

# Does the Uniform Commercial Code apply to power purchase or sale agreements?

*An unsettled question with potentially significant consequences*

One thing that all consumer-owned utilities have in common is power contracts. All utilities have at least one wholesale power purchase agreement. Utilities that have their own generating resources or have made forward power purchases will also likely need wholesale power sales agreements to deal with surplus power. Many consumer-owned utilities have special contracts with large retail customers. What these utilities may not realize, however, is how their legal rights and obligations under these different power contracts may be affected by the Uniform Commercial Code.

The Uniform Commercial Code (UCC) is a set of model statutes that, when adopted by individual states, allow commercial organizations to do business across jurisdictional boundaries with the certainty that virtually the same rules will apply in each jurisdiction. The UCC has been adopted by all states relevant to NWPPA, including: Washington, Oregon, Utah, Alaska, Idaho, Montana, and California. Article 2 of the UCC governs transactions in the sale of "goods." The term "goods" is defined in the UCC as "all things that are movable at the time of identification to a contract for sale."

For purposes of this article, the question is whether the sale of electrical power qualifies as a sale of "goods" governed by Article 2 of the UCC. Although this seems like a simple proposition, the question remains quite unsettled by the legal system. In a recent unpublished decision, *Enron Power Marketing, Inc. v. Nevada Power Co.*, the Southern District Court of New York, interpreting Utah law, held that power sold under the Western Systems Power Pool (WSPP) agreement

does constitute a "sale of goods" governed by the UCC. The *Enron Power Marketing* decision relied on previous cases holding that "electricity is a commodity which, like other goods, can be manufactured, transported and sold." (*Baldwin-Lima-Hamilton Corp. v. Superior Court.*)

But other courts have reached the opposite conclusion. In *Bowen v. Niagra Mohawk Power Corp.*, for example, a New York state court held that the sale of electricity is more analogous to the provision of service than the sale of goods. As such, the court concluded that a sale of electricity under New York law is not subject to the provisions of the UCC. An Indiana state court (*Hedges v. Public Service Co. of Indiana*) specifically held that "high-voltage" electricity that caused an accident was not "the good" that was subject to the transaction. This case implies, but without so holding, that high-voltage wholesale power transactions are not subject to the UCC, while lower-voltage retail sales are subject to the UCC. The end result of these conflicting legal decisions is that nobody can predict with reliable certainty how a specific court in a specific state, under a specific set of facts, will decide the question.

The question of whether the UCC applies to a particular transaction could have important consequences for the contracting parties. In most jurisdictions, the common law of contracts differs from the UCC terms. The following is a non-exclusive list of issues that may be affected by the UCC:

- **Warranties.** The UCC requires that a good be merchantable (i.e., reasonably fit for the ordinary purposes for which such product

is manufactured and sold) and fit for the purpose that the buyer requires. These warranties can be disclaimed or limited, but specific language and procedure is required.

- **Remedies.** The UCC gives both buyers and sellers remedies that may not exist under the common law. For example, the UCC gives buyers the right to revoke acceptance of a good or demand specific performance from a seller when a good is "unique." Sellers are expressly allowed to refuse delivery if the buyer is insolvent and to compute any money damages for non-acceptance of a good using the market price for that good.
- **Modification.** If the parties agree to renegotiate and lower the price term of a contract, the UCC allows such modification without the buyer promising to give anything in exchange for the lower price term. In contrast, most state contract laws would require the buyer to give additional consideration for the lower price term.
- **Statutes of limitation.** Under the UCC, parties must typically bring an action for breach of contract within four years of the breach. The common law statutes of limitations can vary from one year to over six years.
- **Adequate assurances.** The UCC allows a party to demand and to suspend its own performance under a contract if it does not receive adequate assurance of performance. Common law would generally treat such unilateral suspension of performance as a breach of contract.

- **Unconscionability.** The UCC doctrine of unconscionability allows a court to modify or refuse to enforce a contract term if it determines that one party took unfair advantage of superior bargaining power.
- **Parol evidence.** The UCC is typically more liberal in allowing evidence of the parties' course of dealing and trade customs to be used to interpret a contract.

The potential applicability of the UCC to power contracts should be taken into account at the time the contract terms are being negotiated. First, a boilerplate choice of law provision could make it significantly more or less likely for the UCC to apply. A choice of Utah law, for example, would make it more likely for provisions of the UCC to apply in light of the *Enron Power Marketing* case. It is worth noting that Utah law is the default choice of law term of the WSPP agreement. If the contracting parties do not intend for the UCC to govern their transaction, then they should be careful to select some governing law other than Utah (like, perhaps, New York, Indiana, Kentucky, Maryland, Massachusetts, or Michigan).

*As a general rule, the UCC is intended to be a "gap-filler," to provide terms to a transaction where the parties have not specified their own terms. Thus, the parties can avoid most, if not all, of these gap fillers by drafting specific contract terms to govern such issues as statutes of limitations, warranties, remedies, amendments, and use of parol evidence.*

Even with a careful consideration of the governing law, parties cannot be certain that the UCC will or will not apply. Thus, the parties might also include a provision in their agreement stating that it is their intent that the UCC specifically will, or will not, apply to their transaction. Again, this would not assure the parties that a court will enforce such a provision. Nevertheless, we think it may prove helpful where the issue is a matter of first impression before a particular state court.

Finally, even when the UCC does apply, the contracting parties may be able to opt out of certain provisions by including their own specific terms and conditions in their contract. As a general rule, the UCC is intended to be a "gap-filler," to provide terms to a transaction where the parties have not

specified their own terms. Thus, the parties can avoid most, if not all, of these gap fillers by drafting specific contract terms to govern such issues as statutes of limitations, warranties, remedies, amendments, and use of parol evidence. Contracting parties should exercise caution, however, because in certain circumstances, special words must be used to overcome a presumption set forth in the UCC.

NWPPA

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