

## The Climate is Changing, the Law Should Too: Overhauling Utility Liability for Power Outages

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**Abstract:** *Over the past five years, the United States has experienced an onslaught of extreme weather events that have resulted in significant power disruptions for millions of Americans. Research across disciplines emphasizes that climate change is increasing the scale and frequency of extreme weather events, and the United States power distribution grid is struggling to meet the risks posed by these changes. As a result, power outages are increasing in frequency, raising significant economic and health concerns for customers across the country. Despite these well-accepted findings, the law surrounding public utility liability for weather-related power outages has remained stagnant, shielding utilities from bearing liability for their negligent actions in a power outage. Accordingly, many customers have been left with no remedy for damages caused by prolonged power disruptions. This Note surveys the state of the law surrounding utility liability for power outages, highlighting how the current system apportions the costs of these outages primarily to consumers. By analyzing three recent case studies to expose the barriers to consumer relief, critiquing the limited changes to the system in four states, and engaging with the theoretical underpinnings of the current liability system, this Note highlights the current limitations of the existing system in an age of climate change. It then presents a practical policy solution that replaces the current cumbersome tort regime for power outage liability with a state-run compensation regime to create a more socially desirable cost-balance between utilities and customers that can better protect consumers in the face of growing climatic impacts.*

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## INTRODUCTION

Extreme weather is becoming more common across the United States—from record breaking heat waves in the Southwest and powerful cold spells and blizzards in the Northeast to amplified hurricanes cutting through the South and devastating summer storms in the Midwest. The increased frequency and severity of extreme weather events are disrupting the lives of millions of Americans and straining the electricity grid, leading to more—and longer—power outages and service interruptions. Both U.S. and foreign leaders recognize this threat; building better international systems to respond to and prepare for extreme weather was a cornerstone of the 2024 United Nations Climate Change Conference (COP29).

Despite growing consensus on the need to adapt to climate change, there have been limited efforts in the United States to change the laws surrounding responsibility, liability, and cost allocation of power outages caused by extreme weather. But alterations are necessary to meet the inevitability of a changing climate and improve the current legal regime by holding utility companies accountable for limiting power outages so that consumers are not left to bear the costs of these outages alone.

This Note addresses the understudied subject of utility liability for power outages. The current legal regime apportions the costs of power outages primarily to consumers. This scheme leaves limited paths to hold utilities accountable even in the face of their negligent actions during or leading up to an extreme weather event that contributed to a prolonged power outage.<sup>1</sup> Plaintiffs in three recent high-profile climate events have been unsuccessful in their attempts to hold utilities liable for damages, showcasing the limits of the current tort negligence regime for power outage liability.<sup>2</sup> And while some states have revamped their laws to create consumer compensation schemes and grid resiliency planning requirements, these alterations do not go far enough in their efforts to protect consumers.<sup>3</sup> This Note analyzes the shortcomings in the state of the law and proposes replacing the current cumbersome tort regime with a policy solution that combines grid resiliency planning requirements with an expansive compensation scheme. The proposed regime would cover a wider range of damages and a greater set of circumstances than the limited reform efforts to date.

While some scholarship has studied the elements of utility liability for power outages and the potential for altering the system, previous research is dated, does not account for the modern state of climate science, or is too focused on the tangential impacts of liability reform and not on the direct effects it will have on consumers.<sup>4</sup> Many scholars have presented different solutions for modifying common and public utility law centered on the need to force utilities to adapt more quickly and deploy climate planning efforts, or they recommend altering and reframing the duties that utilities have to

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<sup>1</sup> See *infra* notes 63–93 and accompanying text.

<sup>2</sup> While not discussed in depth in this note, recovering damages through the tort liability regime is important because most homeowner and renter insurance does not cover damages for utility-caused power outages. See Mich. Dep’t of Ins. & Fin. Servs., Power Outage, <https://www.michigan.gov/difs/consumers/disaster-prep/power-outage> [<https://perma.cc/Z33T-WUTK>] (last visited Dec. 18, 2024).

<sup>3</sup> See *infra* notes 95–122 and accompanying text.

<sup>4</sup> See, e.g., Ken Costello, Nat’l Regul. Rsch. Inst., Report No. 12-08, Should Public Utilities Compensate Customers for Service interruptions? (2012) (discussing the benefits and constraints of power outage compensation schemes but failing to address any climate change implications); Timothy J. Brennan, Holding Distribution Utilities Liable for Outage Costs: An Economic Look (Res. for the Future, Discussion Paper No. 13-16, 2013) (conducting economic analysis on the generalized effects of the current utility liability regime, a negligence regime, and a strict liability regime, but failing to study public utility commission-driven compensation schemes); Willy E. Rice, “Grossly Negligent Utilities,” “Unimaginable Property Damage,” and the Scope of Liability Insurers’ Duty to Indemnify Subrogated Property Insurers—Probative and Empirical Inferences From Courts’ Divided Subrogation and Indemnification Decisions, 17 Ohio State Bus. L.J. 53 (2023) (focusing attention on the current liability regime for utilities related to property damage claims and the resulting implications for insurers and insurance markets, including analysis of subrogation and indemnification).

their consumers.<sup>5</sup> But none offer detailed analysis on the applicability of these concepts in the context of power outages. This Note does so, providing a deep look at the current state of the law surrounding consumer recovery for damages caused by power outages, analyzing three recent case studies of how courts have treated power outages caused by climatic events, and engaging with the analytical underpinnings of the current legal system. This Note's review thus offers new research to fill the specific gap in the literature on how utility liability, compensation, and planning should be modified to account for rising extreme weather and its impacts on power outages.

This Note proceeds as follows. Part I begins with an overview of the science surrounding extreme weather and surveys contemporary power disruptions in the United States, discussing the physical and economic risks presented by prolonged outages. This research emphasizes that the frequency of outages is increasing, and the electric grid is not prepared for climate-induced extreme weather. Part II turns to the current state of U.S. law regarding power disruptions. It describes the underpinnings of utility law, the utility tariff process, and how public utility commissions ("PUCs") and state courts have applied this law in the context of power outages. Consumers' primary legal recourse in the wake of a power outage is a tort negligence claim, and most jurisdictions apply a standard of gross negligence for utility liability. This essentially absolves utilities of their ordinary negligence in the face of a power outage caused by extreme weather. Despite this already high standard, courts apply a limited duty of care for utilities related to the consistent supply of electricity and have halted recent legal efforts to hold utilities liable, citing concerns around expanding this duty. The result is a legal system that imposes numerous impediments to consumer damage recovery. Finally, this section looks to states that have tried to reform the system through grid resiliency laws and compensation

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<sup>5</sup> See generally Jim Rossi & J.B. Ruhl, *Adapting Private Law for Climate Change Adaptation*, 76 *Vand. L. Rev.* 827 (2023) (analyzing the ways that private law including the law of torts, property, and contracts can be used to usher through climate adaptation, with implications for utilities and a range of other economic sectors and actors); Kenneth T. Kristl, *Diminishing the Divine: Climate Change and the Act of God Defense*, 5 *Widener L. Rev.* 325 (2010) (discussing the Act of God defense and its invocation in areas related to utility liability and predicting that this defense is becoming less applicable with increased climate research); Romany M. Webb, Michael Panfil & Sarah Ladin, *Colum. L. Sch., Sabin Ctr. for Climate Change L., Climate Risk in the Electricity Sector: Legal Obligations to Advance Climate Resilience Planning by Electric Utilities* (2020) (arguing that current common and public law requires utilities to partake in climate resiliency planning and exploring pathways for deploying these laws to force utilities to do so); Heather Payne, *Unservice: Reconceptualizing the Utility Duty to Serve in Light of Climate Change*, 56 *U. Rich. L. Rev.* 603 (2022) (arguing to end the current understanding of the duty to serve in favor of a prudency standard to avoid climate expenses and better allocate capital and resources); Jim Rossi & Michael Panfil, *Climate Resilience and Private Law's Duty to Adapt*, 100 *N.C. L. Rev.* 1135 (2022) (making the case for negligence suits against utilities that fail to adapt to the conditions of climate change, specifically pointing to a newly articulated tort duty to adapt).

programs and finds that, while these programs are improvements, they do not do enough to create a preferred social cost equilibrium.

Parts III and IV discuss the implications of the current system and the theoretical and practical considerations that require modernizing current law. Part III summarizes the limits of the current system and proposes a liability compensation scheme that replaces the current convoluted tort regime. Part IV anticipates the critiques of this system, responding to counterarguments and making suggestions for future economic research to help guide state policymakers. Taken together, this Note argues that the current system inadequately distributes costs, harms consumers, and creates inefficiency. Some states have charted a better path, and it is time to build on these changes to implement a comprehensive power outage compensation regime grounded in traditional theories of negligence liability.

## I. THE RISE IN EXTREME WEATHER AND IMPACTS OF POWER OUTAGES

### *A. Climate Change and Extreme Weather*

There is general scientific consensus that recent widespread changes in weather patterns are occurring due to anthropomorphic climate change.<sup>6</sup> While not the sole reason for extreme weather, climate change influences the frequency and intensity of weather events, including heightened heat waves, stronger and larger hurricanes, more powerful storms, increased rainfall leading to flooding, and longer droughts that amplify fire risk, among other events.<sup>7</sup> According to the National Oceanic and Atmospheric Administration (NOAA) there have been 313 confirmed “weather/climate disaster events” in the United States with losses “exceeding \$1 billion each” (including Consumer Price Index (“CPI”) adjustment to 2024) since the turn of the century.<sup>8</sup> These events often cause significant damage to a region’s private and public infrastructure, including its electrical generation and transmission systems.<sup>9</sup>

While the risks of extreme weather have been around forever, attribution science research has helped identify the role climate change plays in these

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<sup>6</sup> See 2 U.S. Glob. Change Rsch. Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment 25–33 (David Reidmiller et al. eds., 2018).

<sup>7</sup> See U.S. Env’tl. Prot. Agency, Climate Change Indicators: Weather and Climate (last updated Mar. 26, 2025), <https://www.epa.gov/climate-indicators/weather-climate> [<https://perma.cc/AS3B-2RX4>].

<sup>8</sup> Nat’l Ctrs. for Env’t Info., Billion-Dollar Weather and Climate Disasters, Nat’l Oceanic & Atmospheric Admin., <https://www.ncdc.noaa.gov/billions/> [<https://perma.cc/WC37-8BQ4>] (last visited Nov. 23, 2024) (This number was calculated by adding the total events from 2000–2024. Given that these events occur rather frequently, this number is designed to be a snapshot at the time of drafting to highlight the scale of extreme weather in the United States.).

<sup>9</sup> See Juan A. Añel et al., Extreme Weather Events and the Energy Sector in 2021, 16 *Weather, Climate, & Soc’y* 353, 361–63 (2024).

weather events. This modeling can help show that events thought to occur once every 100 years may now be occurring at more frequent intervals and with the ability to cause greater disruption than in the past.<sup>10</sup> While the specifics of the weather event might not be predictable, researchers can now model the type of event, the general areas that are susceptible to that event, and the relevant risk factors.<sup>11</sup> Since 2011, the American Meteorological Society has published a special report titled *Explaining Extreme Events From a Climate Perspective* that aims to “synthesize cutting-edge research, innovative methodologies, and interdisciplinary approaches to enhance our understanding of extreme events, their links to climate change, and their impacts on human and natural systems.”<sup>12</sup> This report publishes both ex ante and ex post methodological frameworks to better predict climate events and uncover the role climate change had in causing extreme weather.<sup>13</sup>

For example, following the June 2021 Pacific Northwest Heatwave, scientists agreed that “anthropogenic warming of the planet contributed to the severity of this event.”<sup>14</sup> Scientists believe events like this now have a “50% chance of yearly occurrence by 2050” as a result of climate change.<sup>15</sup> This research, alongside other similar studies, illuminates several important trends: human emissions are influencing weather events, these events are becoming better understood, and the scope, scale, and range of potential impacts are likely to increase. Modern science shows that extreme weather is no longer an unforeseeable “act of God.”<sup>16</sup> It is something humans are

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<sup>10</sup> See Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?*, 36 J. Energy & Nat. Res. L. 265, 270–74 (2018).

<sup>11</sup> See id. at 272–74.

<sup>12</sup> Am. Meteorological Soc’y, *Explaining Extreme Events From a Climate Perspective: AMS Special Collection* (Nov. 1, 2024), <https://www.ametsoc.org/index.cfm/ams/publications/special-collections/explaining-extreme-events-from-a-climate-perspective-ams-special-collection/> [https://perma.cc/MWN7-QGHN].

<sup>13</sup> See id.

<sup>14</sup> Rachel H. White et al., *The Unprecedented Pacific Northwest Heat-Wave of June 2021*, *Nature Comm’n*, Feb. 2023, at 6 (citing Emily Bercos-Hickey, et al., *Anthropogenic Contributions to the 2021 Pacific Northwest Heatwave*, *Geophys. Res. Lett.* (2022); Philip, S. Y. et al., *Rapid attribution analysis of the extraordinary heat wave on the Pacific coast of the US and Canada in June 2021*, 13 *Earth Syst. Dyn.* 1689–1713 (2022); and Chunzai Wang, et al., *Unprecedented Heatwave in Western North America during Late June of 2021: Roles of Atmospheric Circulation and Global Warming*, 40 *Adv. Atmos. Sci.* 14–28 (2022)).

<sup>15</sup> Karen J. Heeter et al., *Unprecedented 21st Century Heat Across the Pacific Northwest of North America*, *NPJ Climate & Atmospheric Sci.*, 2023, at 1. This is compared to a projected likelihood of approximately 10% in 2020. Id. at 6.

<sup>16</sup> See *Act of God*, *Black’s Law Dictionary* (12th ed. 2024) (defining an “act of God” as “an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado”).

influencing via climate change and can better track, measure, and plan for than ever before.<sup>17</sup>

### *B. The Rise and Harms of Power Outages*

The increasing frequency of extreme weather events poses significant risks to the U.S. bulk power grid and its distribution systems.<sup>18</sup> According to a comprehensive study of the risk of climate change in the United States, researchers found that it is anticipated “to dramatically intensify current weather-related impacts to the U.S. power infrastructure,” especially for electricity transmission and distribution infrastructure.<sup>19</sup> Particularly, researchers have found that “higher temperatures could increase the likelihood of damage to power transformers” and the increased likelihood of extreme weather events “can threaten grid infrastructure and distribution capacity.”<sup>20</sup> Without future improvements, these risks could lead to more power outages and disruptions.<sup>21</sup> Yet despite these quantifiable risks, few utilities appear to be integrating climate risk planning into their decision-making or proposing resiliency improvements to their distribution and transmission infrastructure.<sup>22</sup> This leaves multiple aspects of the grid vulnerable to the threats of increased extreme weather.<sup>23</sup>

The risks created by these power disruptions have material impacts on the lives of everyday Americans. A study that consolidated utility-reported power outage data found that from 2000 to 2023, 80% of all U.S. power outages were due to weather, with the U.S. experiencing “two times more weather-related outages during the last 10 years (2014–2023) than during

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<sup>17</sup> See Jonathan D. Haskett, Cong. Rsch. Serv., R47583, *Is that Climate Change? The Science of Extreme Event Attribution* 1–5 (2023).

<sup>18</sup> The bulk power grid refers to the high-voltage transmission equipment that frequently carries electricity across state lines and over long distances. This is compared to the distribution system which operates at a lower voltage and is responsible for end-use delivery of electricity to customers. This Note’s analysis is focused on distribution. See Nat’l Ass’n of Regul. Util. Comm’rs, *Bulk Power System*, <https://www.naruc.org/core-sectors/electricity-energy/bulk-power-system/#:~:text=The%20generating%20resources%20and%20high,generally%20operate%20at%20lower%20voltages> [<https://perma.cc/52H6-ZMVG>] (last visited Dec. 12, 2024); James McBride & Anshu Siripurapu, *How Does the U.S. Power Grid Work?*, Ctr. Foreign Relations (last updated July 5, 2022, 11:53 AM), <https://www.cfr.org/backgrounders/how-does-us-power-grid-work> [<https://perma.cc/4MAS-JZ5E>] (providing a general overview of how the U.S. power grid functions).

<sup>19</sup> Charles Fant et al., *Climate Change Impacts and Costs to U.S. Electricity Transmission and Distribution Infrastructure*, 195 *Energy* 1, 10 (2020).

<sup>20</sup> U.S. Gov’t Accountability Off., GAO-21-346, *Electricity Grid Resilience: Climate Change is Expected to Have Far-reaching Effects and DOE and FERC Should Take Actions* 17 (2021).

<sup>21</sup> See *id.* at 1.

<sup>22</sup> See Webb, Panfil & Ladin, *supra* note 5, at 9–15 (reviewing the current limited manner in which electric utilities are addressing climate risks).

<sup>23</sup> See North Am. Electric Reliability Corp., 2023 *Ero Reliability Risk Priorities Report* 29–32 (2023) (describing how the increased threat of extreme weather threatens the electricity grid).

the first 10 years analyzed (2000–2009).”<sup>24</sup> Another study found that in 2020, “US electricity customers faced slightly over 8 h[ours per year] of electricity interruptions on average—the highest on record—primarily driven by major events such as hurricanes, wildfires, and snowstorms.”<sup>25</sup> If the statistics are not enough, consider recent notable weather events that resulted in widespread power outages. First, take Winter Storm Uri that swept across large portions of Texas in 2021. This storm resulted in lost power for at least 4.3 million people in the state,<sup>26</sup> the death of at least 246 individuals,<sup>27</sup> and millions of dollars in economic loss.<sup>28</sup> Other examples from the past year include the following: the power disruption in the Southeast from Florida to North Carolina caused by Hurricane Helene which led to at least 176 direct deaths and power outages for over 4.7 million Americans;<sup>29</sup> significant outages caused by the 2024 Western bomb cyclone and atmospheric river events;<sup>30</sup> and power disruptions due to severe thunderstorms sweeping across the Midwest in July 2024.<sup>31</sup>

Unfortunately, the impacts of these outages are pernicious and cause both physical and economic harm to consumers. These effects are caused by people using gas stoves to heat their homes, experiencing the effects of extreme heat or cold in the absence of temperature regulation, lacking access

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<sup>24</sup> Climate Cent., supra note **Error! Bookmark not defined.**

<sup>25</sup> Vivian Do et. al., Spatiotemporal Distribution of Power Outages with Climate Events and Social Vulnerability in the USA, *Nature Comm’n*, 29 Apr. 2023, at 1.

<sup>26</sup> See Brian K. Sullivan & Naureen S. Malik, 5 Million Americans Have Lost Power From Texas to North Dakota After Devastating Winter Storm, *Time* (Feb. 15, 2021, 11:02 PM), <https://time.com/5939633/texas-power-outage-blackouts/> [<https://perma.cc/X87H-GB4X>].

<sup>27</sup> Patrick Svitek, Texas Puts Final Estimate of Winter Storm Death Toll at 246, *Tex. Trib.* (Jan. 3, 2022), <https://www.texastribune.org/2022/01/02/texas-winter-storm-final-death-toll-246/> [<https://perma.cc/UNN4-D7AY>].

<sup>28</sup> Garrett Golding, Anil Kumar & Karel Mertens, Cost of Texas 2021 Deep Freeze Justifies Weatherization, *Fed. Reserve Bank of Dallas* (Apr. 15, 2021), <https://www.dallasfed.org/research/economics/2021/0415> [<https://perma.cc/WRL6-AVC8>].

<sup>29</sup> See Katie Myer, Thousands Are Still Without Power More Than 2 Weeks After Hurricane Helene, *NPR* (Oct. 14, 2024, 4:28 PM), <https://www.npr.org/2024/10/14/nx-s1-5150158/thousands-are-still-without-power-more-than-2-weeks-after-hurricane-helene> [<https://perma.cc/4QBT-7AWU>]; Kassia Micek, Corey Paul, J. Robinson & Ronnie Turner, Hurricane Helene Causes Over 4.7 Million Power Outages Across Southeast U.S., *S&P Glob.* (Sep. 27, 2024), <https://www.spglobal.com/commodity-insights/en/news-research/latest-news/electric-power/092724-hurricane-helene-causes-over-47-million-power-outages-across-southeast-us> [<https://perma.cc/D3JK-SVLE>]; Andrew B. Hagen et al. Hurricane Helene (AL092024) 24–27 September 2024, *National Oceanic Atmospheric Administration* (Apr. 8, 2025).

<sup>30</sup> See Jeanine Santucci, Atmospheric River Takes Final Aim at Pacific Northwest, Still Reeling From Bomb Cyclone, *USA Today* (Nov. 22, 2024, 1:54 PM), <https://www.usatoday.com/story/news/nation/2024/11/22/pacific-northwest-california-atmospheric-river-bomb-cyclone/76493849007/> [<https://perma.cc/V5BZ-RYZ3>].

<sup>31</sup> See Nat’l Env’t Satellite, Data, & Info. Serv., Severe Thunderstorms Race Through the Midwest (July 19, 2024), <https://www.nesdis.noaa.gov/news/severe-thunderstorms-race-through-the-midwest> [<https://perma.cc/K8NG-ACAJ>].



to safe food refrigeration and water system supplies, or having the inability to power at-home medical equipment.<sup>32</sup> A literature review summarizing health research states that power outages have material health consequences for the public, including the possibility of “carbon monoxide poisoning, temperature-related illness, gastrointestinal illness . . . [and] cardiovascular, respiratory, and renal disease hospitalizations, especially for individuals relying on electricity-dependent medical equipment.”<sup>33</sup> Further, in a study of three major metro areas, researchers found that multiday blackouts during heat waves “more than double the estimated rate of heat-related mortality.”<sup>34</sup> In addition to significant health risks, prolonged power outages result in material economic harm. The Department of Energy estimates that power outages and power interruptions cost Americans at least \$150 billion every single year.<sup>35</sup> These numbers factor in spoilage of food and medicine, inability to work and conduct commerce, property damage, costs of backup power generation, and medical expenses.<sup>36</sup>

Research also shows that these outages have disparate impacts on marginalized communities. A study of blackouts in Texas found that Black Americans are 1.7 times more likely to experience power outages over 24 consecutive hours than white Americans.<sup>37</sup> In studies done by the Rockefeller Foundation on the fallout of Winter Storm Uri, researchers found that during this outage event “areas with a high share of minority population were more than four times as likely to suffer a blackout than predominantly white areas.”<sup>38</sup>

Power outages are more than just an inconvenience. They pose a significant health and economic threat to consumers, particularly members of historically marginalized communities. Without further action taken to

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<sup>32</sup> See Joan A. Casey, Mihoka Fukurai, Diana Hernández, Satchit Balsari & Mathew V. Kiang, Power Outages and Community Health: A Narrative Review, 7 *Current Env’t Health Rep.* 371, 371 (2020).

<sup>33</sup> *Id.* at 375–80.

<sup>34</sup> Brian Stone, Jr. et al., How Blackouts During Heat Waves Amplify Mortality and Morbidity Risk, 57 *Env’t Sci. & Tech.*, 8245, 8245 (2023).

<sup>35</sup> See Off. of Nuclear Energy, Department of Energy Report Explores U.S. Advanced Small Modular Reactors to Boost Grid Resiliency, Department of Energy (Jan. 25, 2018), <https://www.energy.gov/ne/articles/department-energy-report-explores-us-advanced-small-modular-reactors-boost-grid> [https://perma.cc/R52F-QSCH].

<sup>36</sup> See *id.*; see also U.S. Dep’t of Energy, Interruption Cost Estimator (ICE) Calculator, Department of Energy <https://icecalculator.com/> [https://perma.cc/7KAT-8ZSB] (last visited Dec. 1, 2024) (recounting a more detailed analysis state-by-state).

<sup>37</sup> See Nina M. Flores et al., The 2021 Texas Power Crisis: Distribution, Duration, & Disparities, 33 *J. of Exposure Sci. & Env’t. Epidemiology* 21, 26 (2022).

<sup>38</sup> Feng Chi Hsu, Jay Taneja, JP Carvallo & Zeal Shah, Frozen Out in Texas: Blackouts and Inequity, Rockefeller Found. (Apr. 14, 2021), <https://www.rockefellerfoundation.org/grantee-impact-stories/frozen-out-in-texas-blackouts-and-inequity/> [https://web.archive.org/web/20250418131658/https://www.rockefellerfoundation.org/grantee-impact-stories/frozen-out-in-texas-blackouts-and-inequity/].

reduce the risks, more consumers may be vulnerable due to the increased threats of climate-induced weather events. As the next section will show, the law has not evolved even as evidence of the risks of extreme weather and power outages has mounted. As such, it leaves consumers without any form of effective remedy.

## II. DIAGNOSING THE CURRENT LEGAL REGIME FOR POWER OUTAGES

### A. *The Legal Foundations of Rate & Liability Regulation*

The laws governing utility power disruptions are primarily connected to the sale and distribution of retail electricity, placing it in the purview of state law.<sup>39</sup> Each state has its own a comprehensive regulatory regime for public utilities, but, at their core, they all contain a series of statutes designed to orchestrate the creation and transfer of reliable electricity sold at a reasonable price.<sup>40</sup> Every state delegates regulatory authority over retail electricity to some form of state public utility commission (“PUC”).<sup>41</sup> The vast majority of state laws are silent on the required processes, utility responsibilities, or implications of power outages.<sup>42</sup> Further, few laws address utility liability for such outages.<sup>43</sup> Instead, these laws are premised in generality, requiring that utilities provide “adequate” service and file “reasonable and just” rates.<sup>44</sup> Virginia is a perfect example of these generalized requirements. As its guiding statute states, “[i]t shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its

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<sup>39</sup> As opposed to wholesale electric generation and transmission, which is regulated by the Federal Energy Regulatory Commission. See generally The Federal Power Act 16 U.S.C. §§ 791 et seq. (2024) (the primary federal statute responsible for establishing the regulation of wholesale transmission and sale of electricity at the federal level). See also Kathryn Clearly & Karen Palmer, U.S. Electricity Markets 101, Res. for the Future (Mar. 17, 2022) <https://www.rff.org/publications/explainers/us-electricity-markets-101/> [<https://perma.cc/S35V-PGRY>] (providing a more detailed summary of the different regulatory schemes).

<sup>40</sup> See Kristin George Bagdanov, Bldg. Decarbonization Coal., Decarbonizing the Obligation to Serve 23–35 (2024).

<sup>41</sup> While the government agency in charge of regulating utilities is not always called a PUC in each state, for purposes of this Note, these regulating entities will either be referred to as “PUCs” or “Commissions.” See generally U.S. Env’tl. Prot. Agency, An Overview of PUCs for State Environment and Energy Officials (May 20, 2010), [https://www.epa.gov/sites/default/files/2016-03/documents/background\\_paper.pdf](https://www.epa.gov/sites/default/files/2016-03/documents/background_paper.pdf) [<https://perma.cc/WS46-9HU2>] (for more information on PUCs).

<sup>42</sup> See, e.g., Romany M. Webb, Michael Panfil & Sarah Ladin, Colum. L. Sch. Sabin Ctr. for Climate Change L., Climate Risk in the Electricity Sector: Legal Obligations to Advance Climate Resilience Planning by Electric Utilities (2020).

<sup>43</sup> But see the laws in Connecticut, Illinois, Michigan, and New York, *infra* Table 1 and accompanying notes 127–130. These states have unique statutory schemes that implicate liability for outages.

<sup>44</sup> Va. Code Ann. § 56-234.

lines.”<sup>45</sup> Some states add a safety component to these requirements, but that too is stated at a high level of generality.<sup>46</sup> This broad statutory guidance gives PUCs significant leeway to set the terms and rates of service for utilities, including the ability to approve different forms of liability for utilities in the face of power outages.<sup>47</sup>

PUCs traditionally approve electricity terms and rates through electric tariffs filed by utilities.<sup>48</sup> In practice, the utility files its preferred rates with the PUC, which then reviews them to determine whether they are just and reasonable. PUCs are traditionally granted broad authority in their determination of what qualify as just and reasonable rates.<sup>49</sup> This process results in the approved tariffs that outline the terms and conditions of service as well as the just and reasonable rates for electricity.<sup>50</sup> Ultimately, these tariffs act as the guiding contract for service between the utility provider and its customers.

While each state court has its own slight variation and nuances for reviewing “just and reasonable” electricity standards, federal law offers a meaningful lens into the basic process of how rates are set and courts review PUC determinations. This federal process not differ greatly from what states do, and can be understood as the baseline approach in state decision-making about rate determinations. In *Federal Power Commission v. Hope Natural Gas Co.*, the Supreme Court stated that the standard for review for the determination of justness and reasonableness is the “result reached not the method employed.”<sup>51</sup> This means that each PUC is free to account for the factors and considerations it deems most important when determining the rate set forth in an electric tariff, as long as the end result is just and reasonable.<sup>52</sup>

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<sup>45</sup> Id.; see also Iowa Code § 476.3; Mass. Gen. Laws ch. 159 § 17; Vt. Stat. Ann. tit. 30 § 218 as other examples of these provisions.

<sup>46</sup> See Ariz. Rev. Stat. Ann. § 40-361 (requiring common carriers to “furnish and maintain such service, equipment and facilities as will promote the safety, health, comfort, and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient and reasonable”); see also Wash. Rev. Code § 80.28.010.

<sup>47</sup> See generally, An Overview of PUCs for State Environment and Energy Officials, *supra* note 41.

<sup>48</sup> See generally N.Y. State Dep’t of Pub. Serv., Electric Tariffs, <https://dps.ny.gov/electric-tariffs> [<https://perma.cc/LP3B-UECD>] (last visited Dec. 1, 2024).

<sup>49</sup> See generally Melissa Whited, Paul Chernick & Jim Lazar, Synapse Energy Economics, Inc., The Ratemaking Process (2017), <https://www.synapse-energy.com/sites/default/files/Ratemaking-Fundamentals-FactSheet.pdf> [<https://perma.cc/5FMK-X7FR>] (describing the ratemaking process).

<sup>50</sup> See generally Diversegy, Energy Rate Tariffs and How They Affect Energy Rates (Aug. 23, 2023), <https://diversey.com/energy-tariffs/> [<https://perma.cc/WZJ6-P7QE>] (describing the tariff process).

<sup>51</sup> 320 U.S. 591, 602 (1944).

<sup>52</sup> Id.

Once this rate is approved by the PUC, it is the only legal rate that a utility provider may charge.<sup>53</sup> Courts refer to this as the “filed rate doctrine.”<sup>54</sup> This doctrine holds that PUC-approved rates are inherently just and reasonable and “[n]o court may substitute its own judgement on reasonableness for the judgement of the [PUC].”<sup>55</sup> Further, neither the court nor the PUC may “alter a rate retroactively.”<sup>56</sup> In a concurrence in *American Telephone & Telegraph Co. v. Central Office Telephone*,<sup>57</sup> Chief Justice Rehnquist added clarity to what courts can review, stating that the purpose of this doctrine “is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law.”<sup>58</sup> Lower courts have interpreted this to stand for the proposition that the filed rate doctrine “does not preclude courts from interpreting the provisions of a tariff and enforcing that tariff.”<sup>59</sup> This leaves state courts with the ability to hear cases revolving around the interpretations and implications of tariff provisions without consistently second guessing whether the provisions are just and reasonable.

### *B. Setting & Interpreting Electric Tariff Provisions*

Within the system described above, PUCs have historically approved limits on the liability of utilities in their tariffs for damages caused by power outages—or what is often referred to as an “interruption” or an irregular, defective, or failed service.<sup>60</sup> These provisions offer various protections, but

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<sup>53</sup> See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (stating that “no regulated seller of natural gas may collect a rate other than the one filed with the Commission.”) While this case is specifically about the sale of gas, the Court states that its application has been be “extended across the spectrum of regulated utilities.” *Id.*

<sup>54</sup> *Id.*; see also Jennifer Quinn-Barabanov & Shaun Boedicker, *Filed Rate Doctrine: A Powerful Tool in Energy Litigation*, *Power* (June 1, 2020) <https://www.powermag.com/filed-rate-doctrine-a-powerful-tool-in-energy-litigation/> [<https://perma.cc/89PC-DE2Y>] (providing an overview of the doctrine).

<sup>55</sup> *Ark. La. Gas Co.*, *supra* note 53, at 577.

<sup>56</sup> *Id.* at 577–78 (noting also that this is subject to the *Hope* standard).

<sup>57</sup> 524 U.S. 214 (1998) (Rehnquist, C.J., concurring).

<sup>58</sup> *Id.* at 230–31.

<sup>59</sup> *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1171–72 (9th Cir. 2002).

<sup>60</sup> See Georgia Power Co., *Rules Regulations and Rate Schedules for Electric Service 1.61* (2024), <https://www.georgiapower.com/content/dam/georgia-power/pdfs/residential-pdfs/tariffs/2024/rules-reg.pdf>;

[<https://web.archive.org/web/20241211184414/https://www.georgiapower.com/content/dam/georgia-power/pdfs/residential-pdfs/tariffs/2024/rules-reg.pdf>]; PECO Energy Co., *Electric Service Tariff*, 22 (Oct. 1, 2024), [https://azure-na-assets.contentstack.com/v3/assets/blt1b5616c79bacadb4/blt9448ea371fcf175a/66fb22a3e1ededefba18a64c/Current\\_Elec\\_Tariff\\_Effective\\_Oct\\_1\\_2024.pdf?branch=prod\\_alias](https://azure-na-assets.contentstack.com/v3/assets/blt1b5616c79bacadb4/blt9448ea371fcf175a/66fb22a3e1ededefba18a64c/Current_Elec_Tariff_Effective_Oct_1_2024.pdf?branch=prod_alias) [<https://perma.cc/829P-LR24>]; MidAmerican Energy Co., *Electric Tariffs: Iowa*, 9 (Aug. 6, 2014), <https://www.midamericanenergy.com/media/pdf/iowa-electric-tariffs.pdf> [<https://perma.cc/BDZ3->

this Note focuses on those that absolve utilities from ordinary negligence standards for outages caused by weather.<sup>61</sup> These tariffs instead hold utilities to a gross negligence standard that absolves utilities of liability for all but willful or wanton negligence.<sup>62</sup>

Courts across states have coalesced around the majority rule that if a utility's tariff includes provisions that limit liability for outages caused by weather, these provisions are legal because they were part of the terms that were negotiated when the PUC determined the just and reasonable rate.<sup>63</sup> This majority rule has resulted in courts approving limitations on utility liability up to a standard of gross negligence.<sup>64</sup> To understand this position it is helpful to look at a frequently cited case standing for this proposition, *Danisco Ingredients USA v. Kansas City Power & Light Co.*<sup>65</sup>

The Kansas Supreme Court in *Danisco* held that while the enabling laws “governing public utilities did not explicitly authorize utilities to limit their common-law liability . . . language in the public utilities act did seem to recognize a narrow right to a limitation on liability such as the requirement that rules and regulations be reasonable and that rates be filed with the commission.”<sup>66</sup> Further, the Court approved of this theory because giving the PUC the ability to limit liability is “an integral part of the rate-making process,” as a negotiation term for “insuring reasonable rates.”<sup>67</sup>

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QFSH] for examples of tariff language that PUCs have approved to absolve utilities from ordinary negligence standards for power outages.

<sup>61</sup> See Rice, *supra* note 4, at 77–80; Costello, *supra* note 4, at 10–13 (describing the breadth of tariff protections).

<sup>62</sup> See *supra* note 60, at 1, 3 (providing examples of these protections).

<sup>63</sup> While courts apply this application of the filed rate doctrine to *limits* on liability, they have not been willing to *absolve* a utility of all liability. See *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 590 (Nev. 1992).

<sup>64</sup> See *Danisco Ingredients USA v. Kan. City Power & Light Co.*, 986 P.2d 377, 385 (Kan. 1999). For other cases citing this as the majority standard, see generally *Pilot Indus. v. Southern Bell Tel. & Tel. Co.*, 495 F. Supp. 356, 361–62 (D.S.C. 1979); *Olson v. Mountain States Tel. & Tel. Co.*, 580 P.2d 782 (Ariz. Ct. App. 1978); *Professional Answering Serv. v. Chesapeake Tel.*, 565 A.2d 55, 63–65 (D.C. 1989); *Landrum v. Florida Power & Light Co.*, 505 So. 2d 552, 554 (Fla. Dist. App. 1 1987); *Southern Bell Tel. Co. v. Invenchek*, 204 S.E. 2d 457 (Ga. Ct. App. 1974); *In re Ill. Bell Switching*, 641 N.E. 2d 440 (Ill. 1994); *Computer Tool & Engineering v. NSP*, 453 N.W. 2d 569, 573 (Minn. Ct. App. 1990); *Warner v. Southwestern Bell Telephone Co.*, 428 S.W. 2d 596, 601–02 (Mo. 1968); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992); *Lee v. Consolidated Edison*, 413 N.Y.S. 2d 826 (N.Y. App. Div. 1978); *Garrison v. Pacific NW Bell*, 608 P.2d 1206 (Or. Ct. App. 1980); *Behrend v. Bell Tele. Co.*, 363 A.2d 1152 (Pa. Super. Ct. 1976), *vacated* 374 A.2d 536 (Pa. 1977), *reinstated* 390 A.2d 233 (Pa. Super. Ct. 1978); *Southwestern Bell Telephone Co. v. Rucker*, 537 S.W. 2d 326 (Tex. Civ. App. 1976).

<sup>65</sup> *Danisco Ingredients USA*, *supra* note 64, at 377–86.

<sup>66</sup> *Id.* at 382.

<sup>67</sup> *Id.* at 383; see also *id.* at 382 (stating that “[t]he provisions of the Electric Public Utilities Act and all grants of power, authority, and jurisdiction made to the KCC are to be liberally construed, and *all incidental powers necessary to carry into effect* the provisions of the Act are expressly granted and conferred upon the KCC”) (emphasis added).

In sum, the *Danisco* Court believed that PUCs engage in a form of cost-benefit analysis, based on the presumption that failing to provide liability protection would increase cost for consumers because utilities would be responsible for repayment for every power outage. It is treated as a tradeoff for reasonable rates.<sup>68</sup> The Court ultimately stated that, “[g]enerally, other jurisdictions have held that rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services are reasonable and will be upheld.”<sup>69</sup> In making this determination, the Court cited a smattering of other cases that hold a similar proposition.<sup>70</sup> This majority gross negligence standard has continued to be upheld in recent cases.<sup>71</sup>

The exact standards for gross negligence vary slightly based on a state’s specific tort regime, but despite subtle nuances, it is a high bar that is often difficult to satisfy. The Delaware Supreme Court characterized this bar as an “ ‘extreme departure from the ordinary standard of care.’ ”<sup>72</sup> The New York Court of Appeals has further defined this as “the failure to exercise even slight care.”<sup>73</sup> This standard was interpreted by a lower New York court in an unreported 2013 opinion to preclude holding a utility liable where it deployed “at least some advance planning.”<sup>74</sup> When taken as a whole, if the utility engaged in some form of remedial or planning action related to a power outage, it will likely be protected from liability under this gross negligence standard.

### *C. Duties of Utilities During Power Outages*

Across forums, and within the state gross negligence standards, there are other factors that pose challenges to liability claims resulting from power outages. Because few states have established regulations designed to compensate and mitigate service interruptions, these challenges take shape

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<sup>68</sup> This is well summarized in *Sheffler v. Commonwealth Edison Co.* 955 N.E. 2d 1110, 1119 (Ill. 2011) (“The theory underlying liability limitations is because a public utility is strictly regulated, its liability should be defined and limited so that it may be able to provide service at reasonable rates, and reasonable rates depend in part on a rule limiting liability.”) (citing *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 57 (Ill. 2004)).

<sup>69</sup> *Danisco Ingredients USA*, supra note 64, at 383.

<sup>70</sup> See *id.* at 383–84 (listing 13 other cases that support the proposition of this as a majority rule).

<sup>71</sup> See *Sheffler*, supra note 68, at 1119–20; *Schlesinger v. Consol. Edison Co. of N.Y.*, 781 N.Y.S. 2d 628, 2003 N.Y. Misc. LEXIS 1591, at \*6–8 (N.Y. Civ. Ct. 2003) (both upholding this proposition).

<sup>72</sup> *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276 (Del. 2010) (quoting *Browne v. Robb*, 583 A.2d 949, 953 (1990)).

<sup>73</sup> *Food Pageant, Inc. v. Consol. Edison Co.*, 429 N.E. 2d 738, 740 (N.Y. 1981).

<sup>74</sup> *Balacki v. Long Island Power Auth.*, No. SC-000735-13, 2013 WL 3940061, at \*3 (N.Y. Dist. Ct. July 30, 2013).

either in PUCs or in the courts as tort negligence suits.<sup>75</sup> Like every standard negligence claim, a plaintiff must show the existence of a legal duty, breach of this duty, harm to the plaintiff, and that the defendant's actions were the proximate cause and cause-in-fact of the harm to the plaintiff.<sup>76</sup> While each element has the potential to hinder claims related to power outages, the most significant element is the existence of a legal duty.

If a court is to find a duty owed by utility providers, it will stem from the concept of a utility provider's duty of service. As discussed previously, most laws governing utilities require that a utility provide "adequate, efficient and reasonable service."<sup>77</sup> Nearly every state statute uses some form of the phrase "adequate service," and some courts have interpreted that to mean utilities have a responsibility to, among other things, minimize power outages.<sup>78</sup> Scholars regard "adequate service" as a foundational duty deriving from the duty/right relationship between utilities and customers. Indeed, the duty "has been interpreted by the courts to require that utilities take affirmative actions to avoid unreasonable risks to customers."<sup>79</sup> While statutes have propelled this duty of service forward, scholars have derived its origin from the common law history of regulating original forms of public utilities such as ferries, mills, and railroads.<sup>80</sup>

The duty of "adequate service" closely resembles a traditional duty of reasonable care. But here, reasonable care is that which is necessary to reasonably manage a utility's electricity system and services to supply electricity to consumers. This duty can best be shown through five notable cases. The first two come from Arkansas in the 1990s, in which the state supreme court found that as part of an electric utility's duty to "exercise ordinary care," it has a duty to "inspect and maintain its power lines in safe and working order," take care in the "construction of [its] services lines," and "see that equipment is kept in a reasonably safe condition and to

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<sup>75</sup> Depending on the state, challenges around compensation and liability for power outages can be brought either in state courts or in front of a state PUC. See Webb, Panfil, & Ladin, *supra* note 5, at 41–44. Because there is significantly more litigation in courts (either following a denial of granting liability from the PUC or because the state is one where courts are the appropriate forum for dispute resolution) this Note analyzes these principles through state court precedent.

<sup>76</sup> John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657, 658–59 (2001).

<sup>77</sup> N.M. Stat. Ann. § 62-8-2; see also *supra* notes 44–46 and accompanying text for further examples.

<sup>78</sup> See, e.g., *Nat'l Food Stores, Inc. v. Union Elec. Co.*, 494 S.W. 2d 379 (Mo. App. 1973) (providing an example of an interpretation of how adequate service may require certain care towards customers for continuous service); Bagdanov, *supra* note 40, at 23–36 (discussing the different adequate service statutory requirements); Rossi & Panfil, *supra* note 5, at 1170–74 (discussing the how these provisions can, and have, relevancy in instances of power outages).

<sup>79</sup> Rossi & Panfil, *supra* note 5, at 1148.

<sup>80</sup> See Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 Energy L.J. 27, 29 (2000) (discussing the historical origin of the duty to serve).

diligently discover and repair defects.”<sup>81</sup> A Louisiana court found that the scope of this duty “encompasses the protection of customers from a sudden discontinuance of service which causes property damage.”<sup>82</sup> The court further stated that to determine breach the court should look for reasonable care in the “installation, operation and maintenance of their electric lines.”<sup>83</sup> A Missouri court provided a broader definition, requiring a utility to “protect its customers from foreseeable damages from failure of electrical service.”<sup>84</sup> Most recently, the Supreme Court of New York conceptualized this as a “duty to exercise reasonable care in the supply of electric service,” meaning a level of care “as would be commensurate with the inherent danger hidden in its high voltage equipment.”<sup>85</sup> When looking at these cases in their totality, courts are deriving this duty from the responsibility to safely maintain a utility’s distribution infrastructure in order to provide adequate electric services.

Despite this duty of reasonable care, utilities often try to leverage the act of God defense to keep this duty from attaching to their operations during extreme weather outages. The idea is that utilities do not have a duty because the extreme weather was out of their hands and there was nothing that could have prevented the power outage.<sup>86</sup> Jim Rossi summarizes the defense as “a shorthand way of concluding that a defendant owes no duty of due care because the plaintiff is not a foreseeable victim of anything within the care of the defendant in the first place.”<sup>87</sup>

Courts have found the act of God defense to be persuasive in several older cases. In 1944, the Tenth Circuit found that despite a Wyoming utility’s concession that it had not met its service obligation, its argument that the primary cause of the outage was “a bolt of lightning, clearly an act of God” should have resulted in a motion for a directed verdict in favor of the utility.<sup>88</sup> Also in 1944, the Florida Supreme Court held that “the hurricane visiting the City of Tallahassee” that led to a multi-hour power outage was “an act of God and a legal justification for the nondelivery.”<sup>89</sup> Finally, in 1973, the Tenth Circuit did not challenge a lower court’s extension of this defense to

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<sup>81</sup> *Rich Mountain Elec. Coop., Inc. v. Revels* 841 S.W. 2d 151, 153 (Ark. 1992); see also *Ark. Valley Elect. Coop. Corp. v. Davis*, 800 S.W. 2d 420, 422–23 (Ark. 1990) (where the court held that the utility has the duty to “inspect and treat” poles carrying electrical power lines).

<sup>82</sup> *Schulze v. La. Power & Light Co.*, 551 So. 2d 22, 24 (La. Ct. App. 1989).

<sup>83</sup> *Id.*

<sup>84</sup> *Nat’l Food Stores, Inc. v. Union Elec. Co.*, 494 S.W. 2d 379, 383 (Mo. App. 1973).

<sup>85</sup> *Praetorian Ins. Co. v. Long Island Power Auth.*, No. 704580/2014, 2019 N.Y. slip. op. 32563(U), at 18 (N.Y. Sup. Ct. Apr. 10, 2019).

<sup>86</sup> See *Black’s Law Dictionary*, supra note 16.

<sup>87</sup> Rossi & Ruhl, supra note 5, at 881.

<sup>88</sup> *Monolith Portland Midwest Co. v. W. Pub. Serv. Co.*, 142 F.2d 857, 859 (10th Cir. 1944).

<sup>89</sup> *Fla. Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944).



include an outage caused by a New Mexico storm with “unequaled . . . intensity and duration” that was not “forecast with a degree of accuracy.”<sup>90</sup> But this affirmative defense is not airtight, and plaintiffs have successfully challenged it by articulating clear concurrent utility negligence that influenced either the scope, start, or duration of the outage.<sup>91</sup>

This defense has come under attack by many scholars who think that despite its continued existence, courts are increasingly skeptical of its deployment given the increased predictability of weather events. Professors Jim Rossi and J.B. Ruhl have argued that this defense is “redundant and unnecessary given the modern law of causation,”<sup>92</sup> and courts should be “suspicious of a defendant’s claim that an unprecedented climate emergency is an automatic shield from liability based on an act of God.”<sup>93</sup> Professor Kenneth Kristl argues that “climate change will ultimately reduce the availability and utility of the act of God defense by fundamentally altering the legal perception of acts of God as their foreseeability increases.”<sup>94</sup>

When viewed as a whole, court precedent demonstrates that for weather-related power outages, courts and PUCs often apply a duty of reasonable care for the maintenance of electricity supply that is a distillation of the common and public law foundations of the utility provider’s duty of service. This duty of care is applied in instances where there are articulable concurrent, tangible, and identifiable actions by a utility provider that influenced an outage alongside the existence of extreme weather. This duty may be limited by the act of God defense, although the applicability of this affirmative defense appears to be bounded, with few recent cases deferring to the defense and attributional climate science calling it into question.

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<sup>90</sup> *Rossin v. S. Union Gas Co.*, 472 F.2d 707, 709, 711 (10th Cir. 1973). (While the court did not reject this defense, it did show some skepticism towards it stating, “[w]e need not reach the question whether the court’s determination that the outage was the result of an ‘act of God’ was correct beyond observing that this characterization adds little to the analysis of the case.”).

<sup>91</sup> See *Nat’l Food Stores, Inc. v. Union Elec. Co.*, 494 S.W. 2d 379 (Mo. Ct. App. 1973) (plaintiffs successfully sought a retrial on the theory that a jury should determine if the utility’s failure to give appropriate notice of outages caused by electric curtailment was the proximate cause of damages); *Nat’l Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light*, 972 P.2d 481 (Wash. App. 1999) (plaintiffs successfully challenged a summary judgement order on the theory that the utility’s electric tariff did not absolve it for the negligent failure to use available back up equipment to provide power to its customers during a storm); *Ark. Valley Elec. Coop. Corp. v. Davis*, 800 S.W. 2d 420 (Ark. 1990) (with the court finding that the plaintiffs had introduced sufficient evidence from which the jury could find that the utility was negligent in causing injuries, showing that even though this negligence occurred alongside a potential act of God, it was not enough to absolve the utility of liability).

<sup>92</sup> Rossi & Ruhl, *supra* note 5, at 881.

<sup>93</sup> *Id.* at 884. They argue the reason for this redundancy is the inherent requirements of establishing duty and causation in any tort law case. Invoking the act of God defense may just be “a shorthand way of concluding that a defendant owes no duty of care.” *Id.* at 881.

<sup>94</sup> Kristl, *supra* note 5, at 328.

Nevertheless, three recent cases show that courts may be skeptical of finding a duty of reasonable care, ultimately limiting plaintiff claims.

*D. Recent Extreme Weather Cases*

Changes in the structure of the utility market, narrow perceptions of the duty of reasonable care, and legislative intervention halting court proceedings have all been justifications to limit the duty of utilities to customers during power outages in recent years. Three cases illustrate these justifications. The first comes from the fallout of Winter Storm Uri in Texas.<sup>95</sup> Plaintiffs brought negligence, gross negligence, negligent undertaking, and nuisance challenges against a range of entities involved in the Texas electricity market, including wholesale electricity generators, natural gas companies, the Electric Reliability Council of Texas (ERCOT), and electric transmission and distribution companies.<sup>96</sup> The Texas Court of Appeals held that “Texas does not currently recognize a legal duty owed by wholesale power generators to retail customers to provide continuous electricity to the electric grid” because the statutes that deregulated the Texas electricity market limited the historically recognized duty of service.<sup>97</sup> The court was unwilling to find a duty for what they deemed “continuous electricity” because “extreme weather is a normal occurrence in Texas, [and] such a duty would likely have significant consequences by increasing the price of electricity.”<sup>98</sup>

Here, the Court cited statutes that deregulated the state’s electricity market as a legislative choice to limit utilities’ duties. This is notable because in the face of increasingly deregulated electricity markets, courts may be unlikely to apply the long-accepted duty of service (and its derived duty of reasonable care) to wholesale generators for power outages. Instead, this duty may only be limited to distribution utilities.<sup>99</sup> The policy rationale for

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<sup>95</sup> See *supra* notes 26–28 and accompanying text for a description of the impact of this storm.

<sup>96</sup> Mark Curriden, Texas Court Blocking Jury Trials for 30,000 victims of 2021 Storm, *Dallas News* (Feb. 17, 2025) (summarizing the various legal efforts by consumers following the storm); see also *In re Luminant Generation Co. LLC*, 711 S.W. 3d 13, 18 (Tex. App. 2023).

<sup>97</sup> *In re Luminant Generation*, *supra* note 96, at 24 (“In rewriting the electricity market in Texas, the Legislature could have codified the retail customers’ asserted duty of continuous electricity on the part of wholesale power generators into law. But it chose not to do so. And we may not impose our own judicial meaning on these statutes.”).

<sup>98</sup> *Id.* at 27.

<sup>99</sup> See William Boyd & Ann E. Carlson, Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law, 63 *UCLA L. Rev.* 810, 835–40 (2016) (discussing how 30 U.S. states have a form of electricity market that no longer adheres to the traditional cost-of-service model. The authors refer to these states as “restructured” and “hybrid” models). While the Texas electricity grid is unique for its lack of federal oversight and notable deregulation, the broad principles of increasing competition and alterations in the traditional regulatory model of utility oversight could have an impact in states with restructured or hybrid energy markets. See Fed. Energy Regul. Comm’n, ERCOT,

this decision seems to stem from the same justification as a gross negligence standard: holding utilities accountable would balloon rates and make it difficult for market participants to enter and exit, potentially hindering overall competition and raising costs for consumers.<sup>100</sup>

The final litigation arising from Winter Storm Uri was against transmission and distribution utilities (TDUs). Heard before the Texas Supreme Court in 2025, it addressed whether the court should grant the utilities' motion to dismiss claims on plaintiffs' gross negligence, intentional misconduct, negligence, negligent nuisance, intentional nuisance, and strict-liability nuisance claims.<sup>101</sup> The TDUs claimed that they were not "governed by tariffs" and their liability shield and force majeure clauses paired with "Texas law preclud[ing] liability for service interruptions in emergency circumstances" provide plaintiffs no legal cause of action for any of their claims.<sup>102</sup> Plaintiffs had argued that the tariff does not preclude the claims that are based on theories of gross negligence or intentional conduct, and that Texas law cannot "abrogate the TDUs' common law duties" for the negligence and nuisance claims.<sup>103</sup>

The Texas Court of Appeals granted the TDUs' petition for writ of mandamus to dismiss claims for negligence and negligent nuisance because the "plain language of the tariff" provided a liability shield for ordinary negligence.<sup>104</sup> Because "the TDUs' tariff does not shield the TDUs from gross negligence or intentional misconduct," the Court of Appeals confirmed the lower court's decision denying the TDUs' motion to dismiss these claims.<sup>105</sup>

In its review of this appellate decision, the Texas Supreme Court dismissed the plaintiffs' intentional-nuisance claims with prejudice but held that although the pleading did not "sufficiently allege gross negligence," the plaintiffs should have "an opportunity to replead."<sup>106</sup> On the issue of gross negligence the Court stated that the plaintiffs "failed to allege facts that could amount to conscious indifference" (the Texas gross negligence

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<https://www.ferc.gov/industries-data/electric/electric-power-markets/ercot> [https://perma.cc/Y7PX-YT3H] (last visited Dec. 2, 2024) (reviewing the unique characteristics of electricity regulation in Texas).

<sup>100</sup> Compare *In re Luminant Generation Co. LLC*, supra note 96, at 27 (discussing how under the new deregulated market "every retail customer chooses its own provider of electricity and the rates are set by competition rather than by regulation," implying that applying this duty would disrupt this regime and raise rates), with supra note 64, at 385 (discussing how a limiting liability for utilities is an "integral part of the rate-making process" and is necessary for "insuring reasonable rates").

<sup>101</sup> See *In re Oncor Elec. Delivery Co. LLC*, 716 S.W.3d 525 (Tex. 2025).

<sup>102</sup> *In re Oncor Elec. Delivery Co. LLC*, 694 S.W. 3d 789, 795, 800 (Tex. App. 2024).

<sup>103</sup> *Id.* at 795.

<sup>104</sup> *Id.* at 799–801.

<sup>105</sup> *Id.* at 800–01.

<sup>106</sup> *In re Oncor Elec. Delivery Co. LLC*, supra note 101, at 529.

standard).<sup>107</sup> While giving the plaintiffs the opportunity to replead, the Court stated that for a successful allegation of gross negligence the plaintiffs must allege that the TDUs “could have reduced the deaths and injuries that resulted from the storm despite applicable legal requirements but nevertheless proceeded as they did with conscious indifference to the rights, safety, or welfare of others.”<sup>108</sup> While not completely denying the plaintiffs’ claims, it sets an extremely high bar moving forward that will be difficult for both this set of plaintiffs and a new group of plaintiffs that are bringing suit against CenterPoint Energy, another TDU, for alleged negligence and gross negligence during Hurricane Beryl in the summer of 2024.<sup>109</sup>

The second case came following Hurricane Sandy, which made landfall in New Jersey, leaving devastation in both New Jersey and New York and eight million customers without power.<sup>110</sup> In *Roudi v. Jersey Central Power & Light*, plaintiffs sought to hold the utility in question responsible for damage they claim was caused by its failure to preemptively de-energize its distribution lines to prevent property damage and reduce the risks of the resulting prolonged blackout.<sup>111</sup> The court refused to find a “new, far-reaching duty to preemptively suspend regular electric and natural gas service to thousands of customers . . . before a forecasted major weather event, and before any damage to the utilities’ systems has occurred.”<sup>112</sup> The court deemed this too far an aberration from the traditional “duty at common law to provide uninterrupted service.”<sup>113</sup> This shows that, at least in New Jersey, courts are defining the duty of service as limited to the response to an event, not to the choices made leading up to that event. This narrowed definition of a utility’s duty may reduce the types of actions plaintiffs can challenge as negligent.<sup>114</sup> If other courts follow suit, this approach could ultimately hinder plaintiffs’ ability to bring successful challenges.

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<sup>107</sup> Id. at 533.

<sup>108</sup> Id. at 534. Load shedding means to “cut power to some customers.” Id. at 529.

<sup>109</sup> See Complaint at 1–4, *Berg Hospitality Grp. LLC v. CenterPoint Energy, Inc.*, No. 202444198 (Tex. Dist. Ct. July 17, 2024).

<sup>110</sup> Hurricane Sandy, National Weather Service, <https://www.weather.gov/okx/hurricanesandy5year> [<https://perma.cc/Q4E4-NVHE>] (last visited Dec. 2, 2024); Henry Devanandham & Jose Emmanuel Ramirez-Marquez, On the Impacts of Power Outages During Hurricane Sandy—A Resilience-Based Analysis, 19, *Sys. Eng’g* 59, 59 (2016) (noting that eight million customers were without power across 21 states).

<sup>111</sup> *Roudi v. Jersey Cent. Power & Light*, No. A-1505-18T1, 2020 WL 1650710, at \*1 (N.J. Super. Ct. App. Div. Apr. 3, 2020).

<sup>112</sup> Id. at \*7.

<sup>113</sup> Id.

<sup>114</sup> Compare with *Praetorian Ins. Co. v. Long Island Power Auth.*, No. 704580/2014 (N.Y. Sup. Ct. Apr. 10, 2019) (finding the issue of whether a utility properly de-energized does fall under the duty to exercise reasonable care and as such is for the jury to decide if the utility “acted with that degree of care which was commensurate with the risk to which it had exposed” the plaintiffs).

The third case stems from the fallout of Hurricane Irma, which struck Florida in 2017, cutting off power to 6.7 million customers.<sup>115</sup> In this case, plaintiffs brought a class action lawsuit against Florida Power and Light (FPL) for damages resulting from the prolonged power outage.<sup>116</sup> The plaintiffs cited the PUC's authorization of significant storm hardening efforts for the utility totaling billions of dollars, including approving a new "storm surcharge."<sup>117</sup> Yet, despite this, the utility failed to respond adequately to the storm and restore power.<sup>118</sup> In 2023, a Florida appeals court certified the class action suit on the plaintiffs' theory that FPL had a "duty to strengthen its distribution system in anticipation of the next hurricane."<sup>119</sup>

Following the decision, the Florida legislature passed a measure eliminating this duty. It states that a "public utility is not liable for damages based in whole or in part on changes in the reliability, continuity, or quality of utility services which arise in any way out of an emergency or disaster."<sup>120</sup> The law further states that it is the exclusive jurisdiction of the PUC to deal with any issues related to "disaster preparedness and response."<sup>121</sup> Because of this law, the same court that advanced the case held that the Florida courts no longer have authority to hear the issue, stating it is now up to the PUC to determine how to assess or manage "liability relating to the sufficiency of FPL's disaster preparedness."<sup>122</sup> Unlike the other cases in which the court acted to limit the duty of utilities, here, the legislature eliminated the duty, removing the issue from the courts. This is the most dramatic example of curtailing a power outage suit and reveals how the current system is not immune to political pressures.

Taken together, these case studies highlight the challenges of establishing duty in extreme weather outage cases. Despite the difficult burden to prove gross negligence, cases are being halted before that standard can even be considered. The duty of service and reasonable care for utilities exists but is limited, and courts may not be willing to extend it any further despite the

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<sup>115</sup> U.S. Energy Info. Admin., Hurricane Irma Cut Power to Nearly Two-Thirds of Florida's Electricity Customers (Sep. 20, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=32992> [<https://perma.cc/3M7F-AAMG>] (noting that this accounts for nearly 64% of all ratepayers in the entire state).

<sup>116</sup> Fla. Power & Light Co. v. Velez, No. 3D22-181, 2023 WL 2589411, at \*1 (Fla. Dist. Ct. App. Mar. 22, 2023), *withdrawn and superseded on reh'g*, No. 3D22-181, 2024 WL 2316357 (Fla. Dist. Ct. App. May 22, 2024).

<sup>117</sup> *Id.* (defining these storm hardening efforts as improvements to facilities and power lines "to withstand extreme wind conditions").

<sup>118</sup> See *id.* at \*2 (summarizing plaintiffs' claims that FPL failed to exercise reasonable diligence in response to the hurricane despite the storm surcharge).

<sup>119</sup> *Id.*

<sup>120</sup> Fla. Stat. § 366.98 (2024).

<sup>121</sup> *Id.*

<sup>122</sup> Fla. Power & Light Co., 2024 WL 2316357, at \*2.

increased prevalence, predictability, and impact of extreme weather. And even when courts recognize a duty based on clear utility action, the legislature can step in to insulate a utility from liability. This leaves plaintiffs in many states without a meaningful pathway for relief from damages suffered from outages during extreme weather and raises questions regarding whether the courts are the best place to resolve these disputes.

#### *E. Limited State Reform*

There are a handful of states that are altering the long-standing legal framework applied to power disruptions by requiring grid resiliency planning or establishing compensation regimes for customers who experience long duration power outages. These two policy changes are notable for their potential impacts on utilities' legal duties, and, for the four states that have some form of compensation scheme, the access to a legal remedy outside the traditional torts approach.

Fourteen states have instituted some form of planning requirements that force utilities to proactively address the grid resiliency issues caused by a range of hazards, including extreme weather events.<sup>123</sup> These plans often include publishing a vulnerability assessment of the risks posed to a utility's assets by a range of natural disasters; explaining how a utility is reaching certain standards and performance metrics related to grid hardening; outlining risk and response management practices and strategies; and detailing future modernization efforts.<sup>124</sup> By clearly articulating the risk of natural disasters and requiring utilities to develop strategies to mitigate their impacts, these laws may stand as grounds to expand the duty of service and provide plaintiffs more ammunition to get over that first hurdle in a power disruption case.<sup>125</sup> Notably, none of these grid resiliency laws address liability or damages for power outages, so they do not reduce the gross negligence standard for power outage cases.

There are four additional states that have explicitly tried to address responsibility for power outages through the creation of a statutory compensation scheme for customers harmed due to long-duration power outages.<sup>126</sup> These schemes are complex, but the chart below distills the core features of each.

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<sup>123</sup> See generally Josh A. Schellenberg & Lisa C. Schwartz, *Grid Resilience Plans: State Requirements, Utility Practices, and Utility Plan Template 8* (Lawrence Berkeley Nat'l Lab'y ed., 2024) (describing these plans and requirements as of 2024).

<sup>124</sup> *Id.* at 7–12.

<sup>125</sup> To date it does not appear that any court has directly heard a challenge that makes this argument.

<sup>126</sup> This list excludes California, which deploys a strict liability standard in inverse condemnation actions brought by property owners for destruction or damage caused by wildfires started because of utility equipment. Given that this program is not directly connected to outages, it is not analyzed as within

**Table 1: Outage Compensation Schemes**

Policy Feature	Connecticut <sup>127</sup>	Michigan <sup>128</sup>	New York <sup>129</sup>	Illinois <sup>130</sup>
<b>Bill Compensation</b>	\$25 per day bill credit <i>No application required</i>	\$40 per day bill credit <i>No application required</i>	\$25 per day bill credit <i>No application required</i>	No compensation limit, each utility designs its own procedure for resolving and paying claims
<b>Additional Compensation</b>	\$250 flat fee for medical and food spoilage  <i>Customers must submit a claim to the utility</i>	None	Up to \$235 for itemized food list  Up to \$500 if showing proof of food loss  Cost of perishable medicine  Up to \$540 for small	All actual consumer damages, but payment amount and methods are determined by utility procedure  Emergency and contingency expenses incurred by a

the scope of this Note. See generally Carolyn Kousky, Katherine Greig, Brett Lingle & Howard Kunreuther, *Wildfire Costs in California: The Role of Electric Utilities* (Wharton University of Pennsylvania ed., 2018) (providing an in-depth analysis of this unique regime).

<sup>127</sup> See Conn. Gen. Stat. §§ 16-32i, 16-32l & 16-32m (2024); PURA Implementation of Residential Customer Credit and Reimbursements by Electric Distribution Companies for Storm-Related Outages, No. 20-12-46 (Conn. Pub. Utilities Regulatory Auth., June 30, 2021).

<sup>128</sup> See Mich. Admin. Code r. 460.701–52 (2024); In the Matter, On The Commission’s Own Motion, to Establish a Workgroup to Review the Service Quality and Reliability Standards for Electric Distribution Systems and to Recommend Potential Improvements to the Standards, No. U-20629 (Mich. Pub. Serv. Comm’n, Sep. 5, 2024).

<sup>129</sup> See N.Y. Pub. Serv. L. § 73 (2024); Proceeding to Implement Customer Credits and Reimbursements Pursuant to Public Service Law Section 73, No. 22-M-0159 (N.Y. Pub. Serv. Comm’n, July 14, 2022).

<sup>130</sup> See 220 Ill. Comp. Stat. 5/16-125 (2024); Ill. Admin. Code tit. 83 §§ 411.10–.360 (2024).

			business food loss  <i>Customers must submit all claims to the utility</i>	unit of local government  <i>Customers must submit claims to the utility</i>
<b>Proof of Damage Requirement</b>	Consumers must attest to lost food and medicine	N/A	Itemized list and proof of all food loss, proof of prescription loss, proof of small business food loss	Utility set methods of verification
<b>Costs Recoverable by Utility</b>	No	Not explicitly banned	No	No
<b>Consecutive Hours of Delay Necessary to Trigger the law</b>	96	96 if 10% or more customers without power  48 if 1–10% without power  16 if less than 1% without power	72	4
<b>Number of Individuals Impacted for Law to Trigger</b>	10% of a utility's customers	See above	At least 20,000 customers	The less of 30,000 or 0.8% of



			experiencing outage	utility's total customers
<b>Waiver Provision</b>	Yes	Yes	Yes	Yes
<b>Other Notable Features</b>		Financial incentives provided for at least 12 months of continued service quality and reliability		All aggrieved customers can file PUC complaint procedures if dissatisfied with the utility's administrativ e resolution  Does not preclude consumers from seeking tort liability

Looking at the specific details of the four states in Table 1, it is notable that most of these compensation schemes do not apply until 72 hours after an outage, leaving consumers without any form of remedy through these compensation programs for outages short of three days.<sup>131</sup> This leaves a large window of financial and health risks uncompensated. While Illinois tries to remedy this with a noticeably shorter outage period, the PUC has made a deliberate choice for the sake of expediency to turn this program over to the utilities. They are the ones responsible for setting reimbursement rates, verifying damages, and ultimately paying consumers.<sup>132</sup>

But the Illinois process is difficult to navigate, as neither of the two largest utilities in the state, ComEd and Ameren, publishes clearly on its

<sup>131</sup> Illinois's program is the notable deviation from this trend, triggering after only four hours. This significantly shorter threshold may explain why Illinois grants a large amount of utility waivers as part of this program. See *supra* notes 141–142 and accompanying text.

<sup>132</sup> See Ill. Admin. Code tit. 83 §§ 411.230 (2024) stating that “utilities shall design and implement an administrative procedure” for this program and then submit a “description of this administrative procedure to the Commission for approval.”

website the details of the compensation program, the types of damages compensated, the general amount of compensation for each damage type, or any other important information about how the utility executes this scheme.<sup>133</sup> Instead, they simply post the claims forms for consumers to fill out, creating a system that is not consumer friendly.<sup>134</sup>

Outside of the bill credits, New York's program has the most robust repayment system for food and medical spoilage. Nevertheless, this program, like those in Connecticut and Michigan, lacks compensation for lost wages, childcare expenses, technology disruption, property damage, and medical expenses caused by the outage period. Only Illinois allows for coverage of all "actual damages."<sup>135</sup>

These compensation schemes are technically enforceable as soon as the requisite number of people are consistently without power for the relevant time, but they are not strict liability regimes. Instead, each state employs a waiver that utilities can file to limit liability.<sup>136</sup> The factors each PUC considers differ depending on the state. For example, New York's PUC will consider a "balancing of the equities" as well as the "conditions on the ground," "severity" of the outage, "actions or omissions" of the utility, and "other criteria" the Commission considers to be in the public interest.<sup>137</sup> The Michigan PUC can grant a waiver if the outage was caused by an "act of God," which it deems to be "an event due to extraordinary natural causes" in which "reasonable care would not avoid the [outage's] consequences."<sup>138</sup> Connecticut requires consideration of the "severity of the emergency, employee safety issues and conditions on the ground" alongside whether the utility "received approval and reasonable funding allowances . . . to meet infrastructure resiliency efforts."<sup>139</sup> Illinois's waiver allows utilities to skirt liability if they can show the outage was caused by "unpreventable damage due to weather events or conditions."<sup>140</sup> The PUC has created a four-part test to determine if something was truly "unpreventable" that focuses on the

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<sup>133</sup> See Ameren Illinois Co., Filing a Claim, <https://www.ameren.com/-/media/Illinois-Site/Files/OutageCenter/AmerenIllinoisClaimForm.pdf> [<https://perma.cc/KS5M-J75B>] (last visited Nov. 26, 2025); Commonwealth Edison Co., Damage Claim <https://www.comed.com/my-account/customer-support/contact-us/damage-claim> [<https://perma.cc/N4J6-VDRL>] (last visited Dec. 2, 2024).

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* Table 1; 220 Ill. Comp. Stat. 5/16-125 (2024).

<sup>136</sup> See N.Y. Pub. Serv. L. § 73 (2024); Mich. Admin. Code r. 460.751 (2024); Conn. Gen. Stat. § 16-321 (2024); *Commonwealth Edison Co. v. Illinois Com. Comm'n*, 16 N.E. 3d 801, 814 (Ill. App. Ct. 2014).

<sup>137</sup> N.Y. Pub. Serv. L. § 73 (2024).

<sup>138</sup> Mich. Admin. Code r. 460.751 (2024).

<sup>139</sup> Conn. Gen. Stat. § 16-321 (2024).

<sup>140</sup> 220 Ill. Comp. Stat. 5/16-125 (2024).

design standards for interrupted facilities or infrastructure at the time of their construction.<sup>141</sup> These are all very utility-friendly PUC waiver standards, and utilities have successfully waived out of the compensation schemes several times in recent years.<sup>142</sup> The broad and protective waiver provisions in these states create clear pathways for utilities to dodge liability in the face of extreme weather, highlighting why a more robust compensation regime is needed.

### III. REFORMING THE CURRENT REGIME

#### *A. Current Legal Limitations*

The nation's legal regime for addressing power disruptions has primarily retained the same structure for decades despite the increased risk of climate-induced extreme weather, its potential to cause more power outages, the well-documented harms caused by these outages, and a historically recognized entitlement to adequate electrical service from utility providers.<sup>143</sup> As Part II showed, within this regime, there is a legal entitlement for consumers to a consistent supply of electricity derived from the duty of adequate service.<sup>144</sup> Nevertheless, recent case studies highlight how consumers have been left with no remedy in many states following significant power outages caused by extreme weather events.<sup>145</sup>

The current legal regime resembles a liability regime, conceptualized by Judge Guido Calabresi and Professor A. Douglas Melamed, which they define as one where the state protects entitlement and initiative transfers through “the basis of value determined by some organ of the state rather than by the parties themselves.”<sup>146</sup> But in practice, this liability regime is not effectively protecting the entitlement to electricity service. By approving unverified assumptions that liability protections are necessary to maintain reasonable rates; deploying an exacting search for duty; entertaining the act of God defense; and forcing plaintiffs to prove a high standard that requires

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<sup>141</sup> *Commonwealth Edison Co. v. Illinois Com. Comm’n*, 16 N.E. 3d 801, 814 (Ill. App. Ct. 2014) (summarizing the PUC’s requirements for what a utility must demonstrate to following to receive a waiver).

<sup>142</sup> See *Ameren Illinois Co. d/b/a Ameren Illinois*, No. 23-0484, 2024 WL 4052502 (Ill. Com. Comm’n Aug. 29, 2024); *Ameren Illinois Co. d/b/a Ameren Illinois*, No. 23-0595, 2024 WL 3314562 (Ill. Com. Comm’n July 2, 2024); *Ameren Illinois Co. d/b/a Ameren Illinois*, No. 22-0464, 2023 WL 2760905 (Ill. Com. Comm’n Mar. 23, 2023).

<sup>143</sup> Excluding the four states documented in Table 2.

<sup>144</sup> See *supra* notes 75–94 and accompanying text.

<sup>145</sup> See *supra* notes 95–122 and accompanying text.

<sup>146</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972).

gross negligence on behalf of the utility; courts are making consumers' defense of their entitlement nearly impossible. These constraints operate as significant transaction costs that limit the effectiveness of the current system.

Regulators and courts have created a liability regime that is based on an "idealized state of affairs."<sup>147</sup> But as Professor Pierre Schlag points out, creating legal rules using "such an idealized state of affairs" causes "significant problems [to] emerge in moving from the idea to the reality."<sup>148</sup> As Schlag argues, by discounting the impact of transaction costs, we create systems that do not mimic a free market but distort it instead.<sup>149</sup> For damages related to power outages, both courts and legislatures have failed to adequately address the significant transaction costs embedded in the existing regime. Legislatures have failed to advance and evolve the duty to serve to ensure consumers can enjoy this entitlement. Meanwhile, courts have taken for granted that a gross negligence standard is a necessary part of the PUC calculus to try to mimic the market and negotiate appropriately utility tariffs for the benefit of consumers.<sup>150</sup> Further, they have enacted significant barriers to litigating over this standard. Instead of deploying a system that balances consumer and utility interests, encourages utilities to make accurate market judgements regarding grid resiliency, and accounts for increasing extreme weather events, courts are placing the burden of outages squarely on consumers who go without electricity. The result of these legislative and judicial actions is a system that does not appropriately account for the harms of ever-increasing power outages. This system requires modification to better protect consumer entitlements and balance the new costs introduced by more frequent extreme weather.

The grid resiliency laws and compensation scheme reforms enacted in some states are steps in the right direction, but do not do enough to remedy the problem. While the resiliency plans may add credence to the application of the duty of service, they do nothing to alter the incredibly favorable gross negligence standards. Existing state compensation schemes take too long to trigger, provide a minor amount of compensation that fails to account for a range of damages caused by power outages, or have utility-friendly waiver features that can excuse compensation in the face of extreme weather events. Both programs give consumers a leg up over the traditional approach to outages, but they do not alter the existing regime enough to make a meaningful difference.

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<sup>147</sup> Pierre Schlag, *The Problem of Transaction Costs*, 62 S. Cal. L. Rev. 1661, 1665 (1989).

<sup>148</sup> *Id.*

<sup>149</sup> See *id.* at 1699.

<sup>150</sup> See *supra* notes 66–74 and accompanying text.

It would be more productive to alter our legal framework to create a system that operates as a capped liability regime for power disruptions, one that protects entitlements by facilitating “a combination of efficiency and distributive results” but has set limits in place to protect utilities’ bottom lines.<sup>151</sup> The present and future implications of climate change demand this legal refresh to promote greater economic efficiency, incentivize heightened grid resiliency, and improve distributional outcomes by ensuring that consumers, particularly those in historically marginalized communities, do not continue to face the uncompensated harms of a lack of electricity. The goals of this new system should be twofold: first, ensuring consumers have access to compensation for damages when utilities are negligent in their maintenance and operation of their infrastructure leading to long-duration power outages; and second, that the legal framework creates appropriate incentives to encourage utilities to deploy grid resiliency efforts to reduce the need for future payouts.

#### *B. Proposed Solutions to Protect Consumers*

The solution to the current disarray is to eliminate the tort liability regime. Instead, states should deploy an overarching policy solution that builds on recent state reforms. Legislators should explicitly merge grid resiliency planning with an expansive PUC-run compensation regime to create a comprehensive system that better accounts for the impacts of climate change. When working in concert, these two reforms will significantly modify the existing framework and greatly expand consumer remedies. Table 2 provides an overview of this proposed scheme.

**Table 2: Proposed Compensation Scheme**

<b>Policy Feature</b>	<b>State of Dreams</b>
<b>Bill Compensation</b>	\$40 per day bill credit <i>No application required</i>
<b>Additional Compensation</b>	Payment for a range of actual damages based on prescribed payment bands. Covered items include but are not limited to:

<sup>151</sup> Calabresi & Melamed, *supra* note 146, at 1110.

	<p>Lost wages Food and medical spoilage Childcare costs Property damage Medical expenses</p> <p><i>Consumers and small businesses can apply, but must submit a claim to the utility</i></p>
<b>Proof of Damage Requirement</b>	Yes, consumers must submit itemized lists of all food and medical spoilage, and then proof of all other claims
<b>Costs Recoverable by Utility</b>	No, except for grid resiliency planning expenses
<b>Consecutive Hours of Delay Necessary to Trigger</b>	24
<b>Number of Individuals Impacted For Law To Trigger</b>	0.6% of customers or 20,000 individual customers, whichever is lower
<b>Waiver Provision</b>	Yes
<b>Other Notable Features</b>	<p>Utilities will be required to inform all consumers of this program in their tariff and following an applicable outage</p> <p>Following PUC waiver determination, parties can file for an appeal to the state courts</p> <p>This system incorporates grid resiliency planning</p>

	The compensation system replaces any tort negligence suits for power outages
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This proposed regulatory scheme aims to take the issue of liability determination for power outages out of the courts and place it squarely within the PUC to aid with efficiency and clarity. The first step of this reform is to remove the gross negligence standard for power outages caused by weather from utility tariffs. Instead, utilities will be held to the standards that legislators establish for the compensatory regime. Utilities will be required to publish an overview of this process and the consumer rights to compensation in their tariffs and on their websites. They will also be required to inform customers of their rights following a power outage.

The second precondition for this scheme is for a state to establish grid resiliency planning requirements. While the exact contents of these plans are out of the scope of this Note, they should adhere to the best practices outlined by the Lawrence Berkeley National Laboratory. These include requiring utilities to publish a vulnerability assessment; describe all the resilience programs they will deploy and the timeline for deployment; develop extreme weather preparation and response plans; and produce a cost-benefit analysis for each proposal.<sup>152</sup> Further, these plans should require utilities to account for grid hardening, load management, distributed resource considerations, and other requirements the state legislators deem important to improving their state's electricity infrastructure. Establishing grid resiliency planning will force the PUC to clearly articulate its expected processes to regulated utilities and give them the opportunity to show how they are preparing for the increased likelihood of extreme weather. Further, the PUC should be able to modify the requirements after an outage if an event exposes considerations that were not properly accounted for. Each utility should be able to recover the costs of both the planning and approved developments outlined in these plans.

For the actual compensation scheme, it should build off the schemes already present in Connecticut, Illinois, Michigan, and New York. It should remove the policy features that unnecessarily insulate utilities from liability and expand the types of damages that can be compensated.<sup>153</sup> This scheme will go into effect when 0.6% or 20,000 customers, whichever is lower, have

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<sup>152</sup> See generally Schellenberg & Schwartz, *supra* note 123, at 28–46 (describing emerging trends and best practices for reliance planning).

<sup>153</sup> See *supra* Table 1.

been without power for 24 hours.<sup>154</sup> Once these thresholds have been met, the compensation requirement will instantly apply, presuming that the utility responsible for the outage is liable unless it makes a successful waiver claim. To compensate those impacted by the power outage, a utility will be required to pay damages, capped based on damage type, to all customers who can establish explicit material losses. These include lost wages, food and medical spoilage, childcare costs, property damage, and medical costs. Additionally, small business owners will be able to file for the losses, with specific business-related caps being set based on the day of the week and duration of the outage. The legislature will establish this scheme, and the PUC will oversee the utilities responsible for executing payouts. The utilities will file reports on every payment made and denied after the event, which the PUC will review for accuracy, demanding corrections where necessary.

Each state legislature should develop payment caps for every expected damage type based on the prevailing costs in its state. For example, say a mother in a family of four had to stay home and miss a full eight-hour workday to watch after her children due to a power outage that closed schools. This family had their food spoiled and lost two vials of insulin because of the lost refrigeration. Assume the minimum wage in this state is \$12.50 per hour, the average refrigerated food expenses for a family of four is \$150, and each insulin vial is worth \$100.<sup>155</sup> Based on these established baselines, the family would receive a compensation amount of \$400 for the first 24 hours, and then \$100 for each subsequent 24 hours in which the mother has to stay home to watch her kids (This covers only the lost wages, since the family was already compensated for food and insulin.)<sup>156</sup> The exact dollar amounts set for each type of expected harm caused by a power outage should be state-specific, set by the state legislators, and revisited every two years to account for inflation or other economic changes. To prove damage, consumers will simply have to submit an itemized list for food and medical spoilage, but they will have to provide proof and detailed explanations for the other damage types they are claiming. The exact requirements for proof for each damage type will be up to each state to decide. The goal behind this approach is to create payment baselines designed to compensate consumers for the actual impact of the losses suffered due to the outage. Additionally,

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<sup>154</sup> These numbers are designed to provide a more consumer friendly balance than existing schemes, extending coverage while not overburdening utilities.

<sup>155</sup> These numbers are provided to serve as rough estimates.

<sup>156</sup> This compensation level could change if the mother had to hire someone to watch her children. Further it assumes no additional medical expenses were caused by the lack of insulin. Both factors could increase payment.



by establishing set payment caps, utilities can appropriately prepare for these potential expenses.

Damage payments in this proposed regime should be offered as either a check or credit for electricity bills. Consumers should be given a reasonable window to file these claims. While damage compensation will be limited only to those who file, all individuals who are known to have experienced the outage should receive baseline compensation in the form of an electricity bill credit.<sup>157</sup> This should be between approximately \$25 and \$40 a day and be altered depending on electricity rates in a given state.<sup>158</sup> Importantly, the utility will not be able to recover costs for any of these payments or associated activities (including filing or defending the waiver).

This proposed scheme grants utilities 14 days from the end of the incident in question to file a waiver to void responsibility for compensation. To avoid liability, a utility must prove to the PUC that: (1) the utility was in compliance with the state's grid resiliency standards and adhered to its disaster response plan; (2) the utility's negligence did not contribute to the outage; and (3) there were not additional reasonable steps the utility should have taken to lessen the scale or duration of the outage.

These three criteria are designed to protect a utility from responsibility for events that truly were out of its control, preventing an imposition of damages and payouts that could balloon utility costs. This system essentially holds utilities to a negligence standard and requires the PUC to consider the steps a utility took to determine if it was reasonable given the circumstances. For instance, where a utility deployed best practices and did not negligently contribute to the scale or duration of the outage, it will be able to waive the compensation programs. This is designed to best mimic a socially optimal level of care, where utilities are financially accountable for their mistakes, but are not liable for uncontrollable circumstances that, if they were held accountable for, would increase consumer rates.

Following a waiver determination, the PUC must publish the rationale behind the decision. Parties will be given the opportunity to appeal this decision to the state courts. The state courts will then consider whether the PUC properly balanced the statutory factors and deployed informed decision-making. This is an attempt to provide one final check in the system.

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<sup>157</sup> This credit would not be provided if a utility filed a successful waiver with the PUC.

<sup>158</sup> This number sits between the range of existing compensation schemes and is included in this proposal to protect consumers who may fail to file for any set of reasons. Further, it acts as a form of consumer-favoring, financial penalty to further incentivize utilities to reduce outages.

## IV. COUNTERARGUMENTS

The idea of creating a new compensation or liability regime for power outages has not been studied in depth, but, in the few instances where it has, commentators have been critical of the idea.<sup>159</sup> Further, the theory of the duty of service that underpins the rationale for a compensatory regime also has been challenged recently due to its economic implications in the face of climate change.<sup>160</sup> Because of this general hostility, this Part briefly addresses the most likely counterarguments to this scheme.

The first challenge is that the system designed in this Note would create a significant financial burden on utilities. It is true that this system will raise expenses for utilities, as they will now be responsible for internalizing costs that previously were not imposed upon them. As with any form of electricity regulation, avoiding the utility death spiral is a must.<sup>161</sup> But this system does not create the financial burden that concerns scholars.<sup>162</sup> Instead, it applies a standard that resembles a negligence regime rather than strict liability. Further, by creating damage caps, limiting payments for consumers who do not file claims, and allowing utilities to recover costs for prudent grid resiliency planning efforts (that may help alleviate liability in the face of extreme weather), there are safeguards to limit the costs incurred by a utility. These limits are an intentional choice of this design to create a socially favorable equilibrium, acknowledging that, until this point, utilities have been underpaying for the system. The proposed system is designed to better promote cost internalization and tilt the scales in favor of consumers without bankrupting utilities.

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<sup>159</sup> See, e.g., Costello, *supra* note 4, at 30–34 (critiquing heightened liability plans); Brennan, *supra* note 4, at 18 (critiquing heightened liability programs).

<sup>160</sup> See Payne, *supra* note 5, at 603–08.

<sup>161</sup> This is broadly conceptualized as rising electricity prices causing consumers to look for different sources of electricity and making the utility economic model no longer financially sustainable. See Stephen Lacey, *This is What the Utility Death Spiral Looks Like*, *Renew Econ.* (Mar. 11, 2014), <https://reneweconomy.com.au/utility-death-spiral-looks-like-21134/> [<https://perma.cc/VM54-QSFZ>].

<sup>162</sup> See, e.g., Brennan, *supra* note 4, at 6–7 (stating that there are many concerns with a strict liability regime). Specifically, it states that

[S]trict liability, however, increases the cost utilities incur, not only by the expense of reducing the likelihood of an outage and restoring service more quickly. It also increases cost by the payments utilities have to make for outages for which prevention was too costly and for restoration delays that were too costly to avoid.

In a similar vein, some consumer advocates may worry that allowing utilities to recover costs for resiliency planning may, in turn, include programs that would essentially cover the compensation payments, failing to make utilities truly internalize these costs. While the proposed scheme does involve cost recovery for resiliency efforts, these are necessary improvements to secure the grid, and PUCs will need to be diligent to ensure there are no cost recoveries for the compensation program. Further, while resiliency efforts may lead to a slight increase in electricity rates, consumers receive a significant new advantage: access to compensation if the utility fails to meet the appropriate threshold of care that these costs should pay for. From these slightly increased rates, consumers will get a more reliable grid, and if they do not, they will be compensated for the utility failure.

The third critique is that this proposed system discounts the role consumers play in preventing the harm caused by outages. As Ken Costello states, “customers can purchase a backup generator, solar photovoltaic systems with smart islanding inverters, or install Powerwall batteries. Residential customers can prepare for an outage by buying extra batteries, flashlights, and blankets, and mitigate losses by purchasing surge protectors.”<sup>163</sup> This, he argues, is a better approach because those who prefer power reliability can choose to purchase these protections. This argument, however, fails to account for the disparate impacts historically marginalized communities face during power outages. Not only are these communities more likely to experience blackouts, they also may be least likely to afford these consumer protections.<sup>164</sup> The American electric grid spreads the costs of electricity over a wide base of consumers within a given state or region.<sup>165</sup> The compensation scheme builds on this framework, allocating reliability protection across a region, reducing individualized costs, and, in turn, protecting historically underserved communities.

Fourth, in his critique of creating a negligence standard for power outages, Professor Timothy Brennan states that it “forces courts and regulators into the political quicksand of ascertaining whether utilities acted appropriately to prevent outages and restore service.”<sup>166</sup> Such determinations, including determining compensation levels, are “likely to be difficult and error-

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<sup>163</sup> Kenneth W. Costello, *Electric Power Resilience: The Challenges for Utilities and Regulators*, 37 *Yale J. on Reg. Bull.* 1, 22 (2019).

<sup>164</sup> See *supra* notes 37–38 and accompanying text.

<sup>165</sup> See U.S. Energy Info. Admin., *Electricity Explained: Factors Affecting Electricity Prices* (June 29, 2023) <https://www.eia.gov/energyexplained/electricity/prices-and-factors-affecting-prices.php> [<https://perma.cc/A8HU-A5E4>] (describing the factors that lead influence electricity prices and how this is spread across different types of consumers in different localities).

<sup>166</sup> Brennan, *supra* note 4, at 18.

prone.”<sup>167</sup> By establishing clear criteria around what due care looks like at the outset through the grid resiliency planning phase and the rules surrounding the implementation of the compensatory scheme, regulators can reduce errors and deploy a transparent system people can have confidence in. The constraints present in the proposed system will also protect consumers by limiting the reasons PUCs could grant waivers to utilities. Further, because participants can appeal all waiver decisions to the judicial system, judges can review PUC work to ensure decisions were made reasonably and that the PUC appropriately considered all the relevant information. These design features will act to reduce errors.

The final argument comes from Professor Heather Payne, who claims that in the face of climate change, utility law should remove the duty to serve in favor of the idea of “prudence” because the social cost of this duty is too high and will create “economic injustice.”<sup>168</sup> While the costs of addressing climate change are certainly high, and the duty to serve will mean that areas vulnerable to climate impacts will need to be serviced, the idea of cutting people off the electricity grid does not seem appropriate. This is based on a theory of social equity grounded in the growing body of research that historically marginalized communities are those that are the most at risk to climate impacts.<sup>169</sup> To cut these individuals off the electric grid, in effect, doubles down on historic inequities. While it might save certain ratepayers and the system money overall, that is not the only point of electricity service. It is a socialized good that all deserve access to, even considering climate change. More research should be conducted on how the program described in this Note will impact utility profits and system costs, but until that is done, a system that over-indexes on societal fairness rather than pure economic efficiency is more appropriate.

## CONCLUSION

Climate change is a present reality, and its effects call into question many legal frameworks, from environmental and utility to housing and health law. It requires policymakers to reconsider the incentives that have been

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<sup>167</sup> *Id.* at 7.

<sup>168</sup> Payne, *supra* note 5, at 608, 621, 628 (claiming the challenge is that “the utility, at this point in time, does not have the ability to determine that spending that money would be imprudent; if a customer is within their geographic service territory, they have a duty to serve that customer” and arguing that it may be more economically efficient for all to limit the most costly parts of this service area).

<sup>169</sup> See generally U.S. Env'tl. Prot. Agency, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts 4–8* (2021) (documenting the disproportionate impact of climate impacts).

embedded into utility law surrounding the appropriate risks and costs associated with power outages caused by extreme weather. Currently, most states deploy a gross negligence standard for utility liability for power outages. This makes any consumer challenge to recover damages incredibly unlikely.

Utilities can further protect themselves from liability by claiming an act of God defense or that the duty of adequate service, and its subsequent requirement of reasonable care, is a narrow duty that can, and should, not be widened past historic interpretations. This, in turn, insulates utilities from any liability for their negligent actions and places the economic costs of an outage exclusively on consumers. This Note aims to show that there are tangible economic and health harms of this system. Principles of fairness, proper cost distribution and internalization, and an increasingly volatile climate demand that regulators adopt a new liability regime that better protects consumers. This approach will build a more resilient grid and tilt the scales in favor of consumers who have long had no remedy for negligent utility acts.

The design of this liability regime matters and is critical to ensuring the scales are not tipped to a point that leads to adverse consequences for utility operation. These challenges are considerable, and changes will need to be tailored to each state through its unique system of utility regulation, but change must occur. This Note does not attempt to answer all questions related to power outage liability but instead places a spotlight on the current fractures in the utility law system, presenting a new compensatory scheme for outages caused by extreme weather that better balances costs and equities. The climate is changing. It is time our laws follow suit.