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PROTECTING AGAINST THE HARMS OF THE MISTAKEN UTILITY UNDERCHARGE

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When low-income households pay too little for their utility bills, it sometimes poses a serious threat to the continuation of their service. The threat arises when, after months or years of undercharges, the utility discovers a mistake and bills the household for the outstanding balance. Typically, the utility's own billing errors create the mistake.[1] Because they lack the resources to pay a cumulative sum, low-income households need a legal mechanism with which to protect themselves.

The application of two legal doctrines initially appears to protect a customer from liability to pay for past undercharges. First, the basic contract doctrine of "mistake" provides that in such situations the burden of the error should lie with the party who is most capable of both preventing the error and bearing the risk of the mistake.[2] Second, if there has been a change in position by an innocent party in reliance on the mistake, then the other party may be estopped to raise the

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1. In one Oregon case, for example, the utility apparently connected the meters to the wrong apartments in a duplex, with Mrs. A's meter reading Mrs. B's apartment and vice versa. Toon v. Pacific Power & Light Co., Docket UC-139, No. 90-236 (Feb. 20, 1990).

2. A. CORBIN, CORBIN ON CONTRACTS §§ 613-19 (1952).

mistake.[3]

Unfortunately, in the regulated utility context, the law is not quite so simple. Public utilities assume a statutory[4] and common law[5] duty to provide service at rates that are not discriminatory. This duty prohibits a utility from providing service at a rate less than the one published in its tariffs.[6] Because of this obligation, in cases arising from a mistake on the part of a utility, the utility has not only the right, but the duty, to collect the undercharge.[7] In these instances, the mandatory duties of the public utility to adhere to its tariffs and to prevent the grant of rebates or other preferences outweigh the doctrines of mistake and estoppel.[8]

This article scrutinizes the utility undercharge.[9] First, Part I introduces the basic law concerning estoppel. Then, Part II discusses the application of estoppel doctrine to the collection of undercharges by public utilities. Next, Part III examines whether, even in situations where the utility may collect the undercharge, it may be prohibited from using service disconnection as a collection device. Part IV ana-

3. A. CORBIN, *supra* note 2, § 606.

4. *See, e.g.*, IND. CODE ANN. § 8-1-2-103 (Burns 1988) (pronouncing statutory duty to avoid discriminatory rate-making); *but see* N.C. GEN. STAT. § 62-110 (1988) (stating that the commission will determine whether tariffs will be uniform).

5. *See, e.g.*, State ex rel. Guste v. Council of New Orleans, 309 So. 2d 290, 294 (La. 1975) (noting that in the absence of a statutory command, courts adopt the generally prevailing rule that a utility's rate structure must be non-discriminatory).

6. *See generally* 13 S. WILLISTON, WILLISTON ON CONTRACTS 585, n.1 (W. Jaeger 3d ed. 1970).

7. *See, e.g.*, Goddard v. Public Service Co. of Colo., 43 Colo. App. 77, 599 P.2d 278 (1979) (requiring the utility to collect the balance due despite the fault of the utility in underbilling for gas); Corporation de Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So. 2d 124 (Fla. Dist. Ct. App. 1980) (requiring public utility to collect undercharges from established rates); Haverhill Gas Co. v. Findlen, 357 Mass. 417, 258 N.E.2d 294 (1970) (requiring gas company to charge rates established by law); Chesapeake & Potomac Tel. Co. of Va. v. Bles, 218 Va. 1010, 243 S.E.2d 473 (1978) (concluding that interstate rail carriers must collect underbillings, regardless of error or mistake in billing).

8. The equitable policy of estoppel may not outweigh these statutory directives. The application of these principles in the freight industry have often been discussed. Annotation, *Carriers Understatement of Charges Where Discrimination is Forbidden*, 88 A.L.R. 2d 1375 (1963); Annotation, *Carrier's Right or Liability in Respect of Excess of Lawful Charge Over Charge Understated Where Discrimination is Forbidden*, 88 A.L.R. 2d 245 (1933). The courts rely on freight cases in deciding public utility cases. *See infra* note 20 and accompanying text.

9. This article does not specifically consider the situation in which the underbilling may be due to a "slow" meter.

lyzes the right of a consumer to bring a counter-claim for damages resulting from a utility's mistaken undercharge. Finally, Part V recommends the adoption of a new approach to the problem of the utility undercharge as it relates to low-income households.

This article holds that courts will find that a utility has not only a right, but an obligation, to collect mistaken undercharges and that the doctrine of estoppel will not abrogate that obligation. The article further concludes that while a utility has the right and obligation to collect mistaken undercharges, it may indeed be estopped from using the disconnection of service as a collection device. The article finally urges the adoption of a new three-pronged approach to the collection of utility undercharges: (1) the inclusion of both service and non-discrimination factors in the undercharge analysis; (2) the grant of rebates for a failure to provide timely bills; and (3) the award of damages for any failure to provide timely and accurate bills.

I. THE DOCTRINE OF ESTOPPEL

Equitable estoppel, otherwise known as estoppel *in pais*, is the doctrine to which low-income advocates might turn in the utility undercharge context. The general rule of equitable estoppel is simple: "[h]e who, by his language[10] or conduct,[11] induces another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."[12] Estoppel does not turn on any misconduct. There need be no intent to

10. *See* Dickson v. United States Fidelity & Guar. Co., 77 Wash. 2d 785, 788, 466 P.2d 515, 517 (1970) (concluding that an insurance company's statement that a claim selection was not final estopped them from asserting a statute of limitations defense because plaintiff relied on that statement in its delayed filing of action).

11. *See* Sharp v. Interstate Master Freight Sys., 442 S.W. 2d 939, 946 (Mo. 1969) (noting that prior conduct may estop a party from claiming rights or benefits).

12. I. X. L. Stores Co. v. Success Mkts., 98 Utah 160, 166, 97 P.2d 577, 580 (1939). In the landmark case of Chesapeake & Oh. Ry. Co. v. Walker, 100 Va. 69, 40 S.E. 633 (1902), the Virginia Supreme Court stated:

> [W]hen one person, by his statements, conduct, action, behavior, concealment or even silence, has induced another, who has a right to rely on those statements, etc. and who does rely upon them in good faith, to believe in the existence of a state of facts with which they are compatible, and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter has so far changed his position that he would be injured thereby.

Id. at 91, 40 S.E. at 641.

deceive,[13] nor any negligence in the statement of erroneous facts.[14] Thus, equitable estoppel initially seems to be particularly applicable in the instance of mistaken undercharges for utility service to low-income households.

Invocation of estoppel could prevent injury to households that structure their budgets upon the belief that their utility bills are a complete and accurate reflection of the charges owed. Indeed, a low-income household must rely on the accuracy of a utility's bills. The household struggles to allocate its scarce resources each month. It rarely has sufficient funds to set aside for possible future liabilities.[15] These households make month-to-month decisions on how to apportion limited income among substantial expenses.

Notably, however, an estoppel defense can fail in several places, even apart from the unique problems with utility undercharges as discussed below. First, the action of the party asserting the defense, the plaintiff, must be causally connected to the statement of the person against whom estoppel is asserted, the defendant. Thus, the defendant's statement must have "induced" the action.[16] If the action would have occurred in any event, then no estoppel will attach.

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13. However, there must be an intent that the statement be acted upon, American Hardware Mut. Ins. Co. v. BIM, Inc., 885 F.2d 132 (4th Cir. 1989); an expectation that it will be relied and acted upon, Shane v. WCAU-TV, CBS Television Stations, Division of CBS, Inc., 719 F. Supp. 353 (E.D. Pa. 1989); or a foreseeability that it will be relied and acted upon. Wolf Bros. Oil Co. v. International Surplus Lines Ins. Co., 718 F. Supp. 839 (W.D. Wash. 1989).

14. The elements of equitable estoppel differ from state to state. *See, e.g., In re* Yachthaven Restaurant, Inc., 103 Bankr. 68, 77 (Bktcy. E.D.N.Y. 1989) (articulating five elements of equitable estoppel); Careau Group v. United Farm Workers of America, 716 F. Supp. 1319 (C.D. Cal. 1989) (articulating four elements of equitable estoppel); Reifschneider v. Nebraska Methodist Hosp., 233 Neb. 695, 447 N.W.2d 622 (1989) (articulating six elements of equitable estoppel); Marashi v. Lannen, 55 Wash. App. 82, 780 P.2d 1341 (1989) (articulating three elements of equitable estoppel).

15. *See* NATIONAL CONSUMER LAW CENTER, ENERGY AND THE POOR: THE FORGOTTEN CRISIS (May 1989); NATIONAL CONSUMER LAW CENTER, LOSING THE FIGHT IN UTAH: LOW-INCOME HOUSEHOLDS AND RISING ENERGY COSTS 46-48 (Jan. 1989); NATIONAL CONSUMER LAW CENTER, THE CRISIS CONTINUES: ADDRESSING THE ENERGY PLIGHT OF LOW-INCOME PENNSYLVANIANS THROUGH PERCENTAGE OF INCOME PLANS, at I-4 to I-5 (Nov. 1986).

16. Chesapeake & Oh. Ry. v. Walker, 100 Va. 69, 91, 40 S.E. 633, 641 (1902). In *I. X. L. Stores*, the concurring opinion argued that the person against whom estoppel is urged must have intended the inducement to occur. *I. X. L. Stores*, 98 Utah at 168, 97 P.2d at 581 (Wolfe, J., concurring). As a general rule, however, there must only be a reasonable expectation that the person urging estoppel would rely upon the statement. 31 C.J.S. *Estoppel* § 69 (1964).

Second, the plaintiff must not only have relied on the defendant's statements, but must have maintained a right to rely on them. If the plaintiff actually knew, or could have discovered the true state of facts by any reasonable effort,[17] then she cannot raise an estoppel defense. Finally, the plaintiff must be injured as a result of the reliance. If no injury occurs,[18] or if the injury is only "speculative,"[19] an estoppel defense will not be available.

Notwithstanding this general estoppel doctrine, basic utility law prevents the use of an estoppel defense to avoid the payment of utility undercharges.

II. THE CURRENT UTILITY RULE

The general utility rule provides that in instances of a mistaken underbilling by a public utility,[20] the erring company holds not only the right, but the obligation, to collect the underpayment.[21] Neither the reason for the underbilling nor the impact on the customer will mitigate the effect on the operation of this rule. In refusing to rely on mistake and estoppel in the underbilling context, most courts reason that invoking equitable estoppel against a public utility would violate the strong public policy against discriminatory rates.[22] The application of the general rule is well-illustrated in the Pennsylvania decision of *West*

17. *See infra* notes 55-56 and accompanying text.

18. *See infra* note 69 and accompanying text.

19. *See infra* note 58 and accompanying text.

20. While this paper addresses the problem of the public utility undercharge, courts often rely upon railroad and freight cases involving undercharges for authority. *See, e.g.*, Goddard v. Public Serv. Co. of Colo., 43 Colo. App. 77, 78, 599 P.2d 278, 279 (1979) (finding case dealing with misquotation of freight rates persuasive in deciding utility undercharge case); Corporation de Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So. 2d 124, 126 (Fla. Ct. App. 1980) (relying on rail rate case to conclude that power utility must collect underbilling balance); Haverhill Gas Co. v. Findlen, 258 N.E.2d 294, 296 (Mass. 1970) (holding that rail carriers and other utilities are equated by statute and must charge rates set by law); Chesapeake & Potomac Tel. Co. of Va. v. Bles, 218 Va. 1010, 1013, 243 S.E. 2d 473, 476 (1978) (holding that rail carriers and utilities must adhere to rates imposed by state).

21. *See infra* notes 29-36 and accompanying text.

22. *See* Consolidated Edison Co. of N.Y. Inc. v. Jet Asphalt Corp., 132 A.D.2d 296, 522 N.Y.S.2d 124 (N.Y. App. Div. 1987). "[I]t is apparent that to permit an undercharge, whether intentionally or inadvertently made, is to grant a preferential rebate to a customer in violation of the statutory mandate." Chesapeake & Potomac Tel. Co. of Va. v. Bles, 218 Va. 1010, 1014, 243 S.E. 2d 473, 476 (1978). To permit an undercharge, the courts hold, would be to disrupt the uniform application of rates. Shoemaker v. Mountain States Tel. & Tel. Co., 38 Colo. App. 321, 324, 559 P.2d 721, 723-24

Penn Power Co. v. Nationwide Mutual Insurance Co.[23] in which the court summarily rejected proffered defenses to an underbilling. In *West Penn Power*, the utility undercharged the customer for thirty-one months.[24] The customer paid the bills as presented but refused to pay a bill for the undercharge. The trial court found that the only issue raised by the pleadings related to the quantity of electricity supplied to defendant during the underbilling period.[25] Noting that the law established the tariff or rate and that the plaintiff admitted to the amount paid by the defendant during the thirty-one month period, the court stated that the defendant's denial of additional service above that originally billed by plaintiff created the dispute.[26] The appellate court agreed, stating the only issue was whether Nationwide paid in full for the electricity provided by the utility.[27] If the meter showed that the defendant consumed the amount of electricity alleged by the utility, the court held, "then the latter's right [to collect] is unquestionable."[28]

Courts will not consider a utility's responsibility for an underbilling when determining whether the utility may collect an additional amount due from a customer. Neither negligence nor willful misrepresentation relieves the utility of the right or the responsibility to collect the rates established by the tariff.[29]

A tariff is legislative in character.[30] Once approved by a state public utility commission, it possesses the same binding effect as a statute.[31] Accordingly, rates established by the tariff are mandatory; a utility has

(1976). This rule is needed "to preserve the integrity of the filed rates." Mars Express v. David Masnik, Inc., 401 F.2d 891, 894 (2d Cir. 1968) (citation omitted).

23. 209 Pa. Super. 509, 228 A.2d 218 (1967).

24. *Id.* at 512, 228 A.2d at 220. The underbilling was attributable to "an error in billing or inadvertence on the part of the [utility]." *Id.* at 510-11, 228 A.2d at 219.

25. *Id.* at 511, 228 A.2d at 219.

26. *Id.*

27. *West Penn Power*, 209 Pa. Super. at 511, 228 A.2d at 220.

28. *Id.* (quoting Allegheny County Light Co. v. Thomas, 31 Pa. Super. 102 (1906)).

29. Illinois Cent. R.R. v. Sankey Bros., 67 Ill. App. 3d 435, 438, 384 N.E.2d 543, 545 (1976) (quoting Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 98 (1915)).

30. *See, e.g.*, Haverhill Gas Co. v. Findlen, 357 Mass. 417, 258 N.E. 2d 294, 298 (1970) (holding that gas company had no discretion to charge rates other than established by statute); *accord* Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F.2d 1360, 1363 (D.C. Cir. 1980) (noting that a carrier cannot waive or modify legally applicable tariffs).

31. *See*, Illinois Cent. Gulf R. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978) (discussing the potential for rate discrimination if carriers could modify their tariffs); Southern Pac. Co. v. Valley Frosted Foods Co., 178 Pa. Super.

no discretion to change them unless the change is presented to and approved by the regulatory commission.[32] The "unrelenting"[33] rule provides that a utility may not (1) contract away a statutory duty,[34] (2) be estopped from enforcing a "statutorily declared public policy interest,"[35] or (3) alter its statutory duties by negligent or willful misrepresentations.[36]

This result should not really be surprising. Courts usually hold the doctrine of equitable estoppel inapplicable to the government.[37] In other words, estoppel cannot supplant the duties imposed upon a public agency,[38] nor can it frustrate properly enacted legislative declarations of public policy designed to promote the public good.[39]

The comparison of utility tariffs to statutes further illuminates the operation of the rule against estoppel in the utility undercharge context. Estoppel requires a representation by the party against whom estoppel is urged upon. Further, the injured party must have reasonably and detrimentally relied upon the representation. A utility's tariff,

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217, 221, 116 A.2d 70, 71 (1955) (stating that nothing will prevent the collection of the full and proper rate).

32. Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915).

33. Southern Pac. Co. v. Valley Frosted Foods Co., 178 Pa. Super. 217, 221, 116 A.2d 70, 71 (1955).

34. West Penn Power Co. v. Nationwide Mut. Ins. Co., 209 Pa. Super. 509, 512, 228 A.2d 218, 220 (1967). *See also*, Northern Wis. Produce Co. v. Chicago & N. W. Ry., 203 Wis. 549, 234 N.W. 726 (1931) (characterizing carrier tariffs as in the nature of statutory obligations).

35. Consolidated Edison Co. of N.Y., Inc. v. Jet Asphalt Corp., 132 A.D.2d 296, 303, 522 N.Y.S.2d 124, 128 (N.Y. App. Div. 1987).

36. Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F.2d 1360, 1363 (D.C. Cir. 1980).

37. K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 17.01-.05, .07-.08 (1959). *But see* K. DAVIS, *supra* §§ 17.06, .09.

38. *See* 10A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 29.103, n.10 (3d ed.) (estoppel may not be used against public agencies to "hinder, restrict or suppress public, governmental rights or powers"). *But see* Sierra Club v. Union Oil Co. of California, 716 F. Supp. 429 (N.D. Cal. 1988); W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 562 A.2d 222 (1989) (acknowledging that equitable estoppel may be invoked against public entities to prevent manifest injustice). The *Union Oil* court held that in order to assert estoppel against the government, a party must establish that the government engaged in affirmative misconduct beyond mere negligence, and that the injustice to the party would outweigh the harm to the public interest if the government is estopped. *Union Oil*, 716 F. Supp. at 436.

39. An excellent example of the balancing required between the protection of public policy and the rights of the individual is found in the California appellate decision, *In re* Back, 214 Cal. App. 3d 372, 262 Cal. Rptr. 608 (Ct. App. 1989).

however, is publicly filed. As with statutes, a consumer is charged with knowledge of the tariff regardless of actual knowledge.[40] Given the consumer's constructive knowledge of the entire contents of a utility's tariff, a utility's misrepresentation—negligent, willful or merely mistaken—cannot generate any reasonable reliance.[41] Whatever the utility's statements regarding its rates, the consumer is charged with knowledge of the actual contents of the tariff, and therefore, of the actual rates.[42]

This reasoning works only if the dispute leading to the underbilling involves a misquotation of rates. For example, the utility may represent that a rate remains at one level, when the actual rate reflects a higher one.[43] In that case, the theory that the consumer must be charged with knowledge of the true rate may have some legitimacy. The theory breaks down, however, when the issue is factual.[44] In that situation, the utility may be in a unique position to know the facts of the case to the exclusion of the customer,[45] thus fortifying the estoppel argument.

Just as the actions of the utility in leading to the mistake are considered irrelevant to whether the undercharge may later be collected, the impact of the mistake on the customer likewise is not considered. Even if subsequent collection inflicts substantial hardship on the underbilled consumer, the utility must collect it. In *Louisville & Nashville Railroad Co. v. Maxwell*,[46] the Supreme Court established that ignorance of rates provides no excuse for the failure to pay or charge the filed rate.[47]

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40. *Cf.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (holding claimants under the Federal Crop Insurance Act to have constructive knowledge of applicable regulations).

41. *Id.*

42. *See, e.g.*, Interstate Motor Freight Sys., Inc. v. Wright Brokerage Co., 539 S.W.2d 764 (Mo. Ct. App. 1976) (concluding that published tariffs are open to all and thus parties to freight contract are conclusively bound to have constructive knowledge).

43. This may occur, for example, if a utility states that a household is eligible for a regular residential rate when later it is discovered that the household should have been on a higher electric heating rate.

44. *See supra* note 1. Moreover, it is not uncommon for utilities to fail to multiply meter readings by the requisite factor of ten to obtain a proper bill from the meter reading.

45. *See infra* note 56 and accompanying text.

46. 237 U.S. 94 (1915). *Maxwell* involved a suit brought by the railroad to recover an alleged undercharge of $58.30 on the sale of railroad tickets. *Id.* at 95.

47. *Id.* at 97.

Recognizing the potential for hardship in some cases, the Court articulated the need for such a strict rule "to prevent unjust discrimination."[48]

Equitable principles such as estoppel do not relieve utility customers from liability for an undercharge. In *I. X. L. Stores Co. v. Success Markets*,[49] for example, the customer received an erroneous electric bill. The face of one of the meters at Success Markets' commercial establishment provided the statement that the kilowatt hours (KWH) registered on the meter must be multiplied by ten to obtain a correct bill.[50] For twenty-eight months, I. X. L. correctly read the meter, but neglected to make the appropriate calculation. Consequently, I. X. L. charged Success Markets only one-tenth of the actual electrical current generated.[51] Nevertheless, I. X. L. billed the difference to Success, which refused to pay.

Success challenged the supplemental bill on the ground that I. X. L. was estopped to charge the additional amounts. Not only did Success pay employee salaries, wages, and bonuses based on available profits,[52] it also sub-leased space at a rent lower than would have been required to compensate for the higher electric bill.[53] Success further contended that the higher bill would have reduced its net profit, resulting in decreased state and federal income taxes.

While the court acknowledged basic estoppel doctrine in *I. X. L. Stores*,[54] it recognized two important limits. First, the court noted both parties' equal opportunity to determine the true billing conditions

48. *Id. Accord* Pittsburgh Cin., Chi. & St. L. Ry. v. Fink, 250 U.S. 577, 582 (1919) (instances of individual hardship cannot change the policy that Congress has embodied in a statute to secure uniformity in charges for transportation); Illinois Cent. Gulf R.R. Co. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978) (noting that individual hardship is not a defense to the application of tariffs because to do so would undermine the policy of uniformity of charges that underlies the Interstate Commerce Act).

49. 98 Utah 160, 97 P.2d 577 (1939).

50. The multiplication was not necessary to obtain a correct bill from the other three meters. *Id.* at 162, 97 P.2d at 578.

51. *Id.* at 162-63, 97 P.2d at 578. All parties acknowledged the good faith of all other parties. Nevertheless, Success argued that I. X. L. knew the proper billing method and did not follow it while Success didn't know. *Id.* at 163, 97 P.2d at 579.

52. *Id.* at 165, 97 P.2d at 580.

53. *Id.* at 163-64, 97 P.2d at 579-80. Success charged a rent of $150. Success argued that a higher electric bill would have required a rent of $200 per month. *Id.*

54. *Id.* at 164, 97 P.2d at 580. Because the dispute was not directly with the utility, however, the court addressed the claim of estoppel. *Id.* at 166, 97 P.2d at 580. Utah

with reasonable diligence.[55] The court reasoned that when the "real facts [are] equally or sufficiently open for his convenient ascertainment, but he has chosen not to take the trouble to observe them, he must suffer the loss."[56] Second, the court determined that the doctrine of estoppel cannot be used as "a weapon of assault."[57] The court then found Success Markets' change of position speculative. Accordingly, the court did not find sufficient basis to invoke equitable estoppel.[58] Rather, reliance upon the speculative change of position would "be more in the nature of a sword cutting off the rights of [I. X. L.] who has served [Success] with power and is now attempting to obtain payment."[59]

A New Jersey court obtained similar results on similar facts in *Mayor and Council of Vineland v. Fowler Waste Manufacturing Co.*[60] In *Vineland*, as in *I. X. L. Stores*, the seller's employee failed to multiply the meter reading by ten. As a result, for two years, the seller rendered bills for only one-tenth of the actual electricity used.[61] After paying the original bills, Fowler Waste refused to pay the subsequent bills for the remaining nine-tenths.[62]

Power and Light was not even a party to the proceeding. I. X. L. represented the lessor and Success Markets represented the lessee.

55. *Id.* at 166, 97 P.2d at 580.

56. *Id.* Despite its holding, the court rhetorically queried:

> [D]id [Success Markets] assume the duty of calculating the number of kilowatt hours? Is that the duty of each subscriber of power, water, gas etc. to determine his individual account and check if the utility has figured correctly the amount of power, water, gas etc. used when a statement is submitted to them?

Id. The court's concern may take on added significance when the consumer is an individual rather than a business. For example, the National Assessment of Educational Progress found that a large portion of the adult population is unable to perform basic consumer math. In one study, only 39% of the adults tested were able to compare different-sized containers to determine the best price. In the same study, only 32% of the adults were able to determine the square foot unit cost of housing space. Only 35% of adults were able to determine the unit cost of a utility bill. National Assessment of Educational Progress, Mathematics Report No. 04-MA-02, at 1-3 (June 1975).

57. *I. X. L. Stores*, 98 Utah at 167, 97 P.2d at 580.

58. *Id.* at 167, 97 P.2d at 581. *See also* Memphis Light, Gas & Water Div. v. Auburndale School Sys., 705 S.W.2d 652, 653 (Tenn. 1986) (estoppel cannot be invoked to contravene public policy).

59. *I. X. L. Stores Co.*, 98 Utah at 160, 167, 97 P.2d at 580 (1939).

60. 86 N.J.L. 342, 90 A. 1054 (1914).

61. *Id.* at 343, 90 A. 1054.

62. *Id. See infra* notes 140-47 and accompanying text for a discussion of a similar case involving natural gas undercharge.

Claiming that the cost of power was a factor in deciding the price of its product, Fowler Waste pleaded equitable estoppel as a defense.[63] Fowler Waste argued that because it sold its product at prices based upon the lower cost calculation during the two-year period, it would be inequitable to later subject it to the loss incident to a change in its product cost. The loss, Fowler Waste argued, would result from a mistake for which it was in no way accountable.[64]

The court rejected the estoppel defense, reasoning that a party "cannot in good conscience throw upon the other a loss to himself which resulted from his own carelessness quite as much as from the other's innocent mistake."[65] In making its determination, the court noted that Fowler Waste's officers and employees could freely inspect the meter which was located on its premises. Further, an accurate reading of the meter did not require any particular technical knowledge.[66] Accordingly, the court found the real facts sufficiently accessible to Fowler Waste's "convenient ascertainment, but that he ha[d] chosen not to take the trouble to observe them."[67]

The *Vineland* court's skepticism regarding the damages claimed by Fowler Waste represents a significant factor in the court's decision. The court observed that at the end of the underbilled period, Fowler Waste oversaw a committee of its creditors.[68] The court questioned whether the plaintiff's error affected the prices at which Fowler sold its products.[69] Thus, the court recognized the need for a direct causal connection between the mistake and the change in position.[70] The

63. *Vineland*, 86 N.J.L. at 343, 90 A. at 1054.

64. *Id.*

65. *Id.* at 344-45, 90 A. at 1055.

66. *Id.* at 346, 90 A. at 1055.

67. *Id.* at 345, 90 A. at 1055.

68. *Id.* at 347, 90 A. at 1056.

69. *Id.* at 347, 90 A. at 1056. The court observed:

> The important fact involved in the estoppel claim was that defendant would have established and successfully charged higher prices for its commodities than it did establish and charge if the error complained of had not occurred. All of the matters inquired about in the questions objected to tended to show an actual condition of affairs making it most unlikely that defendant would have done anything of the kind * * * on the contrary, if it could have sold its products at a higher price than it did, there were ample and much more urgent reasons for so doing than the one which it is now claimed would, if it had known of it, have caused it to do so.

Id. 90 A. at 1056.

70. In this case, charging a lower price constituted Fowler's change in position.

court concluded that knowledge of the mistake must result in a different course of action[71] by the party invoking an equitable estoppel defense.[72]

Two lessons can be learned for low-income advocates from these cases. First, there must be a basis upon which to decide that the mistake induced some client action. The client must argue that she would have taken a different course of action had she known of the mistake. The alternative course of action must be available to the client and capable of being done but for the lack of knowledge of the mistake. The client must establish the direct causal connection between her lack of knowledge and change in position. Would the client have spent less money on food or clothes but for the mistaken underbilling? Would the client have moved to a less expensive apartment but for the mistaken underbilling? Would the client have applied for federal fuel assistance but for the mistaken underbilling? Would the client have reduced her energy consumption but for the mistaken underbilling?

Second, the mistake must be of a nature that the client did not know of it or could not have discovered it through some reasonable effort on her part. Thus, if the seller reads the meter incorrectly, but the meter is readily accessible to the client and easy to read without a technical background, then the client may recover nothing.[73] Moreover, a dramatic change in utility costs without a similar change in consumption puts the consumer on notice that something merits inquiry.[74] It remains unclear whether a court would apply an objective test in deciding this issue or whether the court would examine the individual utility customer's characteristics such as education.[75]

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71. In this case, charging a higher price would indicate knowledge of the mistake.

72. *Vineland*, 86 N.J.L. at 347, 90 A. at 1056. In the court's words:

> [T]he fact the defendant was unable to successfully raise its prices high enough to meet the demands of the big reasons for so doing which it knew did exist was a fair ground from which a jury might properly conclude that its failure to raise these prices was not because of its ignorance of the small reason of which it did not know.

Id.

73. I. X. L. Stores Co. v. Success Mkts., 98 Utah 160, 165, 97 P.2d 577, 579-80 (1939) (an inability to conveniently ascertain true information is required to prevail in an estoppel action).

74. *See, e.g.*, Consolidated Edison Co. of N.Y., Inc. v. Jet Asphalt Corp., 132 A.D.2d 296, 300-01, 522 N.Y.S.2d 124, 127; *see also infra* note 78 and accompanying text.

75. *See supra* note 56 regarding the impact of educational levels.

In this regard, distinguishing between mistakes in the rate charged and mistakes in the amount of energy consumed becomes necessary. There is a common distinction made between mistakes of law and mistakes of fact. For example, if there is a mistake in the rate charged, the consumer is presumed to have knowledge of the rate. Due to the lack of reasonable reliance, no estoppel could lie against the disconnection of service.[76] However, a factual mistake, uniquely within the province of the utility to reasonably discover or prevent, allows possible application of estoppel principles.

An Illinois court held that a utility might be prevented from collecting an undercharge on grounds of estoppel. In *Illinois Power Co. v. Champaign Asphalt Co.*,[77] the utility sought to recover an undercharge resulting from an allegedly defective meter.[78] While largely addressing the construction of specific state regulations,[79] the court, in dicta, did distinguish between situations in which the utility sought to recover payment for erroneously undercharging the defendant and situations in which the mistake related to quantity or volume supplied and used.[80] Errors as to rate levels are akin to mistakes of law, knowledge of which is imputed to the person raising the estoppel defense. Errors as to quantity billed, however, are akin to mistakes of fact, knowledge of which may not be imputed to the consumer.[81]

III. EQUITABLE LIMITS ON COLLECTION MECHANISMS

A mechanism effectuating the equitable principles of estoppel and mistake while simultaneously respecting the utility's obligation to collect its codified rates exists. Allowing the utility to collect the underbilling, but prohibiting it from disconnecting the utility service, represents one such collection device. The utility then would be permitted to use any other legitimate collection device.[82] Accordingly, both the utility

76. *See infra* notes 118-19 and accompanying text (denial of the defense of estoppel generally follows the same reasoning for the denial of counter-claims).

77. 19 Ill. App. 3d 74, 310 N.E.2d 463 (1974).

78. Tests showed that the meter registered roughly 50 percent of the electricity actually used. Billing records showed a drop in billed usage of approximately the same magnitude. *Id.* at 75-76, 310 N.E.2d at 464.

79. *Id.* at 82, 310 N.E.2d at 468-69.

80. *Id.* at 82, 310 N.E.2d at 469 (dicta).

81. *See infra* note 139 and accompanying text (utility held accountable for damages due to mistake of fact).

82. It is beneficial to compare this approach with the Public Utility Commission of

and the consumer share the burdens of the utility's mistake.

This proposal comports with recent trends in the doctrine regulating the collection of undercharges by freight carriers. While recognizing the right to collect the undercharge, cases involving freight carriers place restrictions on the manner of collection. In this fashion, the courts recently have softened the historically absolute rule on undercharge collections. Instead of *ipso facto* permitting the collection of an undercharge, judicial limits have been imposed. An examination of carrier cases can best provide the requisite guidance.[83]

Courts diverge from the strict principle of collecting undercharges in instances where the dispute regards prepayment of shipping charges. Where the carrier erroneously represents that the consignor has prepaid such charges, the carrier may not seek to collect the underpayment from the consignee.[84] In these cases, the historical basis for rejecting an estoppel defense does not apply.[85] Moreover, courts have held that full payment of tariff charges remains the principal concern of the anti-discrimination provisions of the Interstate Commerce Act.[86] This rule prevails at both the federal[87] and state level.[88]

Ohio's (PUCO) decision to adopt a percentage of income plan (PIP). In adopting that plan, PUCO held:

> This plan does not constitute income redistribution because those customers who qualify for the plan are still liable for any arrearages on their bills. There is no debt forgiveness. The Commission is just foreclosing one method by which a utility may exercise its rights to collect for the debt. The utility still has available to it all of its other remedies at law. Because the customer is still liable for his/her arrearages, the Commission's percent of income payment plan does not constitute free service or a rebate as charged by opponents of the plan. The plan is not confiscatory.

In re Investigation into Long-Term Solutions Concerning Disconnections of Gas and Electric Service in Winter Emergencies, No. 83-303-GE-COI, slip op., at 14 (Nov. 23, 1983).

83. The courts often rely upon undercharge cases regarding freight carriers in deciding undercharging issues for public utilities. *See supra* note 20.

84. *See, e.g.*, Interstate Motor Freight Sys., Inc. v. Wright Brokerage Co., 539 S.W.2d 764, 766-67 (Mo. Ct. App. 1976).

85. The customer is charged with knowledge of the tariff and thus has no basis for a reasonable reliance on assertions that the rate is other than what is actually in the tariff. *Id.* at 766. However, the customer does have a right to rely on the customer's statement that freight charges have been prepaid because the matter of prepayment is not published for public notice. *Id.*

86. *Id.* at 766-67 (emphasis in original).

87. The leading case is Davis v. Akron Feed and Milling Co., 296 F. 675 (6th Cir. 1924). *Accord* Southern Pac. Transp. Co. v. Campbell Soup Co., 455 F.2d 1219 (8th Cir. 1972); Consolidated Freightways Corp. of Del. v. Admiral Corp., 442 F.2d 56 (7th

Courts should import the rationale underlying these decisions to prohibit the use of service disconnections as a collection device in undercharge situations. Like the carrier cases, utility collection of full tariff charges represents the concern of the utility anti-discrimination provisions. Such statutes, however, do not contemplate what the collection mechanism shall be. Like the carrier cases, a ban on the use of the disconnection of service as a collection mechanism merely regulates the manner of debt collection while still acknowledging the debt's existence. Several lines of analysis support the legitimacy of this approach.

A. *Mandatory vs. Discretionary Practices*

Courts reason that a utility must collect its mistaken undercharges because it has no discretion to charge a lesser rate than that contained in its tariffs.[89] Moreover, the equitable doctrine of estoppel, in this situation, may not override the statutory requirements that rates not be less than those contained in the filed tariff.[90]

The mandatory obligation regarding filed rates, however, contrasts with the expressly permissive activity of disconnecting utility service. For instance, the United States Supreme Court in *Jackson v. Metropolitan Edison Co.*,[91] held that utility disconnections did not represent "state action" because the state did not order such activity.[92] Rather, the utility solely and independently decided whether to disconnect its services.[93]

In *Iowa Citizen/Labor Energy Coalition v. Iowa State Commerce Commission*,[94] the Iowa Supreme Court discussed a utility's discretion

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Cir. 1971); Missouri Pac. R.R. Co. v. National Milling Co., 276 F.Supp. 367, *aff'd*, 409 F.2d 882 (3d Cir. 1969).

88. *See, e.g.*, Aero Mayflower Transit Co. v. Hofberger, 259 Ark. 322, 532 S.W.2d 759 (1976); Consolidated Freightways Corp. of Del. v. Eddy, 266 Or. 385, 513 P.2d 1161 (1973); Tom Hicks Transf. Co. v. Ford, Bacon & Davis Texas Inc., 482 S.W.2d 364 (Tex. Civ. App. 1972); Lyon Van Lines, Inc. v. Cole, 9 Wash. App. 382, 512 P.2d 1108 (1973).

89. *See supra* notes 30-38 and accompanying text for a discussion of the mandatory nature of utility tariffs.

90. *See supra* note 22 and accompanying text (strong public policy against discriminating rates finds its source in state statutes).

91. 419 U.S. 345 (1978).

92. *Id.* at 357.

93. *Id.*

94. 335 N.W.2d 178 (Iowa 1983).

with greater detail and articulated the prevailing rule.[95] The court held that state agency rules governing the disconnection of service did not constitute "state action" because they merely regulated what is otherwise a permissive business decision by the utility.[96] The court reasoned that state encouragement did not constitute state action.[97]

While the "state action" debate is not relevant to the issue at hand,[98] the fact that shutoffs are discretionary, not mandatory, takes them out of the traditional undercharge analysis. Even if a utility may not be estopped from performing its mandatory duty to collect its undercharges, it may indeed be estopped from using the discretionary tool of service disconnections in the collection process.

As a result of the discretionary nature of disconnections, restricting the use of disconnections as a collection mechanism does not run afoul of the principles articulated in the undercharge cases. Unlike the mandatory duty to charge the rates present in a utility's filed tariffs, restricting the use of shutoffs as a collection device impinges upon no mandatory duty at all. In contrast to the mandatory responsibility to charge the rates in the filed tariff, the disconnection of service is entirely discretionary. Accordingly, by reason of its negligent or willful

95. *Id.* at 183. *See also* Taylor v. Consolidated Edison Co., 552 F.2d 39 (2d Cir. 1977); Srack v. Northern Natural Gas Co., 391 F. Supp. 155 (S.D. Iowa 1975). *See generally* Comment, *Public Utilities and State Action: The Supreme Court Takes a Stand*, 24 CATH. U.L. REV. 622 (1975); Comment, *Constitutional Law—State Action—Termination of Electrical Service by Privately Owned Utility Does Not Constitute State Action for Purposes of the Fourteenth Amendment*, 24 EMORY L.J. 511 (1975); Comment, *Public Utilities—State Action and Informal Due Process after Jackson*, 53 N.C.L. REV. 817 (1975).

96. *Iowa Citizen/Labor Energy Coalition*, 335 N.W.2d at 183.

97. *Id.* In holding that no state action existed, the Iowa Supreme Court stated:

> The commission explained its purpose was merely to establish reasonable procedures to be followed by utilities that elect to terminate services to customers who fail to pay their bills . . . Nor does the state's encouragement of collection of delinquent bills convert the limitations to state action. Disconnections remain merely a permissive device for utilities to use in attempting to achieve that objective. Commission policy favoring collection of delinquent accounts has resulted in enlargement of the scope of permission to discontinue service, but it has not made disconnection for nonpayment mandatory.

Id.

98. The notion that "state action" in the shutoff situation depends upon the state "ordering" the shutoff has been sharply criticized. *See* Comment, *Constitutional Law—Notices of Utility Shutoffs Need Not Meet Due Process Standards Where Rules Promulgated by the Iowa State Commerce Commission Do Not Create a State Action by Utility Companies—Iowa Citizen/Labor Energy Coalition v. Iowa State Commerce Commission*, 33 DRAKE L. REV. 459 (1983-84).

mistake, a utility could be estopped from disconnecting service because disconnection represents a discretionary action. Even in situations lacking both willful misconduct and negligence, the utilities could be prevented from exercising their right to this otherwise discretionary remedy in order to share the consequences of the innocent mistake.[99]

In sum, while the right to collect in an undercharge case is unquestionable, the manner of collection may be regulated. Just as a carrier has the obligation to collect the undercharged freight fees from someone, but not from the consignor in particular, the utility has the obligation to collect the undercharge somehow, but not to use the disconnection of service, in particular, as a collection device.

B. *Collateral Matters*

Limiting the use of disconnections in the case of underbilling accords with black letter law holding that a utility may not disconnect service for a "collateral" matter.[100] For example, a utility may not disconnect residential service for nonpayment of a business account,[101] nor may it disconnect service at one address for nonpayment of service at a different address.[102] Similarly, a utility may not disconnect service for nonpayment of amounts owing toward either appliances[103] or a different type of utility service.[104]

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99. "[H]e who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." I. X. L. Stores Co. v. Success Mkts., 98 Utah 160, 166, 97 P.2d 577, 580 (1939).

100. *See* Annotation, *Right of Public Utility Corporation to Refuse Its Service Because of Collateral Matter Not Related to That Service*, 55 A.L.R. 771 (1928) (noting that caselaw uniformly holds that a public utility cannot refuse to render the service, which it is authorized by its charter to furnish, because of some collateral matter not related to that service).

101. *See, e.g.*, Northern Ohio Tel. Co. v. Public Util. Comm'n, 9 Ohio St. 2d 153, 154, 224 N.E.2d 528, 529 (1967) (unless tariff clearly provides for termination as a collection device, telephone company may not discontinue service for nonpayment); Josephson v. Mountain Bell, 576 P.2d 850, 852-53 (Utah 1978) (same).

102. *See* Annotation, *Right of Public Utility to Discontinue or Refuse Service at One Address Because of Refusal to Pay for Past Service Rendered at Another*, 95 A.L.R. 556 (1935); *see also* Annotation, *Right of Public Utility to Deny Service at One Address Because of Failure to Pay for Past Service at Another*, 73 A.L.R. 3d 1292 (1976).

103. *See, e.g.*, Garner v. City of Aurora, 149 Neb. 295, 302, 30 N.W.2d 917, 920 (1948).

104. *See supra* note 101 and accompanying text. *See generally* Annotation, *Right of Municipality to Refuse Services Provided by It to Resident for Failure of Resident to Pay for Another Unrelated Service*, 60 A.L.R. 3d 714 (1974); Annotation, *Right to Cut Off*

In each instance above, courts restrict the utility in the mechanisms available to seek collection. Each case recognizes that customers owe money to the utility, and that collection may be undertaken. The law also recognizes, however, the essential nature of utility service and the inherently coercive nature of the disconnection of service as a collection mechanism.[105] Accordingly, the law traditionally bars the use of that collection mechanism for "collateral" matters.[106]

A past undercharge exemplifies a matter "collateral" to any current customer liability. In general, "collateral" matters include matters that bear no relation to the current utility service being offered to the customer.[107] "Collateral" matters relating to particular utility services, however, remain unclear. The Iowa Supreme Court, for example, defines a "collateral" matter as "a wholly separate and independent transaction."[108]

Other courts have adopted similar approaches. The Nebraska courts

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Water Supply Because of Failure to Pay Sewer Service Charge, 26 A.L.R. 2d 1359 (1952).

105. As one court has stated:

> The parties are not upon equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again, and perhaps still again. He cannot resist, lest he lose his water.

Wood v. Auburn, 87 Me. 287, 292-93, 32 A. 906, 907-08 (1895).

106. To recognize the debt, while barring a particular remedy, is akin to what happens pursuant to a "general" statute of limitations.

> Most states have enacted what are referred to as 'general' statutes of limitations. These statutes provide that at the end of the statutory period, no action in law (or suit in equity) can be maintained based upon the debt in question. However—and it is a big however—these 'general' statutes operate only on the remedies available to the creditor. While the statute may extinguish the right to enforce a debt, it does not extinguish the debt itself. As a result, the creditor has every other lawful means, other than a suit in law or equity, of realizing on the debt.

Colton, *Statutes of Limitations: Barring the Delinquent Disconnection of Utility Service*, 23 CLEARINGHOUSE REV. 3 (May 1989).

107. *See generally* 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, 256-57 (1969).

108. Berner v. Interstate Power Co., 244 Iowa 298, 302, 57 N.W.2d 55, 57 (1953).

hold that a matter is "collateral" if it is an "independent transaction, not strictly connected with the particular physical service."[109] One Louisiana court's definition was somewhat narrower, holding that a matter is collateral if it is "*entirely* . . . unconnected with the particular service which is being rendered."[110] These definitions seem somewhat circular, however, and advocates may well have to turn to definitions of "collateral" in other areas of the law for guidance.[111]

Florida courts provide perhaps the most workable definition of a "collateral service." Services are not collateral, according to the Florida courts, if they are "so interlocked that neither can be effective without the other."[112] Thus, while water and sewer services are not collateral to each other, water and electric services are collateral.[113]

Amounts sought to be collected as a result of mistaken past undercharges fall into the realm of "collateral" matters. Such charges are akin to charges for a bill at a different address, or a bill for a different transaction. A bill for past undercharges does not constitute a bill for services arising in the ordinary course of monthly customer/utility relations. It would thus fall within the "independent transaction" analysis of the aforementioned cases.

In any event, the nonpayment of the mistaken past due amount bears no relation to the customer's activity toward the utility. Rather, the customer pays the monthly bills as requested by the utility. The utility then seeks recoupment for its own past mistake of undercharging the customer. Consequently, it is appropriate to proscribe the disconnection of service based upon collateral matters.

Finally, to the extent that a disconnection of service can be analogized to a "forfeiture," estopping a utility from disconnecting service as a collection device is consistent with contract law.[114] Professor Corbin

109. Garner v. City of Aurora, 149 Neb. 295, 302, 30 N.W.2d 917, 920 (1948).

110. Hicks v. City of Monroe Util. Comm'n, 237 La. 848, 887, 112 So. 2d 635, 649 (1959) (emphasis in original).

111. This task will be left to another day.

112. Edris v. Sebring Util. Comm'n, 237 So. 2d 585, 587 (Fla. Dist. Ct. App. 1970).

113. *See generally* Annotation, *Right of Municipality to Refuse Services Provided by It to Resident for Failure of Resident to Pay for Another Unrelated Service*, 60 A.L.R. 3d 714 (1974); Annotation, *Right to Cut Off Water Supply Because of Failure to Pay Sewer Charge*, 26 A.L.R. 2d 1359 (1952).

114. Other aspects of a forfeiture are similar to the process of service disconnection. For example, there must be notice and an opportunity to cure before a forfeiture. Elsasser v. Wilcox, 286 Or. 775, 779, 596 P.2d 974, 976-77 (1979); Braunstein v. Trottier, 54 Or. App. 687, 695, 635 P.2d 1379, 1384 (1981).

recognized that "to avoid such a forfeiture, the courts have been very astute to find and declare the existence of . . . an estoppel . . . [s]uch a provision will not be enforced if the creditor has in any way contributed to the default . . ."[115] Like the collection of arrears for collateral matters, the courts do not deny the liability, and do not wish to prevent collection. Rather, courts simply seek to deny the forfeiture. By allowing the collection of a utility undercharge, but preventing the disconnection of service as a collection device, courts achieve practically identical results.

IV. RIGHT TO FILE COUNTER-CLAIM FOR DAMAGES

Most courts deny counter-claims for damages to customers whether utilities misquote rates willfully, negligently, or merely by mistake.[116] The courts' denial of counter-claims largely follows the same reasoning of the denial of the defense of estoppel. Accordingly, courts charge the consumer with notice of the "true" rate whether or not she actually knew it.

In *Denver & Rio Grande Western Railway Co. v. Marty*,[117] a carrier case, the Colorado Supreme Court held that the duly filed rate of the carrier is the only lawful charge; shippers and travelers are charged with notice of it, and both parties must abide by it.[118] Indeed, courts hold that a consumer has as much of a duty as a carrier in determining the correct rate. Even if a consumer relies on a carrier's representation, she does so at her peril. Thus, courts charge the consumer with the knowledge that the carrier could not evade the statutory duty to collect the full amount of charges lawfully due.[119]

The denial of counter-claims for damages is further deemed necessary to preserve the statutory policy against rebates. The *Marty* court noted the statutory prohibition of rebates regardless of the legal theory upon which the claims for rebates are based. Further, it stated, "to hold that the statute affects contract claims only and is not applicable to tort claims growing out of the rate misquotation would effectually

115. A. CORBIN, *supra* note 2, § 754.

116. Denver & Rio G. W. R.R. v. Marty, 143 Colo. 496, 499-500, 353 P.2d 1095, 1097 (1960).

117. 143 Colo. 496, 353 P.2d 1095 (1960).

118. *Id.* at 499-500, 353 P.2d at 1097 (quoting Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97, (1915)).

119. Houston & Texas Cent. R.R. v. Johnson, 41 S.W.2d 14, 15-16 (Tex. Ct. App. 1931).

nullify this statute and the policy set forth therein."[120] The court added that the strong policy of the statute would become meaningless if it could be circumvented merely by developing a different legal theory.[121] Courts have been "almost unanimous in holding that no action to recover damages from the carrier will lie, since to do so would amount to a preferential and unlawful rebate."[122]

The rule, however, may not be as firm as it first appears. Two important distinctions may determine the validity of a counter-claim. First, courts must recognize the distinction between seeking damages equal to the amount of the undercharge and seeking damages resulting from the utility's unlawful contract. Second, courts must recognize the distinction between seeking damages for a mistaken rate quotation and seeking damages for a mistake of fact leading to an undercharge.

Nonetheless, whatever the legal theory, a consumer is barred from seeking a rebate through a counterclaim.[123] Thus, defining the type of damages sought in order to prevent a court from characterizing those damages as a rebate becomes important. In *Houston & Texas Central Railway Co. v. Johnson*,[124] for example, the counter-claimant sought to recover the freight charges.[125] As in *Marty*, the counter-claim alleged reliance on the carrier's misquotation of rates "to their damage in the amount of the difference between the actual freight rate and the amount which it would have been had the quotation of plaintiff's agent been correct."[126]

Similarly, in *Graves Truck Line, Inc. v. Hy Plains Dressed Beef, Inc.*,[127] the plaintiff carrier sued to recover an undercharge. Hy Plains counter-claimed, asserting that it "had been damaged and was entitled to a setoff in the entire amount for which it was sued."[128] The court denied both of these counter-claims as a matter of law.[129] This type of damage action simply seeks to undo the fulfillment of the policy which

120. *Marty*, 143 Colo. at 500, 353 P.2d at 1097.

121. *Id.* at 500-01, 353 P.2d at 1097.

122. Annotation, *Carriers Understatement of Charges Where Discrimination is Forbidden*, 88 A.L.R. 2d 1375, 1392 (1963).

123. *Marty*, 143 Colo. at 500, 353 P.2d at 1097.

124. 41 S.W.2d 14 (Tex. Ct. App. 1931).

125. *Id.*

126. *Marty*, 143 Colo. at 497, 353 P.2d at 1095.

127. 204 Kan. 275, 462 P.2d 130 (1969).

128. *Id.* at 276, 462 P.2d at 132.

129. "The public policy against discriminatory ratemaking precludes a shipper from

the mandatory collection of tariffed rates seeks to implement. In other words, one cannot seek the amount of the undercharge as damages.

In contrast, however, actual damages exceeding the amount of the undercharge are recoverable. A utility customer has a right to seek compensation for harms experienced resulting from a mistaken underbilling. The recoverable damages are limited, however. A customer may seek only compensatory damages that directly and proximately arise out of the utility's mistake—a limit that is placed on any damage action.

Courts have held that a utility's obligation to collect an underbilling does not insulate it from consumer counter-claim actions for damages.[130] As the Missouri courts have stated, "although a utility company must be compensated for the full amount lawfully due it under the law and the rates fixed by the Public Service Commission, it 'cannot divorce itself from the consequences of its own failure to use ordinary care to avoid harm to its customers.' "[131] While public policy requires that any underbilling error be recognized and corrected, it does not require that all parties stand in equal position to absorb the consequences of the error.[132]

Note, for example, the damages considered by the *I. X. L. Stores* court: (1) sub-letting a premises for a price made non-compensatory by the retroactively applied rates; (2) the expenditure of sums of "extra" money on employee bonuses that would not have been "extra" if the rates were properly applied in a timely fashion; and (3) the reduction in taxable income attributable to increased operating expenses.[133]

These damages would have been permissible had they been sought through a counter-claim.[134] The customer, however, did not plead the

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asserting a claim, counter-claim or defense in an action brought by a carrier to recover the full legal charges for transportation." *Id.* at 280, 462 P.2d at 134.

130. *See, e.g.*, Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574, 577 (Mo. Ct. App. 1976).

131. *Id.* at 577 (citations omitted).

132. *See generally* Annotation, *Carrier's Right or Liability in Respect of Excess of Lawful Charge Overcharge Understated Where Discrimination is Forbidden*, 83 A.L.R. 245, 267 (1933).

133. I. X. L. Stores Co. V. Success Mkts., 98 Utah 160, 168, 97 P.2d 577, 580-81 (1939).

134. *Id.* at 169-70, 97 P.2d at 581 (Wolfe, J. concurring). The concurring opinion explained:

> In this case, defendant set up one counterclaim for allowance of the five percent discount which the Utah Power & Light Company gave the plaintiff. It was al-

damages, as counter-claims; rather, they were pled as a basis for an estoppel defense. Because the estoppel defense failed, the court did not award damages.[135]

In sum, courts will generally permit damages not involving efforts to recoup the undercharges. In effect, a public utility's overcharge converts the provision of service to the involved customer into an unlawful special contract at a discounted rate. Courts will seek to remedy the unlawful contract, but that unlawful action cannot insulate the utility from what otherwise would be its liability.[136] A utility may not hide behind its own unlawful actions, innocent or not, to avoid paying compensation for the harms that its actions have imposed on others.[137]

Even when seeking damages is generally permissible, a consumer is barred from seeking damages based upon a mistake of law.[138] Mistakes of fact, however, lead to different results. The Missouri courts have specifically held, for example, that because an undetectable defect in the metering device caused the underbilling, the consumer had no means of discovering the lawfully established rate. Therefore, the utility should be held accountable for any damage caused to the

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lowed by the court. He then set up another counterclaim for loss of rentals to a sublessee. This was disallowed because the court found that it did not appear that he suffered any such loss as the proximate and natural consequence of the plaintiff's mistake. No counterclaim for increased State and Federal income taxes which were paid by reason of a supposed greater net income was pleaded, except by way of estoppel; nor was any counterclaim set up showing loss by reason of payment of increased bonuses to workmen due to supposed greater net profits than were actually earned. It would seem that had there been the increase in taxes paid because of the mistake, the amount of such increase might have been mathematically determined.

Id.

135. *Id.* at 170, 97 P.2d at 581-82.

136. Note, for example, with regard to carriers:

The fact that a contract of shipment is invalid as violating the Interstate Commerce Law prohibiting discrimination does not operate as a bar to an action to recover for loss of, or injury to, the goods by negligence, or for injury due to delay in transportation, or for damages caused by willfully misrouting the goods so that the shipper is compelled to pay a much higher rate of freight. Even though the carrier is entitled to recover the rate fixed by the schedule, the rights or the shipper are not in other respects, not dependent on the special contract, different from what they would have been had the contract been free from illegality as to rates charged.

13 C.J.S. *Carriers* § 394 (1972).

137. *See supra* note 132 and accompanying text.

138. *See supra* notes 118-19 and accompanying text.

consumers.[139]

Contrary to this reasoning is the troublesome Wisconsin decision of *Wisconsin Power & Light Co. v. Berlin Tanning & Manfacturing Co.*[140] In *Berlin Tanning*, a consumer asserted two counter-claims against Wisconsin Power and Light Company. The first alleged that the cost of natural gas represented a substantial cost of doing business reflected in prices charged to consumers. Berlin further asserted that it had no means of recovering that cost from its own customers and that an operating loss exactly equal to the amount of the deficit would result.[141] This first counter-claim is nearly identical to those asserted in *Johnson*, *Marty* and *Hy Plains Beef*. Thus, not surprisingly, the court denied the counter-claim as seeking an unlawful rebate.

The *Berlin Tanning* court's treatment of the second counter-claim is more disturbing. Berlin asserted in its second counter-claim that it purchased certain shares of its own capital stock during the period of the undercharge. The purchase price of that stock was computed and paid based upon the book value of the stock at the time. Berlin argued that if the energy delivered by Wisconsin Power and Light had been properly charged, the book value would have been less. Berlin further argued that it had no recourse against the seller of the stock to recover the "excess" price paid.[142]

The *Berlin Tanning* court also denied the second counter-claim holding that the state's antidiscrimination statute required denial as a matter of law. The Wisconsin court stated that if the defendant's pleas were recognized as either setoffs or defenses, the defendant would have paid less than the proper rate for gas.[143] The court refused to acknowledge a difference between reducing the amount to be paid plaintiff through an estoppel defense arising out of negligent billing, and reducing the amount through a setoff of damages that resulted from negligent billing.[144]

The companion case to *Berlin Tanning* involved an even more egregious situation. In *Wisconsin Power & Light Co. v. Berlin Laundry*

139. Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574, 577 (Mo. Ct. App. 1976). *See supra* note 80 and accompanying text.

140. 275 Wis. 554, 83 N.W.2d 147 (1957). *See also* Wisconsin Power & Light Co. v. Berlin Laundry Co., 275 Wis. 562, 83 N.W.2d 152 (1957).

141. *Berlin Tanning*, 275 Wis. at 556, 83 N.W.2d at 149.

142. *Id.* at 557, 83 N.W.2d at 149.

143. *Id.* at 559, 83 N.W.2d at 150.

144. *Id.* at 561, 83 N.W.2d at 151.

Co.,[145] the defendant consumer entered into a contract with a heating contractor for the installation of gas fired equipment. The contract provided that if the gas fired equipment could not be operated at a cost comparable to or less than the cost of operating the coal burning equipment, the gas fired equipment would be removed and the coal fired equipment reinstalled at no cost to the defendant. Based upon the bills received from the utility, Berlin Laundry erroneously released the contractor from liability under his guaranty.[146] The court denied Berlin Laundry's counter-claim on the same basis as *Berlin Tanning*.[147]

The *Berlin Laundry* and *Berlin Tanning* decisions portray an erroneous application of the law. In those cases, there was not an erroneous quotation of rates. Instead, the utility failed to multiply the meter reading by ten to calculate the proper bill. The disputed amount equalled 90 percent which remained unpaid. In this instance, the defendant knew the tariff rates. The dispute arose, however, over the level of utility usage. The issue, being factual, left the court with no basis for imputing that knowledge to the defendant. Moreover, the action was for damages independent of the contractual arrangement between the utility and the customer. Specifically, the customer sought compensation for injury suffered at the hands of the utility, not a rebate of the undercharge which the utility later sought to collect.

Berlin's damage claims represented neither a discount nor a rebate of previously paid charges. Instead, they constituted a reasonable computation of the harms arising from Wisconsin Power and Light's wrongful billing. Compensatory damages would not have given Berlin a preference. Rather, they would have only made Berlin whole. The court's denial of the counter-claim not only deprived Berlin of the full services for which it had paid—including timely and accurate billing—but also failed to compensate Berlin for additional harms resulting from that failure.

V. NEED FOR A NEW DOCTRINE

The existing problems in the traditional rules demonstrate a need for a new doctrine to govern collections of mistaken billings. This new doctrine should encompass three parts. First, the courts should relax their ban on the use of estoppel to govern the collection of un-

145. 275 Wis. 562, 83 N.W.2d 152 (1957).

146. *Id.* at 563, 83 N.W.2d at 152.

147. *Id.* at 563, 83 N.W.2d at 153.

dercharges to low-income households. The theory underlying a denial of the estoppel defense provides that a utility's nondiscrimination statute prohibits the grant of rebates or preference. This theory may be true when a utility has rendered identical service. If the level of service varies, however, the discrimination arises by charging an identical rate, not by charging a different rate. Permitting a utility to render inferior or inadequate service, while forbidding relief from rates paid for adequate service, does not prevent discrimination, but furthers it.

Second, courts and commissions should allow the rebate of some portion of previously charged rates in those instances where the utility has failed to provide the service upon which the rates are based. Finally, a utility should be liable for all damages proximately caused by its rendering of inadequate service. Courts should clearly provide relief for consumers who are damaged because of a utility's delay in providing complete and accurate bills, so long as the claim for damages is not simply a claim for a rebate of the amount of the undercharged bill.

A. *The Underlying Theory: A Utility's Service Obligation*

The "service" a utility provides to its customers consists of several components.[148] Unquestionably, the utility must provide the units of energy, water, or telecommunication. A utility, however, maintains an obligation to provide more than those units as part of its service; it has a further obligation to provide correct bills. The provision of a bill is not superfluous, it is an essential part of a utility's service to the customer.[149] Obtaining a regular and correct meter reading, for example, as opposed to mere estimates, represents an obligation enforced by many commissions.[150] In short, timely and accurate billing is part of

148. Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 313 (1962).

149. *See, e.g.*, *Re* Davenport Water Co., 76 Pub. Util. Rep. 3d (PUR) 209, 232 (Iowa Comm. C. 1968) (approving rate adjustment to compensate for new billing procedure).

150. *See, e.g.*, 52 PA. CODE § 56.12 (1989). Section 56.12 reads in pertinent part:

> Except as provided in this section, a utility shall render bills based on actual meter readings by utility company personnel * * * Where a utility bills on a monthly basis, it may estimate usage of service every other billing month, so long as the utility provides each ratepayer with the opportunity to read the meter and report the quantity of usage in lieu of such estimated bill.

Id.

the utility's obligation to render "reasonably adequate service."[151] More importantly, timely and accurate billing encompasses part of the utility's service that each utility customer buys.[152] Indeed, the cost of billing and collection is part of the rates charged to consumers.[153]

In rendering "reasonably adequate service," the utility should comply with the temporal element implicit in the definition of "adequacy." It does not suffice for a utility to provide the demanded services "sometime." The utility is obligated to provide the service at the time and place demanded.[154] Tardy service and timely service are not equivalents.[155] A utility's delay in the provision of water, gas or electric service may well result in compensable damages to consumers.[156]

Moreover, even if found not to be part of the utility's statutory or common law service obligation, the provision of timely and accurate billing remains an enforceable obligation. If the utility tariff promises timely and accurate billing, for example, that obligation has become part of the "service" which the consumer has contracted to receive. If a utility fails to perform the services which it has contractually agreed to provide, and for which it is charging, then charging the same rate to persons underserved and to persons adequately served is unjust and discriminatory.[157] Accordingly, in addition to specific retroactive re-

151. *See infra* note 157 and accompanying text explaining that a utility's tariffs are part of its contract with its customers, and, as such, are binding on the utility.

152. The "purchase" of this service is most explicit in the telecommunications industry, where billing and collection services have been examined in detail. *See In re* Detariffing of Billing and Collection Servs., 102 F.C.C.2d 1150 (1986) (Order Adopting Rules); *In re* Detariffing of Billing and Collection Servs., 100 F.C.C.2d 607 (1985) (Notice of Proposed Rulemaking).

153. *See* FERC Customer Records and Collection Expenses, 18 C.F.R. Pt. 101, § 903 (electric utilities) (1990); FERC Customer Records and Collection Expenses, 18 C.F.R. Pt. 201, § 903 (natural gas utilities) (1990).

154. *See generally* Annotation, *Liability of Electric Company for Interruption, Failure, or Inadequacy of Power*, 4 A.L.R. 3d 594 (1965); Annotation, *Duty of Public Utility to Notify Patron in Advance of Temporary Suspension of Service*, 52 A.L.R. 1078 (1928).

155. Note, *supra* note 148, at 313 (noting the statutory duty to provide continuous efficient service).

156. *See generally* 64 AM. JUR. 2D *Public Utilities* § 313 (1972); *Annotation, Liability of Gas, Electric or Water Company for Delay in Commencing Service*, 97 A.L.R. 838 (1935).

157. When a customer's bill fails to reflect the actual amount owed, they are receiving service which is inferior to that which properly billed customers receive. A utility's subsequent attempt to recover payment for unreceived service contravenes the statutory policy against discriminatory rate making.

bates for inadequate service,[158] prospective rate relief has been delayed[159] or denied altogether[160] due to the provision of inadequate service.[161]

B. *Rebates For Inadequate Service*

Prospective rate relief, however, may provide an inadequate remedy in individual cases. In this situation, the customer adversely affected by inadequate service should receive a rebate. A rebate for inadequate service is not statutorily prohibited. Indeed, the grant of rebates or discounts for inadequate service commonly occurs in public utility regulation. The Nebraska Supreme Court set forth the basic principle in *In re Application No. 30466.*[162] In *Application No. 30466,* the court held that a public service commission has a right to force a utility to provide the service for which its rates have been fixed.[163] The court reasoned that this right is inherent in the public service commission's regulatory power.[164]

158. *See infra* notes 162-64 and accompanying text.

159. *See, e.g., Re* Long Beach Motor Bus Co., 12 Pub. Util. Rep. 3d (PUR) 198 (Cal. P.U.C. 1955) (transit company's rate increase conditioned upon improved service); *Re* Norwalk Indep. Tel. Co., 27 Pub. Util. Rep. 3d (PUR) 17 (Wis. P.S.C. 1959) (telephone company's rate increase contingent upon plant repairs).

160. *See, e.g., Re Arkansas Tel. Co.,* 79 Pub. Util. Rep. 3d (PUR) 241 (Ark. P.S.C. 1969) (a substandard service may afford a basis for denial of a request for higher rates); *Accord, Re General Telegraph Co. of the Southwest,* 89 Pub. Util. Rep. 3d (PUR) 92, 99-100 (Ark. P.S.C. 1971).

161. Again, state commissions have allowed differences in the quality of service to result in differences in rates to the same members of an otherwise uniform class. *See Re* Blair Tel. Co., 51 Pub. Util. Rep. 3d (PUR) 262, 264 (Neb. P.S.C. 1963) (to provide an incentive for a small telephone company to replace old wall and desk type instruments with a new handset type as rapidly as possible, an authorized rate increase would be permitted to go into effect only as each instrument was replaced).

162. 194 Neb. 55, 230 N.W.2d 190 (1975).

163. *Id.* at 63, 230 N.W.2d at 196. The court stated:

> [I]nherent in the power of the commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service.

Id.

164. *Id.* The court reasoned:

> [T]he commission, as part of its power and duty to establish rates which will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate.

Id.

The Nebraska decision is not unique. In 1957, the New York commission reduced a New York telephone company's rates to make them commensurate with the poor quality of service.[165] The state of New York institutionalized such a review, with the commission finding that rate adjustments could be based on numerical indicators of whether service quality was poor.[166] In 1969, the Florida commission ordered a telephone company to refund a portion of the money received from customers through a provisional rate increase once it was found that the utility had not complied with a prior order of the commission which related to the quality of the utility's service.[167] In 1979, the Maine Public Utility Commission disallowed a return on equity for a water company because of the substandard quality of water service.[168]

Moreover, rate adjustments for inadequate service have not been limited to entire classes of customers. For example, the Indiana commission found that rate relief could be provided to a portion of residential customers. *In Re Midwest Telephone Co.*,[169] the commission held that no telephone utility can render reasonably adequate service with more than ten subscribers on any line.[170] The commission further held that particular customers who paid for adequate service but did not receive it were eligible for rate relief. That relief was available "until such time that such service is made reasonably adequate."[171]

Courts denying rate refunds, rebates or discounts for inadequate service approve of the principle, but preclude relief based upon the facts. In a Vermont case, for example, the court denied relief because the consumers alleging inadequate service did not prove the extent of their loss.[172] In contrast, a North Carolina court held that a utility may not be penalized twice: once through a reduction in the value of its prop-

165. *Re* New York Tel. Co., 92 Pub. Util. Rep. 3d 321, 357 (N.Y. P.S.C. 1971).

166. *Id.* at 358.

167. *Re* Southern Bell Tel. and Tel. Co., Docket no. 9775-TP, Order No. 4462-A (Fla. P.U.C. July 22, 1969).

168. *Re* Northport Mountain Spring Water Co., F.C. Nos. 2437, 2491 (Me. P.U.C. Dec. 17, 1979).

169. 23 Pub. Util. Rep. 3d (PUR) 26 (Ind. P.S.C. 1958).

170. *Id.* at 32.

171. *Id.* at 31. The Commission provided relief to all customers in a designated local exchange area. *Accord Re* Western Light & Tel. Co., 10 Pub. Util. Rep. 3d 70, 76 (Mo. P.S.C. 1955).

172. Arlington Selectmen v. Arlington Water Co., 136 Vt. 495, 496, 394 A.2d 1130, 1131 (1978) (undrinkable water held to have substantial value, thus undermining consumer's refund claim).

erty, and again through an express rate discount or refund.[173]

When customers are entitled to relief, the scope of that relief is not subject to exact determination. According to the Kentucky appellate courts, the extent of the relief, "is primarily one of regulatory policy to be determined by the Public Service Commission."[174] Nevertheless, courts and regulators have developed a "test" to determine the reasonableness of a refund. The Georgia commission concluded that rates should be reduced to "make them commensurate with the poor quality of service provided."[175] Further, the Georgia commission held that the rates of a telephone company should "be reduced so that they are commensurate with the character and quality of service rendered."[176] Other commissions do not use a principled calculation to make a rate adjustment. In *Chandler & McKenzie, Inc. v. Osland*,[177] the Colorado commission waived the water charges from customers for a three month period during which a serious water shortage occurred.[178]

While specific rebates have been granted to specific customers when the utility renders inadequate service,[179] these cases involve a broader principle. The rebates illustrate that charging different rates to different customers, even within the same customer class,[180] is not "discriminatory" if the utility has provided different levels of service—one adequate and the other not. The level of rates and the level of service cannot be isolated from each other. If the customer has bought and paid for a designated service which she has not received, then imposing identical rates rather than recognizing different rates greatly advances discrimination.

Accordingly, permitting a downward adjustment in the mistaken undercharge situation allows a utility commission to reconcile a public

173. State *ex rel.* Util. Comm'n v. General Tel. Co., 21 N.C. App. 408, 411, 204 S.E.2d 529, 531 (remanding the case to the commission for specific factual findings regarding inadequate service) *rev'd*, 285 N.C. 671, 208 S.E.2d 681 (1974) (holding that commission's failure to find specific facts was harmless error and remand would only delay final determination).

174. Lexington v. Public Serv. Comm'n, 249 S.W.2d 760, 764 (Ky. 1952).

175. *Re* Parker, 19 Pub. Util. Rep. 3d (PUR) 400 (Ga. P.S.C. 1957).

176. *Re* Segler, 68 Pub. Util. Rep. 2d (PUR) 117 (Ga. P.S.C. 1947).

177. 1933 B Pub. Util. Rep. (PUR) 357 (Colo. P.S.C. 1932).

178. *Id.* at 361-62.

179. *In re* Application No. 30466, 194 Neb. 55, 60, 230 N.W.2d 190, 195 (1975). A utility "may not continue to exact rates for reasonably adequate service that wholly fails to meet that standard." *Id.* 230 N.W.2d at 195.

180. For example, two residential customers.

utility's duty to charge mandatory rates with its duty to deliver the services for which it has collected compensation. Particularly with low-income customers, a strict rule against rebates based upon the public policy against discriminatory rates becomes less compelling. Unlike carrier cases in which states promulgate statutes and tariffs to avoid collusion between the carrier and the customer,[181] a utility retains no motivation to enter into such favorable contract terms with low-income residential utility customers. The strict rule against preferential ratemaking in the carrier cases is thus inapplicable to a mistaken undercharge which imposes a severe hardship on a low-income household.

C. *Damages For Inadequate Service*

A utility is liable for all damages proximately caused by the rendition of inadequate service.[182] Accordingly, if there is a delay in providing a complete and accurate bill—willful, negligent or otherwise—the utility has not provided the service which it has been paid to provide and it can be sued in either tort or contract.[183]

CONCLUSION

Traditional doctrine holds that a utility has not only the right, but the obligation, in an undercharge situation to collect the undercharge from the consumer. This obligation is predicated on the strong public policy, as expressed in statute, that utility rates are to be mandatory.

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181. *See* People v. Ryerson, 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246, 250 (1966) (articulating the state's interest in avoiding collusion between carriers and shippers).

182. *See, e.g.*, Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574, 577 (Mo. Ct. App. 1976). *See generally* Annotation, *Liability of Electric, Power or Light Company For Interruption, Failure or Inadequacy of Power*, 4 A.L.R. 3D 594 (1965); Annotation, *Measure and Amount of Damages for Breach of Duty to Furnish Water, Gas, Light or Power Service*, 108 A.L.R. 1174 (1937); Annotation, *Liability of Gas, Electric, or Water Company for Delay in Commencing Service*, 97 A.L.R. 838 (1935); Annotation, *Question of Proximate Cause as Affecting Liability For Damages For Failure to Obtain Telephone Connection*, 10 A.L.R. 1456 (1921), *supplemented by* 19 A.L.R. 1419 (1922).

183. 64 AM. JUR. 2d *Public Utilities* §§ 28, 30 (1972). *See also* 86 C.J.S. *Telecommunications* § 272(a) (1954); *Wrongful Termination of Electric Service*, 15 PROOF OF FACTS 2d 125 (1978); 9 AM. JUR. *Pl. and Prac. Forms* (Rev.), Forms 31, 32 (1984). *See generally* Colton, *Utility Disconnections as a Tort: Gaining Compensation for the Harms of Unlawful Utility Shutoffs*, 22 CLEARINGHOUSE REV. 609 (1988).

To effectuate this statutory policy, utilities have a mandatory duty to collect the rates included in their filed tariffs.

Nevertheless, the utility is not obligated to rely upon the disconnection of service as a collection device. As the courts have repeatedly recognized in constitutional "state action" discussions, the disconnection of service is entirely discretionary with the utility. Moreover, even a state's encouragement of the collection of delinquent accounts does not translate the use of the disconnection of service into a non-mandatory activity. Therefore, a utility may be estopped from disconnecting service for nonpayment of an undercharge, even if the utility is permitted to use any other legitimate collection device.

This result is not simply a public policy decision by the respective state public utility commission based upon the "equities" of a particular situation. Black letter utility law prohibits the use of disconnection of service for a matter that is "collateral" to the provision of that service.[184] While the law recognizes the right of a utility to collect outstanding amounts for these collateral matters, the utility is barred from using the disconnection of service as a collection device.[185] Moreover, while the law recognizes the rights of creditors to collect arrearages, it also abhors forfeitures.[186] The courts have been particularly aggressive in preventing practices in the nature of forfeiture when the creditor has in any way contributed to the default.[187]

In addition to this preservation of utility service against disconnection, a household may seek damages arising from a utility undercharge. The customer may not seek the amount of the undercharge as damages, however, because that would simply allow discrimination by indirection which is prohibited by direction. At the same time, however, by way of counter-claim, consumers may plead for damages directly caused by the utility undercharge that they would not have incurred but for the undercharge.

Notwithstanding traditional doctrine, a need for a new approach to the mistaken utility undercharge exists. Courts and commissions must realize that a utility has obligations beyond providing non-discriminatory service. A utility has a further duty, established by statute, contract, and the common law, to provide "reasonably adequate service."

184. *See supra* notes 101-07 and accompanying text.

185. *Id.*

186. *See supra* notes 115-16 and accompanying text.

187. *Id.*

The rates charged to consumers assume that such adequate service is indeed provided. The rendition of reasonably adequate service involves more than simply the provision of energy, water, or telecommunications. It also involves the provision of complete, timely, and accurate bills.

When a utility fails to provide adequate service for which it has charged, the consumers who have received the inadequate service not only are entitled to a rebate of some portion of the rates paid for the higher level of service, but are also entitled to collect damages for the utility's breach of its duty. A rebate of some portion of rates paid for lower quality service is not prohibited by non-discrimination statutes. Discrimination arises when utilities charge a uniform rate, yet provide different levels of service.

NOTES