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# ENERGY "GOODS": SHOULD ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE APPLY TO ENERGY SALES IN A DEREGULATED ENVIRONMENT?

KOBY BAILEY\*

A common joke in public utility regulatory forums was the old adage that you could get any color of phone you wanted from Ma Bell,<sup>1</sup> as long as it was black. The traditional utility service provided a relatively undifferentiated service to its customers.<sup>2</sup> In exchange for having monopoly markets for a particular service, regulations required utilities to serve all customers within their utility territories and regulators to set utility prices.<sup>3</sup> Of course, the key component of being a monopoly is the barrier created by regulation that prevents competitors from entering the utility's "market."<sup>4</sup>

Due to restructuring, the traditional utility service<sup>5</sup> today

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1. "Ma Bell" refers to the old Bell operating company that provided long distance and local phone service in the United States prior to 1981.

2. See Douglas Gegax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 YALE J. ON REG. 63, 67 (1993) (describing the nature of the single product natural monopoly). A natural monopoly occurs when the long-run average cost function of providing the service is decreasing over the relevant range of output. *Id.* at 67.

3. See Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1244-58 (1998) (describing the regulation and duties of public utilities from the common law to today).

4. See *id.* at 1244-58 (describing the role that the early common law, economies of scale and 19th century regulation played in creating the regulatory compact of monopoly service in exchange for the obligation to serve).

5. The traditional utility is vertically-integrated and combines three functions: 1) the generation or production of either electricity or natural gas; 2) the transmission of that energy from source to a distribution network; and 3) delivery of the energy to the ultimate customer by means of a distribution grid. See EDWARD KAHN, *ELECTRIC UTILITY PLANNING & REGULATION* 16-19, 306-10 (Carl Blumstein ed., American Council for an Energy-Efficient Economy 1988) (describing the organization of the utility industry). Vertical

reflects an entity more like a common carrier than a utility service.<sup>6</sup> The traditional utility structure is experiencing changes due to the pressure caused by the changing costs of energy production, social policy favoring competition over regulated markets and other factors.<sup>7</sup> Regulatory reform and restructuring of the utility industry is and will further alter how retail customers buy their energy.<sup>8</sup> Instead of only being able to buy "the black telephone" version of utility service, markets will develop more complicated, custom-made contracts for energy services.<sup>9</sup>

Customer choice will lead to new problems and challenges for

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integration links the different steps in a production process in order to minimize the total delivered cost of the service. See Rossi, *supra* note 3, at 1265-66 (discussing economic advantages of vertical integration). An important characteristic of a public utility is that it is a monopoly provider of a good or service by virtue of its regulatory and economic status. See Kahn, *supra* note 5, at 17 (commenting that a "regulated franchise" avoids "social waste" created by competition).

6. Common carriers, in the context of a public utility providing natural gas or electricity, are entities that will transport others' energy over their distribution networks. See Kahn, *supra* note 5, at 308 (describing how gas is transported from seller to user without the "pipes" company taking ownership of the gas). The common carrier aspect of an electric utility is commonly referred to as transmission and distribution. See LEONARD S. HYMAN, AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE 19-34 (Public Utilities Reports, Inc. 5d ed. 1994) (1983) (discussing the structure of public utility provided electricity). The interstate pipeline system and the local distribution utilities' mains and services are also a type of common carrier. See ALFRED KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS vol. II, 152-71 (Massachusetts Institute of Technology 2d ed. 1989) (1971) (discussing the function of the interstate pipeline system); *id.* at 276-80 (discussing the role of the local gas distribution utility).

7. See Richard D. Cudahy, *Judges' Forum No. 2: Whither Deregulation, A Look at the Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155, 161-71 (2001) (discussing factors that have changed regulated industries including utilities, telephone companies, railroads and airlines).

8. Mark E. Haedicke, *Competitive-Based Contracts for the New Power Business*, 17 ENERGY L.J. 103, 103 (1996).

9. *Id.* at 103-05. There are two indicators of the trend towards competition and away from the old model of energy provisioning. First, twenty states now allow retail customers to choose their own supplier of electricity. Regulatory Research Assocs., Inc., *Electric Industry Restructuring Update*, REG. FOCUS, Aug. 26, 2002, at 1. Second, in North America most large natural gas customers have access to the competition and have been able to select their own suppliers of natural gas. Bhar & MacDonald, *supra* note 17, at 2. In 26 states, smaller consumers of natural gas, including small businesses and residential customers are able to purchase natural gas from a party other than the local gas distribution utility. *Id.* Cash and derivative markets have also sprung-up to support the growing energy market. See Douglas F. John & Ronald S. Oppenheimer, *The Commodization of Energy*, 12 NAT. RESOURCES & ENV'T 251, 253-54 (1998) (describing the shift of natural gas and electricity from being considered utility services to commodities, and the expansion of cash and derivative markets to support the growing competitive market).

energy.<sup>10</sup> The Uniform Commercial Code (U.C.C. or Code) can help address those challenges. From an economic efficiency perspective, the application of Article 2 of the U.C.C. to the energy industry can assist in minimizing transaction costs and properly allocating risks between parties, reducing the cost of energy and benefiting society.<sup>11</sup> However, in order for energy contracts in a competitive environment to fall under the Code's statutory provisions the energy contract must be a "transaction in goods."<sup>12</sup>

This Comment examines the issue regarding the sale of natural gas and electricity as "transactions in goods."<sup>13</sup> Part I of the Comment provides a discussion of the restructuring of the natural gas and electricity industry from a monopoly towards a competitive industry. It also examines the case law treating natural gas and electricity as "goods" or "services," while providing an examination of Article 2. Part II explores whether Article 2 should govern energy transactions. Part III proposes that Article 2 should govern electricity and hybrid energy-swap transactions in a competitive environment.

## I. VANILLA TO 31 FLAVORS: ENERGY FROM A SERVICE TO GOODS

### A. *The Changing Landscape of Energy Utilities*

The changing regulatory structure of the utility industry will alter existing utility-customer relationships.<sup>14</sup> Part of the

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10. Haedicke, *supra* note 8, at 103-04. See also Theodore M. Smith, *Effects of the Uniform Commercial Code on the Operation and Litigation of Natural Gas Contracts*, 14 COLO. LAW. 1809, 1809-11 (1985) (describing some alternative contractual arrangements made by parties in a competitive natural gas market).

11. U.C.C. § 1-102(2) (1972). "[The] Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions." *Id.* Article 2's uniform treatment of contractual issues, its allowance for the ability to enter and modify agreements quickly and efficiently, its relative certainty in terms of damages, and its adoption of customs of the particular industry should help reduce transactions costs and properly allocate risks. See generally Smith, *supra* note 10 (discussing the implications of Article 2 on natural gas contracts). See also Alysse Kaplan, *Partial Satisfaction under the UCC*, 61 FORDHAM L. REV. 221, 237-38 (1992) (stating "[u]nder common-law principles for modification of an agreement, both parties must offer consideration [however,] U.C.C. § 2-209(1) specifies that no consideration is necessary to modify the contract").

12. U.C.C. § 2-102 (1972).

13. *Id.*

14. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1330-49 (1998) (outlining how deregulation, or the movement toward competition, causes three separate changes to the relationship between the utility and its

changing regulatory structure will force public utilities to provide their energy delivery components as a common carrier service, while multiple competing suppliers will provide the energy portion of the utility service.<sup>15</sup>

Electric and natural gas utilities have different structures for producing, transporting and delivering usable energy to their customers. Traditionally, the electricity utility industry has been vertically integrated and "operat[ed] in a traditional island monopoly structure."<sup>16</sup> The natural gas industry consists of firms dedicated to extracting natural gas at the wellhead, interstate pipeline companies to transport the gas to markets, and local distribution companies to deliver the gas to consumers.<sup>17</sup>

In addition, the way customers purchase their energy needs is changing. Most customers purchase gas and electric utility service based on rate contracts approved by state public utility commissions.<sup>18</sup> However, issues of security of energy supply, increasing electricity and natural gas prices, and the concern during the 1970s over the sources of electricity and gas led to a series of federal actions that began the process of moving the gas and electric utilities from a noncompetitive world to a competitive marketplace allowing customers to select their own suppliers.<sup>19</sup>

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customers: a detariffing of utility services, the unbundling of utility service elements, and an end to cross-subsidization). Detariffing implies a removal of regulatory oversight from certain portions of the utility's rate contract with its customers. *Id.* Unbundling implies separating the elements of utility service, distribution, transmission and energy. *Id.* at 1330-49. An end to cross-subsidization implies that each customer will pay its "true" cost of energy and not be subsidized by or will not subsidize any other customer. *Id.*

15. *Id.* at 1363. The competing providers are providers of the energy, whether natural gas or electricity. Theoretically, the only continuing, traditional utility function will be the distribution function. Rossi, *supra* note 3, at 1281-82.

16. Harriet Liza Moses, *The Changing Regulatory Framework: Federal Legislation*, in REINVENTING ELECTRIC UTILITY REGULATION 37, 38 (Gregory B. Enholm & J. Robert Malko eds., 1995). The "island monopoly structure" indicates that, at least for the electric utilities, for many years, the utilities operated independently from each other with their customers receiving electricity solely from the monopoly utility. *Id.* at 39.

17. See Elizabeth L. Bhar & Mark E. MacDonald, *A Comparative Overview of the Unbundling of Gas Distribution Services in North America—Lessons for Nova Scotia and New Brunswick*, 38 ALBERTA L. REV. 1, 2-5 (2000) (discussing the regulation and structure of the natural gas industry prior to 1978). See also *United Distrib. Cos. v. Fed. Energy Regulatory Comm'n*, 88 F.3d 1105, 1122 (D.C. Cir. 1996) (describing the functional separation of the natural gas industry). Traditionally, the local gas utility distributed the gas it purchased from the pipelines and producers. *Id.* at 1122. Now many customers can purchase gas from other suppliers delivered through utility pipes. *Id.*

18. See ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 159-80 (2d ed. 1989) (discussing the structure of rates and the regulatory structure).

19. See Mark D. Luftig, *Factors Driving Change in the Electric Utility*

### 1. Natural Gas Restructuring

Over the last twenty-five years, Congress and the Federal Energy Regulatory Commission (FERC) have passed legislation and issued administrative orders restructuring the natural gas markets and making them more competitive.<sup>20</sup> In the 1980s and early 1990s, the FERC issued orders transforming the interstate pipelines into common carriers by requiring open access to the pipelines, and forcing the interstate pipelines out of the supply function.<sup>21</sup> As the orders forced the interstate pipelines out of the gas supply function and into common carriers, local natural gas distribution utilities (LDCs) followed a similar path, whereby the LDCs became carriers of natural gas for customers and suppliers.<sup>22</sup>

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*Industry, in* ELECTRIC UTILITIES MOVING INTO THE 21ST CENTURY, 11, 12-17 (Gregory B. Enholm & J. Robert Malko eds., 1994) (describing the pressures that are forcing changes in the electric utility industry); Bhar & MacDonald, *supra* note 17, at 1-6 (describing pressures that forced a changing regulatory structure for the natural gas pipelines and utility industry, particularly due to supply shortages); Kearney & Merrill, *supra* note 14, at 1383-1404 (discussing a combination of technological, intellectual, interest group pressures and perceptions of regulatory failure as drivers of change in the regulatory structure of utilities). States also wanted to encourage competition by allowing utility customers to choose their own suppliers of natural gas and electricity in order to reduce utility prices. See William A. Borders, Note, *Learning from the Storm: Lessons for Illinois Following California's Experience with Electricity Restructuring*, 77 CHI-KENT L. REV. 333, 337-46 (2001) (describing the pressures that forced the change in federal regulation over the electric utility industry and describing state regulatory actions allowing electric utility customers to choose their own supplies).

20. *United Distribution*, 88 F.3d at 1122-27. The first step taken by the federal government was to deregulate wellhead prices, which brought competition to the production end of the natural gas market. *Id.* at 1123. Prior to the 1978 Act, a byzantine system of price controls regulated wellhead prices of natural gas. See *id.* at 1122-27 (describing the structure of natural gas wellhead pricing).

21. Natural gas deregulation can be characterized as a series of FERC orders that were followed by appeals in the courts, and whose rulings in turn, combined with added FERC orders, led to a complete "package" of restructuring of the interstate pipeline system. See generally Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (Oct. 18, 1985) (detailing the benefits and detriments to subjecting all pipeline transports to equal access provisions); Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992) (discussing the changes in rules seeking to promote efficiency and equality of natural gas supplied).

22. See Bhar & MacDonald, *supra* note 17, at 4-16 (describing the unbundling of local gas distribution utilities). Unbundling was implemented after state public utility commission approval. *Id.* Bundled gas utility service provided by a utility includes the supplying of natural gas, transportation of that natural gas from wellhead to the distribution network, and final delivery of the gas to customers. *Id.* at 4-5. In an unbundled environment, the utility usually maintains its distribution role. *Id.* The transportation customer of

Some view the natural gas restructuring experience as a model of deregulation and competition.<sup>23</sup> The current market structure is highly competitive with many buyers and sellers of natural gas purchasing natural gas through market hubs and bilateral transactions.<sup>24</sup> Financial derivative markets for natural gas expanded and the underlying network of interstate pipelines, local distribution company resources and extensive storage facilities in production and consumption areas provided for dense physical exchanges.<sup>25</sup> While the natural gas industry changed significantly for larger gas customers, the smaller customers, by in large, still have their local gas utility as the bundler and transporter of natural gas.<sup>26</sup>

## 2. Electricity Restructuring

Electric utility unbundling and competition are a more recent phenomenon.<sup>27</sup> The first significant step toward making electricity transmission facilities into common carriers was the Energy Policy Act of 1992.<sup>28</sup> Subsequent to the Act, electric utilities filed tariffs that unbundled their transmission service, which provide nondiscriminatory open access to other parties seeking to use their transmission network.<sup>29</sup> Producers of electricity have easier access

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the utility will pay the utility a regulated rate for utility service and procure by contract, through its own efforts or with the aid of a marketer, its own gas supply, pipeline capacity and storage services. *Id.*

23. *Id.* at 4.

24. *Id.*

25. *Id.*

26. See Kearney & Merrill, *supra* note 14, at 1345 (describing the limited competition existing for small customers).

27. Cudahy, *supra* note 7, at 169. The federal government did pass legislation in 1978, in response to rising energy prices and concern regarding domestic energy supply. *Id.* The intent of the federal legislation was to diversify the United States' portfolio of electricity-generated assets by requiring electric utilities to purchase power from small renewable energy facilities such as wind and solar. *Id.* The 1978 Public Utility Regulatory Policy Act (PURPA) also required certain conservation measures and required utilities to purchase electricity from certain types of small power plants. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978). PURPA is sometimes characterized as the first step towards competition in the electric utility industry by having some party, other than an electric utility, own and operate a generation source, thereby encouraging the growth of the independent power industry. See Borders, *supra* note 19, at 337 (arguing that PURPA was the first step in the process towards electric restructuring). See also Jason B. Myers, *The Sale of Electricity in a Deregulated Industry: Should Article 2 of the Uniform Commercial Code Govern?*, 54 SMU L. REV. 1051, 1075 (2001) (indicating that PURPA was the first step towards electric utility restructuring).

28. See Cudahy, *supra* note 7, at 169-70 (referring to the expansion of the FERC's authority to order electric utilities to provide open access to their transmission assets, also known as wheeling).

29. See *id.* at 170 (referring to the FERC's actions to require electric

to new markets and customers, which allowed utilities and the independent power producers to compete for customers.<sup>30</sup>

Electric price disparities between different states and different electric utility territories, along with other pressures, led states through legislative or public utility commission actions, to allow retail customers of electric utilities to choose their supplier of electricity.<sup>31</sup> An “unbundled” electric utility provides transmission and distribution service on a nondiscriminatory basis to marketers seeking to serve customers in the utility’s service territory.<sup>32</sup> Unlike the experience in the natural gas industry, only twenty states embrace restructuring and competition in the electric market.<sup>33</sup>

Given the expansion of deregulation into the electric utility industry, a new form of oversight should replace regulatory oversight. For example, Article 2 is able to serve as a means of establishing contractual certainty for customers with a choice of suppliers.

### B. Finding the “Goods”: The Scope of Article 2

For Article 2 rules to apply to a contract, the contract must fall within the Article 2’s scope provision.<sup>34</sup> In order for a contract

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utilities to file non-discriminatory, open access, transmission tariffs).

30. *Id.* Open access to the transmission network led to an expanding competitive wholesale energy market and eventually to the development of NYMEX futures and option contracts along with electricity trading hubs throughout the United States. John & Oppenheimer, *supra* note 9, at 252, 254.

31. *See generally* Kearney & Merrill, *supra* note 14, at 1364-1408 (describing the pressures that move markets towards deregulation and open access).

32. The electricity provided to the customer by the marketer may have been purchased from the utility, a wholesale marketer, an organized exchange, an independent power producer, or from another utility. *See generally* John & Oppenheimer, *supra* note 9, at 252-53 (describing the expansion of options available for the purchase of energy).

33. Regulatory Research Assocs., *supra* note 9, at 1. Twenty-nine states either have slowed their consideration of restructuring or have decided not to seek electricity competition. *Id.* at 1-3. The remaining state, Nebraska is served by publicly-owned electric utilities. *Id.* at 2.

Retail-level choice of suppliers is also a relatively new change to traditional utility-dominated service provision having been in place since only 1998. *Id.* at 2-3. The states with the highest electricity prices—California, Illinois, New York, Pennsylvania, Massachusetts, Connecticut and New Hampshire—are considered early-adopters of electricity deregulation starting with restructuring plans as early as 1995 and open access in 1997-1999. *Id.* at 3, 34. *See also* Cudahy, *supra* note 7, at 172 (discussing how the states with the highest electricity prices were the first states to pursue restructuring); Borders, *supra* note 19, at 340-346 (describing California’s and Illinois’ electricity restructuring programs).

34. U.C.C. § 2-102 (1972).



to fall within the Article 2's scope,<sup>35</sup> the contract must be a "transactions in goods."<sup>36</sup> Therefore, for electricity and hybrid energy-swap transactions to fall within Article 2,<sup>37</sup> the product of the transactions must be "goods."<sup>38</sup>

Goods are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."<sup>39</sup> "Goods must also be both existing and identified before any interest in them can pass."<sup>40</sup> Goods include things extracted from real property, such as crops and minerals.<sup>41</sup>

The next section examines the courts' review of Article 2's application to contracts for natural gas and electricity.<sup>42</sup>

### C. The Case Law on Natural Gas

The cases where courts apply Article 2 to utility services and other contractual disputes in a competitive environment illustrate the types of issues that arise when courts consider natural gas purchase contracts<sup>43</sup> as "goods."<sup>44</sup> Most states have a statute

35. *Id.* § 2-106(1). A "[c]ontract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.*

36. U.C.C. § 2-102.

37. The scope of this Comment does not extend to the legal treatment of electricity and natural gas purchased directly from an organized exchange or to the purchase of energy-based derivatives that do not contain an underlying supply delivered to consumers. For a discussion of the regulatory regime for consumer derivatives see Carolyn H. Jackson, *Have You Hedged Today? The Inevitable Advent of Consumer Derivatives*, 67 *FORDHAM L. REV.* 3205 (1999).

38. See Gary D. Spivey, Annotation, *Electricity, Gas, or Water Furnished by Public Utility as "Goods" Within Provisions of Uniform Commercial Code, Article 2 on Sales*, 48 *A.L.R.3d* 1060 (1973) (exploring courts' application to the definition of goods under Article 2 to goods and services provided by utilities); Sonja A. Soehnel, Annotation, *What Constitutes "Goods" Within the Scope of UCC Article 2*, 4 *A.L.R.4d* 912 (1981) (discussing various courts' application of the definition of goods under Article 2 to a variety of subjects).

39. U.C.C. § 2-105(1) (1972).

40. *Id.* § 2-105(2). Sales of goods that "are not existing and identified are 'future' goods." *Id.* A "present sale of future goods" is "a contract to sell." *Id.* Therefore, a sale of goods for current shipment and consumption, or a sale of goods that will ship and be consumed later, falls within the definition of goods under Article 2. *Id.* § 2-105.

41. *Id.* § 2-107. "A contract for the sale of minerals or the like (including oil and gas) . . . is a contract for the sale of goods . . . if they are to be severed by the seller." *Id.*

42. See, e.g., *Gardiner v. Phila. Gas Works*, 197 A.2d 612, 612-13 (Pa. 1964) (describing the application of Article 2 to a natural gas transaction); *Helvey v. Wabash County REMC*, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972) (describing the application of Article 2 to an electricity transaction).

43. For purposes of this Comment, a purchase contract can refer to the utility-customer relationship governed by a regulated tariff or to a contract between a competitive supplier of natural gas and its customers.

44. See, e.g., *Gardiner*, 197 A.2d at 612 (describing an implied warranty

following Article 2's provision indicating that contracts for the sale of natural gas are goods.<sup>45</sup> Under Article 2, a contract for natural gas is a "transition in goods" under § 2-107.<sup>46</sup>

The next two sections separate the courts' consideration of natural gas as "goods" under Article 2 based on whether the contractual relationship is between the utility and the customer or between the supplier and the customer.

### 1. Cases Involving Utilities and Their Customers

Gas utility cases under Article 2 typically involve gas leaks from service mains that cause damage to a customer's property.<sup>47</sup> In those cases, customers seek to recover damages from the host utility under implied warranties, along with other theories.<sup>48</sup>

For example, in *Gardiner v. Philadelphia Gas Works*,<sup>49</sup> a gas leak damaged a utility customer's residence.<sup>50</sup> The customer sought recovery from the utility on the theory that the utility expressly and impliedly warranted that the gas would be delivered in a safe manner.<sup>51</sup> As a matter of first impression, the court noted that Article 2's goal was to modernize commercial transaction law and to remove sales contracts from the general laws in order to conform with the most appropriate "modern business practice."<sup>52</sup> The court determined that the regulated service provided to the customer was a contract for the "sale of goods" and therefore,

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action by a customer against the customer's local gas utility); *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 567-69 (Tex. 1996) (describing the application of Article 2's good faith and proportionality provisions to an output contract between an exactor and processor of natural gas and an interstate pipeline company).

45. See *Lenape*, 925 S.W.2d at 577 (indicating that forty-three states and the District of Columbia have adopted statutes mirroring Article 2's § 2-107, which indicates that minerals and the like, including natural gas and oil, that are severed from the land are goods).

46. U.C.C. § 2-107 (1972).

47. See, e.g., *Gardiner*, 197 A.2d at 612; *Stanton v. Nat'l Fuel Gas Co.*, 4 U.C.C. Rep. Serv. 2d 378, 379 (Pa. Ct. Com. Pl. 1987); *Univ. of Pittsburgh v. Equitable Gas Co.*, 24 U.C.C. Rep. Serv. 1131, 1131 (Pa. Ct. Com. Pl. 1979) (describing cases in which gas leaked from a utility facility and damaged the customer's home or business).

48. *Gardiner*, 197 A.2d at 612. See U.C.C. §§ 2-313, 2-314, 2-315 (1972) (describing express warranties and implied warranties under Article 2). See generally Debra L. Goetz et al., Special Project: *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1162-1219 (1987) (discussing the application of Article 2's warranty provisions).

49. 197 A.2d 612 (Pa. 1964).

50. *Gardiner*, 197 A.2d at 612.

51. *Id.* However, the customer brought the complaint after the statute of limitations period had expired. *Id.* The customer sought to have the state's Uniform Commercial Code statute of limitations of four years apply, as opposed to the state's noncommercial statute of limitation of two years. *Id.*

52. *Gardiner*, 197 A.2d at 614.

Article 2 applied.<sup>53</sup>

Similarly, in *University of Pittsburgh v. Equitable Gas Co.*,<sup>54</sup> a utility customer sought to have an implied warranty imposed against a gas utility for damages to the customer's premises.<sup>55</sup> The court reasoned that the purchase of natural gas service included not only the actual gas consumed by the buyer, but also the distribution of that gas through the mains and meters.<sup>56</sup> It held that Article 2 warranties applied because the gas was fit for sale when the utility company placed it in the mains.<sup>57</sup>

Further, in *Stanton v. National Fuel Gas Co.*,<sup>58</sup> a court held that a utility-customer contract for natural gas service was a "transaction in goods."<sup>59</sup> However, the court found that a warranty could not be imposed on the utility because no sale had taken place.<sup>60</sup> It also reasoned that because natural gas is a product, it is also a "good."<sup>61</sup>

Courts have held natural gas to be a good in other circumstances. The warranty provisions of Article 2 are applicable to a natural gas utility service when a customer requires a custom service.<sup>62</sup> Natural gas provided through a utility service is a "good"

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53. *Id.* at 613. The Court specifically indicated that "the supplying of gas to the Gardiner's home on a month-to-month basis falls within the definition of a 'contract for sale' or 'sale' within section 2-106." *Id.* at 614 n.8. The Court never specifically refers to the regulated service as goods, but its decision resulted in Pennsylvania's Article 2 provisions applying. *Id.* at 613. See also *Rush v. UGI Corp.*, 29 U.C.C. Rep. Serv. 66, 68 (Pa. Ct. Com. Pl. 1979) (indicating that natural gas is not a tangible, movable good and that no case in Pennsylvania holds that a contract for the sale of gas is a sale of goods).

54. 24 U.C.C. Rep. Serv. 1131 (Pa. Ct. Com. Pl. 1979).

55. *Equitable Gas*, 24 U.C.C. Rep. Serv. at 1131. The customer contended that the gas flow through the utility service mains was an essential part of the regulated sale of gas, and was part of the "continuum of sales-service transactions." *Id.* at 1133.

56. *Id.* at 1134.

57. *Id.* Again, the Court never specifically held that gas was a good under Pennsylvania's interpretation of the U.C.C. See *id.* at 1133-35.

58. 4 U.C.C. Rep. Serv. 2d 378 (Pa. Ct. Com. Pl. 1987).

59. *Stanton*, 4 U.C.C. Rep. Serv. 2d at 382. The Court indicated that natural gas was movable and identifiable. *Id.* at 382-83 (citing *Equitable Gas*, 24 U.C.C. Rep. Serv. 1131). Since the court found that gas was movable and identifiable, the court followed the decision that natural gas was a good. *Id.*

60. *Id.* at 384. In this case, gas had drifted from a cracked main to the customer's premise; the gas had not passed through the customer's service lines. *Id.* at 379. Because the gas had drifted rather than had moved through service lines to the premises, the gas was not considered purchased by the customer and no sale had taken place. *Id.* at 382.

61. *Id.* "If natural gas can be considered as a 'product' for the purpose of 402A, it should also be considered a 'good' for purpose of breach of warranty." *Stanton*, 4 U.C.C. Rep. Serv. 2d at 383. The Court also found that natural gas was a product for purposes of product liability, but because no sale took place there was no liability. *Id.* at 381-82.

62. See *Pioneer Hi-Bred Corn Co. of Ill. v. N. Ill. Gas. Co.*, 306 N.E.2d 337,

when its quality provided to a customer is lacking.<sup>63</sup>

## 2. Cases Involving Gas Purchase Contracts

Another type of contract for the sale of natural gas is a purchase contract, which is, apart from a transaction between a utility and its customers, a transaction between a competitive supplier of natural gas and a buyer.<sup>64</sup> In these types of competitive purchase contracts, the courts look to the individual state's equivalent of § 2-107 of the U.C.C. to determine if the contract for natural gas is a "transaction in goods."<sup>65</sup> Courts consider natural gas purchase contracts to be "transactions in goods" for purposes of applying Article 2's language to a variety of issues. These issues include, resolving ambiguity in contract terms,<sup>66</sup> calculating damages for cover and breach of contract,<sup>67</sup> imposing good faith and fair dealing standards,<sup>68</sup> and conditions associated with output contracts.<sup>69</sup>

Contracts for natural gas can be "transactions in goods" when no utility is involved.<sup>70</sup> Some courts use the tests in §§ 2-105 and

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343 (Ill. App. Ct. 1974), *rev'd on other grounds*, 329 N.E.2d 228 (Ill. 1975) (discussing when the utility's gas is furnished at a desired pressure for the customer's unique consumption needs and implied warranty for fitness for a particular purpose can apply). The Court did indicate that if the gas was supplied for an unspecified, general use, no implied warranty of fitness for a particular purpose would exist. *Id.*

63. *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969, 974 (Wyo. 1970). The Court held that the gas distribution utility impliedly warranted that its gas would be suitable for the purpose intended and merchantable. *Id.* at 974-75. The customer's premises had been damaged when an improper type of gas ("wet gas") had been placed in the distribution lines rather than processed "dry" gas. *Id.* at 972-73.

64. *See Bhar & MacDonald, supra* note 17, at 2-4 (describing the movement from the utility-customer transaction to gas supplier-customer transactions).

65. *See, e.g., Lenape*, 925 S.W.2d at 577 (describing the state law's consideration of natural gas as goods).

66. *See generally Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677 (10th Cir. 1991); *In re MSR Exploration, Inc.*, 147 B.R. 560 (Bankr. Mont. 1992).

67. *See generally Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 443 F. Supp. 14 (S.D. Ohio 1977) (describing the measure of damages for anticipatory repudiation); *Sunflower Elec. Coop. v. Tomlinson Oil Co.*, 638 P.2d 963 (Kan. Ct. App. 1981) (describing the measurement of damages under Article 2).

68. *See W. Gas Processors, Ltd. v. Woods Petroleum Corp.*, 15 F.3d 981, 987 n.7 (10th Cir. 1994) (describing what it properly considered to be within the definition of facilities for purposes of good faith and fair dealing).

69. *See generally Lenape*, 925 S.W.2d at 577 (Phillips, J., concurring and dissenting in part) (finding that output contracts are usually burdened with "indefiniteness and lack of mutuality"); *Colo. Interstate Gas Co. v. Chemco, Inc.*, 854 P.2d 1232 (Colo. 1993) (describing the application of state statutory versions of the U.C.C. § 2-306 to output contracts).

70. *See generally Energy Mktg. Servs. v. Homer Laughlin China Co.*, 186

2-107 to find natural gas transactions between competitive suppliers and purchasers to be within the scope of Article 2.<sup>71</sup> For example, in *Kansas Municipal Gas Agency v. Vesta Energy Corp.*,<sup>72</sup> the Court applied Kansas' definition of goods<sup>73</sup> and determined that the natural gas contract between a marketer and a customer was a "transaction in goods."<sup>74</sup> While the Court did not specifically go through the "goods" analysis in § 2-105, which requires (1) all things, (2) to be movable, (3) at time of identification of the contract for sale,<sup>75</sup> it applied the test to find that natural gas was a "transaction in goods."<sup>76</sup> Similarly, in *Energy Marketing Service v. Homer Laughlin China Co.*,<sup>77</sup> the Court found that a gas purchase contract was a transaction in goods based on Ohio's Commercial Code.<sup>78</sup>

#### D. The Case Law on Electricity

Unlike natural gas, electricity has not been consistently considered goods.<sup>79</sup> The cases considering whether electricity is a

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F.R.D. 369 (S.D. Ohio 1999) (showing cases where a marketer supplies natural gas to utility distribution service customers); *Kan. Mun. Gas Agency v. Vesta Energy Co.*, 843 F. Supp. 1401 (D. Kan. 1994) (showing a natural gas transaction with no utility involved); *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769 (Colo. 1985) (discussing a case between a natural gas user and a private natural gas supplier).

71. U.C.C. §§ 2-102, 2-105, 2-107 (1972).

72. 843 F. Supp. 1401 (D. Kan. 1994).

73. KAN. STAT. ANN. § 84-2-105(1) (2002). "Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." *Id.*

74. *Kansas Mun.*, 843 F. Supp. at 1407.

75. See *Helvey*, 278 N.E.2d at 610 (describing a test for determining if a utility service is goods). The test developed in *Helvey* has been used in instances to examine if a utility or network service can be considered goods. See *Kaplan v. Cablevision of Pa.*, 671 A.2d 716, 723 (Pa. Super. Ct. 1994) (describing the use of tests for goods in the utility industry and the application to the cable television industry); Berg Othman, *Implied Warranties for the Sales of Water: Have the Courts Applied the Wrong Test?*, 30 U.C. DAVIS L. REV. 543, 546 (1997) (describing the application of the *Helvey* test to municipal water service); Myers, *supra* note 27, at 1068 (applying the *Helvey* test to electricity).

76. KAN. STAT. ANN. § 84-2-105(1) (2002).

77. 186 F.R.D. 369 (S.D. Ohio 1999).

78. *Energy Mktg. Serv.*, 186 F.R.D. at 374. Ohio's Commercial Code § 1302.02 defines goods as: "[A] contract for the sale of minerals or the like, including oil and gas, . . . is a contract for the sale of goods." OHIO REV. CODE ANN. § 1302.03 (West 2002).

79. Compare *Helvey*, 278 N.E.2d at 610 (applying U.C.C. § 2-105 to determine that electricity is goods) with *New Balance Athletic Shoe v. Boston Edison Co.*, No. 95-5321-E, 1996 WL 406673, at \*2 (Mass. Super. Mar. 26, 1996) (finding that electricity was not goods given the extensive regulatory oversight of the utility industry).

good have been within the context of products liability<sup>80</sup> and breach of implied warranties. These cases typically involve damages to customers and their premises by utility-provided equipment or power.<sup>81</sup>

### 1. Cases Involving Electric Utilities and Their Customers

*Helvey v. Wabash County REMC*<sup>82</sup> was a key case that held that an electricity sale between a customer and a utility was a “transaction in goods.”<sup>83</sup> The Court determined that for electricity to be a “good” it must be: “(1) a thing; (2) existing; and (3) movable, with (2) and (3) existing simultaneously.”<sup>84</sup> The Court held that because a meter measures electricity, electricity exists, is movable and is a thing.<sup>85</sup> Since the customer in the case purchased the utility service, the contract was a “transaction in goods,” therefore, electricity was within the scope of Article 2.<sup>86</sup>

Contrary to *Helvey*,<sup>87</sup> in *Southwestern Electric Power Co. v.*

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80. See, e.g., *Petroski v. N. Ind. Pub. Serv. Co.*, 354 N.E.2d 736, 747 (Ind. Ct. App. 1976) (describing the use of the product liability standard as applied to electricity delivered by a utility). For a product liability claim, the injured party must show: 1) the product that was sold was defective and unreasonably dangerous to the consumer; 2) the seller of the product engaged in the business of selling the product; and 3) the product got to the consumer “without [a] substantial change in the condition in which it [was] sold.” *Id.*

81. See, e.g., *Helvey*, 278 N.E.2d at 609 (describing a breach of implied and express warranties for utility delivery of electricity that damaged electrical appliances); *Aversa v. Pub. Serv. Elec. & Gas Co.*, 451 A.2d 976, 978 (N.J. Super. Ct. Law Div. 1982) (describing a case of strict liability and breach of implied warranties for a utility’s injury to a customer).

82. 278 N.E.2d 608 (Ind. Ct. App. 1972).

83. *Helvey*, 278 N.E.2d at 609. In this case, the consumer sought to have Article 2’s statute of limitations apply to a claim of damaged property against the utility. *Id.* The utility delivered a higher voltage of electricity than normal to the customer’s residence causing damage to his electric appliances. *Id.* Under Indiana law, actions for breach of a contract must commence within four years after the breach. *Id.* The statute of limitations under Article 2 was six years. *Id.* at 610.

84. *Id.* The Court’s interpretation follows the structure of U.C.C. § 2-105 of the Uniform Commercial Code. At the time of the *Helvey* case, Indiana had a statute similar to U.C.C. § 2-105. *Id.* at 609-10.

85. *Helvey*, 278 N.E.2d at 610.

86. *Id.* In deciding the case, the court indicated that it relied on *Gardiner*. *Id.* at 610. To establish further that electricity was a thing, the Court indicated that electricity was personal property that can be bartered, sold and stolen. *Id.* But see *Hedges v. Pub. Serv. Co. of Ind.*, 396 N.E.2d 933, 935-36 (Ind. Ct. App. 1979) (describing that while electricity is a good and Article 2’s provisions on warranties apply, a customer’s contact with power lines, prior to the passage of the electricity through the customer’s meter, does not constitute a sale, and hence Article 2 does not apply). In *Hedges*, the court found that there was no sale of electricity, even though it held electricity was a product, because the plaintiff’s contact of a high voltage transmission line with a metal ladder was not the typical way of delivering electricity. *Id.* at 935-36.

87. *Helvey*, 278 N.E.2d at 609.

*Grant*,<sup>88</sup> the Texas Supreme Court found that while electricity sales may be “transactions in goods,” Article 2 would not apply to the utility-customer contractual relationship.<sup>89</sup> The Court indicated that the application of Article 2 to consumer-utility sales would weaken the comprehensive regulatory system governing the relationship between utilities and their customers.<sup>90</sup> However, the Appellate Court held earlier in *Grant v. Southwestern Electric Power Co.*<sup>91</sup> that electricity was a manufacturable and sellable commodity,<sup>92</sup> therefore, Article 2 applied since electricity sales were “transactions in goods.”<sup>93</sup>

Some courts distinguish whether electricity is a “good” based

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88. 73 S.W.3d 211 (Tex. 2002).

89. *Grant*, 73 S.W.3d at 218-19.

90. *Id.* at 218-19. The Supreme Court of Texas did not reject the idea that a contract for the sale of electricity was a “sale of goods.” *Id.* at 218. In addition, the Court did not rule on the defendant utility’s assertion that it provided electric service. It supported the utility’s assertion that Article 2 should not govern an area where state regulation was extensive and governed all aspects of the electricity purchase contract (in essence, the price, terms and conditions of regulated utility service). *Id.* at 218-19. It noted that the Public Utility Commission regulation serves as a substitute for competitive markets. *Id.* In deciding the case, the court stated that “unlike contracts for the sale of goods that unregulated companies may enter into in a free market, a public utility can only enter into contracts consistent with the regulatory scheme.” *Id.* at 219. The court seemed to indicate that in a competitive environment, without the regulatory oversight of a public utility commission, Article 2 would apply to the sale of electricity. *Id.* at 219.

The court also indicated that it was troubled in extending Article 2 to cover utility-customer transactions given the highly regulated nature of the utility industry. *New Balance*, 1996 WL 406673, at \*2. In that case, a power surge had damaged a customer’s production facilities. *Id.* at \*1. The court cited *Helvey* and *Gardiner* courts’ decisions that electricity and natural gas, respectively, were goods. *Id.* at \*2. The Court rejected their analysis since public utilities are heavily regulated and their services are not open to competition. *Id.* at \*2.

91. 20 S.W.3d 764 (Tex. Ct. App. 2000), *aff’d in part, rev’d in part*, 73 S.W.3d 211 (Tex. 2002).

92. *Grant*, 20 S.W.3d at 771.

93. *Id.* at 771. The Court of Appeals in this case held that the public utility’s tariff established the contractual duties of the parties and was a contract. *Id.* at 769. The Court decided that the distribution of electricity may be a service, and not under Article 2, but “electricity itself is a consumable product” and therefore a good. *Id.* at 771. The Court based this finding on *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988). *Grant*, 20 S.W.3d at 771, n.22. However, the Court in *Houston Lighting & Power* addressed whether electricity was a product for purposes of a product liability claim, but never specifically considered the issue of Article 2’s application. *Houston Lighting & Power*, 765 S.W.2d at 785. The Court found that “[e]lectricity is a commodity, which, like other goods, can be manufactured, transported and sold.” *Id.* The Court found that electricity was a product because it was in the stream of commerce and it was produced, but the utility was not liable for a customer’s injury through contact with a transmission line. *Id.* at 785-86.

on the passage of electricity through the customer's meter.<sup>94</sup> Others opine on whether the injury caused by the electricity occurred because of the sale of the electricity product between the utility and customer.<sup>95</sup>

The remainder of courts that have considered the issue reject electricity as a "good" in any context.<sup>96</sup> In *Williams v. Detroit Edison Co.*,<sup>97</sup> the Court determined that electricity was a service, and so Article 2 did not apply.<sup>98</sup> Similarly, in *Bowen v. Niagara Mohawk Power Corp.*,<sup>99</sup> a customer sought recovery under products liability for damage a power surge caused her house.<sup>100</sup> The Court held that electricity was a service and there is no manufacturer of electricity.<sup>101</sup> In *United States v. Consolidated Edison Co. of New York*,<sup>102</sup> the Court held that electricity sold between a utility and its customers was not a "transaction in goods" where the dispute related to the reservation of rights for the recovery of interest on a utility overcharge.<sup>103</sup>

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94. See Myers, *supra* note 27, at 1056 (discussing how courts have made a distinction between whether electricity is "goods" based on if the electricity has passed through the customer meter).

95. *Id.*

96. See, e.g., *G & K Dairy v. Princeton Elec. Plant Bd.*, 781 F. Supp 485, 489-90 (W.D. Ky. 1991) (indicating that because the state's public utility commission has determined electricity to be a service, Article 2 does not apply and because the damages were inflicted by stray voltage, no transactions in goods occurred because a utility does not sell stray voltage); *Farina v. Niagara Mohawk Power Corp.*, 81 A.D.2d 700, 700-01 (N.Y. App. Div. 1981) (finding that electricity cannot be a good because the plaintiff was injured by contacting transmission lines and hence, the electricity was not in a marketable state, was neither packaged nor in the stream of commerce, and that electricity evades definition).

97. 234 N.W.2d 702 (Mich. Ct. App. 1975).

98. *Id.* at 705-06. In *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 196 N.W.2d 316 (Mich. Ct. App. 1972), an electrical fire destroyed the plaintiff's building. *Buckeye Union*, 196 N.W.2d at 317. The Court held that electricity is not a "good" under Article 2, but implied warranties should apply to the sale of services and of goods. *Id.* at 317-18.

99. 183 A.D.2d 293 (N.Y. App. Div. 1992).

100. *Bowen*, 183 A.D.2d at 294.

101. *Id.* at 297. While this was a product liability case, the lack of manufacture as seen by the court would seem to imply that electricity could not be considered goods.

102. 590 F. Supp. 266 (S.D.N.Y. 1984).

103. *Consolidated Edison*, 590 F. Supp. at 269. Consolidated Edison refunded an overcharge to the U.S. Postal Service ("USPS"), but did not include interest. *Id.* at 267. The USPS endorsed the check, but indicated that the check was not to be construed as a waiver of the claim of the interest. *Id.* at 267. While the Court rejected the application of Article 2, it allowed the application of New York's version of the U.C.C. on the reservation of rights issue. *Id.* at 269-70.



## 2. Cases Involving Electricity Purchase Contracts

Courts are split whether competitive power purchase contracts are “transactions in goods.” In *In re Pacific Gas & Electric Co.*,<sup>104</sup> the Court held that an electricity transaction between two utilities is a “transaction in goods” and Article 2 applied.<sup>105</sup> The Court determined that electricity is a “transaction in goods” because the electricity passes through a customer’s meter, is marketed, is a commodity, is manufactured, transported and sold.<sup>106</sup> The Court also applied the *Helvey* test finding that a contract for the purchase of electricity is a “transaction in goods.”<sup>107</sup>

However, courts do not uniformly consider electricity sales a “transaction in goods.” The court in *Rural Electric Convenience Cooperative Co. v. Soyland Power Cooperative*<sup>108</sup> held that the sale of electricity is not a “transaction in goods” even if the voltage level is reduced to usable levels and the power is measurable through the customer’s meter.<sup>109</sup> Similarly in New York, courts hold that Article 2 does not apply to purchase contracts between

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104. 271 B.R. 626 (N.D. Cal. 2002).

105. *In re Pacific Gas*, 271 B.R. at 638-39. The case centered around whether the utility, Puget Sound Energy, could demand adequate assurances from Pacific Gas & Electric after Pacific Gas & Electric had failed to deliver power to Puget Sound several times in 2001. *Id.* at 631. The utilities executed a contract in 1991 whereby each utility would sell electricity to the other during certain times of the year. *Id.* at 629-30. At the time of the breach of contract, the California Energy Grid was nearing blackout conditions and Pacific Gas & Electric was on the verge of bankruptcy. *Id.* at 634-35.

106. *Id.* at 638-40.

107. *Id.* The court cited the California Commercial Code that adopted the U.C.C. definition of goods as “all things . . . which are movable at the time of identification to the contract for sale.” *Id.* at 638. The court dismissed the argument that electricity in a utility’s distribution system was not goods and commented on the holdings of other courts in this regard:

These cases seem to hold that transformation from a service to a product occurs when raw power crosses from the utility’s distribution system to the customer’s meter. And so I am at a loss to know why the same rules wouldn’t apply when a customer happens to be a utility and even though the power is much greater, it certainly contemplates some sort of meter or some source of measuring device.

*In re Pacific Gas*, 271 B.R. at 638-39. The Court then held that because California case law considered electricity to be a product, it was also a good by analogy. *Id.* at 639. The court said electricity was a good when it was moved through power lines, was metered and thus became identifiable. *Id.* at 640. The court also indicated that because, even though other courts have not found electricity to be goods, various provisions of Article 2 have been applied to transactions in electricity by those courts, so Article 2 should govern electricity as a transaction in goods. *Id.* at 639-40.

108. 606 N.E.2d 1269 (Ill. App. Ct. 1992).

109. *Rural Electric*, 606 N.E.2d at 1275. Unfortunately, the court does not provide any reasoning for its decision other than citing *Singer Co. v. Baltimore Gas & Electric Co.*, 558 A.2d 419, 424 (Md. Ct. Spec. App. 1989). *Rural Electric*, 606 N.E.2d at 1275-76.

independent power producers and utilities<sup>110</sup> because the sale of electricity is a service not a “transaction in goods.”<sup>111</sup>

## II. ANALYSIS

### A. *Testing the Goods*

Courts apply several different tests to determine whether Article 2 applies to the sale of a utility’s output.<sup>112</sup> The *Helvey* test applies the definition of goods to a transaction to determine if it falls within the scope of Article 2.<sup>113</sup> The predominant-factor test applies to contracts involving mixed service and goods contracts.<sup>114</sup> The gravamen of the action test also applies to contracts for electricity.<sup>115</sup> In addition, courts consider other factors to determine whether an electricity contract is a “transaction in goods” or a service.<sup>116</sup> Finally, a policy-based test, which compares the attributes of natural gas to those of electricity can be helpful in determining if Article 2 applies to a utility sale.<sup>117</sup>

#### 1. *The Helvey Test*

The *Helvey* test<sup>118</sup> applies the definition of goods under U.C.C. § 2-105.<sup>119</sup> The *Helvey* test sets out the following criteria in defining goods: 1) is the good a thing; 2) which is existing;<sup>120</sup> 3) is

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110. See *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 705 N.E.2d 656, 661-62 (N.Y. 1998) (holding that while electricity still cannot be considered goods under New York law, Article 2’s demand for adequate assurances should be allowed for public power reasons); *Sterling Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 239 A.D.2d 191, 191 (N.Y. App. Div. 1997) (describing that adequate assurances cannot be demanded by a party to an electric sale contract because electricity was not goods); *Phila. Corp. v. Niagara Mohawk Power Corp.*, 207 A.D.2d 176, 178 (N.Y. App. Div. 1995) (applying Article 2’s rule on good faith in output contracts to an agreement on electrical production, even though electricity is not a good).

111. *Encogen Four Partners, L.P. v. Niagara Mohawk Power Corp.*, 914 F. Supp. 57, 61 (S.D.N.Y. 1996). The Court relied on New York precedent holding that the sale of electricity was a service not a good. *Id.*

112. See *Othman*, *supra* note 75, at 549-52 (describing the imposition of implied warranties on municipal water utilities and the relationship of Article 2’s application to utility services).

113. See *infra* Part II, A-1.

114. See *infra* Part II, A-2.

115. See *infra* Part II, A-3.

116. See *infra* Part II, A-4..

117. See *infra* Part II, A-5.

118. See *Helvey*, 278 N.E.2d at 619-10 (applying § 2-105 to determine if electricity provided by a utility is a “transactions in goods”).

119. U.C.C. § 2-105 (1972).

120. The analysis of electricity as “goods” blends the concept of tangibility with being existing and identifiable. Myers, *supra* note 27, at 1070-71. An example given of something existing, but not identifiable for sale, is the wind. *Id.* at 1068. Further identifiably implies a thing is tangible. *Id.* at 1068.

movable; and 4) is existing and movable simultaneously.<sup>121</sup> In *Helvey*, the Court found that a thing must be identifiable for it to be a “good.”<sup>122</sup> However, the difficulty of applying this test is assessing whether each element exists with the particular good.

a. Electricity a thing

To be a thing, Article 2 requires that the object of the contract be tangible.<sup>123</sup> Tangible implies a thing that has real substance and value.<sup>124</sup> Tangibility encompasses things manufactured through commerce.<sup>125</sup> Pure service contracts are distinguishable from goods because they do not produce a final product.<sup>126</sup> However, a good can still be tangible if there are significant intangible qualities and the services present related to the object of the contract.<sup>127</sup>

Electricity, unlike a pure service or something intangible, such as intellectual property, has consumable physical properties.<sup>128</sup> Electricity is also measurable through metering, which implies tangibility.<sup>129</sup> Electricity is a commodity, like other

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121. *Helvey*, 278 N.E.2d at 610.

122. *Id.*

123. Myers, *supra* note 27, at 1068.

124. *Id.* at 1069.

125. See Leslie M. Bock, *Sales in the Information Age: Reconsidering the Scope of Article 2*, 27 IDAHO L. REV. 463, 473 (1990) (describing the scope of Article 2 as limited to tangible, manufactured products in commerce). Tangible, manufactured things that come under Article 2 include items such as automobiles, chemicals, machinery and those things that may not be “goods in common parlance,” such as natural gas, farm animals and future crops. *Id.* at 473-74.

126. See *id.* at 474 (stating that “Article 2 was clearly not intended to cover pure service contracts”). See also Myers, *supra* note 27, at 1068 (describing that the “thing element” was designed to exclude pure service contracts from Article 2).

127. See Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 EMORY L.J. 853, 860-83 (describing that many things considered goods under Article 2 have significant amounts of services and intellectual property inherent in their formation). Software is used as an example of a thing that contains significant amounts of intangibles in the form of ideas, intellectual property and services, yet it is argued, should fall under Article 2. *Id.* at 882-83. Cf. Raymond T. Nimmer, *The Revision of Article 2 of the Uniform Commercial Code: Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1351 (1994) (arguing that tangibility should have relatively little to do with whether a transaction is covered by Article 2).

128. See *Farina*, 81 A.D.2d at 700 (suggesting that electricity is “[a] subtle agency that pervades all space and evades successful definition”). Electricity can be sensed, although not seen, through its tangible effects. Myers, *supra* note 27, at 1069. Intellectual property is not normally considered to be goods that can be consumed and handled and is intangible. See Nimmer, *supra* note 127 (discussing the need to revise Article 2 to cover intangibles).

129. See *Helvey*, 278 N.E.2d at 610 (finding that electricity qualifies as a

products such as natural gas, oil, and hog bellies, indicating that it has some value.<sup>130</sup> Courts distinguish between electricity as a natural force, an intangible (e.g., static electricity), and as a manufactured product delivered as a current into a customer's premises.<sup>131</sup> Electricity is energy eventually used by customers.<sup>132</sup>

Some courts that recognize electricity as goods do not expressly analyze the tangibility or "thingness" of electricity.<sup>133</sup> Other courts reason that if electricity is a product then it is also a good.<sup>134</sup> Still other courts indicate that electricity is a commodity bought and sold and consumable from the perspective of an ordinary user.<sup>135</sup> In the context of products liability, few courts classify electricity as an intangible.<sup>136</sup>

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good because the electric utility monitors how much electricity passes through the meter and whatever is measurable is a good).

130. See *In re Pacific Gas*, 271 B.R. at 638-40 (describing electricity as tangible by virtue of being a commodity).

131. See *Singer*, 558 A.2d at 424 (discussing that electricity in its "raw state" is not a good, but when passed through the meter it transforms and becomes purchasable). See also *Myers*, *supra* note 27, at 1070 (discussing electricity characterized as charged particles and not merely a natural force). Manufactures must create electricity for it to be usable, therefore, it is tangible. *Id.*

132. Electricity does not exist simply because miles of copper wire eventually lead into a customer's meter. The copper wires of the utility distribution simply are a conduit for electricity, which contain nothing without being energized. Power plants manufacture the current or charged particles that then move along those wires to customers hooked up to the distribution system.

133. See *In re Pacific Gas*, 271 B.R. at 638-40 (describing electricity as tangible since it is a commodity and is sold, delivered, and manufactured). See also *Helvey*, 278 N.E.2d at 610 (focusing on the movability of electricity rather than its "thingness").

134. See *Pierce v. Pacific Gas & Elec.*, 212 Cal. Rptr. 283, 294 (Cal. Ct. App. 1985) (arguing that if electricity is a product it is also a good). The *Pierce* Court determined that electricity was a good because it has value, is capable of delivery and is produced for commerce and trade. *Id.* at 289.

135. See *Grant*, 20 S.W.3d at 771 (discussing that while distribution is a service, electricity is a consumable product and hence considered goods under Article 2). The Supreme Court of Texas later overruled the Appellate Court's holding that electricity is not within the scope of Article 2 because the utility industry is heavily regulated. *Grant*, 73 S.W.3d at 218-19.

136. See *Farina*, 81 A.D.2d at 700 (suggesting that electricity is "a subtle agency that pervades all space and evades successful definition"). See also *Williams v. Detroit Edison Co.*, 234 N.W.2d 702, 706 (Mich. Ct. App. 1975) (finding that while electricity is intangible, it is still a product).

Another court held that electricity was not a product because it is not manufactured. *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 838 (Ohio 1988). The court indicated that electricity is nothing more than naturally charged electrical particles. *Id.* Contrary to *Otte*, another court held that electricity was manufactured. See *Ransome v. Wis. Elec. Power Co.*, 275 N.W.2d 641, 643 (Wis. 1979) (finding distribution of electricity was a service).

b. Electricity as Existing and Identifiable to the Contract

The *Helvey* test indicates that a thing must be movable and existing, which is further modified by U.C.C. § 2-105(2)m, which requires that a thing be existing and identified.<sup>137</sup> The *Helvey* test emphasizes that the movability and the identification of an object of a contract is a key component in determining whether the transaction falls under Article 2.<sup>138</sup> When identification and existence overlap as the object of the contract, both must be determined and must be in existence.<sup>139</sup>

The *Helvey* test supports the conclusion that electricity is identifiable because it is the object of a contract.<sup>140</sup> The movement of electricity from the utility distribution system through the customer's meter "identifies" that the electricity exists.<sup>141</sup> The measurement of the current as it moves through the utility distribution system and through the customer's meter allows one to identify the electricity consumed.<sup>142</sup> A contract for the sale of electricity indicates the quantities to deliver and the timing of the delivery.<sup>143</sup>

Further, the transportation of electricity from its source, the generation facility, across the high voltage transmission system to the utility distribution system is governed by a system that identifies the power as it moves from "source to sink."<sup>144</sup> Under

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137. *Helvey*, 278 N.E.2d at 610.

138. See Crystal L. Miller, *The Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web*, 59 NOTRE DAME L. REV. 717, 726 (1984) (describing movability as a key factor to determine if the object of a contract falls within Article 2's definition of goods).

139. See *Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro*, 412 S.E.2d 910, 915-16 (N.C. App. 1992) (holding that water provided by a municipal utility was movable and identified at the time of the formation of the contract).

140. Miller, *supra* 138, at 726-27.

141. See *Singer*, 558 A.2d at 424 (explaining that electricity transforms into a usable product when it passes through the meter).

142. See *In re Pacific Gas*, 271 B.R. at 638-40 (illustrating that the movement of the electricity between utility distribution systems demonstrates the existence or presence of the electricity).

143. See *id.* at 629-34 (describing the contractual arrangement between buyer and seller of electricity as including the level of power to be exchanged, where the power was to be exchanged, and when the power was to be exchanged). The court in *In re Pacific Gas* highlighted the physical nature of electricity into the movement of the electricity, the timing of the movement and the amount of electricity transferred—as indicative of the existence of the electricity. *Id.* at 629-34, 639.

144. See, e.g., Commonwealth Edison Co., *Open Access Transmission Tariff*, at <http://comedtransmission.com/trsfiles/oatt2.doc>, at 47-114 (last visited Oct. 31, 2003) (describing an example of the steps required for the delivery of electricity into the Commonwealth Edison utility system). In order for a competitive supplier to deliver power to a customer within a utility's distribution system, the supplier must identify where the power is to be

this system, the source of the power is identified as is, the amount and time it is to be “shipped,” and the party taking the power at the utility’s distribution grid.<sup>145</sup> Therefore, because electricity can be contracted for, it is identifiable.

### c. Electricity as Movable

In order to be a good under the *Helvey* test, a thing must be movable.<sup>146</sup> In *Helvey*,<sup>147</sup> the court described the movement of electricity by noting that the customer’s bill is a monthly reminder that electricity moves through the customer’s meter.<sup>148</sup> Other courts indicate that electricity is not a product until it moves through the customer’s meter,<sup>149</sup> and the focus on the passage of electrons or current through the meter implies movement of electricity. Therefore, since electricity moves, it is identifiable by contract and is a thing it constitutes a “transaction in goods” under Article 2.<sup>150</sup>

## 2. The Predominant Factor Test

For transactions that involve a mixture of goods and services, courts apply the predominant factor test.<sup>151</sup> Under the

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delivered from and the point at which the utility will receive the power. *Id.* at 54-56. The supplier must then schedule the power and amount with the transmission-provider (the utility). *Id.* at 57. The transmission-providing utility operates its transmission system akin to a common carrier selling capacity to the parties desiring to move electricity “across” the system. *In re Pacific Gas*, 271 B.R. at 629-40.

145. *Id.*

146. *Helvey*, 278 N.E.2d at 610.

147. *Id.*

148. *Id.*

149. *See Farina*, 81 A.D.2d at 700 (finding that electricity in overhead lines had not actually been delivered to a customer for purposes of establishing product liability). *Cf. Ransome*, 275 N.W.2d at 649 (describing how electricity is subject to products liability if it passes through the meter).

150. *See Myers*, note *supra* 27, at 1071 (arguing that case authority lead to the conclusion that electricity falls within the scope of Article 2).

151. *See Othman*, *supra* note 75, at 551 (describing the use of the predominant factor test as a means for assessing whether water provided by a municipal utility is a transaction in goods). In *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir 1974), the Court assessed whether the sale and installation of a bowling ally was a transaction in goods or a sale of services. *Bonebrake*, 499 F.2d at 958-59. The court indicated that services usually play a vital role in transactions of tangible property. *Id.* at 958. The transformation of the raw materials of the product into a thing usable by the customer and the distribution of the thing to the customers will always involve services. *Id.* at 958-59. Most goods will involve some idea, intellectual property or information to transform the object of the contract into a thing that the buyer can use. *See Rodau*, *supra* note 127, at 863-74 (describing the mixture of intellectual property, ideas, and tangible property that go into computer software and the application of the predominant factor test to determine if computer software is a transactions in goods).

predominant factor test, courts examine whether the services portion or the goods are the primary purpose of the contract.<sup>152</sup> Courts look to the nature of the services performed to determine whether the services are a means to an end of providing the good, or if the service performed is for its own sake.<sup>153</sup>

The sale of electricity by a utility to a customer is necessarily a mixture of goods and services. Courts routinely characterize transmission and distribution of electricity as a utility service.<sup>154</sup> However, the courts rarely apply the predominant factor test for utility goods and services.<sup>155</sup>

Several courts consider electricity to be goods under the predominant factor test, even though the problem that caused the customer's injury came from a failure in distribution.<sup>156</sup> Other courts indicate that the predominant feature of the contract was a service.<sup>157</sup> The court in *Cincinnati Gas & Electric Co. v. Goebel*<sup>158</sup>

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152. See Miller, *supra* note 138, at 724-25 (describing the application of the predominant factor test).

153. *Id.* Services to make equipment functional are incidental to a contract, implying that a contract is a "transaction in goods." *Id.* at 718.

154. See *G & K Dairy*, 781 F. Supp. at 489 (citing Kentucky's public utility statute defining services as "any practice relating to the service of any utility"); *Pierce*, 212 Cal. Rptr. at 291 (describing the distribution of electricity as a service even if the electricity is a consumable product); *Smith v. Home Light and Power Co.*, 734 P.2d 1051, 1056 (Colo. 1987) (noting that the utility provides a service to its customers when it delivers electricity); *Aversa*, 451 A.2d at 979 (describing the transmission of electricity as a service). See also *Henderson v. Anglin*, No. 86-C-1909, 1987 WL 5240, at \*1 (N.D. Ill. Jan. 7, 1987) (describing the transmission of long distance communications as a service); *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply*, 381 A.2d 774, 782 (N.J. 1977) (describing the furnishing of water, through the municipal utility's mains is a sale of a service). *But see* cases cited at *supra* notes 47 and 62 and accompanying text (noting that Article 2 applies to transactions in goods even if the problem occurs with the distribution service for natural gas utilities).

155. Myers, *supra* note 27, at 1066.

156. *Id.* at 1067. In *In re Pacific Gas*, the court determined that Article 2 governed an electricity sale between two utilities because electricity is a good. *In re Pacific Gas*, 271 B.R. at 639. The court also conducted an analysis based on the product liability case law and determined that electricity was a product. *Id.* at 639-40. Conducting a *Helvey* test analysis, the court found that electricity is a good and the transmission and distribution of electricity is a service. *Id.* It suggested that if a thing is a product it is also a good for purposes of Article 2. *Id.* at 639. The predominant feature of the transaction in the case was the sale of electricity and the failure to deliver the contracted electricity. *Id.* at 636.

*Bellotti v. Duquesne Light Co.*, 4 U.C.C. Rep. Serv. 2d 1393 (Pa. Ct. Com. Pl. 1987), the Court found electricity to be a transaction in goods even though a power surge, a distribution-related problem, caused the damage to the customer. *Bellotti*, 4 U.C.C. Rep. Serv. 2d at 1394-95.

157. See, e.g., *Singer*, 558 A.2d at 424 (describing the failure to deliver electricity to the customer premises, as a service related problem because the failure to deliver the power occurred on the utility-side of the meter). See

discussed the hybrid nature of the electric utility service.<sup>159</sup> It indicated that electricity being sold to a customer is service before it enters a customer's meter and is goods after it passes through a customer's meter.<sup>160</sup>

The question becomes whether a utility's contractual relationship with a customer, governed by regulated tariff, is predominantly a service.<sup>161</sup> The result of the transaction between an electric utility and customer is a consumable product provided to the customer.<sup>162</sup> However, an entire integrated structure generates, transmits, and distributes that power to the customer under significant regulatory oversight providing a continuous service to the customer.<sup>163</sup>

### 3. Gravamen of the Action Test

Another method to determine whether electricity is goods or services is the gravamen of the action test.<sup>164</sup> The gravamen of the

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*generally Consolidated Edison*, 590 F. Supp. 266 (describing a case where no distribution or power-related problems occurred, but a billing problem occurred where the court found that electricity is a service). The court in *Consolidated Edison* alluded that the predominant feature of electricity provided by a utility is a service. *Id.* at 269. Note that in New York and other states, the sale of electricity between an independent power producer and a purchasing utility are services. *See, e.g., Sterling Power*, 239 A.D.2d at 191. Clearly, the parties in the case were not exchanging a distribution service, but rather only electricity. *Id.*

158. 502 N.E.2d 713 (Ohio Mun. Ct. 1986).

159. *Goebel*, 502 N.E.2d at 714.

160. *Id.* at 715. In *Goebel*, the court applied the *Helvey* test, but added another factor to the test. *Id.* at 714-15. Relying on precedent, the court determined that a problem occurring prior to electricity passing through a meter implies that electricity is a service and a problem occurring after electricity passes through a meter leads to the conclusion that electricity is a good. *Id.* at 714-15.

161. *See Whitmer v. Bell Tel. Co. of Pa.*, 522 A.2d 584, 587 (Pa. Super Ct. 1987) (discussing telephone communications as a service because it did not provide the thing transmitted, the communication). *Whitmer* noted that the electric and gas utilities both provide the thing transmitted and the transmission service. *Id.* It determined that electricity or gas in the distribution system are services and not goods or products until they move past the meter. *Id.*

162. *See Grant*, 20 S.W.3d at 771 (noting that in the mind of the customer, distribution was a service, but the electricity provided was a consumable product).

163. *See Grant*, 73 S.W.3d at 218-19 (stating that the regulated structure of the utility was so extensive that Article 2 should not supercede regulatory law governing utility to customer relationships).

164. Under the gravamen of the action test, a court must assess the part of the contract that caused a breach or injury. Ann Lousin, *Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code: Proposed UCC 2-103 of the 2000 Version of the Revision of Article 2*, 54 SMU L. REV. 913, 916 (2001). For instance, applying the facts of *Bonebreak*, if the installation of the bowling ally was defective, then Article 2 would not



action determines whether the item in question is a “transaction in goods” or services based on where the breach of contract occurred.<sup>165</sup> Distribution-related problems of voltage surges, electrical shock distribution-related power outages, and other service-related problems would be services under the gravamen of the action test.<sup>166</sup> Contract-related problems, such as the failure to deliver or render payment, would have the electricity contract treated as a “transaction in goods.”

#### 4. Other Factors Introduced by the Courts

Courts also use additional factors beyond the *Helvey* test and the predominant factor test to assess whether the object of a contract is a transaction in goods.<sup>167</sup> Some courts use the post-meter/pre-meter distinction to determine if electricity is a product.<sup>168</sup> In *Goebel*, the court specifically distinguished electricity as a “good” when it passes through a customer meter from electricity that avoids the customer meter.<sup>169</sup> The court in

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govern. Conversely, if the equipment provided failed to work, then Article 2 would govern. *Id.*

165. *Id.*

166. While the courts have not done explicit analysis, courts have focused on electricity as a service and rejected the application of Article 2 when the breach of contract of injury occurred before reaching the meter in the utility distribution system. See *Singer*, 558 A.2d at 424 (describing the failure to deliver electricity to the customer premises as a service-related problem because the failure to deliver the power occurred on the utility-side of the meter); *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 108 (Minn. Ct. App. 1992) (describing Article 2 as not applying because stray voltage was a problem associated with the distribution of electricity, but accepting on *Helvey's* implication the electricity may be goods); *Navarro County Elec. Coop., Inc. v. Prince*, 640 S.W.2d 398, 400 (Tex. App. 1982) (holding that injury to a customer because of contact with a high voltage transmission line is not governed by Article 2 because transmission was a service).

167. See *Myers*, *supra* note 27, at 1064-66 (describing how several different factors used in the analysis of electricity as a “good” are inappropriate). Courts have tended to use the “if it’s a product, it’s a good” analysis only in terms of applying both strict product liability and implied warranties of merchantability to customer injury. See generally Roger W. Holmes, *Strict Product Liability for Electric Utility Companies: A Surge in the Wrong Direction*, 29 SUFFOLK U. L. REV. 161 (1995) (discussing the courts application of strict liability to cases of electrical damage to customers and their premises).

168. See, e.g., *Smith*, 734 P.2d at 1057 (imposing no product liability for injury when a person contracts a high voltage transmission line).

169. *Goebel*, 502 N.E.2d at 715. In *Bellotti*, an electrical power surge was found to be goods because it had passed through the customer’s meter. *Bellotti*, 4 U.C.C. Rep. Serv. 2d at 1394-95. The Court indicated that the transmission of electricity was a service and therefore was not a product and was not a good. *Id.* The Court in *ZumBerge* indicated that Article 2’s application to electricity is unsettled. *ZumBerge*, 481 N.W.2d at 108. In the case, stray voltage had damaged the utility customer’s livestock. *Id.* at 105. Stray voltage occurs when low levels of electric current “escape” from a

*Singer Co. v. Baltimore Gas & Electric Co.*,<sup>170</sup> held that because power interruptions occur before the electricity reached the customer's meter the power was in an "unmarketed and unmarketable" state in the utility's distribution system, therefore, no "transactions in goods" took place.<sup>171</sup>

Another factor the courts consider in determining whether electricity is a good is whether the transaction goes to the ultimate consumer. In *Rural Electric Convenience Cooperative v. Soyland Power Cooperative*,<sup>172</sup> the Court held that because the transaction was between two utilities and not with ultimate customers, the transaction was not a sale of goods.<sup>173</sup>

A further distinction, unique to the utility industry, is the consideration that Article 2 only applies to industries without significant regulation.<sup>174</sup> The court in *Grant* held that while electricity looked like a transaction in goods, the transaction did not resemble a commercial transaction due to the lack of competition and choice in the electric utility industry.<sup>175</sup> The court indicated that the predominant and omnipresent regulatory

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grounding line. *Id.* The source of the stray voltage occurred after the electricity had passed through the customer's meter. *Id.* at 107-08. The court held that while the customer's purchase of power from the meter was a transaction, the incidental "escaped" current was not part of the transaction. *Id.* Because the stray voltage was not part of a transaction, Article 2 did not apply. *Id.* at 107. In addition, the Court declined to consider whether the customer-utility transaction was a transaction in goods and therefore did not rule on the issue of whether the sale of electricity is a transaction in goods and covered by Article 2 in Minnesota. *Id.*

170. 558 A.2d 419 (Md. Ct. Spec. App. 1989).

171. *Singer*, 558 A.2d at 424. The court distinguished electrical problems occurring pre-meter from those occurring post-meter as other courts have done, even though there were no power surges or electrical shocks in this case. *Id.* The problem was that the electricity did not reach the customer's facilities in a usable form due to power surges and interruptions of service. *Id.* at 423-24. The court also indicated that the power was delivered at a higher voltage than normal and not a stepped-down voltage suitable for the customer's use. *Id.* at 424. Therefore, the electricity involved in the transaction was not a transactions in goods. *Id.* The court did not treat the electricity as nonmerchandise or defective. *Id.*

172. 606 N.E.2d 1269 (Ill. App. Ct. 1992).

173. *Rural Electric*, 606 N.E.2d at 1275. Several other decisions have found that transactions between independent power producers and the purchasing utilities were not goods. See generally *Philadelphia Corp.*, 207 A.D.2d 176; *Gordonville Energy v. Va. Elec. & Power Co.*, No. LA-2266-4, 1996 WL 449167, at \*6 (Va. Cir. Ct. May 29, 1996) (describing an electricity purchase contract as not a transaction in goods but as the sale of a service).

174. *Grant*, 73 S.W.3d at 218-19.

175. *Id.* Coincidentally, the Court decided the case the same year that Texas began to allow electric utility customers to choose other suppliers of electricity. Regulatory Research Assocs., *supra* note 9, at 3. See also *New Balance*, 1996 WL 406673, at \*2 (finding that utilities should be placed outside of the realm of contract and tort law for purposes of implied warranties and product liability issues because they are so heavily regulated).

structure would be disturbed by the application of the U.C.C.<sup>176</sup> Strangely, courts ruling on cases involving water and natural gas utilities, both with extensive regulatory structures on par with electric utilities, have found both water and natural gas to be "goods."<sup>177</sup>

##### 5. *The Btu Test; Comparing McIntosh to Granny Smith*

Electricity and natural gas provided to customers as usable products differ little when one considers they are both simply delivered Btu's.<sup>178</sup> A court could consider the similarities between the two different forms of delivered energy to determine Article 2's scope in a regulated or deregulated environment.<sup>179</sup> Electricity, as a service or goods delivered over a regulated utility's system could be compared to services or goods provided over another type of regulated utility's system.<sup>180</sup> Given the historical context of deregulation, one can compare deregulated gas sales as goods to deregulated electricity sales as goods and services.<sup>181</sup>

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176. *Grant*, 73 S.W.3d at 218-19.

177. *See, e.g., Zepp v. Mayor of Athens*, 348 S.E.2d 673, 677-78 (Ga. Ct. App. 1986); *Gardiner*, 197 A.2d at 612 (describing cases where water and gas utilities output were treated as goods).

178. *John & Oppenheimer*, *supra* note 9, at 251.

179. While the policy argument has seemingly not been made that if it is a transaction in goods for one type of utility then it should be a transactions in goods for another type of utility, or the inverse, cases involving the output of utilities tend to cite to other utilities cases. *See Helvey*, 278 N.E.2d at 610 (relying on *Gardiner*, 197 A.2d at 612, where natural gas provided by a utility was found to be a transactions in goods for the purpose of applying the U.C.C.'s four-year statute of limitations). *But see New Balance*, 1996 WL 406673, at \*2 (referring to case law declaring natural gas and water to be goods, but not extending the application of goods to electricity because public utilities are heavily regulated and unlike other industries). Other comparisons of utility network services such as telephone and cable services with the electric and natural gas case law has also occurred. *See Whitmer*, 522 A.2d at 586 (arguing whether Article 2 should apply to telephone service); *Kaplan v. Cablevision of Pa., Inc.*, 671 A.2d 716, 723-24 (Pa. Super Ct. 1996) (discussing whether cable services are goods and contrasting utility-provided services as goods). Cases involving utilities providing water have also used case law from other utilities. *See, e.g., Zepp*, 348 S.E.2d at 677-78 (describing that water is like electricity and therefore should be considered goods).

180. *See Zepp*, 348 S.E.2d at 677-78 (referring to electricity as a thing that exists, is identifiable, is movable at the time of identification, and is able to be metered and reasoning that water also possesses these qualities so water sales are transactions in goods); *New Balance*, 1996 WL 406673, at \*2 (assessing the case law on water and natural gas). *Othman*, *supra* note 75, at 549-51 (discussing that courts have employed similar tests, particularly the *Helvey* test to determine if water, natural gas, and electricity provided by utilities are goods).

181. An independent power producer selling electricity to utilities is sufficiently analogous to a wellhead producer of natural gas (e.g., Amoco) selling to a natural gas utility (e.g., Nicor Gas). While the regulatory structure may differ by degree of regulatory oversight over the relevant

By using gas as an example in assessing whether water or electricity should be treated as goods, courts implicitly analogize these different industries.<sup>182</sup> Yet comparing the different forms of energy is reasonable when one considers that one of the purposes of the U.C.C. is to expand the ability of parties to use customs, usages of trade, and courses of dealing in their contracts.<sup>183</sup> The U.C.C. also encourages liberal interpretation in its applicability.<sup>184</sup>

The analogous nature of natural gas and electricity supports a liberal interpretation of the U.C.C. in its applicability to electricity transactions. Utility services, particularly natural gas utilities, share common elements with electric utilities.<sup>185</sup> Utilities provide electricity and natural gas to their customers through a regulated network of distribution assets.<sup>186</sup> Under the traditional utility structure, the supply of the electricity and natural gas to the customer begins with the creation or purchase by the utility.<sup>187</sup> Apart from parallels of distribution, electricity and natural gas are fungible.<sup>188</sup> The energy moves through displacement along an

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industry, both transactions are contracts for the purchase of a fungible, energy commodity. See *supra* notes 14-33 and accompanying text (describing the regulation of the utility industry). The Court in *Econogen v. Niagara Mohawk Power Corp.*, 914 F. Supp. 57 (S.D.N.Y. 1996), cited other cases ruling that electricity was not transactions in goods and did not refer to case holdings treating natural gas as goods, even though the independent power transaction with a purchasing utility was fairly analogous to a utility purchasing natural gas from a wellhead producer. *Econogen*, 941 F. Supp. at 61. While in *In re Pacific Gas*, the court examined cases that involved utility-customer transactions and utility purchase contracts from independent power producers and held that a purchase contract for electricity was a transaction in goods, the court did not examine comparable case law on natural gas purchase contracts. *In re Pacific Gas*, 271 B.R. at 639.

182. See *supra* note 180 and accompanying text (discussing the comparison of utility outputs and the application of Article 2).

183. U.C.C. § 1-102(2) (1972).

184. *Bonebreak*, 499 F.2d at 955.

185. As deregulation has progressed, the idea of the convergence or merging of the electricity and natural gas industries has been frequently discussed. The two industries' commonalities are such that it may be more efficient for the two industries to merge into a single "energy" delivery entity. See Dan Gabaldon & Joe Quoyeser, *Vertical Integration in Gas and Power: Necessity or Distraction?*, PUB. UTIL. FORT., Apr. 15, 2002, at 28 (discussing vertical integration and its importance to the future success of the gas and electricity industry); Branko Terzic, *Ties that bind; energy industry reregulation and restructuring*, PUB. UTIL. FORT., Sept. 15, 2001, at S20 (discussing the convergence of natural gas and electric industries through the integration of fuel and power generation and in terms of joint electricity-natural gas offerings).

186. See generally Cudahy, *supra* note 7, at 159 (discussing the structuring of regulated industries).

187. See generally Kahn, *supra* note 5, at 16-17 (discussing how the energy is provided to customers and the structure of the utility industry).

188. See John & Oppenheimer, *supra* note 9, at 251 (discussing the similarities of natural gas and electricity).

integrated distribution and transmission grid where a customer can purchase it.<sup>189</sup> In addition, electricity and natural gas continue to be delivered to customers along a common carrier network of utility distribution assets.<sup>190</sup>

Perhaps the most important similarity between electricity and natural gas is that they are a means of delivering “Btus.”<sup>191</sup> While not perfect substitutes for each other, electricity and natural gas are exchangeable in that they both provide usable energy to the customer’s premises.<sup>192</sup> From a consumer’s point of view, the delivery of either meets her heating or energy demands.<sup>193</sup>

There are, however, some significant differences between electricity and natural gas, such as their different physical properties.<sup>194</sup> The statutory and regulatory processes also differ.<sup>195</sup> Finally, the U.C.C. expressly includes natural gas as “goods.”<sup>196</sup>

Under a test that considers the similarities between natural gas and electricity transactions combined with the *Helvey* test, the predominant factor, or the gravamen of the action test, electricity would likely be “goods.”<sup>197</sup> In cases involving a purchaser selecting

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189. *Id.*

190. *Id.*

191. *See generally id.* (discussing how financial markets will treat electricity and natural gas as readily exchangeable commodities and that consumers are unconcerned whether they receive electricity or gas but instead seek to have units of energy, Btu’s that are convertible into the desired form of work (e.g., heating or cooling)).

192. *Id.*

193. *Id.*

194. Natural gas is a collection hydrocarbon molecules that are both invisible and odorless in their natural state. AMERICAN GAS ASSOCIATION, GLOSSARY FOR THE GAS INDUSTRY 40 (American Gas Association 1996). It is extracted from the earth by wells and then processed into a usable form. *Id.* Natural gas is placed under pressure to move it through the interstate pipeline system and the utility distribution system. *Id.* at 77. Natural gas can also be stored. *Id.* at 101-02.

Electricity is a form of energy. *Houston Lighting & Power Co. v. Reynolds*, 712 S.W.2d 761, 766 (Tex. App. 1996), *rev’d on other grounds*, 765 S.W.2d 784 (Tex. 1988). Electricity that is usable by consumers is created by the conversion of hydrocarbons (i.e., coal, natural gas and fuel oil), nuclear reactions, or other forces (e.g., running water, light, wind) into current. *See Hyman, supra* note 6, at 19-38. Whereas natural gas can be directed by pressure, electricity flows instantaneously along a transmission and distribution grid to the source of demand. Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L.J. 911, 928-29 (2002). Electricity is not storable in its form. *Id.*

195. *See supra* Part II for an exploration of the regulatory structure of the two industries.

196. U.C.C. § 2-107(1) (1972).

197. *See* the discussion, *supra* note 180 and accompanying text for supporting cases and articles (discussing the analogies made between utility-provided goods and services to determine if water, electricity, or natural gas fall under the U.C.C.’s Article 2).

his own supplier of electricity, electricity would, analogous to natural gas transactions, be a "transaction in goods."<sup>198</sup> In cases involving injury due to contact with transmission facilities or other distribution-related problems, the "Btu" test would be applicable as both distribution systems are designed for the delivery of energy.<sup>199</sup>

### III. PROPOSAL

If one of the goods tests are to applied to electricity, which test should be applied?<sup>200</sup> If Article 2 is applied to electricity purchase contracts in a deregulated environment, what implications does this hold for those purchase contracts, existing utility-customer relationships, regulatory policy, and further expansion of alternative energy products?

#### A. Comparing and Determining the Test

##### 1. The Best Test for Goods

Any transaction in electricity is a mixture of services and goods.<sup>201</sup> The predominant factor test is very useful in hybrid sales-services contracts, but its use is limited in cases of utility-customer transactions. In utility-customer transactions, the omnipresent oversight of regulation and the integration of the components of generation, transmission, and distribution tend to suggest that the entirety of the transaction is a service.<sup>202</sup> In competitive supplier-purchaser transactions, electricity purchase

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198. Only in *In re Pacific Gas* has a court established that a transaction between competitive buyer and sellers, the two utilities, was a transaction in goods. *In re Pacific Gas*, 271 B.R. at 639. Transactions by buyers and sellers (outside of the traditional utility utility-seller/customer-buyer relation) are universally considered to be transactions in goods. See generally *Energy Marketing Serv. v. Homer Laughlin China Co.*, 186 F.R.D. 369 (S.D. Ohio 1999); *Kan. Mun. Gas Agency v. Vesta Energy Co.*, 843 F. Supp. 1401 (D. Kan. 1994) (describing transactions between natural gas buyers and sellers in a competitive market where natural gas is treated as a transaction in goods).

199. See Part II, A-1. (discussing the application of the Btu-*Helvey* test to determine if electricity is a good).

200. See *supra* Part II.

201. The goods component, when electricity is determined to be a transaction in goods, is the electricity. *Helvey*, 278 N.E.2d at 610. The distribution and transmission of power to the customer has been considered a service. *Ransome*, 275 N.W.2d at 643. See also *Pierce*, 212 Cal. Rptr. at 291 (describing distribution as a service). Of course, apart from the delivery of electricity, there are other services involved in providing any good to its ultimate customer. See *Bonebreak*, 499 F.2d at 958-59 (describing services as always necessary for the ultimate use of the good).

202. See *Grant*, 73 S.W.3d at 218-19 (discussing how the regulatory rules of the public utility commission govern a utility's transactions, thus forcing electricity falls outside the scope of Article 2).

contracts most closely resemble “transactions in goods.”<sup>203</sup> The gravamen of the action test is helpful because Article 2 only applies if a problem arises in the goods element of a transaction.<sup>204</sup> However, courts rarely apply this test.<sup>205</sup>

The *Helvey* test most closely adheres to the definition of “goods.”<sup>206</sup> However, the *Helvey* test suggests a “transaction in goods” even when the problem in a transaction arises from its service elements.<sup>207</sup> Consequently, a policy-based test as previously discussed<sup>208</sup> is useful as a tool for exploring whether the scope of Article 2 embraces a particular electricity transaction.<sup>209</sup> Courts would best employ the policy-based test in conjunction with the application of the *Helvey* test.<sup>210</sup>

## 2. Applying the Helvey-Btu Test to Electricity Purchase Contracts in a Deregulated Environment

Courts should apply the *Helvey*-Btu test to electric purchase contracts in a deregulated environment. The outcome of the test would result in the application of Article 2 to electricity transactions. The use of the *Helvey*-Btu test would also provide

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203. The case law does not overwhelmingly support this position. *See supra* notes 107-109 and accompanying text (indicating several states have rejected the application of Article 2 to electricity in transactions involving competitive buyers and sellers). But a recent federal court decision, *In re Pacific Gas*, supports the proposition that a transaction between a competitive buyer and purchaser is a transaction in goods. *In re Pacific Gas*, 271 B.R. at 639.

204. *See Myers, supra* note 27, at 1067 (describing how the gravamen of the action test would focus on the specific element of the transaction, the service, or goods, where the problem arose in determining whether to apply Article 2).

205. *Id.*

206. *See Helvey*, 278 N.E.2d at 609-10 (listing the qualities electricity must possess for Article 2 to apply).

207. *See Miller, supra* note 138, at 727 (describing the *Helvey* test as possibly too restrictive, causing virtually all contracts to be considered transactions in goods). Also, the *Helvey* test could mischaracterize the intent of the parties in contracts where a tangible good is present, but the service element of the contract was the intended predominant fact. *Id.* Arguably, the utility-customer relationship is one where the service element of the contract is intended to predominate even though electricity, a good under the *Helvey* test, is present.

208. *See supra* Part II.

209. Policy-based tests to determine the scope of Article 2's application have been characterized as ad hoc, yet useful. *Miller, supra* note 138, at 728. The scope of Article 2 is supposed to be widely construed to meet the policy goal of making commercial transactions uniform and facilitating commerce. *Bonebreak*, 499 F.2d at 955. The Btu test best fits a discussion of whether the transaction is commercial or regulatory.

210. The *Helvey* test combined with the policy-based Btu test would be useful because it could be used to assess the intent and expectation of the parties and could allow for equitable and regulatory considerations. *See Miller, supra* note 138, at 730-31 (describing a blending of a policy-based test with other factors to determine if Article 2 should apply).

more jurisdictional certainty<sup>211</sup> in how to treat electricity purchase contracts.<sup>212</sup>

The primary argument against treating electricity purchase contracts as a “transaction in goods” is the extensive regulatory oversight of the utility industry.<sup>213</sup> Arguably, public utility regulation serves as a substitute for competitive markets, therefore; regulation should supercede the use of Article 2 in those markets because the use of Article 2 tends to focus on competitive markets.<sup>214</sup> However, the world of extensive monopoly regulation has changed with the advent of deregulation, injecting market forces into electricity transactions.<sup>215</sup>

Applying Article 2 to electricity transactions in a deregulated environment is appropriate for two reasons. First, the scope of Article 2 is supposed to help facilitate and create uniformity among laws governing commercial transactions.<sup>216</sup> A policy-based approach that ties the *Helvey* test to competitive electricity transactions puts these commercial transactions on par with other energy transactions that use Article 2.<sup>217</sup> Second, energy contracts combining electricity and natural gas in a single transaction should apply the same rules in order to facilitate lower transaction costs and reduce the uncertainty of either party within the contract.<sup>218</sup>

211. See Myers, *supra* note 27, at 1086 (criticizing the courts for using imprecise analysis of whether electricity was goods). See also Myers, *supra* note 27, at 1064-67 (criticizing the courts’ use of inconsistent, incomplete, and sometimes wrong analysis of whether electricity is a good).

212. The existing case law on whether electricity is a “good” is widely varied and many courts use idiosyncratic means to determine the status of electricity. See *supra* Part II (discussing the various additional characteristics used by courts to reject or apply Article 2 to electricity transactions).

213. See *supra* notes 88 and 167 and accompanying text (discussing how the courts have found the extensive presence of regulation has served as a substitute for market forces and it would be inappropriate to apply Article 2 to those regulated transactions). The courts have considered electricity transactions between utilities and customers and between competitive purchasers and sellers as not within Article 2’s scope. See *supra* notes 90, 103, 109-111 and accompanying text (discussing cases where the courts have rejected the application of Article 2 to electricity transactions).

214. See *supra* notes 9, 14 and 33 and accompanying text (discussing the current state of deregulation in electricity markets).

215. See *supra* notes 7-9 and 14-16 and accompanying text (discussing regulatory and other forces changing the utility industry).

216. See *supra* note 209 and accompanying text (discussing the intended scope of Article 2).

217. See *supra* Part II (discussing the application of Article 2 to natural gas transactions outside of the utility context).

218. Energy transactions for end-using customers are a means of transferring a usable unit of work, the Btu. See John & Oppenheimer, *supra* note 9 (discussing the convergence of the concept of electricity and natural gas as units of work, e.g., hot and cold with energy’s commoditization).



Courts view the electric utility industry as competitive<sup>219</sup> and modify their analysis of treating electricity transactions in deregulated transactions as “transactions in goods.”<sup>220</sup> As argued above, the appropriate analysis that the courts should employ when assessing whether Article 2 applies to an electricity purchase contract in a deregulated environment is the *Helvey*-Btu test. With that test, courts could weigh whether the object of the transaction was tangible (a thing), movable and identifiable, along with the extent and presence of regulatory oversight and analogous treatment in the market for natural gas.<sup>221</sup> If the Btu-test led to the conclusion that the electricity transaction took place through a regulated monopoly transaction and no analogy could be made to an energy purchase contract in a competitive market, the court could reject that the transaction was one in “goods.”<sup>222</sup>

*B. Implications for Treating Electricity Purchase Contracts in a Deregulated Market as Transactions in Goods and Related Issues*

*1. Changes to the Contractual Relationship*

If Article 2 applied to electricity purchase contracts in a deregulated environment it would implicate several contractual issues.<sup>223</sup> If Article 2 applied to electricity transactions, the

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219. See *supra* notes 7, 14-15 and accompanying text (discussing the transformation of the electric utility industry).

220. But see Myers, *supra* note 27, at 1087 (noting that while jurisdictions should treat electricity as a transaction in goods for deregulated transactions, precedent may limit the ability of courts to willy-nilly change the law).

221. See Parts II, A-1 and A-5 (discussing the *Helvey* test and Btu test).

222. The application of the Btu-based policy test has some limits when applied to a regulated transaction. Article 2 considers natural gas a good whether it is provided by a utility transaction or through a competitive gas purchase contract. U.C.C. § 2-107 (1972). If electricity was treated as completely analogous, an electricity transaction in a utility-customer context would be treated as a transaction in goods, even though courts have routinely rejected Article 2's application to situations involving the heavily regulated electric utility industry. See *supra* note 213 and accompanying text (discussing how courts have rejected the application of Article 2 to transactions in electricity because the utility industry is heavily regulated). While the Btu-based test may be appropriate to analogize between competitive gas and electric purchase contracts, it likely fails in the context of utility-customer transactions. Both gas and electric utilities rates and terms of service to their bundled customers are highly regulated. See *supra* notes 7 and 17 and accompanying text (discussing the regulation of the natural gas and electric utility industries). Arguably, if utility regulation is a substitute for competition, and if Article 2 should have its scope limited to commercial contexts where the government does not serve as a substitute for the competitive market, then Article 2 should not apply to either natural gas or electric utility transactions with their customers. Instead, those utility transactions would be treated as the provision of services.

223. Note that the courts have at times, applied certain sections of Article 2

competitive electricity seller would potentially be liable for “defective” electricity.<sup>224</sup> Contracts for electricity would be drafted to accommodate commercial rather than regulatory needs.<sup>225</sup> Assuming that courts deciding contract interpretation questions for electricity purchase contracts behave in a similar manner to their actions in gas purchase contracts, Article 2’s parol evidence rule would be applicable.<sup>226</sup> Additionally, contract formation for electricity transaction would be more flexible under Article 2 than under the common law rule of contracts.<sup>227</sup>

Applying Article 2 to electricity transactions alters issues related to the breach of contract, such as remedies and anticipatory repudiation. In a breach of contract case, a buyer’s damages equal the cost of cover may become available.<sup>228</sup> If cover is not available a buyer could seek consequential and incidental damages.<sup>229</sup> Unlike the common law, anticipatory repudiation and the ability to demand adequate assurances would also be allowed

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to a contractual dispute at hand, while rejecting the proposition that electricity purchases are transitions in goods in both utility-customer exchanges and utility-power seller transactions. *See supra* notes 103 and 110 and accompanying text (discussing court decisions applying provisions of Article 2 without declaring that the transaction is within the scope of Article 2).

224. *See Myers, supra* note 27, at 1083-85 (discussing how the competitive power seller could be held strictly liable for a breach of the implied warranty of merchantability for delivering “defective” power). Based on the case law, many of the implied warranty claims arise from distribution-related problems rather than an actual defect in the power. *See supra* note 48-63 and 81 and accompanying text (discussing the use or rejection of implied warranties from service-related problems). *See also Myers, supra* note 27, at 1084 (describing the function of the utility transmission and distribution system as the proximate cause of damages to customers). Potentially, based on the theory of implied warranty of merchantability, a power marketer that had nothing to do with the “defect” in the delivered power caused by utility’s service-related problem could be strictly liable for the injury to the customer. *Id.* at 1084-85. Theoretically, the power marketer could then seek contribution from the utility that provided the distribution and transmission services. *Id.*

225. *See Haedicke, supra* note 8, at 118-19 (noting that the deregulated energy environment will require contract flexibility). Issues of contract security, actions in the event of party default, damages, and warranties will be important in drafting the competitive electricity contract. *Id.* at 120-25.

226. *See Smith, supra* note 10, at 1810 (describing Article 2’s hierarchy for interpreting contract terms).

227. *See Smith, supra* note 10, at 1809 (describing contract formation as relatively easy under Article 2 and further, noting contracts can also be amended easily).

228. *See Myers, supra* note 27, at 1086 (defining cover as the difference between the cost of procuring the substitute power and the contract price).

229. *See Smith, supra* note 10, at 1811 (stating that the consequential damages are recoverable assuming the buyer seeks to mitigate his injuries and cover the supply). Consequential damages could be significant in cases of outages due to the lack of available power supply.

under Article 2.<sup>230</sup>

The evolving competitive electricity contract will likely include power along with attendant terms, such as quantity of product demanded, date of delivery and price.<sup>231</sup> The competitive energy contract will also include other energy products such as fuel oil or natural gas.<sup>232</sup> With a similar legal environment, the application of Article 2 to all these streams of energy that can be bundled into a single contract should aid in the development of the competitive energy market. Markets that are more competitive should imply a greater range of choices for customers and reduced legal complexities should reduce transactions costs. Further, the more extensive use of swap transactions may be used to financially hedge the physical energy contracts to help mitigate price risks.<sup>233</sup>

## 2. What and Whose Law Applies and When?

Even if courts adopted the position that electricity purchase contracts in a deregulated environment are “transactions in goods,” there remains the problem of what law should govern in the event of a breach of contract. Applying the *Helvey-Btu* test, any breach of contract, whether it occurred because of the seller or because of the delivery utility, would hold the seller liable under an implied warranty of merchantability, when neither party may have intended or contemplated such a warranty to apply to the transaction.<sup>234</sup> In order to avoid such an outcome, the courts should determine whether the breach of contract arose on the

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230. U.C.C. § 2-609 (1972).

231. The source of power could be, for instance “green” or renewable power. Green power typically refers to power from renewable energy sources such as wind, sun, water, and biomass. Green Mountain Energy Co., *Frequently Asked Questions: What is renewable energy?*, at <http://www.greenmountain.com/FAQ/index.jsp#renewable> (last visited Oct. 21, 2003). Certain power marketers have developed niche markets to serve customers desiring power with low airborne polluting emissions. *Id.*

232. See Haedicke, *supra* note 8, at 126 (describing the creation of the “master energy contract” that will address all the customer’s energy needs).

233. *Id.* A swap transaction is a contract that exchanges the price (or other index-type) risks of a transaction between parties. See Jackson, *supra* note 37, at 3208-09 (stating that one party exchanges a fixed stream of payments for a particular good or thing while the other party exchanges a variable stream of payments). Roberta Romano, *A Thumbnail Sketch of Derivative Securities and Their Regulation*, 55 MD. L. REV. 1, 56 (1996). Retail energy swaps, those swap transactions that take place between an energy marketer and a retail customer, have been identified as a product that will expand significantly in use as the energy markets become more competitive. Board of Governor of the Federal Reserve System et al, *Joint Report on Retail Swaps* (Dec. 26, 2001), at 6, available at <http://www.treas.gov/press/releases/docs/rss-final.pdf> (last visited Oct. 19, 2003).

234. See *supra* note 224 and accompanying text (indicating that a competitive supplier could be held liable for the failure of utility service under the implied warranty of merchantability).

utility's distribution system or with the energy supplier.<sup>235</sup> At that point, if the breach arose from the "power"-side of the transaction, courts should employ the *Helvey-Btu* test to determine if this is a competitive energy transaction between competitive buyers and sellers or a utility energy sale to a customer. If the problem related to the energy rather than the delivery service and the transaction was between a customer and a competitive energy supplier rather than the traditional utility, the *Helvey-Btu* test would lead to the conclusion that Article 2 governed the transaction.

#### IV. CONCLUSION

Over the past seven years, the electricity industry has begun a rapid change from a market composed of monopoly-power providers to a market composed of competing-energy sellers and buyers with choice of electricity providers. Meanwhile, financial and commodity markets are transforming themselves to allow customers greater flexibility in purchasing energy goods, natural gas and electricity. Courts should change their scope of Article 2 analysis of electric purchase contracts to reflect the new dynamics in the utility industries.

Following the decisions on natural gas purchase contracts, courts should find that electricity purchase contracts are "transactions in goods" within the scope of Article 2. Providing clarity of the law by applying Article 2 to the newly developing competitive market would reduce uncertainty and transaction costs, benefiting both buyers and sellers of power. In addition, applying similar Article 2 treatment for competitive gas and electricity contracts would allow for greater customer choice and diminish transactional costs.

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235. See Myers, *supra* note 27, at 1080-81 (discussing use of the gravamen of the action test to determine what law applies to a breach of contract). Note that the energy supplier and the utility could be one in the same as currently occurs under the traditional utility service.

