



## **ENERGY COMMITTEE**

# **Made in NY: Electricity**

MARCH 2020

NEW YORK CITY BAR ASSOCIATION  
42 WEST 44TH STREET, NEW YORK, NY 10036

## Made in NY: Electricity

According to the highest court in New York State, in *Brush Electric Manufacturing*,<sup>1</sup> electricity is a commodity and a product which is manufactured. This Court decision was made about 5 years before the first electric taxi fleets started operating in New York City.<sup>2</sup>

Why does this matter? If electricity is a commodity and a product, then there is strong implication that it's a good and not a service. A surprising variety of legal issues are resolved based on a determination of whether or not electricity is a service or a good (or a product, a commodity, or some other non-service thing). Think bankruptcy, commercial contracts, torts, labor law, and tax. Examples of such cases are provided in a **backgrounder**<sup>i</sup> included as endnote i. In *Brush*, the Court needed to determine what electricity was in order to determine whether or not a company that produced it, Brush Electric Manufacturing, was a manufacturing company and therefore exempt from a tax.

As a general rule, if electricity is involved in a matter, in order to know one's rights, one should know whether electricity is a good or service in the applicable jurisdiction. States vary in determinations as to whether electricity is a good or service, but New York is—special. In 2017, a federal bankruptcy court judge lambasted New York's treatment of the issue in fabulous fashion in his opinion in *In re Escalera Res. Co.*,<sup>3</sup> which, by the way, was a case that had nothing to do with New York (it was interpreting a federal statute in Colorado, in respect of a Maryland company with operations in Wyoming served by a utility company organized in Oregon). The situation in New York being so bad (and the opinion being so thorough--a virtual treatise), that the judge apparently felt the need to call New York out, as excerpted below:

After carefully parsing the state personal injury cases involving high voltage wire contact (not metered and delivered electrical energy), there seems to be only one real outlier: New York. New York courts first addressed whether electrical energy constitutes "goods" under the UCC in *Farina* (N.Y. App. Div. 1981). *Farina* was a personal injury case stemming from contact with an overhead electric wire prior to metering and delivery. Although the main focus was on a tort claim, the intermediate appellate court also discussed a UCC claim. First, *Farina* determined that the UCC was inapplicable because there was no sale. Then, in what appears to be almost an after-thought, the *Farina* court mentioned: "goods." The entire UCC "goods" discussion consisted of only a single sentence: "[W]e are unable to conclude that it was intended that electricity be included within the definition of "goods" (Uniform Commercial Code, § 2-105)." And, again, the case was of the

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<sup>1</sup> *People, ex rel. Brush Electric Manufacturing Co. v. Edward Wemple*, 129 N.Y. 543, 29 N.E. 808, 4 Am. Electl. Cas. 563 (N.Y. 1892), avail. at <https://books.google.com/books?id=4YgwAQAAMAJ&pg=PA563>. (All links cited herein were last visited on Mar. 11, 2020.)

<sup>2</sup> See *Hailing the History of New York's Yellow Cabs*, NPR (Jul. 8, 2007), avail. at <http://www.npr.org/templates/story/story.php?storyId=11804573> ("since July of 1897, twelve electric hansom cabs . . . had plied the city streets. . . . [T]he Electric Vehicle Company expanded its New York fleet to sixty-two in 1898 and then to one hundred the next year. . .").

<sup>3</sup> 563 B.R. 336 (Bankr. D. Colo. 2017).

personal injury before metering variety. This inauspicious and analysis-free dicta appears to be the sole basis why subsequent New York courts have determined that electricity is not a good under the UCC.

The *Farina* dicta jumped to federal court in *U.S. v. Consol. Edison Co. of N.Y.*, (S.D.N.Y. 1984). That case concerned a breach of contract (to recover overcharges) against a public utility. Again, the UCC "goods" discussion comprised one sentence: "In New York, electricity is not considered "goods" and the U.C.C. therefore is not directly applicable to contracts involving the provision of electricity." The court dropped a footnote citing *Farina* as the exclusive support for the proposition. From that humble beginning, the *Farina* dicta somehow metastasized into a precedential holding referenced in many subsequent New York cases as controlling. See *Encogen Four Partners, L.P. v. Niagara Mohawk Power Corp.* (S.D.N.Y. 1996) (determining that New York UCC did not apply to electricity sale contracts; adopting *Consol. Edison* without analysis).

The bottom line is that the great majority of state courts consider electrical energy to be "goods" under the UCC. In the special context of personal injury cases involving overhead power wires (before metering and delivery of electrical energy), some States exclude application of the UCC holding that stray electrical current in overhead power lines is not "goods." However, such state courts frequently have distinguished such results and clarified that electrical energy metered and delivered to a customer constitutes "goods" under the UCC. New York simply is an outlier. In fact, other than in New York, the Court has been unable to locate any other state court precedent suggesting that electrical energy actually metered and delivered to a customer is anything other than "goods" under UCC Section 2-105.

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[T]he New York view is a true outlier built on the faulty foundation of a dicta statement in the *Farina* overhead electric transmission products liability case.

*Escalera*, 563 B.R. at 352-53, 358 (partial citations omitted; mic drop implied).

So, why are we talking about *Brush* now? The *Escalera* case, including its serious slam of New York case law (hereinafter, the "Escalera Critique of New York"), inspired research on applicable New York law, and *Brush* was then discovered in the American Electrical Cases reporter. It's a bit of a gem that may not jump out at one when using the major online research services, unless one is specifically looking for it.

What did the New York Court of Appeals say in *Brush*? It found (over 125 years ago):

The fact that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is, what was commonly known at the

time of the passage of the corporation tax law. . . a manufacturing corporation.<sup>4</sup>

In describing the electricity that a company like Brush Electric Manufacturing produces, the *Brush* Court states “[i]t is the product of capital and labor and in this respect cannot be distinguished from ordinary manufacturing operations. . . . The electricity or thing . . . is generated or produced by . . . means of a process wholly artificial, . . . [enabling the company] to sell the product of its operations to its customers.”<sup>5</sup>

*Brush* quotes the Supreme Court of Pennsylvania, to state “[t]his company, whose character we are considering, sells the electricity it makes, or ‘brings into being,’ as a commodity.”<sup>6</sup>

*Brush* is affirmed by the New York Court of Appeals 24 years later.<sup>7</sup> It appears that New York courts have not cited this case since the early 1920s,<sup>8</sup> and no evidence that it has been overturned has been found.

**So, what’s the law in New York**—is electricity a good or a service? If *Brush* is excluded, in New York, electricity is arguably a service.<sup>9</sup> If *Brush* is included, in New York, electricity is a product and a commodity.<sup>10</sup>

If *Brush* hasn’t been overturned, why don’t we hear about it? Citator limitations? What about the New York Court of Appeals—what has the highest New York State court said on the “electricity as a good or service?” issue since it affirmed *Brush* in 1916?<sup>11</sup>

Not much.<sup>12</sup>

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<sup>4</sup> *Brush*, 129 N.Y. at 554.

<sup>5</sup> *Id.* at 553-556.

<sup>6</sup> *Id.* at 556 (citing *Pennsylvania v. Northern Electric Light & Power Company*, stating that “[t]he facts that are before us in this case, touching the manner of generating and using electricity, are the same in substance as were before the Supreme Court of Pennsylvania in the case above referred to.”)

<sup>7</sup> *People ex rel. Empire State Dairy Co. v. Sohmer*, 218 N.Y. 199, 210 (1916) (in determining that pasteurization of milk is not manufacturing, Court cites *Brush* favorably, stating “In [*Brush*] it was being determined whether the business of generating electricity and supplying [it] . . . was a manufacturing business. It seems difficult to understand how it could be seriously urged that it was not and the court so held.” *Id.* at 204).

<sup>8</sup> *Brush* is followed in administrative law decisions in the early 1990s. See NY Div. of Tax matters, *infra*, note 20.

<sup>9</sup> Only “arguably a service” because, as detailed in the Escalera Critique of New York, the New York case law lacks a foundation for a service determination.

<sup>10</sup> See *supra* notes 4 – 6.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> In a case involving overlapping taxes, the Court notes that a statute defines sales of tangible property to include electricity, but this is not essential to the case, and the characterization of electricity is not at issue. *County of Erie v. City of Buffalo*, 4 N.Y.2d 96, 100 (1958). The characterization of electricity is, however, relevant 40 years later in *Norcon*, discussed *infra*.

In 1998, there's *Norcon v. Niagara Mohawk*. It's a federal case, but the New York Court of Appeals becomes involved to answer a certified question of law submitted from the U.S. Court of Appeals for the Second Circuit.<sup>13</sup> The characterization of electricity (as a service or good) is relevant to the dispute in the case, which involves a long-term contract for the sale of electricity. However, the New York Court of Appeals' decision (i.e., its answer to the certified question) is not about determining what the attributes of electricity are and how they support categorizing electricity as a good or a service. The decision is about adequate assurance. The dispute arises as to whether or not the buyer under the contract, Niagara Mohawk, would have the right to demand adequate assurance from the seller, Norcon, based on the concern that the seller wouldn't be able to perform obligations under the contract in the future. The federal trial court finds that adequate assurance may not be demanded because electricity is not a good under the UCC.<sup>14</sup> On appeal, the question that the Second Circuit certifies to the New York Court of Appeals does not refer to electricity, but asks about non-UCC contracts, generally. The text of the question is as follows:

Does a party have the right to demand adequate assurance of future performance when reasonable grounds arise to believe that the other party will commit a breach by non-performance of a contract governed by New York law, where the other party is solvent and the contract is not governed by the U.C.C.?

*Norcon*, 110 F.3d at 9 (2d Cir. 1997).

The New York Court of Appeals is not asked to analyze whether electricity is a good or a service, and it does not do so. What the New York Court of Appeals states about electricity in *Norcon* is the following (the "Electricity-Related Text"):

The Second Circuit Court of Appeals preliminarily agrees with the District Court that, except in the case of insolvency, no common-law or statutory right to demand adequate assurance exists under New York law which would affect non-UCC contracts, like the instant one.

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A useful analogy can be drawn between the contract at issue and a contract for the sale of goods. If the contract here was in all respects the same, except that it was for the sale of oil or some other tangible commodity instead of the sale of electricity, the parties would unquestionably be governed by the demand for adequate assurance of performance factors in UCC 2-609.

*Norcon*, 92 N.Y.2d at 462 & 468 (citations omitted).

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<sup>13</sup> 92 N.Y.2d 458 (1998), *answering certified question from Encogen Four Partners, LP v. Niagara Mohawk Power Corp.*, 914 F. Supp. 57 (S.D.N.Y. 1996), *question certified sub nom. Norcon Power Partners, LP v. Niagara Mohawk Power Corp.*, 110 F.3d 6 (2d Cir. 1997).

<sup>14</sup> *Encogen*, 914 F. Supp. at 61. As noted in the Escalera Critique of New York, *supra*, the trial court does not analyze the UCC's applicability to electricity.

The rest of the roughly seven-page opinion is a discussion of the facts of the dispute<sup>15</sup> and an analysis of the doctrine of adequate assurance and to what degree it is appropriate to expand the doctrine.<sup>16</sup> (The expansion is narrow,<sup>17</sup> which limits its precedential value, and other factors may constrict the decision's applicability even further.)<sup>18</sup>

*Norcon* does not cite *Brush*. While New York courts have not cited *Brush* since the early 1920s,<sup>19</sup> it has been followed in New York administrative proceedings involving tax.<sup>20</sup> Courts in other states

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<sup>15</sup> *Norcon* 92 N.Y.2d at 460-62.

<sup>16</sup> *E.g.*, “The doctrine, known as demand for adequate assurance of future performance, is at the heart of [the] Federal lawsuit [that the certified question comes from]”. *Norcon* at 92 N.Y.2d at 460. “New York, up to now, has refrained from expanding the right to demand adequate assurance . . . beyond the [UCC].” *Id.* at 466. “[D]eciding a specific case, even with the precedential comet's tail its rationale illuminates, is very different from enacting a statute of general and universal application.” *Id.* at 467.

<sup>17</sup> The decision extends the doctrine of adequate assurance narrowly, as it states that “the policies underlying the UCC 2-609 [right to demand adequate assurance] . . . should apply . . . [to] **this kind of controversy**.” *Id.* at 468 (emphasis added). More specifically (or confusingly), it identifies what “this kind of controversy” is by stating that “[i]t should apply to the type of long-term commercial contract between corporate entities entered into by *Norcon* and *Niagara Mohawk* here, which is complex and not reasonably susceptible of all security features being anticipated, bargained for and incorporated in the original contract.” *Id.*

<sup>18</sup> Remarkable background regarding the opacity of the Court's explanation of what “this kind of controversy” means, has been identified by Victor Goldberg in *A Precedent Built on Sand: NorCon v. Niagara Mohawk*, Colum. Bus. L. Rev. 38 (2013), who notes that the contract in *Norcon* to which the question of a right to demand adequate assurance relates, is a contract that has been labeled as **involuntary**. A “contract of adhesion.” *Id.* at 56. He quotes from the amicus brief submitted by the New York Public Service Commission (PSC) on behalf of *Niagara*:

In traditional contract law, it is assumed that parties are able to negotiate reasonable agreements and, when necessary, protect themselves against non-performance through agreed-upon damages. This assumption loses force when parties are coerced into agreements by, in this case, federal law. [This is authority] for the proposition that contracts of adhesion are an exception to the rule that courts see no harm in express agreements limiting the damages to be recovered for breach of contract. . . . Here . . . the contracts were imposed upon *Niagara Mohawk*.

*Id.* Additionally, although the decision in *Norcon* is addressing the right to demand adequate assurance under a certain type of contract, Goldberg, quoting from the initial version of the contract in question, notes that it already provided for some security in the form of a lien on *Norcon*'s generation plant (and was subsequently amended because the PSC felt that such security was not enough). *Id.* at 54. So, not only is the holding, which applies to “this kind of controversy,” narrow, it would appear to be more narrow than is knowable from merely the Court's opinion itself. *I.e.*, the scope of the holding which applies to “this kind of controversy,” is a controversy about demanding adequate assurance under an involuntary contract which already has some security.

<sup>19</sup> The holding of *Brush* was affirmed by the New York Court of Appeals in 1916. *People ex rel. Empire State Dairy Co. v. Sohmer*, 218 N.Y. 199, 204 (“In [*Brush*] it was being determined whether the business of generating electricity and supplying the same to customers for lighting purposes was a manufacturing business. It seems difficult to understand how it could be seriously urged that it was not and the court so held.”). *Brush* was subsequently cited as authoritative by lower level New York courts in *People ex rel. Clements v. Williams*, 100 Misc. 569, 166 N.Y.S. 560, 562 (Sup. Ct. 1917) (generation of electric current is manufacturing); and in *People ex rel. Haile v. Brundage*, 187 N.Y.S. 460, 461 (3d Dept 1921) (cited for principle specific to tax).

<sup>20</sup> *See, Matter of Frederick R. & Anne M. Clark*, 1991 NY Tax LEXIS 441, NY St Div of Tax Appeals DTA No. 807929 at 32 – 33 (Aug. 1, 1991) (Petitioner qualifies for an investment tax credit for equipment used to produce electricity, where electricity is determined to be a “good” within the meaning of the applicable tax statute. In making the determination, the administrative law judge does not follow *U.S. v Consolidated Edison*, which it criticizes for

have since followed *Brush*, such as Wyoming’s Supreme Court in 2017.<sup>21</sup>

**So, again, what’s the law in New York**—is electricity a good or a service? Perhaps a better question to ask is: what is the best legal authority for what electricity is in New York?

The highest New York court gives us *Brush*, affirmed by *Empire State Dairy*, and it gives us the Electricity-Related Text in *Norcon*. Then there are lower court decisions, including those criticized in the Escalera Critique of New York,<sup>22</sup> and some decisions which cite the criticized decisions or *Norcon*,<sup>23</sup> some decisions from bankruptcy proceedings,<sup>24</sup> some judicial tax decisions<sup>25</sup> and administrative law orders,<sup>26</sup> as well as some statutes (largely tax) that carve-out electricity from

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only relying on dicta in *Farina* (*accord* Escalera Critique of New York, *supra*), but does follow *Brush*, quoting its explanation of why production of electricity is manufacturing.), *aff’d*, 1992 NY Tax LEXIS 476, NY St Tax Appeals Tribunal DTA No. 807929 (Sep. 14, 1992) (opinion which also follows *Brush*); *Matter of the Petition of BT Capital Corp.*, 1991 NY Tax LEXIS 551, NY St Div of Tax Appeals DTA Nos. 807195 & 807686 at 10 – 11 (Oct. 10, 1991) (Petitioner is entitled to investment tax credit for property used in production of goods, where hydroelectric facility produces electricity. In determining that electricity is a good, *Brush* is cited. In response to Tax Division’s argument that a separate sales tax law excludes electricity from the definition of tangible personal property, the administrative law judge states “the need to exclude electricity from the definition of tangible personal property supports the conclusion that electricity is . . . tangible personal property”), *aff’d*, 1992 N.Y. Tax LEXIS 505, NY St Div of Tax Appeals DTA Nos. 807195 & 807686 (Oct. 1, 1992).

<sup>21</sup> *PacifiCorp, Inc. v. Dep’t of Revenue*, 2017 WY 106 (Wyo. 2017) (cited among other cases as authority that generating electricity is manufacturing). *See also* *People v. Menagas*, 367 Ill. 330, 333 (1937) (“[*Brush*] holds that electrical energy is a commodity; that a company which manufactures and furnishes it is a manufacturing company . . . .”); *Curry v. Alabama Power Co.*, 243 Ala. 53, (1942) (Alabama’s court quotes its decision in *Beggs v. Edison Electric Illuminating Co.*, 96 Ala. 295 (1892), stating “[t]he very point we have in hand was ably considered in [*Brush*] . . . . [T]he [C]ourt of [A]ppeals of New York were unanimous in the opinion that the electric light company was a manufacturing corporation.”).

<sup>22</sup> *Farina v. Niagara Mohawk Power Corp.*, 81 A.D.2d 700 (3d Dept 1981); *U.S. v. Consol. Edison Co. of New York, Inc.*, 590 F. Supp. 266 (S.D.N.Y. 1984); *Encogen*, note 13, *supra*.

<sup>23</sup> *Flood*, *see* endnote i, *infra*; *Sterling Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 239 A.D.2d 191 (1st Dept May 13, 1997); *Bowen v. Niagara Mohawk Power Corp.*, 183 A.D.2d 293 (4th Dept 1992); *Zoller v. Niagara Mohawk Power Corp.*, 137 A.D.2d 947 (3d Dept 1988).

<sup>24</sup> *Hudson Energy*, *see* endnote i, *infra*; *Enron Power Mktg., Inc. v. Nev. Power Co.*, No. 01-16034(AJG), 2004 BL 34982 (S.D.N.Y. Oct. 10, 2004).

<sup>25</sup> *E.g.*, the Appellate Division indirectly expresses a view about the tangibility of electricity where it states that “we cannot find it irrational for the Tribunal to conclude that the claimed assets were not principally engaged in producing any tangible property other than electricity.” This is in a decision involving an investment tax credit statute that excludes electricity from definition of “goods,” and a nuclear plant operator who produces electricity and (unsuccessfully) petitions for the benefit of the credit with respect to the water and steam it produces as part of the process to make electricity (which are determined not to qualify as the production of goods because the water and steam are only interim steps). *Matter of Constellation Nuclear Power Plants LLC v. Tax Appeals Tribunal of State of N.Y.*, 131 A.D.3d 185, 192 (3d Dept 2015).

<sup>26</sup> *See*, NY Tax Appeals and Tax Appeals Tribunal decisions, *supra*, note 20. *See also* dicta in proceedings of the NY Public Service Commission, stating that electricity is a good, Order Authorizing Solicitation Methods and Consideration of Bid Evaluation Criteria and Denying Request for Clarification, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, CASE 03-E-0188 at 4 - 5 (NY PSC Oct. 19, 2006)

the term “goods” for specific purposes,<sup>27</sup> distinguish between electricity and electric service,<sup>28</sup> and refer to electricity as something that is manufactured.<sup>29</sup> Whatever authority you cite, how electricity is characterized matters. It has far-reaching implications and deserves closer attention by a wide range of stakeholders. Cases described in the Backgrounder involve bankruptcies (determining administrative expense priorities); contracts and commercial law (determining jurisdiction under the Contracts Dispute Act and applicability of UCC provisions to contract terms); anti-trust (whether a claim can be stated under the Robinson-Patman Act); product liability

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(“objects . . . because, it states, recent studies show that auction pricing of **goods, such as electricity** or environmental attributes, is highly susceptible to market manipulation . . . . The AG agrees . . . .”) (emphasis added); Opinion and Order Granting Certificate of Environmental Compatibility and Public Need, *Application of Brookhaven Energy Limited Partnership for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 580 Megawatt Electric Generating Facility in the Town of Brookhaven, Suffolk County*, CASE 00-F-0566 at 75 (NY PSC Siting Board Aug. 14, 2002) (the Commission (through the Siting Board) quotes examiners’ findings on a proposal by LIPA: “supply and demand will come into balance when the market price reflects the risks and rewards of production and use of the **goods (electricity in this case)**. . . . We adopt the examiners’ findings.”) (emphasis added).

<sup>27</sup> E.g., there are carveouts under certain credits applicable to franchise tax for business corporations, to personal income tax, and to premiums for workers compensation coverage, each of which state, “[f]or the purpose[s] of [the applicable part of the statute], the term ‘goods’ shall not include electricity.” See N.Y. Tax Law §§ 210-B(3)(b)(viii) & 606(j)(2), Workers’ Compensation Law § 135(3)(c). With respect to sales tax, the definition of “tangible personal property” which is “[c]orporeal personal property of any nature,” is qualified by stating “[h]owever, except for purposes of the tax imposed by [Tax Law § 1105(b), which specifies certain types of sales, including of electricity that are “other than . . . for resale”], such term shall not include gas, electricity, refrigeration and steam.” Tax Law § 1101(b)(6). Note that gas is a good under the N.Y. UCC (see §§ 2-105(1) & 2-107(1)), and since gas, along with electricity, is carved out, the reason for the carveout of electricity has to do with something other than whether or not it is a good. In a regulation applicable to an investment tax credit, a definition of “qualified property,” includes certain types of tangible property used in the production of goods, with a *conditional* carveout that states:

With respect to property placed in service on or after April 1, 1993, the term **goods shall not include electricity except** in the case of a newly constructed facility which is placed in service by a taxpayer, for the first time, on or after April 1, 1993, or an addition to such facility, if, with respect to such facility or addition, the following events have occurred before April 1, 1993:

- (1) all necessary pre-construction permits, approvals or other authorizations have been obtained by the taxpayer;
- (2) construction site clearance and excavation have been commenced by the taxpayer; and
- (3) substantially all of the funds necessary for payment of construction costs are available to the taxpayer.

20 NYCRR 5-10.2 (emphasis added).

A deeper review of the tax statutes may be useful, but it is worth keeping in mind that the NY State Division of Tax Appeals has noted where the exclusion of electricity from a term implies its otherwise inclusion. See *supra*, note 20.

<sup>28</sup> Statutory usage for sales and compensating use taxes, with respect to electricity (and gas), indicates a distinction between a thing and service of providing the thing, as shown in the following excerpt from the definition of “receipt”: “The amount of the sale price of any property and the charge for any service taxable under this article, including **gas and gas service and electricity and electric service** of whatever nature . . . .” Tax Law § 1101(b)(3).

<sup>29</sup> The term “manufacturing” is applied to electricity in a statute relating to a tax credit for petroleum businesses for certain petroleum product or fuel purchases made “to fuel generators for the purpose of **manufacturing or producing electricity**.” Tax Law § 301-D(a)(1) & (2) (emphasis added). The concept of manufacturing electricity appears elsewhere, including in *Brush*.



(whether electricity has passed through a customer’s meter); labor law (whether the “outside salesman” exemption under the FLSA applies); and tax (whether various exemptions and credits will be available to a tax payer).

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An earlier version of this article was significantly longer and written in a way that advocated more for a particular position. This version is intended to inform about *Brush* and *Escalera*, and to serve as a starting point for a conversation about the implications for the legal characterization of electricity in New York.

March 2020

Energy Law Committee  
Rosalyn K. Quaye, Chair  
Geoffrey F. Heffernan, Primary Author

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<sup>i</sup> **Background on electricity as a good or a service:** The resolution of a variety of legal issues involving electricity can depend upon the legal distinction as to whether or not electricity constitutes a service or some non-service thing like a product, manufactured product, finished product, tangible or intangible product, good, finished good, commodity, or tangible or intangible personal property.

#### Bankruptcy.

A number of court decisions discuss the definition of “goods” under the UCC, even if the main legal issue is based on some other statute. This is seen in bankruptcy proceedings, for example. *See In re Erving Industries Inc.*, 432 B.R. 354 (Bankr. D. Mass. 2010) at 365 stating “this Court concludes (as have most, if not all, courts addressing the issue), that the meaning of goods under § 503(b)(9) [of the United States Bankruptcy Code] is primarily informed by the meaning of goods under Article 2 of the UCC.”

The definition of UCC “goods” states:

‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

N.Y. UCC §2-105(1).

In a bankruptcy proceeding, a creditor that has sold goods to a debtor within 20 days prior to the filing of a bankruptcy proceeding may pursuant to Section 503(b)(9) of the Bankruptcy Code obtain administrative expense priority for such goods received by a debtor. “Goods” is not defined in the Bankruptcy Code. Whether or not a judge is convinced that electricity is a good can determine the outcome in a claim under Section 503(b)(9). *See, e.g., Hudson Energy Servs., LLC v. Great Atl. & Pac. Tea Co.*, 538 B.R. 666, 668, 674 (S.D.N.Y. 2015) (finding electricity not to be a good and therefore not affording priority status to the value of electricity sold to debtor within the Section 503(b)(9) window, the Court states “the confounding questions of physical science at the heart of the dispute indicate that the question of whether electricity is a good is not clearly answered in the affirmative”); *Escalera* at 373 (Bankr. D. Colo. 2017) (“the metered electrical energy delivered by PacifiCorp to the Debtor constitutes ‘goods’ under the unambiguous text of Section 503(b)(9)”); *In re Wometco De Puerto Rico Inc.*, No. 15-02264 (Bankr. D.P.R. Jan. 12, 2016) at 3 (finding electricity to be a good, the Court states “pursuant to the express language of the UCC’s definition of ‘goods,’ a thing is a ‘good’ as long as it is moveable at the time of identification to a contract for sale, regardless of whether it remains moveable for eternity or for an infinitesimal amount of time thereafter. . . further . . . because electricity is movable at the time of identification to the contract, the purchased electricity constitutes a good under 11 U.S.C. § 503 (b) (9)”); *In re NE Opco, Inc.*, 501 B.R. 233, 260 (Bankr. D. Del. 2013) (“electricity is not a good under section 503(b)(9)”); *In re S. Montana Electric Generation & Transmission Coop., Inc.*, Case No. 11-62031-11 (Bankr. D. Mont. Jan. 08, 2013) at 5 (“metering satisfies the identification requirement of the UCC and the movement is sufficient to satisfy the movability requirement, even if it reaches the speed of light. . . . [T]he Court concludes the power supplied by PPL EnergyPlus, LLC to Debtor was a good”); *In re Grede Foundries* (“[T]here is no principled distinction to be made between natural gas, water, or electricity. Regardless of how big the particle or how fast it moves, it is a good if moveable at the time of identification.”), *aff’d sub nom. GFI Wisconsin* at 804 (“electricity is a good”); *In re Pilgrim’s Pride Corp.*, 421 B.R. 231, 240-41 (Bankr. N.D. Tex. 2009) (electricity does not fall within the term “goods,” but natural gas does); *In re Erving Industries, Inc.*, 432 B.R. 354, 374 (Bankr. D. Mass. 2010) (“electricity constitutes a good under § 503(b)(9).”).

Other sections of the Bankruptcy Code may also be relevant to determinations about electricity’s legal status. *See Escalera* at 372, in a discussion of why Section 546(c) should not determine whether or not electricity should be within the scope of Section 503(b)(9), quoting from *GFI Wisconsin*, the Court states

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“[h]ad Congress intended to limit administrative priority claim under § 503(b)(9) to only the subset of goods that could qualify for reclamation under § 546(c), Congress could have said so.” (citations omitted); *see also* Craig R. Enochs & Andrea Pincus et al., *Hudson Energy Denied Administrative Priority for Electricity Sold Pre-Bankruptcy*, ReedSmith Client Alert 15-274 (Oct. 5, 2015), <https://www.globalrestructuringwatch.com/2015/10/hudson-energy-denied-administrative-priority-for-electricity-sold-pre-bankruptcy/>, noting that in *Lightfoot v. MXEnergy Electric, Inc. (In re MBS Mgmt. Servs., Inc.)*, 430 B.R. 750 (Bankr. E.D. La. 2010), a case involving the applicability of Bankruptcy Code safe harbor provisions (not a Section 503(b)(9) issue), the Court discusses the nature of electricity and determines that electricity is a commodity within the meaning of Section 761(8) of the Bankruptcy Code.

#### Contracts Dispute Act.

Another example of a court looking to the UCC definition of goods for purposes of a statute other than the UCC is in *Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1352 (Fed. Cir. 2016), where the Court reasons that the UCC definition of “goods” is applicable to the Contracts Dispute Act, a federal statute which refers to “personal property,” otherwise the Court would not have jurisdiction. *See also* discussion of *Pac. Gas in Escalera* at 352.

#### FERC.

The UCC definition of goods is also relied upon by the Federal Energy Regulatory Commission (“FERC”) for electricity. *See Escalera* at 363-64 (discussing FERC decisions). The FERC and its predecessor “repeatedly and consistently have determined that Article 2 (Sales) of the UCC governs contracts for the interstate sale of electrical energy . . . . [I]n ruling that Article 2 of the UCC governs transactions for the interstate sale of electrical energy, the [agencies] effectively have determined that electrical energy is a ‘good.’”). *Id.*

#### Anti-trust.

In determining whether electricity is a service or a non-service thing, the word chosen to describe the non-service thing tends to relate to the type of legal issue involved because of the word’s use in an applicable statute or Restatement of Law (e.g., “good” in commercial contracts, “product” in strict products liability, “commodity” in anti-trust, and “property” in tax and other matters), but there is overlap and some interchangeability. *See, e.g., Town of Concord v. Boston Edison Co.*, 676 F. Supp. 396 (D. Mass. 1988), where the Court uses several different terms to describe electricity in its discussion of why electricity is a commodity for purposes of the Robinson-Patman Act. It states that “[t]he term “commodity” is commonly used to refer to **goods**, merchandise, wares, supplies and other items bought and sold in the marketplace,” *id.* at 397 (quoting from *Baum v. Investors Diversified Services Inc.*) (citations omitted, emphasis added), and that “electricity is not a completely **intangible product** . . . . Electricity is a **manufactured product** . . . .” *Id.* at 398 (emphasis added). The legal status of electricity is relevant in anti-trust. *See Williams v. Duke Energy Int’l, Inc.*, 681 F.3d 788 (6th Cir. 2012) at 799-801 (quoting from the Robinson-Patman Act, and noting that an element of a claim of violation of the Act includes an allegation of discrimination “in price between different purchasers of commodities of like grade and quality,” the Court reaffirms existing precedent that electricity is a commodity under the terms of the Act, defeating a defense of a motion based on electricity being outside of the scope of the Act) (citations omitted).

#### Commercial contracts.

In commercial contracts, whether or not electricity is a good within the meaning of the UCC definition impacts what terms apply to contracts. *See, e.g., Rural Electric Convenience Coop. Co. v. Soyland Power Coop., Inc.*, 239 Ill. App. 3d 969 (App. 4th Dist. 1992) (in a claim for relief from the effects of a merger, assignability provision in UCC §2-210 held not applicable because electricity not a good). One challenge in assessing legal risks associated with commercial contracts is that sometimes courts decide that electricity is not a good as defined under the UCC, but nonetheless rationalize a way to apply a UCC concept. *See, e.g., Consol. Edison* (Court determines that electricity is not a good, but nonetheless applies UCC

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reservation of rights provision to statement of non-waiver written on check related to electricity purchases); *Norcon Dec. 1, 1998* (a challenging holding discussed *supra* at note 13) and in accompanying text, where the Court treats electricity as if it is not a good and then applies the concept of adequate assurance, which would ordinarily be available for a sale of goods under the UCC).

### Torts.

Contractual and tort issues can overlap, and incidents involving personal injury and damage to property may be analyzed from the perspective of contracts law. See *Helvey v. Wabash County REMC*, 151 Ind. App. 176 (Ct. App. 1972) (determination that electricity is a good, so shorter four year statute of limitations for UCC transactions applies barring breach of implied and express warranties claims for appliances damaged by electricity with incorrect voltage); *Grant v. Sw. Elec. Power Co.*, which, notwithstanding the ultimate outcome, highlights the potential for unconscionability restrictions in the UCC to be implicated depending on whether or not electricity is a good, 20 S.W.3d 764, 771-72 (Tex. App. 2000) (Involved are claims of personal and property injury from electricity at home of electric utility customer where utility tariff limits liability. Court finds tariff is subject to article 2 of UCC based on precedent of that electricity is a good, and it analyzes liability limitation based UCC unconscionability provision.), *rev'd in part*, 73 S.W.3d 211 (Tex. 2002) (Without upsetting precedent that electricity is a good, Court finds that UCC article 2 not applicable to tariff for regulatory reasons.); *Farina v. Niagara Mohawk Power Corp.*, 81 A.D.2d 700, 701 (3d Dept 1981) (in respect of an electrocution, Court finds no seller's warranty where electricity had not yet passed the customer's meter there had not been a sale).

Whether or not electricity has passed through a customer's meter is a factor in many cases involving electricity as good or service determinations. This is particularly so in products liability decisions. See *Pierce v. Pacific Gas & Electric Co.*, where the Court in deciding that a strict liability cause of action against a utility company is available to a consumer injured when electricity with an excessive voltage of 7,000 volts was delivered into her home, states that it limits its holding to where "electricity is actually in the 'stream of commerce,' and expected to be at marketable voltage. In most cases this will mean [it must be] delivered to the customer's premises, to the point where it is metered, [but] variations in electrical systems prevent . . . drawing a "bright line" at a particular point," 166 Cal. App. 3d 68, 73, 84 (App. 3d Dist. 1985). See *Williams v. The Detroit Edison Co.*, where the Court states that "[e]lectricity is a service rather than a 'good,' but the doctrine of implied warranty has been held to apply to its sale, 63 Mich. App. 559 (Ct. App. 1975) at 564 (citing *Buckeye Union Fire Insurance Co v Detroit Edison Co*, 38 Mich App 325 (1972)) (partial citation omitted). The Court finds that a warranty claim against the utility company is not available to plaintiff whose husband was killed after being struck by the company's electric line running along a road after it was knocked down because "there had been no transfer of the product out of [utility company's] control." Noting that "electricity does not leave [utility company's] control until it passes through a customer's meter," *id.* at 567-68 (citing *Buckeye*), the Court states that "contact with defendant's wire and its subsequent descent onto plaintiff's decedent did not involve placing the electricity 'into the stream of commerce' . . ." *Id.* See also *Aversa v. Public Serv. Electric & Gas Co.*, 186 N.J. Super. 130 (Super. Ct. Law. Div. 1982). "[A] sale is not an absolute prerequisite to a finding that a product has been placed in the stream of commerce. Electricity may enter the stream of commerce when the electric company relinquishes exclusive control over its product. *Id.* at 136-37 (quoting *Petroski v. Northern Indiana Pub. Service Co.*, 171 Ind.App. 14 (1976)) (partial citation omitted). *Aversa* holds "that the principles of strict liability in tort, as well as the implied warranties of merchantability and fitness for particular use, are applicable in cases where injuries are sustained from electricity placed in the stream of commerce." *Id.* at 137. The Court notes that "evidence that an electric company relinquished exclusive control over its product may establish strict liability at a point prior to its running through a meter where charges are computed." *Id.* There are a number of other fact patterns. See, e.g., *Mancuso v. Southern California Edison Co.*, 232 Cal. App. 3d 88 (App. 2d Dist. 1991) (lightning not a product); *Walston v. Northeast Utilities Conn. L. P. Co.*, No. Cv 920327441, Conn. Super. Ct. 14350 (Dec. 28, 1995) (injury from electromagnetic radiation (EMR) alleged to come from electricity in utility's equipment, power lines & substation, but fails product test because no evidence that this electricity was delivered to plaintiff's home or measured by meter); *G &*

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*K Dairy v. Princeton Electric Plant Bd.*, 781 F. Supp. 485 (W.D. Ky. 1991) (stray voltage not a product). For a notable reference source with detail on numerous cases involving electricity, which are relevant to products liability in more than half of the states in the U.S., see *Ronald B. Standler, Legal Liability for Electricity in the USA: Products Liability* (May 24, 2012), <http://www.rbs2.com/utility.pdf>. See also chart of 47 states and the District of Columbia identifying certain cases relevant to strict liability involving natural gas, electricity, and water, in the Congressional Record, Senate, 142 Cong Rec S2341, Vol. 142, No. 40, Common Sense Product Liability Legal Reform Act of 1996—Conf. Rep., <https://www.gpo.gov/fdsys/pkg/CREC-1996-03-20/pdf/CREC-1996-03-20-pt1-PgS2341-6.pdf#page=34> at 34.

#### Labor law.

The legal status of electricity can be relevant in labor law matters. See, e.g., *Flood v. Just Energy Mktg. Corp.*, No. 7:15-cv-2012 (KBF) (S.D.N.Y. Jan. 20, 2017). In defense of claims of violations of wage requirements under the Fair Labor Standards Act (“FLSA”) and the New York Labor Law (“NYLL”), defendants claim that plaintiff is exempt from these statutes because plaintiff is an “outside salesman” within the meaning of the FLSA, and such exemption also applies to NYLL’s overtime provision. Noting that part of the definition of “outside salesman” provides that it is an employee “(1) [w]hose primary duty is: (i) making sales . . . or (ii) obtaining orders or contracts for services . . .” *id.* at 5 (quoting from 29 C.F.R. §541.500(a)), the Court finds that even if plaintiff did not “make sales,” he obtained orders for contracts or services. In response to plaintiff’s argument that gas and electricity are commodities not services, the Court states that “[t]he law in New York, however, where plaintiff worked . . . is clear that the sale of electricity is a service, not a good.” *Id.* at 8 (citing *Norcon Power Partners, LP v. Niagara Mohawk Power*, 163 F.3d 153 (2d Cir. 1998); *United States v. Consol. Edison Co. of New York, Inc.*, 590 F. Supp. 266 (S.D.N.Y. 1984); *Farina*). The Court states such interpretation is also supported by terms used in the Energy Services Company Consumers Bill of Rights, including defining “‘energy services’ to mean ‘electricity and/or natural gas’; [and] an ‘energy services company’ to mean ‘an entity eligible to sell energy services to end-use customers using the transmission or distribution system of a utility . . . .’” *Id.* See also discussion of federal labor law in *Escalera* at 362-63.

#### Tax.

The legal status of electricity for tax purposes impacts whether or not various exemptions and credits will be available to tax payer. See, e.g., *Exelon Corp. v. Dept. of Revenue*, 334 Ill. Dec. 824 (2009). On third appeal on a claim for tax credits for investments in property used in Illinois by retailers, the Court holds that electricity is tangible personal property. *Id.* at 827-28, 831, 836. This qualifies Exelon for the tax credit where the definition of “retailing” under Illinois’ Income Tax Act includes a reference to sales of “tangible personal property,” although the Court applies its judgment prospectively. *Id.* at 837. See also discussion of tangible personal property under tax law in *Escalera* at 366-67; citations to sections of tax law of 22 states that define “electricity” as “tangible personal property.” *Id.* n.31.