (1987), ***Energy Needs and Costs of Low-Income Households: A Preliminary Profile of Delaware LIHEAP Clients***, Newark, Delaware: Center for Energy and Urban Policy Research, University of Delaware; Community Services Administration (nd), ***Too Cold--Too Dark: Rising Energy Prices and Low Income Households***, Washington D.C.: U.S. Superintendent of Documents; Colton, R. and Levinson, R. (1991). ***Energy and Poverty in North Carolina: Combining Public and Private Resources to Solve a Public and Private Problem***, Boston: National Consumer Law Center; Fuel Oil Marketing Advisory Committee, U.S. Department of Energy (1980), ***Low-Income Energy Assistance Programs: A Profile of Need and Policy Options***, Washington D.C.: U.S. Superintendent of Documents; Economic Opportunity Research Institute (1988), ***An Evaluation of Innovative Partial Payment Programs for Low Income Utility Customers***, Des Moines: Iowa Utility Association; Grier, E. and Grier, G. (1980), ***The Cost of Survival--Subsidies Required to Help Elderly and Low-Income Americans Meet Home Energy Bills***, Bethesda, MD: The Grier Partnership; Hoffman, W.L. (1979), ***Providing Energy Assistance to the Poor: Choices Relevant to Design of Future Programs***, Washington D.C.: The Urban Institute; Parks, S. (1989), ***Energy Needs of the Poor: Reassessing Michigan's Energy Assistance Programs***, Lansing: Michigan League for Human Resources; Unseld, C. (1978). ***The Impact of Rising Energy Costs on the Elderly Poor in New York State***, New York City: New York Department of Aging.

any source, to meet all their basic needs."[16] A Utah study confirmed that households with incomes in the lowest 20 percent paid almost one-fourth of their gross income for basic energy needs.[17] According to the Utah report, "all available assistance together by no means provide a satisfactory solution to the problem. Under the present system where essential utility service costs more than low-income customers can afford, large arrearages, threats of termination of service, actual shutoff, and the adversarial collection efforts will continue."[18]

C.THE COSTS TO A UTILITY OF NOT MITIGATING DAMAGES

More recently, concern has been raised over the costs which non-paying customers impose on a utility and its remaining ratepayers.[19] Traditional credit and collection techniques --these might involve the disconnection of service, the demand for deposits and the like-- are questioned as costing the utility more than they save.[20] As the Pennsylvania Public Utility Commission's (PUC) Bureau of Consumer Services found in its recent report based on its investigation into the control of uncollectible accounts, "ratepayers are already bearing significant costs attributable to the problems of payment troubled customers and uncollectible balances. Further, BCS believes that incorporating the following recommendations into utility operations will lead to a more rational and cost effective use of existing resources. Over time, proper implementation of the recommendations may result in a reduction of total utility costs."[21]

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[16] ***Ready for Winter? Final Report of the Blue Ribbon Commission on Energy Policy for Maine's Low-Income Citizens***, at 1 (November 1990).

[17] Shirley Weathers, ***Utility Ratepayers, Winter Heating Costs, and the Unaffordability Gap***, at ii (1987).

[18] *Id.*, at ii - iii.

[19] Roger Colton, "A Cost-Based Response to Low-Income Energy Problems," 127 ***Public Utilities Fortnightly*** 31 (March 1, 1991).

[20] *See generally*, Roger Colton, ***The Cost-Effectiveness of Utility Credit and Collection Practices*** (1990).

[21] Bureau of Consumer Services, Pennsylvania Public Utility Commission, ***Investigation of Uncollectible Balances: Final Report to the Pennsylvania Public Utility Commission***, at 6 (Feb. 1992) (recommendations excluded). The Bureau set forth xx recommendations on how that state's utilities could seek to control uncollectible accounts while maintaining essential public service. Among the recommendations made were that each utility adopt income-based "customer assistance programs," through which utility rates are set equal to an affordable percentage of income; that utiliities engage in "early identification" efforts through which to determine what customers might pose future payment problems; and that utilities waive unnecessary and counter-productive expenses imposed on low-income households, such as security deposits and late payment fees. In addition, the Bureau recommended expanded federal funding of low-income weatherization and expansion of utility-financed low-income conservation programs.

Over the broad spectrum of a public utility's customer base, it may be expected that the offering of conservation programs[22] will result in a net savings to the utility as compared to a collection scheme involving only the disconnection of service at some set value of arrears.[23] This result is likely to arise even where the investment, risk, transaction and monitoring costs of conservation exceed the sum of the amount owed by any particular customer plus the costs of effecting termination and collecting on past arrears.

Costs associated with termination include: transaction costs of notice, disconnecting service, engaging in collection activity and writing off uncollectible debt.[24] In addition, utility terminations generate hidden costs as terminated customers go underground --changing names on accounts, moving to new addresses, whether within or without the jurisdiction of the utility, and the like-- or enlist advocates to fight the termination. All these activities impose costs on the utility, in the form of increased legal, transaction and monitoring costs.[25] Moreover, the disconnection of service results in the utility foregoing the possibility of collecting future revenue from the household.[26]

As such, the likelihood is that the utility will, directly or indirectly, be supplying its services to the estranged customer again. To the extent that service cutoffs and reinitiations impose transaction costs on customers as well as public utilities, those customers will have less money to pay for the necessities of life --including utility bills.[27] Without positive changes in the household's payment pattern or energy usage, therefore, the cycle that leads to arrears,

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[22] For a description of what is contemplated by the term "conservation programs," *see*, note **Error! Bookmark not defined.**, *infra*, and accompanying text.

[23] ***Quaid and Pigg***, *supra* note **Error! Bookmark not defined.**; *see generally*, ***Leff***, "Injury, Ignorance and Spite: The Dynamics of Coercive Collection," 80 ***Yale L.J.*** 1 (1970).

[24] *See generally*, Colton, *supra* note **Error! Bookmark not defined.**, at 21 - 28.

[25] These include the costs associated with approving and starting up new accounts, and greater scrutiny of new accounts, and increased collection costs and legal fees. In addition the company may have lost forever a potentially profitable account. A utility with a reputation as a hard-core collector of fees risks loss of good will and encouraging subversive behaviors as well. Leff, "Injury, Ignorance and Spite, the Dynamics of Coercive Collection," 80 ***Yale L.J.*** 1, 5 -10 and 35 (1970).

[26] ***The Cost-Effectiveness of Utility Credit and Collection Practices***, *supra* note **Error! Bookmark not defined.**, at 21 - 27. The costs of service terminations by utilities are even greater than investor-owned or municipal utilities because of transaction costs of establishing ownership. *See*, Hansman, "Ownership of the Firm," 4 ***Yale J. of L., Economics and Organization*** 267, 298 (1988).

[27] *See*, Roger Colton, ***Forced Mobility: The Indirect Impacts of Shutoffs on Public Utilities and their Customers*** (January 1991).

consequent termination, and reinstitution of service (whether legitimately or through underground strategies) continues.[28]

A decision to disconnect utility service creates external costs imposed by service cutoffs for society as a whole. Terminated customers may, for a time, attempt to struggle by without the utility service to the detriment of the health of the household and safety of the neighborhood.[29] Eventually, families are forced to move to obtain service,[30] and costs are imposed as schools and neighborhoods are disrupted and properties are run down.[31] In the case of many low income families, the costs of moving and reinitiating utility service will be drawn either from public assistance or from family reserves for other necessities, again implicating health and safety costs which may ultimately be borne by society. Furthermore, the termination and collection process imposes transaction costs on the judicial system, as well as the parties, and thus there is a further societal interest in ending the cycle.[32] Finally, society has a clear concern favoring the conservation of the scarce natural resources which the utility controls.

D.THE CONTRACTUAL RELATIONSHIP BETWEEN UTILITY AND CUSTOMER

The question posed by this article is whether all of these various costs can be integrated into some formal theory of the law. Indeed, such a theory can be developed which involves contract principles involving the mitigation of damages that are not foreign to the law at all. While public utility consumers and society at large, as well as the utility, would profit from adopting conservation programs as a means of damage mitigation, it is the utility which is uniquely positioned to realize these gains.[33] Accordingly, not only is requiring the offer of conservation programs in mitigation of nonpayment of utility bills commercially reasonable, but legal arguments can be raised in support of requiring such action as well.[34]

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[28] *See e.g.*, ***Pennsylvania Public Utilities Commission v. Columbia Gas Company of Pennsylvania***, Docket R-891468, Decision and Order, at 158 - 159 (Sept. 19, 1990).

[29] For a discussion of external costs imposed by housing units in disrepair, *see*, Markovits, "The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications," 89 ***Harv. L.Rev.*** 1815 (1976).

[30] *See e.g.*, Energy Coordinating Agency of Philadelphia and Institute for Public Policy Studies (Temple University), ***An Examination of the Relationship between Utility Terminations, Housing Abandonment and Homelessness*** (June 1991).

[31] For a judicial recognition of costs associated with relocation, *see*, ***Pennell v. City of San Jose***, 108 S.Ct. 849, 859, n.8 (1988); *see also*, Durham and Sheldon, "Mitigating the Effects of Private Revitalization on the Poor," 70 ***Marquette L.Rev.*** 5, 25 - 31 and n.41 (1986).

[32] ***Leff***, *supra* note **Error! Bookmark not defined.**, 80 ***Yale L.J.*** at 5 - 10.

[33] This is true because the utility has the resources and information to do so, and because it deals with sufficient numbers of low-income consumers to allocate risk over all sectors of customers.

[34] *Compare*, ***McCormick***, *supra* note **Error! Bookmark not defined.**, at 143 (if the nonbreaching party is able to pay the amount required to avoid further damage, business prudence would require it do

There is little question but that the provision of utility service is a commercial relationship governed by the law of contract.[35] The contractual relationship is governed by the Uniform Commercial Code (UCC),[36] and the breach or denial of service gives rise to an action for breach of contract.[37]

Basic contract principles were applied in a utility context in *Meridian Light and Railway Co. v. Steele.*[38] In *Meridian*, appellee Steele entered into a contract with a utility to furnish service for her home. Later, when Steele moved to a new residence, she entered into a contract with the utility in which she agreed that she would pay any arrearage which she incurred at her former residence, or face termination. The court held that the contract signed by Steele, "in so far as she may be bound to pay the arrearage on her former residence before installment of lights in her present residence was without consideration and void* * *."[39]

Similarly, it has been held that prohibiting the imputation of the debts of one person to a third party is a doctrine based upon straight contract law.[40] Generally, when there is an express contract between a utility company and one of its customers, such an agreement will not support liability by parties other than the person who has contracted.[41] Thus, when an applicant for service enters into an express contract for service, through which the utility company agrees to

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so); *see*, ***Gershwin v. Southeastern California Association of 7th Day Adventists***, 14 Cal. App.3d 209 (1971).

[35] ***Williams v. City of Mount Dora***, 452 So.2d 1143 (Fla. App. 5 Dist. 1984); *accord*, ***Cat Hill Water Company v. Public Service Commission***, 1991 WL 302547 (Del. Super. 1991); ***Re. Appeal of Pennichuck Water Works***, 419 A.2d 1080, 1082-83 (NH 1980); *see generally*, 64 ***Am.Jur.2d***, *Public Utilities* § 28 (1972).

[36] *See*, Jane Mallor, "Utility `Service' Under the Uniform Commercial Code: Are Utilities In for a Shock?", 56 ***The Notre Dame Lawyer*** 89 (1980); *see also*, Annotation, *Electricity, Gas or Water Furnished by Public Utilities as `Goods' Within the Provisions of U.C.C. Art. 2 on Sales*, 48 ***A.L.R.3d*** 1060 (1973).

[37] *See*, 64 ***Am.Jur.2d***, *Public Utilities* § 28 (1972); *see e.g.*, ***DeLong v. Osage Valley Electric Valley Electric Co-op Ass'n***, 716 S.W.2d 320 (Mo. App. 1986).

[38] 83 So. 414, 121 Miss. 114 (1920).

[39] Id.

[40] *See generally*, Annotation, *Arrearages: charges upon property or against present owner, irrespective of person who enjoyed the service*, 13 A.L.R. 346 (1921); *supplemented*, 55 ***A.L.R.*** 789 (1928), *superseded*, 19 ***A.L.R.3d*** 1227, 1231 (1968). The annotation goes on to state: "in this connection, it is irrelevant whether the supplier and collecting authority is a municipality or a public utility company, since the results, all other things being equal, are the same in either case." Id.

[41] *See e.g.*, ***New York Telephone Company v. Teichner***, 69 Misc.2d 135, 137, 329 N.Y.S.2d 689, 692 (N.Y.D.C. 1972).

provide service and the applicant agrees to pay for the service provided, liability for that service cannot be transferred to a person not a party to the express contract.[42]

The Ohio courts have explicitly adopted this view of the utility-consumer relationship. In *Cincinnati Gas and Electric Company v. Sinkfield*,[43] the Cincinnati utility sought to hold plaintiff liable for the debts incurred by a prior occupant of the property. Sinkfield had been a co-owner of the property at the time the bills had been incurred, but had neither been an occupant of the premises nor a customer of the utility at that time. According to the Ohio court: Liability for unpaid utility services may not properly be predicated upon

> ownership of the property receiving the service; rather, the relationship between a utility and its customer is one of contract. The Public Utilities Commission of Ohio, in resolving utility service disputes* * * has held that even a consumer of utility services is not liable for unpaid bills in the absence of a contractual relationship.[44]

The only party responsible for the payment of bills in Ohio, the court said, "is a `customer,' defined in Ohio Administrative Code 4901:1-18-02 as `any person who enters a contractual relationship with the company to receive electric or gas service.'"[45]

This article seeks to synthesize the concerns over the social problem of inability to pay with the concerns of whether utilities adequately seek to protect themselves, and their remaining ratepayers, from the costs of such nonpayment. The article suggests that utilities have not only an opportunity to provide social benefits while controlling costs through the offer of low-income conservation programs,[46] but that they have a duty enforceable at law to offer such programs in order to "mitigate the damages" of nonpayment.

Given the direct applicability of contract law to the governance of the commercial relationship between a utility and its customers, the analysis below looks at whether an obligation to mitigate damages by offering conservation and weatherization services[47] can be found to flow out of this contract law. In particular, the following analysis will examine the obligation of a public utility to mitigate damages through the offer of conservation measures when faced with nonpayment either by an individual or by an entire class of its customers.

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

[43] 1987 WL 9464 (Ohio App. 1987) (unpublished).

[44] *Id.* (citations omitted).

[45] *Id.*

[46] For a description of what is contemplated by the term "conservation programs," *see*, note **Error! Bookmark not defined.**, *infra*, and accompanying text.

[47] For a description of what is contemplated by the term "conservation programs," *see*, note **Error! Bookmark not defined.**, *infra*, and accompanying text.

I. THE MITIGATION OF DAMAGES GENERALLY

The duty to mitigate the damages of inability-to-pay is grounded in very basic contract law. It is premised on the recognition that the relationship between a utility and its customers, in fact, is one of standard contract law. Indeed, documents such as the utility's tariffs, its franchise, its certificate of public convenience and necessity, and the like, all represent components of the standard contract between the company and its customers.[48]

A. COMMON LAW MITIGATION OF DAMAGES REQUIREMENT.

There are few principles in the law of remedies as well established as that of a claimant's duty of mitigation.[49] Under this doctrine, a breaching party, even if she is clearly in the wrong, is responsible only for those consequences for which her breach was the proximate cause. Accordingly, she can *not* be held liable for consequences that her victim could have avoided by the victim's own reasonable conduct.

This analysis focuses on the mitigation principle in the context of a public utility's action to terminate a nonpaying customer's service to collect unpaid arrears. In particular, this article examines whether the mitigation principle requires a utility to offer an energy conservation program to its customers prior to termination or else be barred from seeking to collect the arrears which those mitigation measures would have prevented.[50]

The conclusion below is that the application of "traditional" mitigation doctrine might lead to the conclusion that there exists no obligation for a utility to engage in efforts to mitigate damages prior to the disconnection of service to a nonpaying customer. However, specialized contract principles *do* exist upon which such an obligation may be predicated. Before turning to the specific applications, however, it is first helpful to undertake a general overview of mitigation doctrine.

B.GENERAL APPROACHES TO MITIGATION PRINCIPLES IN BREACH OF CONTRACT ACTIONS.

A public utility, in seeking to collect delinquent bills, is responding to the breach of a contract with its customer to supply service in exchange for the customer's promise of payment as charges become due. The utility which claims a breach of contract by nonpayment is entitled

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[48] *See e.g.*, ***Sommer v. Mountain States Telephone and Telegraph Co.***, 519 P.2d 874, 5 P.U.R.4th 125 (Ariz. 1974); ***Cullinane v. Potomac Electric Power Co.*** 147 A.2d 768, 27 P.U.R.3d 384 (D.C. Mun. Ct. App. 1959); ***Illinois Bell Telephone Company v. Miner***, 136 N.E.2d 1, 15 P.U.R.3d 316 (Ill. App. 1956); ***Carroway v. Carolina Power and Light Co.***, 84 S.E.2d 728, 7 P.U.R.3d 545 (S.C. 1954); ***Sherwood, Trustee v. County of Los Angeles***, 21 Cal. Rptr. 810 (Cal. App. 1962).

[49] *See*, note **Error! Bookmark not defined.**, *supra*, and accompanying text.

[50] For a description of what is contemplated by the term "conservation programs," *see*, note **Error! Bookmark not defined.**, *infra*, and accompanying text.

to compensation for all those consequences which are a reasonably foreseeable result of the breach, and which the utility could not have averted by reasonable efforts on its own part.[51]

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

1. Restrictive view: First, some courts hold to a bright-line rule under which a party is *never* required, as part of its "duty" to mitigate,[52] to further deal with the party in breach.[53] Under this "restrictive view," the utility would be required to take all reasonable measures to avoid the adverse consequences of the breach short of engaging in further dealings with its delinquent customer.[54]

A Texas court faced with a mirror-image dispute between a customer and an REC reached exactly this result. The customer had separate accounts with the utility for his home and his place of business. The shop's account was in arrears, but the residential account was not. However when the customer offered to pay his residential account, the utility refused the payment and terminated the residential service. As a result the customer incurred actual damages of $1,000. The utility contended that the customer could have mitigated these damages by paying the disputed shop account, which would have maintained his residential service, and then sued the utility for overpayment. The court rejected the utility's arguments,[55] finding that one party to a contract cannot compel the other to do something not required by the contract in order to reduce the damages the nonbreaching party would suffer by reason of the other's breach.[56]

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[51] *See*, ***Warren v. Stoddard***, 105 U.S. 224 (1884).

[52] Although courts frequently speak in terms of a non-breaching party's "duty" to mitigate, the only sanction for failure in this duty is that the party will be foreclosed from recovering damages which mitigating measures would have averted. *See*, II ***Farnsworth on Contracts***, §8.15 (1990). (hereinafter ***Farnsworth***).

[53] 5 ***Corbin on Contracts***, §1043(1964) (not necessary to deal with breaching party, even on terms that would eliminate loss); *see also*, ***Iseman v. Kansas Gas and Electric Co.***, 567 P.2d 856 (Kan. 1977); ***Home Life Ins. Co. v. Clay***, 773 P.2d 666 (Kan. App. 1989); ***W-V Enterprises Inc. v. FSLIC***, 673 P.2d 1112 (Kan. 1983); *see*, ***Hector Inc. v. United Savings and Loan Association***, 741 P.2d 542, 546 (Utah 1987); ***United States v. Sabin Metal***, 151 F.Supp. 683, *aff'd* 253 F.2d 956 (2nd Cir 1950); *see also*, ***Nylan v. Park Doral Apartments***, 535 N.E.2d 78, 183 (Ind. App. 1983); ***Cappole v. Marden Orth and Hastings Coop***, 138 N.E. 499, 500 (Ill. 1917).

[54] 5 ***Corbin on Contracts***, *supra* note **Error! Bookmark not defined.**, at §1043, at 272.

[55] ***Southwestern Gas and Electric Co. v. Stanley***, 45 S.W.2d 671 (Tex. Civ. App. 1931). Perhaps underlying this rejection of the utility argument was the basic law that a utility may not disconnect service at one address for nonpayment at a separate address. That doctrine has been expressly held to prohibit the disconnection of service at a residential address for nonpayment of a business bill. *See*, ***Texas Central Power Co. v. Perez***, 291 S.W. 622 (Tex. Civ. App. 1927), *aff'd*, 70 S.W.2d 413 (Tex. 1934).

[56] ***Stanley***, *supra* note **Error! Bookmark not defined.**, 45 S.W.2d at 674. In general, courts are divided on the similar issue of whether a buyer who agreed to purchase on credit is required to deal on

2. Flexible view: The second analysis adopts a flexible approach to the requirement of damage mitigation. A California court faced with a dispute similar to that in *Stanley* evidences this second approach.[57] Although that court reached the same result as the Texas court, it did so on the fact-specific basis that the amount the utility demanded to restore service ($134) exceeded what reasonable mitigation measures would have required.[58] The "flexible approach" represented by this California decision requires a party to expend effort or money in order to mitigate damages caused by the breach, but only if: (1) the expenditure is small in comparison to the foreseeable losses; (2) the effort required is slight; and (3) the likelihood is great that the expenditure of time and money would result in a net gain to the party harmed by the breach.[59] Under the "flexible approach," the non-breaching party need not accept additional obligations if so doing would result in humiliation or inconvenience; neither must the nonbreaching party accept an offer conditioned on the abandonment of any right of action for the prior breach.[60]

3. Reasonableness view: A third approach holds that the question of the obligation to mitigate is a question of fact to be determined based on general "reasonableness" considerations.[61] This approach counsels that the reasonableness of the nonbreaching party's

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cash terms as part of its duty to mitigate. *See*, 5 ***Corbin on Contracts*** *supra* note **Error! Bookmark not defined.**, at §1043, at 274; Annotation, *Duty to Minimize Damages By Accepting Offer Modified by Party Who Has Breached Contract of Sale*, 46 ***A.L.R.*** 1192 1194 - 1195 (1927).

[57] ***Schultz v. Town of Lakeport***, 54 P.2d 1110 (Cal. 1936); *see also*, Farnsworth, ***Contracts***, §12.12, at 230 - 231 (1990).

[58] 54 P.2d at 1113; *see also*, ***Coulter v. Sausolito Bay Water Co.***, 10 P.2d 780, 784 (Cal. App. 1932) (plaintiff is not required to incur more than slight expense in attempting to prevent the damages foreseeable flowing from a utility shut-off); *compare*, ***Key v. Kingwood Oil Co.***, 236 P. 598 (Okla. 1924) (customer should have mitigated by purchasing oil from breaching supplier at higher-than-contract price and sued for excess); ***Severini v. Sutler-Butte Canal Co.***, 210 P. 49 (Cal. App. 1922); ***Lyntel Products v. Alcan Aluminum Corp.***, 437 N.E.2d 653 (Ill. App. 1981).

[59] ***Tampa Electric Co. v. Nashville Coal Co.***, 214 F.Supp. 647 (M.D.Tenn. 1963); ***Unverzagt v. Young Builders Inc.***, 215 So.2d 823 (La. 1968); ***Tel-Ads Inc v. Trans-Lux Playhouse Inc.***, 232 F.Supp. 198 (D.C. 1964); *see also*, ***McCormick on Damages***, §35 (1935).

[60] ***Key v. Kingwood Oil Co.***, 236 P. 598 (Okla. 1924); ***Toradyne Inc. v. Teledyne Industries***, 676 F.2d 865, 870 (1st Cir. 1980); ***Paragould v. Arkansas Light and Power Co.***, 284 S.W. 529 (Ark 1926); ***Farmer's Cooperative Association v. Shaw***, 42 P.2d 887 (Okla. 1935); ***City National Bank v. Wells***, 384 S.E.2d 374 (W.Va. 1989); ***Publicker Chemical Corp. v. Belcher Oil***, 722 F.2d 482 (5th Cir. 1986); *see generally*, ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, at 230 - 231; *see also*, Calamari & Perillo, ***Contracts***, §14 - 15, at 612 (3d ed. 1987) (hereafter ***Calamari***).

[61] Annotation, *Duty to Minimize Damages By Accepting Offer Modified by Party Who Has Breached Contract of Sale*, 46 ***A.L.R.*** 1192 (1927); ***Hussey v. Holloway***, 104 N.E. 471 (Mass. 1914); ***Gurney Industries Inc. v. St. Paul Fire & Marine Ins. Co.***, 467 F.2d 588, 595 (4th Cir. 1972); ***Lawrence v. Porter***, 63 F. 62 (6th Cir. 1894); ***Key v. Kingwood Oil Co.***, 236 P.2d 598, 599 - 600 (Okla. 1924).

actions are assessed in light of the totality of circumstances relevant to the contract in dispute at the time and place of its breach. Thus, in *Ashley v. Rocky Mountain Bell Telephone Company*,[62] the court held it to be the responsibility of an aggrieved customer to pay a disputed bill and to sue later for damages where to do otherwise would result in great injury owing to a threatened termination of service.[63] If essential utility service were terminated, in other words, the household would risk damages to health, property and perhaps even life. If that threat could be avoided through the payment of money, later to be recouped, the obligation existed to do so.

4. Discussion: At first glance, it may seem that there is little difference of substance between the "flexible" and the "reasonableness" approaches. Any reasonableness determination must include a consideration of factors such as the costs and inconvenience of mitigation versus the likelihood of savings. However, there *is* a difference in the focus and emphasis which would be applied upon the conduct of the utility as the nonbreaching party. More importantly, in practice, some courts place such a gloss on the second approach that this analysis in fact approaches the analysis under the first, "restrictive approach." These courts require the nonbreaching party (*i.e.*, the utility) to expend no more than a minimal amount under any circumstances, and require no expenditure at all unless a net cost reduction is a virtual certainty.[64]

Problems exist with each of these three approaches. The first ("restrictive") and second ("flexible") approaches appear to place undue emphasis on injury to the feelings of the non-breaching party, an emphasis which is markedly out of step with modern commercial relations.[65] The third ("reasonableness") approach fails to appropriately take account of the fact

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[62] 64 P. 765 (Montana 1901).

[63] 64 P. at 767; *see also*, ***Holly v. City of Neodesha***, 127 P. 616 (Kan. 1912); *but see*, ***Schultz v. Town of Lakeport***, 54 P.2d 1110, 55 P.2d 485 (Cal. 1936), Annotation, *Measure and Amount of Damages for Breach of Duty to Furnish Water, Gas, Light or Power Service*, 108 ***A.L.R.*** 1174, §II.B.2 (1977) (no duty for customer to pay a disputed bill as mitigation measure).

[64] ***Coulter v. Sausolito Bay Water Co.***, 10 P.2d 780, 784 (Cal.App. 1932); *see also*, ***American Railway Express Co. v. Judd***, 104 So. 418 (Ala. 1925); *see*, ***Corbin on Contracts***, *supra* note **Error! Bookmark not defined.**, at §1042 (never necessary for nonbreaching party to spend time or money unless advantage to be derived is almost certain.) However, courts may grant more latitude on the definition of "certainty of savings" where a large loss could have been avoided by the expenditure of a little time or effort.

[65] *See*, ***McCormick***, *supra* note **Error! Bookmark not defined.**, at §39, p.143 ("the person wronged may well fling away prudence and follow pride"); *compare*, Holmes, "The Path of the Law," 10 ***Harv.L. Rev.*** 457, 462 (1897) (contract law not designed to consider morality of breach, hurt feelings or pride); *but see*, ***Fried***, **Contract as Promise**, at 14 - 17 and 131 - 132 (1981); *see also*, ***Apex Mining Co. v. Chicago Copper and Chemical Co.***, 340 F.2d 985, 988 (8th Cir. 1965) ("it savors of oppression to compel a performing party to enter into new relations with a party who has willfully broken his obligation to protect the latter from loss.") To the extent these approaches reflect common law doctrines that continued dealings with the breaching party orders an unfair modification of the contract, they are likewise anachronisms in modern commerce. *Compare,* ***U.C.C.*** §1-207. As discussed below, a more plausible basis for decisions exempting dealings with the party in breach from mitigation analysis is a fear of encouraging strategic behavior by the

that, in many cases, requiring mitigation may in fact divest the injured party of a cause of action and allow the party in default to work a unilateral modification of the contract terms.[66]

In fact, none of the three "traditional" mitigation approaches discussed above adequately addresses the case of a utility's duty to minimize losses caused by its delinquent customers. This is true even though under either the "flexible" or "reasonableness" approaches, a public utility *may* be required to provide conservation or payment plans to delinquent customers rather than terminate service. Instead, the proper analysis, as discussed in more detail below, should consider the peculiar position of each party to the contract relationship at issue. Only under this suggested "totality of the circumstances" approach are mitigation measures such as payment plans and conservation programs recommended by their wealth-increasing potential both to the utility and to society as a whole.[67]

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

C.EVALUATING A PUBLIC UTILITY'S "DUTY" TO MITIGATE BY OFFERING CONSERVATION PROGRAMS UNDER TRADITIONAL MITIGATION ANALYSIS.

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

(..continued)

party in breach. *See*, notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**, *infra* and accompanying text.

[66] *See*, ***Holly v. City of Neodesha***, 127 P. 616, 620 (Kan. 1912); ***Ashley v. Rocky Mountain Bell Telephone Co.***, *supra* note **Error! Bookmark not defined.**; ***Hamilton v. McKenna***, 147 P. 1126 (Kan 1915) (all holding that where utility refuses service except at an excessive rate, the overcharge should be paid to obtain service and suit entered for the excess payments. Of course, in many cases, the amount will not justify the costs and risks of a suit; the aggrieved customer is left a right without a remedy); *see also*, ***Severini v. Sutler-Butte Canal Co.***, 210 P. 49 (Cal. App. 1922) (utility customers should have paid disputed amount to maintain service, and thus would be limited to lost interest of $1.53).

[67] *See*, Posner, ***Economic Analysis of Law*** (3rd ed.), at 6 (mitigation doctrine designed to deter incentives given by award of damages to engage in inefficient behavior); *see also*, Shavell, "Damage Measure for Breach of Contract," 11 ***Bell J.Econ.*** 466, 572 (1980) (damages in contract law designed to promote efficient behavior); *see also*, Posner, "Utility Economics and Legal Theory," 8 ***J. Leg. Studies*** 103 (1979); ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, at §12.3 (1990); *but compare*, ***Fried***, *supra* note **Error! Bookmark not defined.**, at 16.

1. LIMITS OF TRADITIONAL MITIGATION ANALYSIS.

At least four historical limitations exist regarding the traditional duty-of-mitigation analysis in basic consumer law situations. Unfortunately, if limited to traditional mitigation analysis, application of these limitations restricts the ability of a court or PUC to promote reasonably prudent behavior on the part of public utilities and their customers within the context of how most appropriately to react to nonpayment.[68]

- First, asserting mitigation is often traditionally considered a defensive rule only.[69] This may be a major limitation on the application of the mitigation principle in support of terminated utility customers. Mitigation may be an exclusively defensive response to a suit for past-due payments by a utility company. Accordingly, while mitigation may be used to reduce the dollars sought by the utility as damages arising from nonpayment, the defense is perhaps unavailable to enjoin the service termination in the first instance.[70]
- Second, the traditional mitigation principle does not comprehend all benefits to all parties that would result from the adoption of the suggested measures; instead, mitigation savings are assessed only against the consequential damage incurred by the utility as a result of the terminated customer's nonpayment.[71]

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

[69] ***Calamari***, *supra* note **Error! Bookmark not defined.**, at §14 - 15; *see*, ***Halliburton Oil Wall Cementing Co. v. Millan***, 171 F.2d 426 (5th Cir. 1948); *compare*, ***Penna v. Atlantic Macaroni Co.***, 161 N.Y.S. 191 (1916).

[70] *See*, Fried, *supra* note **Error! Bookmark not defined.**, at 13. Mitigation-bottomed arguments may, however, be useful in negotiations with the utility prior to shut-offs. This also may suggest that the duty to mitigate does not arise until after the customer has breached his contract by being *significantly* delinquent in payments. *See*, ***Stanley***, *supra* note **Error! Bookmark not defined.**, 45 S.W.2d at 674; *see also*, ***Perez***, *supra* note **Error! Bookmark not defined.**, 291 S.W. 622.

[71] Indeed, a utility might argue, considering this factor, that the company's duty to mitigate damages requires it to cease all dealing with a consumer as quickly as possible once she fails to pay her bills in a timely fashion.

oThird, most courts hold that there is no duty to anticipate payment default so as to mitigate damages *prior* to the default.[72] Under this reasoning, a public utility would not be required, incident to a duty to mitigate, to offer a conservation program to low-income consumers to avert the situation where they may be at risk of default, or even to those consumers clearly at risk.

oFourth, and perhaps most significantly, courts traditionally tend to limit mitigation analysis to the effects of mitigation on the parties before them, as it would apply to the instant dispute. Principally because of this tendency, courts have failed to develop an analysis which considers the reasonableness of action within the context of the entire relationship between a utility and its entire customer base, and thus have failed to provide proper incentives to either the utility or its customers to pursue all commercially reasonable mitigation measures.

2.APPLYING TRADITIONAL ANALYSIS.

Although the factors of cost, effort and risk generally cut in favor of including conservation measures within a utility's duty of mitigation in general, it would appear under traditional mitigation analysis that many courts or regulators may impose no such duty on a public utility in particular cases because of the continued intense involvement that such a duty would involve. Moreover, in many cases, the consequential damages to the utility flowing from the particular breach before the court or PUC may not appear to justify *requiring* the utility under traditional doctrine to choose to incur the cost, effort and risk involved with these recommended programs.[73] In other words, a court or PUC that is limited by the constraints imposed by traditional mitigation analysis is unlikely to find a utility to have been unreasonable in failing to undertake such a course of action.

This result seems anomalous in light of the evidence that the offering of conservation programs as an alternative to shut-offs produces significant benefits for both the customer and the utility, as well as for society as a whole.[74] Moreover, there is no inherent limitation that restricts a court or PUC to considering *only* the transaction before it in determining *the duties* of

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[72] ***Stanley***, *supra* note **Error! Bookmark not defined.**, 45 S.W.2d at 674. However, a few courts have included within mitigation analysis measures by the plaintiff which would have obviated the other party's breach, ***Penna v. Atlantic Macaroni Co.***, 161 N.Y.S. 191 (1916); *see*, Farnsworth, "Legal Remedies for Breach of Contract," 70 ***Columbia L.Rev.*** 1145, 1184 (1976); *see*, ***Southern National Bank v. TRI Finance Corp.***, 317 F.Supp. 1173, 1185 (SD. Tex 1970);

However, there are principles in contract law which *do* govern the anticipation of a breach of contract. *See e.g.*, U.C.C. §2-609 (adequate assurance within context of anticipatory breach) and ***Restatement (Second) Contracts***, § 350, comment b (anticipatory breach). Anticipating contract breaches, in other words, is not a foreign concept at all in the law of contract.

[73] *See*, ***Coulter v. Sausolito Bay Water Co.***, 10 P.2d 780, 784 (Cal.App. 1932).

[74] *Compare*, ***Posner***, *supra* note **Error! Bookmark not defined.**, at 80 (purpose of contract law remedies is to encourage those investments which would only prove profitable over the long run).

the parties; indeed, courts in tort and contract cases often look beyond the situation before them in determining a party's duty.[75]

Whether a public utility would be *ordered*[76] to undertake the offer of conservation measures in mitigation of the damages associated with nonpayment is considered below. Where the utility knows, or has reason to know, that the income of a consumer is simply inadequate to meet the demands for each month's current bill payment, it is reasonable for the court or PUC to direct the utility to take action which would reduce the customer's overall bill *ab initio*, such as through the offering of conservation measures along the lines of those discussed below,[77] or risk a denial of the "damages" that could have been avoided had such reasonable action in fact been taken. To impose such an obligation would be to impose no obligation that is not otherwise imposed in any other comparable commercial contract transaction.

Energy conservation programs are one way for a public utility to mitigate the damages arising from nonpayment of bills. Consumer conservation programs --broadly defined here to include weatherization plans, energy audits, equipment upgrades and similar measures designed to reduce the consumer's energy usage by offering services, education and investment towards long-term energy savings-- serve the salutary purposes of: (1) conserving scarce natural resources, and (2) decreasing energy costs for low-income consumers who would otherwise lack the resources or incentives to invest in such measures.[78] Nonetheless, it is not clear, as discussed below, whether under traditional mitigation analysis a public utility would be *directed* to offer such programs in mitigation of nonpayment.

(a) <u>Potential for savings</u>: Energy conservation programs offer benefits to a public utility as more affordable energy bills may avert high arrearages and consequent uncollected bills and thus the administrative costs of account collection, service termination, and, often service reinstitution.[79] In a recent study of low-income energy services in Wisconsin and

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[75] *See generally*, Kennedy, "Form and Substance In Private Adjudication," 89 ***Harv. L.Rev.*** 1685, 1777 (1971). Many commentators argue that an examination of the societal wealth increasing effects of a rule of law is the *only* valid basis upon which to determine where to place duty. *See*, ***Shavell***, *supra* note **Error! Bookmark not defined.**; *see also* ***Posner***, *supra* note **Error! Bookmark not defined.**.

[76] This entire section considers not whether a utility *should* undertake these efforts in mitigation, but rather whether a court or commission would find, as a matter of law, that the utility should be *directed* to undertake such efforts, even if the utility opposes such efforts.

[77] For a description of what is contemplated by the term "conservation programs," *see*, note **Error! Bookmark not defined.**, *infra*, and accompanying text.

[78] *See*, Colton, "Discrimination as a Sword for the Poor: Use of an `Effects Test' in Public Utility Litigation," 37 ***Washington U. J. of Urban and Contemp. L.*** 97, 125 - 129 (1990); *see also*, Colton and Sheehan, "A New Basis for Conservation Programs for the Poor: Expanding the Concept of Avoided Costs," 21 ***Clearinghouse Review*** 135 (1987).

[79] Colton and Sheehan, "A New Basis for Conservation Programs for the Poor: Expanding the Concept of Avoided Cost," 21 ***Clearinghouse Review*** 345 (1987). Of course, conservation programs offer

Washington State, for example, the authors found that weatherization programs dramatically reduced arrearages for low-income customers and could significantly lower administrative collection costs and uncollected debts of utilities.\80\ The authors concluded:

> In low-income households occupied by payment-troubled customers, the delivery of conservation services can benefit not only customers, but utilities as well. Program investments can yield conserved energy resources *and* the financial benefits of long-term reductions in uncollectible revenues and collection costs.\81\

Wisconsin Gas Company, too, recognized the legitimacy of special low-income conservation and weatherization programs when it implemented a pilot program explicitly designed to use conservation measures as a means to reduce the costs associated with delinquent payments and bad debt. The purpose of the study, Wisconsin Gas said, was "to examine the effects of Wisconsin Gas Company's Weatherization Program on the arrearages of low-income customers."\82\

The Wisconsin Gas results were dramatic. For single family homes, Wisconsin Gas experienced an overall therm savings\83\ of 23.4 percent.\84\ Moreover, therm savings based on heat load were computed, producing "an overall single family heat load savings rate of 30.7 percent* * *."\85\ Two-family homes generated similar results.\86\

Wisconsin Gas found that not only did the program reduce energy consumption for participating households, but the households recognized significant *arrears savings* from the program as well. According to that utility, its conservation program reduced the number of members of the study group who would have had arrears of $100 by 300 percent; moreover, Wisconsin Gas reported, its program reduced the number of households having *any* arrears by

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many other benefits to the utility, but we are here concerned with benefits of conservation programs compared to a regime of service terminations.

\80\Quaid & Pigg, ***Measuring the Effects of Low-Income Energy Services on Utility Customer Payments*** (1991) (mimeo). (hereafter ***Quaid and Pigg***).

\81*Id.*

\82*See*, Wisconsin Gas Company, ***Weatherization Arrears Savings*** (April 1988).

\83\Quantities of natural gas are measured in therms, just as quantities of electricity are measured in kilowatthours (Kwh).

\84\While the savings ranged widely between units, the company noted that 64 percent of the single family homes fell in the 10 percent to 35 percent savings range. *Id.*, at 2.

\85*Id.* Again, while the savings ranged widely between units, 60.2 percent of the single family homes fell in a range of 25 percent to 50 percent savings.

\86*Id.*, at 5. Over 70 percent of the dwellings fell in the 10 percent to 35 percent savings range.

400 percent. "This reflects favorably on weatherization potential as an arrears eliminator," the Company said.[87] Indeed, Wisconsin Gas found that it received a 20 percent return on its weatherization investment in the first year of the program, *strictly* from the reduced nonpayment, and *before* considering traditional avoided costs.[88]

In sum, Wisconsin Gas concluded: "The study indicates that single family dwellings generated on average $353 less *annual* arrears after weatherization. For the two family group, weatherization reduced arrears $502 *annually*."[89] (emphasis added).

In a different program, participants in an energy education program offered by Niagara Mohawk Power Company in conjunction with its company-financed weatherization program improved their payment patterns in two ways, according to Niagara Mohawk's evaluation.[90] Through the Niagara-Mohawk program, different groups of households received different conservation services. One group (Group 1), a "control group," received no services at all to allow comparisons to be made to households who had received no energy conservation assistance. A second group (Group 2) received weatherization provided by the New York State Weatherization Assistance Program (WAP); these services include efforts to reduce heating energy.[91] In addition, two other groups (Groups 3 and 4) received electric (non-heating) conservation, in-home energy and money management sessions, and an affordable payment plan in addition to the WAP heating services.[92]

This New York utility found that its conservation efforts resulted in reductions in arrears and the costs associated with those arrears. "First," the utility's report said, "through the affordable payment plan --which guaranteed that their utilities would not be shut off as long as they made a mutually agreed-upon payment amount-- they increased the frequency of their monthly utility payments to almost 100 percent. In contrast, Groups 1 and 2 participants made their monthly utility payments about 50 percent of the time."[93] Second, although the monthly payment amount was as low as $10 per month for participants with very low incomes (and as high as $190), Education participants "increased the average amount of total dollars paid to the utility over the pre-treatment period."[94]

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[87] *Id.*, at 6.

[88] *Id.*, at 2.

[89] *Id.*, at 4.

[90] Merrilee Harrigan, (1992). ***Evaluating the Benefits of Comprehensive Energy Management for Low-Income, Payment-Troubled Customers*** (Washington D.C.: Alliance to Save Energy).

[91] *Id.*, at 19.

[92] *Id.*

[93] *Id.*, at 2, 47 - 61.

[94] *Id.*

According to the company's evaluation, while all low-income households incurred new arrears, those who had received the weatherization and electric conservation services had fewer new arrears than those who did not.[95] Moreover, the company found, the new arrears for these households likely arose because the provision of conservation services was matched with a decrease in fuel assistance. "If those [fuel assistance] dollars had been received at the previous level, it is probable that [the assisted] households would on average *not* have built up new arrears."[96] (emphasis added).

Finally, consider Connecticut Light and Power (CL&P), a Connecticut subsidiary of Northeast Utilities (NU). This Connecticut utility created a broad-based residential conservation and weatherization program in 1988. One specific component of the program, known as Plan E4, was directed to low-income payment troubled households. The CL&P program included 49 measures which were made available to its residential customers, 47 of which were made available through Plan E4.[97] The measures included both measures to reduce electric usage, including heating consumption, water heating consumption, and lighting consumption.[98]

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

> Overall, the data indicated an improvement in the average ***monthly*** change in arrearage of $9.73 for the 1989 participants and $18.77 1990.* * *(One plan)[99] was specifically targeted to payment-troubled customers, with the express purpose of reducing arrearages.* * *(This plan) was highly successful in this regard. The average (monthly) improvement in arrearages among plan E4 participants was approximately $40.00 for 1989 and $28.00 for 1990.[100]

The Northeast Utilities effort, begun in 1989 in conjunction with other interested parties in Connecticut, implemented a pilot weatherization program directed at low-income payment-troubled customers.[101] The program, called Plan E4, provided for a maximum investment in energy efficiency of $1500.[102] Participants must have annual income at or below 200 percent of

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[95] *Id.*

[96] *Id.*

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

[98] *Id.*, at 1-6 - 1-7.

[99] This plan was called Plan E4.

[100] ICF Resources, Inc., ***Program Evaluation: Weatherization Residential Assistance Partnership (WRAP) Program: Volume I, Final Report***, at 4-30 (December 1991).

[101] Other programs were implemented at the same time directed toward other populations.

[102] *Id.*, at 1-9.

the Federal Poverty Level and the customer's account must be "seriously delinquent."[\103\] An account having $200 or more in arrears qualified.[\104\]

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

(b) Costs: The cost of conservation measures can range from the nominal (for mere advice and information) to substantial expenditures for insulation, equipment and repairs. To gain the benefits of a conservation program, a utility is advised to combine education with real help in making up-front payments for improvements that will realize savings over time. Such measures may require more than the minimal expenditure which courts have required of nonbreaching parties in the traditional mitigation context.[\105\] Moreover, while studies conclude there is a cost-savings *over time* to utilities who offer such programs, it is possible that such expenditures cannot be justified in response to the damages flowing from the *particular* individual breach complained of in the case before the court.[\106\] In any event, using traditional mitigation analysis, it may be difficult to persuade a court or PUC to judge a utility's refusal to make such expenditures *unreasonable*.[\107\]

(c) Effort: The effort required to realize gains from a conservation program may be significant.[\108\] To be effective, such a plan may require monitoring energy use in the future. Moreover, the capital investment in conservation programs may be substantial.

These mitigation efforts must be justified by comparison to the unmitigated costs flowing from the instant breach. In the ordinary case, these costs would include excess arrearages accruing between the initial nonpayment and the termination of service, where "excess" is defined as that portion of the arrears that would not have been incurred if the conservation

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[\103\] *Id.*

[\104\] *Id.*

[\105\] ***Stanley***, *supra* note **Error! Bookmark not defined.**, 45 S.W.2d at 674.; ***Haukland v. Muirhand***, 206 N.W. 549, 552 (Mich. 1925).

[\106\] However, if there were a *class* of customers who routinely did not pay, and who the utility, in advance, knew or should have known that the class imposed a cost on all ratepayers because of the nonpayment of class members, this argument would not apply.

[\107\] ***McCormick on Damages***, *supra* note **Error! Bookmark not defined.**, §35, at 133 - 134 (1935) (choice need not be best, only reasonable).

[\108\] *Compare*, *Id.*, at 135.; *see*, ***Haliburton Oil Well Cementing Co. v. Millican***, 171 F.2d 426 (5th Cir. 1948); ***City National Bank v. Wells***, 384 S.E.2d 374, 384 (W.Va. 1989).

program were instituted, as well as the costs of the actual process of termination, itself, including the costs of necessary notice, service call, and the like.

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

(d) Risk: Under traditional mitigation analysis, it might be difficult to prove with the required degree of certainty[\109\] that savings would arise from the offer of conservation measures in any given instance. In one study, a sampling of low-income customers were given combined weatherization, energy assistance, education and a budget plan. The program impressively reduced the number of households in arrears from 58 percent to 18 percent of the subject group.[\110\] Even among this group, however, it may have been difficult to make a case that any *individual* participant would have avoided default by reason of the plan. While it could be said with confidence that, over the spectrum of all of the utility's customers, the availability of a conservation plan would result in a net savings to the utility as compared to service disconnections of all those in default,[\111\] in the great majority of instances, it may be difficult to prove cost-savings on a case-by-case basis with the requisite degree of certainty, (*i.e.*, that *any specifically-identified household* will be able to cure *its* default by reason of a conservation plan).[\112\]

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

II. AN APPROPRIATE MITIGATION OF DAMAGES RULE FOR UTILITIES

The pessimism discussed above with regard to the ability to obtain an order directing the implementation of mitigation measures by a public utility faced with nonpayment is limited to an application of traditional mitigation analysis. In this sense, "traditional" analysis is meant to encompass only that analysis which is otherwise applied to traditional one-shot consumer transactions. This analysis, however, is inappropriate to the utility customer service situation.

Accordingly, this section argues for a mitigation analysis that considers the reasonableness of the nonbreaching party's failure to act against the background of the effects of inaction on the utility's business as a whole, as well as against the external costs such

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[\109\] *See*, notes **Error! Bookmark not defined.**, **Error! Bookmark not defined.**, for a discussion of the certainty required.

[\110\] ***Quaid and Pigg***, supra note **Error! Bookmark not defined.**, at 5; *compare*, ***Haukland v. Muirhand***, 206 N.W. 549, 552 (Mich. 1925).

[\111\] ***Quaid and Pigg***, *supra* note **Error! Bookmark not defined.**.

[\112\] ***Quaid and Pigg***, *supra*, note **Error! Bookmark not defined.**.

nonfeasance imposes. By adopting such a rule, courts and PUCs can avoid the existing disincentives to prudent behavior occasioned by the limited vision of present mitigation rules.[\113\]

A.LOOKING BEYOND "TRADITIONAL" MITIGATION ANALYSIS: UNIQUE CONTEXT OF CONSUMER-UTILITY CONTRACT AND ITS IMPLICATIONS FOR MITIGATION DOCTRINE.

A consumer-utility contract shares little in common with the one-shot commercial transaction upon which traditional contract law is predicated.[\114\] In particular, with regard to the issue of mitigation undertaken in response to a breach of a contract for utility service, consumer-utility contracts differ in at least four essential ways.

First, except for certain specific contractual relations --certain employment or franchise arrangements are examples-- it strains credulity to believe that courts or PUCs would refuse to impose a duty of mitigation that comprehends further dealings between the original parties to the contract in breach solely because further dealings would result in "humiliation" for the utility.[\115\] In any event, a public utility's customer's contract involves neither intense personal relations,[\116\] nor opportunity for strategic behaviors,[\117\] that have urged courts to narrowly apply a duty of mitigation which would require further dealings with the party in breach.

[\113\] *See*, ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, 70 ***Col. L.Rev.*** at 1184 - 1199 (stating that traditional damages rules assume a free market and suggesting that those rules may be inapplicable in other contexts. Contract damage rules *are* sometimes adjusted for peculiar markets). For example, the general rule against specific performance gives way when the subject of the contract is unique, or "in other proper circumstances." ***U.C.C.*** §2-716. In construction contracts, rules requiring merely substantial performance of contract terms have been adopted. ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, at §8.15.

[\114\] *See*, notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *infra*, and accompanying text; *see* ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, 70 ***Columbia L.Rev.*** at 1184 (traditional rules for contract remedies contemplate a one-shot transaction in a free market, and those rules may be inapt in other contexts).

[\115\] *See*, notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.** and **Error! Bookmark not defined.**, *supra*, and accompanying text.

[\116\] Nor is there a threat that the nonbreaching party (*i.e.*, the utility) would have materially changed its position in reliance on a reasonable expectation of future contract compliance.

[\117\] More likely driving judicial decisions declining to impose a duty to mitigate is a notion of deterring opportunities for strategic behavior as opposed to protection of nonbreachers against humiliation. For example, a seller who agrees to sell to a buyer on credit, and who likely has extracted concessions from the buyer in return, presents a real threat of using mitigation doctrine to force the buyer to renegotiate a cash deal at the time of performance, and shift the loss to the buyer, assuming either that the buyer is not able to sufficiently quantify the losses he has suffered, or that those losses do not justify the costs of a court action.

Second, a utility, as a monopolistic provider of an essential resource, cannot assume that a service termination will end the terminated consumer's use of the utility's service. Indeed, as discussed above, it seems more reasonable to assume that the consumer will "go underground" -- find someone else in whose name she can maintain service, move elsewhere and initiate service, or "double-up"-- than to assume she would do without the service or move to a home outside of that utility's service territory.\118\

Third, even if a utility could accurately, and costlessly, exclude once-terminated customers, recent studies indicate that offering some combination of deferred payment plans and conservation programs would be more profitable as an across-the-board policy than termination.\119\ Nevertheless, courts and PUCs cannot assume that utilities would, of their own accord, engage in such behavior without incentives, since: (1) utilities are not subject to ordinary market forces and can costlessly pass on losses to their customers; and (2) undertaking only limited mitigation obligations may result in the utility recouping its full loss from other ratepayers rather than incurring the cost and risk of offering ameliorative programs.\120\

(..continued)

A utility customer, by contrast, lacks sufficient bargaining power to force terms on a utility, and typically faces sufficient risks to health and safety from a utility shut-off to render strategic behavior unlikely.

\118\This conclusion seems reasonable. The availability of public utility services is essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in ***Craft v. Memphis Gas, Light and Water Division***, 436 U.S. 1 (1978), that "utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety." 436 U.S. at 18. Similarly, an Ohio federal district court has stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." ***Palmer v. Columbia Gas Co. of Ohio***, 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); *see also*, ***Stanford v. Gas Service Company***, 346 F.Supp. 717, 721 (D.Kan. 1972). An excellent canvass of cases is found in ***Montalvo v. Consolidated Edison Company of New York***, 110 Misc. 2d 24, 441 N.Y.S.2d 768, 776 (N.Y. 1981). The poor in particular are vulnerable to the loss of utility service. Kirkwood, "Cash Deposits--Burdens and Barriers in Access to Utility Services," 7 ***Harv. Civ. Rights Civ. Lib. L.Rev.*** 630 (1972); Note, "The Shutoff of Utility Services for Nonpayment: A Plight of the Poor," 46 ***Wash. L.Rev.*** 745 (1971); Note, "Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers," 78 ***Yale L.Rev.*** 448 (1969).

\119***Quaid and Pigg***, *supra* note **Error! Bookmark not defined.**; ***Wisconsin Gas Company***, *supra* note **Error! Bookmark not defined.**; ***1989 Cleveland State University***, *supra* note **Error! Bookmark not defined.**.

\120\Analogously, a terminated employee may be unlikely to incur the costs and trouble of looking for a replacement job, *ceteris paribus*, if she knew that she could recoup her full wages, without deduction, in a court suit if she did not pursue new employment. *See also*, Goetz and Scott, "The Mitigation Principle: Toward a General Theory of Contractual Obligation," 69 ***Virginia L.Rev.*** 967, 980 (1984) (hereafter ***Mitigation Principle***). (This is a classic "moral hazard": the party whose rights are "insured" by the performance obligation is unwilling to adopt precautions that benefit the insuror.)

Finally, because of a utility's position as a monopolistic provider of a necessary resource, it is uniquely positioned to secure the gains that would be produced by offering conservation programs. Not only is a utility in a position to spread the costs and risks of such a regime over its customer base,[121] but, because of its monopolistic position, a utility would also be the recipient of the profits produced by such activities.

1. Contract Rules Appropriate to Specialized Contractual Relations.

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

In other contexts, courts have developed contract rules appropriate to specialized contractual relations. The development of the law of contracts has proceeded on the implicit assumption that most contracts involve a discrete one-time transaction between parties possessed of roughly equal bargaining power, set against a backdrop of viable substitute markets.[122] Where certain types of contractual relationships no longer meet these conditions, the common law has carved out niches appropriate to the new relation rather than rewriting the entire common law of contracts.[123] Courts have developed specialized rules for contractual relations where it is particularly appropriate to require a duty to mitigate damages, notwithstanding the doctrine applied in the general consumer context.

The imposition of a particularized duty to mitigate has been found appropriate in situations in which it is apparent that the contract comprehends a specialized contract subject or a continuous contractual relationship over an extended period of time.[124] For example, the doctrine of substantial performance in construction contracts requires the nonbreaching party to mitigate by accepting a deficient performance coupled with money damages.[125]

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

[122] *See e.g.*, ***Northwest Lumber Sales v. Continental Forest Products***, 495 P.2d 744 (Or.1971); *see*, Farnsworth, *supra* note **Error! Bookmark not defined.**, 70 ***Columbia L.Rev.*** at 1188.

[123] *See*, Unger, "The Critical Legal Studies Movement," 96 ***Harv. L.Rev.*** 563, 617 (1983).

[124] *See*, Goetz and Scott, "Principles of Relational Contracts," 67 ***Virginia L.Rev.*** 1089 (1981).

[125] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 985; ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, at §8.15; *see generally*, Collier, ***Construction Contracts***, 151 - 152 (1979).

The imposition of a duty to mitigate should be found appropriate, as well, in situations where the parties stand in grossly unequal bargaining positions,\126\ or more precisely, where one party is uniquely positioned to effect the post-breach modifications which would result in cost savings to all, or where one party is less risk averse than the party in breach.\127\

Finally, the imposition of a duty to mitigate has been found appropriate in situations where the parties cannot turn to viable markets for substitute performances.\128\ Seemingly contradictory common law decisions have consistently identified absence of alternative performance as a major variable justifying a duty to deal with the breacher.

Each of these conditions applies to a contract between a public utility and its customers. A utility contract contemplates a long-term relationship between the utility and its customers. More importantly, as a monopolistic supplier of an essential element of health, life and safety, a utility consumer has few alternatives to receipt of the service in question: seeking alternative suppliers or substitute performance, and doing without, are not viable alternatives.\129\

2. Applying Specialized Rules To Mitigation of Damages.

In the remedies allowed for broken contracts, the common law invests courts with great potential to direct parties' behavior towards mutually profitable and allocatively efficient

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\126\ *See*, Kronmen, "Contract Law and Distributive Justice," 89 ***Yale Law Journal*** 472 (1980); *see*, Michalmen, "Norms and Normativity in Economic Theory of Law," 62 ***Minn. L.Rev.*** 1015, 1016 - 1037 (1978); MacNeil, "Contracts: Adjustment of Long-Term Economic Relationships Under Classical, NeoClassical and Relational Contract Law," 72 ***Northwestern L.Rev.*** 854, 876 - 886, 900 (1978).

\127\ Because the court cannot assume that the parties would place the burden of post-contracting modification on the party best suited to effect it. *See* ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 972 - 973 and 1018 - 1023. By contrast, threat of bad faith extortion by a party with superior bargaining power threatening breach is a factor counseling no duty to mitigate. Id., at 1006.

\128\ ***Ashley v. Rocky Mountain Bell Telephone Co.*** 64 P. 765, 767 (Montana 1901); ***Holly v. City of Neodesha***, 127 P. 616, 620 (Kan. 1912); ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 969, 984, 1004 (1984) (a casual review of various contract rules reveals a noticeable sensitivity to the character of the market); *see also*, ***Farnsworth***, *supra* note **Error! Bookmark not defined.**, 70 ***Columbia L.Rev.*** at 1188; Barton, "The Economic Basis of Damages for Breach of Contract," 1 ***J.Leg. Stud.*** 277, 277 - 279 (1972) (hereafter ***Barton***).

\129\ Indeed, Professors Goetz and Scott find that courts have consistently imposed a duty to deal with the breacher in disputes over specialized service contracts such as those for utility service. ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 1005 and note 99.

decisions.[130] In particular, precise mitigation rules are *required* to reach such optimal results where there are not viable markets for substitute performance available to each party.[131]

In these situations, by precise application of mitigation doctrine, courts and PUCs can, for example, provide contracting parties with proper incentives to share information. The utility customer may be able to tender a substitute performance, such as through a deferred payment plan, which might be acceptable to the utility. However, if the utility does not share with the consumer the availability of such plans, a mutually profitable alternative to breach will be lost.[132] Absent such information sharing, a consumer is unlikely to inform the utility about a pending inability to meet her obligations because she may feel the utility unlikely to compromise, as well as because of the threat that the utility (as well as a court) might deem the act of sharing that information a breach unto itself.[133]

Courts have also required contracting parties in these situations to engage in mitigation efforts that involve discovering mutually profitable alternatives to contract breach.[134] Occasionally courts will even require the nonbreaching party to suffer the consequences of her failure to take actions that might have avoided the breach.[135]

In utility-consumer disputes, placing a burden on the utility to offer some type of conservation program in appropriate cases would encourage the utility to offer information as to what substitute performances it would accept. Such a duty would also encourage the consumer to share information as to her ability to meet (the altered) contractual obligations.[136] An outstanding example of this principle in action is the common utility practice, whether favored by self-interest or required by regulation, of offering balanced billing plans which levelize a consumer's high winter heating bills over an annual period.[137]

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[130] ***Barton***, *supra* note **Error! Bookmark not defined.**, 1 ***J. Leg. Stud.*** at 277 - 282.

[131] *See*, note **Error! Bookmark not defined.**, *supra* and accompanying text; *see also*, ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 984 - 987 and 1004 (more specialized transactions simply require more varied and complex mitigation incentives to encourage optimal contractual behavior).

[132] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** ar 982.

[133] Id., at 983.

[134] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L. Rev.***, at 973 - 982; *see generally*, Shavell, ***Economic Analysis of Accident Law***, §3.2 (1987).

[135] ***Penna v. Atlantic Macaroni Co.***, 161 N.Y.S. 191 (1916); *see also*, ***Delafield v. J.K. Armstrong Co.***, 116 N.Y.S. 71 (1909), *aff'd*, 199 N.Y. 518 (1910); *see also*, ***McCormick***, *supra* note **Error! Bookmark not defined.**, §33, at p.127.

[136] *Compare*, Harak, ***The Light and Heat Handbook***, at 40 - 41; *see*, Hillman, "Keeping the Deal Together After Material Breach --Common Law Mitigation Rules, the UCC and the Restatement (Second) of Contracts", 47 ***U.Colo. L.Rev.*** 553, 561 (1976). (hereinafter ***Hillman***).

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

Even to those courts reluctant to rely on theories of economic efficiency to inform contractual analysis,[\138\] a utility's duty to mitigate by offering conservation programs could independently be justified based upon protecting the contracting parties' expectation interests. It may be assumed the parties' contract contemplated, at least absent specific disclaimers to the contrary, "that a non-breaching party should be required to accept an offer in mitigation which would impose additional burdens not contemplated by the contract, but which would reduce joint damages,"[\139\] and that the burden of responding to post-contracting changes in the contractual relationship would fall on the party best able to suggest the mutually profitable substitute, or to alter the relationship to the benefit of each party.[\140\]

Thus, it would appear that the utility, as contrasted to the customer, can far more easily make (less costly) adjustments post-breach. Accordingly, if fully apprised of all relevant information at the time of contracting, the parties would likely have agreed *at that time* that the utility should make the healing adjustments in the event of a breach.[\141\]

Given this background, one would expect the common law to have developed well-defined mitigation rules appropriate to discrete classes of contracts. Indeed, courts have developed situation-appropriate rules for certain contractual relationships.[\142\] In fact, some commentators have noted at least the incipient stage of the development of a mitigation doctrine apt for dealing with adjustments during the course of the contract to avoid the necessity for breach. In particular, in specialized service contracts, such as utility contracts, and in construction contracts, courts have imposed a duty to deal with the party in breach so as to encourage pre-breach adjustments in the contractual relationship.[\143\] Another example is the

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[\138\] *See*, ***Berman and Sons Inc. v. Jefferson***, 396 N.E.2d 981 - 983, 985, n.8 (Mass 1979).

[\139\] ***Hillman***, *supra*, note **Error! Bookmark not defined.**, 47 ***U.Colo. L.Rev.*** at 600.

[\140\] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 981 - 982; *see also*, Id. at 1012 (specialized contracts also require mitigation by internal adjustments affected by nonbreacher's rearrangement of his own affairs).

[\141\] Id., at 979 - 981. Further, because the consumer is far more averse to the risk of service termination, the parties would rationally have placed the burden on the utility to explore the possibility of substitute performance.

[\142\] *See e.g.*, ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, at 1012 n. 133 (the tenant, the bus passenger, and the runner of a construction project can all overcome reluctance of a potential plaintiff [nonbreaching party] by offering additional compensation in advance [of breach]). Goetz and Scott note for example, that in construction contracts, a party tendering substantial, but nevertheless deficient performance has breached his contract, but does not lose all his contractual rights. The injured party must mitigate by accepting the substandard performance plus a monetary allowance. ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 985, n.431. Professor Hillman notes that in responses to breaches of service contracts, courts generally hold that the nonbreacher must accept new offers from the breacher, at least where the new term is not onerous, and acceptance would avert a large loss. ***Hillman***, *supra* note **Error! Bookmark not defined.**, 47 ***U.Colo. L.Rev.*** at 573 - 574.

option offered by the Uniform Commercial Code (UCC) to demand assurances, rather than to suspend performance and treat the contract as having been breached.[144]

Others less optimistically point to a state of law which is, at present, in disarray.[145] In particular, two distinct types of concerns continue to stand as obstacles to the development of a fluid and consistent doctrine of mitigation. First, there is a host of predominantly pretextual arguments against requiring further dealing with the breacher. These appear to be, as Professor Hillman notes, bottomed on the notion that courts simply do not like breachers.[146] Such arguments include that the contract was of an intensely personal nature, and that continuation would involve undue humiliation for the nonbreacher;[147] that acceptance of the offer threatens to work a waiver of the nonbreacher's rights to seek damages for breach;[148] or that the breacher has proved herself to be an unreliable party and the nonbreacher should not be required to expose herself to further risk.[149]

(..continued)

[143] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 1004 - 1005 and n.99 ("the common law has created appropriate rules of thumb in regard to a post-breach mitigation duty to deal with breacher that accommodates certain specialized environments* * *. As the market for substitute performances thins, the judicial decisions become increasingly [more apt to impose a duty to mitigate by further dealing with the party in breach.]* * *Courts have consistently imposed a duty to deal with the breacher over specialized service contracts.")

[144] ***U.C.C.*** §2-609. *See also*, note **Error! Bookmark not defined.**, *supra*, and accompanying text.

[145] ***Hillman***, *supra* note **Error! Bookmark not defined.**, at 554 - 555 (courts have not applied consistent principles, nor reached consistent results, nor even proposed consistent policies or goals regarding when a nonbreaching party is required to further deal with the breacher incident to its duty of mitigation.)

[146] ***Hillman***, *supra* note **Error! Bookmark not defined.**, 47 ***U.Colo. L.Rev.*** at 559, n.31; *see also*, ***Fried***, *supra* note **Error! Bookmark not defined.**, for an examination of the perceived moral implications of breach.

[147] ***Hillman***, supra note **Error! Bookmark not defined.**, 47 ***U.Colo. L.Rev.*** at 569; *see*, ***Stanley Mealy Boy's Clothes v. Hickey***, 259 S.W.2d 160, 162 (Tex. 1924). Goetz and Scott generously propose these arguments are merely stand-ins for more cogent arguments that, in certain personal service contracts, further dealings would require the nonbreacher, and the courts to absorb excessive costs in monitoring and enforcing the [altered] contractual terms. ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 1009.

[148] For an early critical assessment of the artificiality of this argument. *See*, Note, "Obligations of Aggrieved Contracting Parties to Accept New Offers of Defaulter To Obviate Avoidable Damages," 33 ***Harvard L.Rev.*** 854, 855 (1933). (No sound law to support fear that acceptance of an offer might subject nonbreacher to risk of implicitly waiving his contract rights).

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

A second set of arguments is concerned with the commercial reality that placing the burden of post-breach adjustment on one party or the other will result in manipulative behavior by the party not bearing the burden; somewhat relatedly, this argument posits that forcing the parties to deal may result in wasted resources in the form of excessive monitoring costs.[150]

None of these damages seem relevant to the situation where a consumer seeks the installation of conservation measures before having utility service disconnected due to nonpayment. In the situation where a utility is "required" to offer conservation programs,[151] the danger of a consumer employing strategic measures to impose additional terms is absent. A consumer has scant bargaining power by which to coerce a utility. Moreover, a consumer is unlikely to rely on the gambit of the loss of her home energy service in order to gain some benefit from the utility.[152] As a result, there is little to be gained through manipulative behavior.

More to the point, the premise of this analysis is that the offer of conservation programs will be profitable to the utility as well as to the consumer. Accordingly, "capitulating" to the consumer's demand for the installation of conservation measures prior to her breach will not represent any loss to the utility.[153]

3. Applying A Customized Mitigation of Damages Doctrine.

It is possible to apply a customized mitigation of damages doctrine to the context of utility-consumer disputes. The above analysis suggests that the usual impediments to having courts impose a duty to mitigate by further dealing with the breacher are not present in the utility-consumer dispute. In particular, there is little threat of manipulative behavior by the defaulting consumer;[154] there are no intense personal relations involved; the monitoring and

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[150] *See*, ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 972 (mitigation rules inevitably encourage strategic behavior by both parties; legally regulating one aspect will exacerbate the other).

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

[152] *See*, note **Error! Bookmark not defined.**, *supra* and accompanying text.

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

[154] *See*, notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *supra*, and accompanying text. Goetz and Scott view the threat of strategic behavior by breachers as the most serious obstacle to context-appropriate mitigation analysis. ***Mitigation Principle***, *supra*, note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 1006 - 1007.

enforcement costs for the amended contract are not stifling; there are no reputational or other intrinsic values threatened; and the added benefits justify the costs involved.

In deciding whether to require mitigation within the utility-consumer context, courts and utility regulators can be guided by Professor Hillman. Hillman offers four questions, the affirmative answer to which, he proposes, should lead courts to "require" the mitigation at issue.[155] His questions, with proposed responses are offered here.

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

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

3. Can the breaching party provide adequate assurance that she will perform her (amended) obligations? The answer to this question, which may be determinative, is two headed. First, on the usual premise that the court or PUC would require evidence that the *particular* defaulting-consumer would be able to meet her (amended) obligations,[156] the answer will be fact-dependent on the considerations outlined above.[157] On the other hand, a court or PUC should be urged to assess the profitability of mitigation measures over the entire spectrum of a utility's customer base against that of an across-the-board program of scheduled terminations.[158] The answer on the empirical evidence presented would be that pretermination payment plans and conservation programs are more profitable than a general policy of disconnection.

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[155] ***Hillman***, *supra* note **Error! Bookmark not defined.**, 47 ***Colo. L.Rev.*** at 599. Actually, Professor Hillman proposes five questions, one of which is irrelevant to present purposes:

Is the breacher's offer the best available? It is irrelevant because a utility is, in this context, a "lost-volume" caller. Its failure to serve the consumer in breach does not free resources that permit it to serve another consumer. *Compare*, ***Hillman***, *supra* note **Error! Bookmark not defined.**, 47 ***Colo. L.Rev.*** at 582 - 583 (sellers should not be able to proceed under U.C.C. §2-708(2) for lost profits as a lost volume seller where the breacher stands ready to deal on terms which would be profitable to the seller).

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

[157] *See*, notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.** and **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *supra* and accompanying text.

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

4. Can acceptance of the new offer reduce damages? By hypothesis, yes. The discussion above indicates that the pursuit of conservation measures[\159\] will reduce the arrears, collection costs, bad debt and the like associated with nonpayment.

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

On efficiency and distributional grounds, on Professor Hillman's analysis, and pursuant to traditional analysis of the rationale advanced by courts in *failing* to impose a duty to deal with breachers, a mitigation requirement in the utility-consumer context is posited as being consistent with the individualized mitigation requirements that courts have imposed regarding comparable specialized contracts.[\160\] Filling in the content of such a requirement is the subject of the remainder of this article.

B.ELEMENTS OF MITIGATION ANALYSIS APPROPRIATE TO UTILITY-CONSUMER CONTRACTS.

Limited and narrowly drawn mitigation requirements appropriate for typical one-shot market transactions[\161\] between parties of equal bargaining power are glaringly inadequate in the context of consumer-utility transactions. Requirements can be established, however, within the law appropriate to utility-consumer transactions, which create proper incentives for profitable and mutually beneficial behavior by all parties as well as require specific actions.

1.Information Sharing

Proper elements of a mitigation analysis should include a requirement akin to a court-imposed *dis*incentive to reach mutually profitable solutions.[\162\] Such a disincentive, Professors Goetz and Scott point out, can be found in the notions derived from *Hadley v. Baxendale*.[\163\] That case states that responsibility for the consequences of breach is set by the knowledge of the parties at the time of contract. This "rule" acts as a disincentive to share information acquired

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[\159\] *See* notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.** and **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *supra*, and accompanying text.

[\160\] *See*, notes **Error! Bookmark not defined.** - **Error! Bookmark not defined.** and **Error! Bookmark not defined.** - **Error! Bookmark not defined.**, *supra* and accompanying text.

[\161\] ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 986 - 987.

[\162\] Id., at 986 - 987; *see* note **Error! Bookmark not defined.**, *supra*, and accompanying text.

[\163\] 9 Exch. 341 (1854), *as quoted at*, ***Corbin on Contracts***, §1007, n.15 (1964).

after formation of the contract regarding: (1) how the parties could keep the contract together; (2) what impediments to meeting obligations are presented to the consumer; (3) what performance would be feasible to the consumer; and (4) what substitute performance alternatives would be acceptable to the utility.[\164\] No reason exists to create and maintain such a disincentive in the consumer-utility context.

Accordingly, an ideal mitigation doctrine within the utility-consumer context would be premised on appropriate incentives for the parties to share information and to act upon that information. In particular, the utility should be required to share information, at least to the extent to allow it to determine if a mutually profitable solution exists.[\165\] If the consumer is allowed to prove that a solution exists in mitigation, a utility may have an incentive to cooperate.[\166\] If the court or commission goes further by requiring the utility to prove that it exhausted possible ameliorative arrangements, the court or commission will be assured that its judicial intervention is not standing in the way of an ideal solution.[\167\]

2.Acting on Information: "Best Efforts" Standard.

Assuming that it is established that the utility has a duty to share information with, and perhaps to discover information from, the consumer, a court or PUC will have to decide how far it will go in requiring the utility to then actually *engage* in institutionally profitable and allocatively efficient behavior. The court or PUC must further decide what standard it will employ to assess the reasonableness of the utility's actions. A "rule of reason" approach seems best suited in this regard.[\168\]

[\164\] Id., at 987; *see also*, Schmitthoff, "The Duty to Mitigate," 1961 ***J.Bus. Law*** 361, 362 - 363 (1961).

[\165\] *Compare* ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 981. The duty is imposed on the utility in the first instance because it has greater access to information and is risk averse to the risk of breach.

[\166\] If the utility is assured of recouping all arrears, without risk, it has no incentive to take on the risk and effort these programs entail. *See*, note **Error! Bookmark not defined.**, *supra* and accompanying text; *see also*, ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virg. L.Rev.*** at 1010 (substantial performance doctrine in construction contracts encourages cooperation by softening the breacher/nonbreacher distinction).

[\167\] "Courts should require each party to extend whatever efforts in sharing information and undertaking adaptations that are necessary to minimize the joint costs of readjustment (after breach)." ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 973; *see generally*, ***Shavell***, *supra* note **Error! Bookmark not defined.**, at §3.2.

[\168\] *Compare*, a "rule of thumb" approach. The concept and name of this latter approach is developed in ***Mitigation Principles***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 984 - 985, citing the substantial performance doctrine in construction contracts as one version of a rule of thumb courts have approved in contract remedies law.

A rule of reason approach would assess the reasonableness of the utility's actions in light of all the circumstances of the contractual relation:[\169\] the utility's resources, the consumer's particular situation, the availability of alternative services, and the degree to which standard contract terms are imposed. In the typical situation, where the utility maintains monopoly power over a necessary and irreplaceable resource, and where none of the dangers of imposed mitigation are present, the standard should be appropriately high.

Commentators have suggested that such conditions require a "best efforts" standard, similar to the standard implied in promotional and requirements contracts.[\170\] This standard approaches a fiduciary duty, consistent with the duty that has been implied against utilities as monopolistic power holders as well as in other contract law areas.[\171\] This standard would require the monopolistic provider of a product essential to public health and safety to use due care in attempting to discover alternative performances, such as conservation programs that would allow the customer to maintain service. Moreover, the utility would be barred from recovering any expenses which could have been avoided by such performance if it failed to offer the option to its customer.[\172\]

II. APPLICATIONS OF A MITIGATION DOCTRINE FOR UTILITIES

A.THE CENTRAL MAINE POWER CASE INVOLVING NONPAYMENT MITIGATION.

The issue of a utility's obligation to mitigate the damages associated with nonpayment by offering conservation measures was raised in a 1991 rate case involving Central Maine Power Company (CMP) before the Maine Public Utilities Commission (PUC).[\173\] In that proceeding, the staff of the PUC submitted testimony concerning CMP's marketing of "energy management

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[\169\] This approach is suggested by a "best-efforts standard" proposed by Goetz and Scott. ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 984 - 985.

[\170\] Id. at 985, 1015 - 1016 and n.126 (courts should impose a best efforts obligation whenever a single party controls the instrumentality necessary to achieve a cooperative goal). Moreover, Goetz and Scott state that the concept of "best efforts" implies a duty to seek to discover exactly what contingencies may require adjustment, as well as a duty to act on information known or discovered. *Id.*, at 1015 - 1016.

[\171\] ***Trigg v. Tennessee Electrical Membership Corp.***, 533 S.W.2d 730, 734 (Tenn. App. 1975); ***Carroll v. Local No. 269***, 31 A.2d 223 (N.J. Chanc. 1943); ***McCreery Angus Farms v. American Angus Association***, 379 F.Supp. 1068 (D.Ill.), *aff'd*, 506 P.2d 1404 (7th Cir. 1974).

[\172\] *See*, ***Mitigation Principle***, *supra* note **Error! Bookmark not defined.**, 69 ***Virginia L.Rev.*** at 1013 - 1014; *see also*, ***Delafield v. J.K.Armstrong Co.***, 116 N.Y.S. 71 (App. Div. 1909), *aff'd*, 199 N.Y. 518 (1910).

[\173\] **In Re. Central Maine Power Company Proposed Increases in Rates**, Docket No. 90-076, Decision and Order (May 15, 1991).

services" to low-income customers. The company, according to the staff testimony, was not effective in its marketing.[\174\]

According to information presented in that proceeding, there is a positive correlation between high arrears balances and high usage. The company, according to the PUC staff, "should pursue the implications of the [recent study of payment plans] and undertake a marketing effort that targets high use, low-income customers at the time they negotiate a payment arrangement."[\175\]

The state Office of Public Advocate agreed. According to that office, CMP could significantly reduce its write-offs and collection costs by providing energy management services to high usage customers on special payment arrangements.[\176\] The Public Advocate said that the utility could save as much as $2 million a year "if CMP ha(d) been successful in delivering its Insulation Plus and Bundle Up programs to its special payment arrangement customers."[\177\]

The Maine PUC acted favorably on the criticisms of the lack of action by Central Maine Power. According to the Commission:

The successful marketing of energy management programs to low-income customers, particularly low-income customers on special payment arrangements, has a clear benefit above and beyond the capacity or energy savings generally associated with demand-side management programs. Low income customers that see a reduction in their bills will be able to manage their bills better. The Company's carrying costs associated with late-paid bills and uncollectibles, which are generally passed on to other ratepayers, should be reduced.[\178\]

The PUC directed the company to take remedial action. Moreover, the PUC said, by no later than one year after the order, "CMP shall provide extensive information concerning what measures it is taking to improve its performance in this area as well as a description of what improvements have taken place."[\179\] The PUC then warned, in classic mitigation language: "should CMP fail to accomplish a significant improvement in this area, we will consider

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[\174\] On an overall basis, the company had 21,376 special payment arrangements in 1989, but installed or accomplished only 194 energy management service measures (water heater wraps, Insulation Plus, residential audits, and the like). In addition, of the 15,600 low-income customers who used electricity as the primary heating source, the company completed only 19 of its low-income Insulation Plus weatherization programs.

[\175\] cite.

[\176\] cite.

[\177\] cite.

[\178\] Decision and Order, *supra* note **Error! Bookmark not defined.**, at 7.

[\179\] *Id.*, at 8.

evidence and argument that we should impose a disallowance of some of CMP's uncollectible expense as imprudent."[\180\]

This favorable action by the Maine PUC gives rise to the issue of whether the same general principles can and should be applied as a general rule of mitigation to all public utilities, but particularly by those utilities who face an identifiable group of nonpaying customers who routinely impose costs on the utility as a result of the nonpayment of their full bill.

B.THE UNIQUE OHIO CONTEXT.

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

Ohio utilities are under an obligation to provide continuing service even to low-income households who have an acknowledged inability to pay their monthly bill in full.[\181\] Under the Ohio Percentage of Income Payment Plan (PIPP), low-income households may retain their service if they pay a designated percentage of their income toward their utility bill each month.[\182\] So long as the households make their PIPP payments, they are protected from the disconnection of service. While households continue to "owe" the remainder of their bills, utilities may not disconnect service for nonpayment of that remainder.[\183\]

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

the concept of an income-based program was not new in Ohio. At the time the

> PIP was adopted, the rules of the Ohio PUC required each electric and natural gas utility under its jurisdiction to offer a plan through which a delinquent customer could retain service during the winter

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[\180\] *Id.* Compare this language to the standard rule regarding mitigation set forth in the text accompanying note **Error! Bookmark not defined.**, *supra*.

[\181\] cite ohio pipp order.

[\182\] ***In the Matter of the Investigation into Long-Term Solutions Concerning Disconnection of Gas and Electric Service in Winter Emergencies***, Case No., 83-303-GI-COI, at 12 - 14 (Nov. 23, 1983).

[\183\] *Id.*, at 14. "A point should be made about what PIP is and what it is not. PIP is a payment plan; it is not debt forgiveness. To the extent that a particular customer's payments are less than the bill and that arrearages have accrued, that customer is responsible for the arrearage. PIP only prohibits a utility from using disconnection as a method of debt collection. The utility may collect the debt by whatever other legal means it has available." Marsha Ryan and Steven Deerwester, ***Heat or Eat?--Ohio's Percentage of Income Plan***, presented at the Biannual Regulatory Information Conference, National Regulatory Research Institute (1986) (hereafter Ryan and Deerwester).

if she paid 15 percent of her income to the utility threatening disconnection.[184]

This requirement was part of Ohio's "1/6 plan," under which a delinquent customer would pay either 1/6th of the arrears plus the current bill *or* monthly payments equal to 15 percent of the total monthly household income, whichever was greater.[185]

Monthly payments toward home energy bills are set at a pre-determined percentage of income for Ohio's PIPP participants.[186] During the heating months, PIPP households are required to pay ten percent of their income toward their primary heating source (usually natural gas) and five percent toward their secondary energy source (usually electricity).[187] During the non-heating months, PIPP households are required to pay either these income percentages, or their actual bills, whichever is higher. As a result, Ohio's PIPP households pay about ten percent of their income over a year for their gas bills and about 12 percent over a year for electric bills.[188]

Each year, Ohio's PIPP participants face a "gap" of roughly $46 million which they owe to their utility companies.[189] This gap represents the difference between the households' full utility bills --a "full" bill is that bill which would have been rendered to the household in the absence of PIPP-- and the payments that are made from the households' own funds or on the households' behalf from fuel assistance.[190] "It is this gap which is of concern to state program administrators, the Public Utilities Commission, the utilities, and low-income advocates* * *."[191] As Cleveland State concluded: "a concern common among all states is that, unless an extraordinary amount of money is available for energy assistance there will always be a short fall

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[184] *Id.*, at 3.

[185] *Id.*, at 3 - 4.

[186] ohio pipp cite.

[187] Cleveland State University, ***Coordinating Ohio's Percentage of Income Payment Plan and Home Energy Assistance Program: A Guidebook***, at 7 (September 1989). (hereafter ***Cleveland State University***).

[188] *Id.*, at 2.

[189] *Id.*, at 8.

[190] Federal fuel assistance is provided through the Low-Income Home Energy Assistance Program (LIHEAP). 42 ***U.S.C.*** §§ 8621 *et seq.* (1989 and 1991 supp.). In addition, limited funds have been made available through a state-funded supplement to LIHEAP. ***Cleveland State University***, *supra* note **Error! Bookmark not defined.**, at 8.

[191] *Id.*, at 8.

between what low-income households can afford to pay for energy and what they use."[\192\] As of April 1989, PIPP participants owed their utility companies a total of $213 million.[\193\]

The most recent data available[\194\] shows that there are more than one-quarter million PIPP customers statewide in Ohio. Among Ohio's biggest utilities, from two to five percent of all residential customers participated in the PIPP program in the 1991-1992 program year.

{PRIVATE } **COMPANY**	**TOTAL RESIDENTIAL CUSTOMERS**[\195\]	**PIPP CUSTOMERS**[\196\]	**PERCENT PIPP IS OF TOTAL RESIDENTIAL**[\197\]
CLEVELAND ELECTRIC ILLUMINATING	657,289	30,059	4.6%
COLUMBUS SOUTHERN POWER	504,681	15,215	3.0%
OHIO POWER	562,567	28,659	5.1%
OHIO EDISON	813,500	38,611	4.7%
TOLEDO EDISON	255,563	9,188	3.6%
CINCINNATI GAS & ELECTRIC	532,731	10,706	2.0%
DAYTON POWER & LIGHT	428,644	12,303	2.9%
COLUMBIA GAS	1,089,793	37,458	3.4%

[\192\] *Id.*, at 1.

[\193\] *Id.*, at 25. This includes all debts which were accumulated prior to joining the PIPP and the debt accumulated while on the PIPP. *Id.*, at 25 - 26. Moreover, the evidences tends to demonstrate that the accumulation of arrears for these households occurred at a lesser rate under PIPP than before PIPP, indicating that, while the households did not pay their *entire* bills under PIPP, they paid a greater portion of their bills with PIPP than without. Roger Colton, ***Ohio's Percentage of Income Payment Plan: Problems and Potentials*** (May 1991).

[\194\] Bryan Gates, ***"09" Disconnect Report, June 1, 1991 through May 31, 1992***, Consumer Services Division, Office of the Consumers' Counsel (1992). (adapted from the "Ohio Utility "36" Column Report on Disconnections for Non-Payment").

[\195\] *Id.*, at Table 2.

[\196\] *Id.*, at Table 3.

[\197\] *Id.*, at Table 6.

EAST OHIO GAS	971,043	44,687	4.6%
TOTAL	5,815,811	226,886	3.9%

While the arrears incurred by Ohio PIPP customers are of concern, these arrears could be controlled with proper attention by the utilities. One study performed by Cleveland State University looked specifically at households with high arrears in the Ohio PIPP. The Cleveland State study found that "the vast majority (80-90%) of PIP households are managing to keep their debt at reasonable levels."[198] The study continued to note, however, that there is a group (11-12%) that "is accumulating debt at a very rapid pace."[199] According to Cleveland State, "this small group accounted for 40% and 34% of total gas and electric PIP debt respectively."[200] Cleveland State described these customers, saying:

The high debt segments are a relatively small percent of the total population.

> This small group has tended to accumulate debt at a high rate in the past; they begin the program with 2.6 times higher debt, they have accumulated 3 times as much total net debt, and their annual increase in debt is 3 times greater than the majority of the PIP households.[201]

The Cleveland State study continued, stating: "Their annual usage (and their annual bills) are 1.6 times higher than the mid-range segments."[202] The university study concluded that: "Targeting weatherization and energy education to the high-debt group seems to hold the greatest potential for minimizing the growth in debt."[203] Nonetheless, utility programs directed toward providing conservation and weatherization to PIPP households have not become common in Ohio.

The Ohio context places the duty to mitigate damages in a favorable light. Within the context of these observations, low-income advocates should consider not whether the offer of energy conservation measures to PIPP participants is good policy, but rather whether there is a contractual *duty* on the part of Ohio utilities to offer conservation programs to households who participate in the state's Percentage of Income Payment Plan. The analysis presented in this article would conclude that the utilities have an obligation to provide such conservation measures as a means to "mitigate the damages" caused by the nonpayment of PIPP participants'

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[198] ***Cleveland State University***, *supra* note **Error! Bookmark not defined.**, at 4.

[199] *Id.*

[200] *Id.*, at 2.

[201] *Id.*, at 41 - 43.

[202] *Id.*, at 43.

[203] *Id.*

full bills. Recovery of any damages --"damages" are defined in this sense as the unpaid bills of PIPP participants-- that could reasonably have been reduced, or avoided altogether, as a result of reasonable utility efforts at mitigation is not permitted.

CONCLUSION

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

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

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

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