The Great Blackout of 2003 – A Summary of the Investigation to Date And Legal Issues Relating to Subrogation and Recovery

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Within days of the blackout of August 14, 2003, Cozen O’Connor forwarded to our subrogation and recovery clients a Subrogation & Recovery Alert that discussed the enforceability of exculpatory provisions in utility tariffs. Since that time, Cozen O’Connor has continued to take the lead in analyzing the causes of the blackout and potential recovery for our clients. A task force of subrogation attorneys, co-chaired by Mark T. Mullen and Douglas B. Fox, was convened to review blackout claims with an eye towards potential recovery. A short summary of the Task Force’s investigation to date is being circulated via this Subrogation & Recovery Alert.

Facts

The blackout of August 14, 2003 was the worst blackout in American history. Over 100 power plants shut down, 61,800 megawatts ("MW") of power were lost, and some 50 million people were left in the dark. Parts of the province of Ontario in Canada and some eight states (Ohio, Michigan, Pennsylvania, New York, New Jersey, Vermont, Massachusetts, and Connecticut) were affected. At the height of the blackout, one-fourth of Canada’s population was without power.

Electricity had been restored to most areas of the United States and Canada by Saturday, August 16th. The most frequently quoted estimate with respect to an overall assessment of the damage is $6 billion. Michigan’s governor testified before Congress on September 3rd, and she stated that the loss in Michigan alone “will reach the $1 billion mark.” New York City’s mayor is on record with a similar estimate of his city’s loss. The amount of those losses covered by insurance is unknown.

The Power Grid

Electricity in the United States is generated by some 6,000 power plants owned and operated by fully 3,000 separate utilities. It is then sent to customers over almost one-half million miles of high-voltage transmission lines, and the “Grid” – the high-voltage transmission system that makes up this nation’s network of underground and overhead high-tension wiring – has been called the largest machine ever made by man.

The manner in which power is passed from one utility to another over this system has never been federally regulated. Instead of being subject to federal regulation, the seamless and uninterrupted transmission of power in this...
country relies entirely upon cooperation between private companies in voluntary compliance with a number of guidelines established by the industry itself.

**The Causes of the Blackout of 2003**

The investigation into what triggered the Blackout of 2003 may well take a year or more. A good deal of information has already surfaced in press reports and testimony to Congress. This information allows us to draw at least some conclusions about what occurred and why. The actual sequence of events is summarized in the sections that follow, but investigators theorize that the Blackout of 2003 was caused by human error and not by accidental physical loss or damage.

Analytically, the events leading to the outage appear to fall into two discrete categories. First, a number of trips or line failures were experienced by FirstEnergy Corporation (“FirstEnergy”), an Ohio utility and a member utility of the Midwest Independent Transmission System Operator, Inc. (“MISO”), a Midwest power grid operator. These took place over the course of approximately one hour between 3:00 p.m. and 4:00 p.m. on August 14th. While the Congressional Committee investigating the Blackout of 2003 has heard testimony that these Ohio problems “started a long distance chain reaction of overloads and plant shut downs,” there was no single event that precipitated the entire chain.

The errors here were made by FirstEnergy and MISO system operators, according to some investigators. FirstEnergy engineers are reported to have been unable to diagnose and rectify a growing problem of overloads and line failures for some 60 minutes, in large part because a computer “glitch” prevented its engineers from seeing the “big picture” about events that were quickly about to overtake FirstEnergy’s ability to absorb them. There are indications that MISO was unable to help because it was kept largely in the dark by FirstEnergy, and because a computer “glitch” in its systems prevented it, as well, from seeing the “big picture.” The New York Times has described the confusion that day as being akin to “air traffic controllers trying to keep order in the sky without knowing where all the planes were.” Lipton, Perez-Pena, Wald, “Overseers Missed Big Picture as Failures Led to Blackout” (September 13, 2003).

Secondly, this was followed, shortly after 4:00 p.m., by a very quick sequence of events lasting only a few minutes, during the course of which power was lost from Cleveland all the way to Connecticut. Again, a lack of communication by MISO with its neighboring grid operators is likely to have contributed to the spread of the Blackout. As Nora Mead Brownell, a Federal Energy Regulatory Commission (“FERC”) member, stated at a news conference on September 4th, when the cause is ultimately pinpointed, “I suspect it’s going to be something about the lack of communications.”

**The Law and Policy Considerations**

**Duty**

The Blackout of 2003 affected Connecticut, Massachusetts, Michigan, New York, New Jersey, Ohio, Pennsylvania, Vermont, and one Canadian province. Preliminary research in this country reveals that two of the affected states, Massachusetts and New York, have addressed claims against utilities for damages caused by loss of power. It is, of course, well settled in all the jurisdictions involved that in order to prevail on a claim the potential plaintiff must establish four essential elements: duty, breach of duty, causation, and damages.

With respect to duty, courts have distinguished between direct customers of the electric utility (typically landlords and businesses) and those who are not (typically tenants and employees). One court has precluded, on public policy grounds, recovery by a tenant for personal injuries suffered during a blackout.

Economic losses against a utility were subject to the same analysis. That same court re-
affirmed “that the existence and scope of an alleged tortfeasor’s duty, at the threshold, is a legal, policy-laden determination dependent on consideration of different forces, including logic, science, competing socio-economic policies and contractual assumptions of responsibility.” After considering all of those factors, public policy once again prevailed:

We reject plaintiffs–respondents’ reasoning because it would hold regulated utilities liable to every tenant in every one of the countless skyscrapers comprising the urban skyline. This would unwisely subject utilities to loss potentials of uncontrollable and unworkable dimensions.

Courts have permitted certain claims against electric utilities when the plaintiff was a direct customer of the utility and the damages were “for physical injury to persons and property directly resulting from the service interruption.”

**Economic Loss Doctrine**

In those situations where the courts have allowed recovery against the utility for a loss of power, they have applied the economic loss doctrine to determine what plaintiffs can recover. A succinct statement of the law on this issue was set forth in a case where an explosion at a neighboring plant interrupted the power lines into the plaintiff’s business. The court stated:

Plaintiff’s physical damage, losses in materials or equipment and cost of clean up resulting from the flying debris and concussion, are compensable under familiar principles of law and to the extent that similar damages were sustained and are proved, which were caused by the interruption of electrical service, they are also compensable.

A separate team of Cozen O’Connor lawyers is working on the complex issues pertaining to insurance coverage for the Blackout claims. Anyone who needs help in that regard can contact Rick Mackowsky or Richard Bennett in our Atlantic Regional Office, who are co-chairing the blackout task force on coverage. We anticipate that there will be some property damage claims that may have directly or indirectly resulted from the blackout due to a mechanical failure of emergency or back-up equipment or from a candle or other temporary illumination or power device causing a problem. These claims will include food or product spoilage as a result of the loss of power and the consequent failure of refrigeration or a similar invasion of a clean work environment. These types of claims will involve some component of an actual physical loss to property. However, by far the largest of the anticipated claims will most likely be loss of income or profits because of lost productivity due to the total lack of electricity. Finally, there will be claims that involve both a physical loss and lost profits or business interruption.

**Effect of Tariff Limitations of Liability**

Any analysis of the potential liability of FirstEnergy (and other utilities) must include a review of the tariffs filed by its operating companies. A tariff is a schedule of rates and services filed by a public utility with a state's public utility commission, or with a federal agency. Upon approval of a tariff by the applicable agency, the tariff has the force and effect of law and is part of any contract between the utility and its customer, regardless of the customer's knowledge or assent.

Each of FirstEnergy’s operating companies’ tariffs contains “boilerplate” language that purports to limit FirstEnergy’s liability for blackout related damages. The tariff’s intent is to insulate FirstEnergy for liability resulting from ordinary negligence or even gross negligence, and requires proof of “willful and wanton misconduct.”

It has long been accepted that public utilities may, under certain circumstances, disclaim or limit their liability for losses caused by their own conduct. The majority of courts that have
considered the issue have held that a public utility may, in its tariff, disclaim or limit liability for negligence, although not for gross negligence or willful misconduct. Cases adopting the “majority” view include not only those seeking recovery for economic loss, but also actions for personal injury and property damage.

One early Ohio case suggested that Ohio had adopted the “majority” rule. However, other Ohio cases have explicitly rejected the “majority rule,” at least where a utility attempts to exculpate itself for negligence in connection with providing a necessary service for which the utility holds a monopoly position.

Ohio courts would likely reject an attempt by FirstEnergy to disclaim liability in connection with provision of a necessary service such as power transmission and distribution. Nonetheless, given the high stakes involved, we anticipate that FirstEnergy may nonetheless attempt to utilize its tariff provisions to exculpate itself from broad liability for ordinary negligence (as opposed to willful and wanton misconduct) in connection with losses arising out of the incident.

FirstEnergy may also argue that jurisdiction for Blackout-related claims is vested solely in the Public Utility Commission of Ohio (“PUCO”), and not in the Ohio courts. Ohio's statutory scheme vests PUCO jurisdiction over complaints against public utilities relating to "unjust, unreasonable, unjustly discriminatory, unjustly preferential . . . insufficient . . . [or] inadequate" service. R.C. 4905.26. However, the Ohio Supreme Court has ruled that Ohio courts retain jurisdiction over many common-law tort and contract claims involving utilities.

Power grid operators, like other utilities, are also required to file tariffs. Grid operators transmitting power across state lines are required to file tariffs with FERC. For example, MISO filed a tariff, effective April 1, 2002, that provides, in pertinent part, that MISO and its member utilities will not be liable to each other or to “third parties or other persons” for consequential or punitive damages, and in any event will not be liable in the absence of evidence of gross negligence or intentional misconduct. The Federal Energy Regulatory Commission has previously approved electric utility tariffs that limit a utility's liability for service interruptions to instances of gross negligence or willful misconduct.

**Conclusion**

The Blackout of 2003 presents difficult issues of law and public policy that courts will be forced to grapple with in any subrogation matter. Only by carefully reviewing the facts of each individual case in light of each state’s laws and applicable utility tariffs can an informed decision be made as to whether subrogation will be viable. We will continue to work with our clients to analyze losses arising out the Blackout to determine whether, on a case by case basis, subrogation should be pursued. Should you wish to discuss any of your Blackout 2003 claims please contact Doug Fox or Mark Mullen in our Atlantic Regional Office at 1-800-523-2900 or via e-mail dfox@cozen.com or mmullen@cozen.com.

For additional information concerning Cozen O’Connor’s Subrogation and Recovery Program, please contact:

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