

**The Law of Public Utilities:
Bringing Competition to Monopolistic Industries**

**Fall 2024| Tuesdays 5.45p-7.45p | McD 411
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Overview: From Monopoly to Competition

The U.S. energy and telecommunications industries display similar trends, each internally contradictory. Originally monopolistic, they host ambitious new entrants: in electricity, providers of renewable energy, storage, and energy efficiency services; in telecommunications, providers of cell phones, broadband access, internet content and more. For nearly 40 years, state and federal policymakers have worked to introduce competition. Overlapping, and conflicting with, this energetic activity is a three-decade march toward consolidation, due to continuous mergers and acquisitions. Your local electric company, standalone for most the 20th century, is now likely to be one subsidiary of a multi-utility, multi-state, even multi-industry and multi-national holding company. AT&T's original vertically integrated monopoly, broken up by a 1984 antitrust settlement, has now reacquired much of what it divested, while major communications incumbents are merging with major content providers.

The result is continuous conflict: between (a) the incumbents, still advantaged by their legacy monopoly status; and (b) the new entrants, seeking to inject diversity, innovation and competition. That continuous conflict is the subject of this seminar.

For over a century, our nation has depended on regulated utilities for electricity, gas, telecommunications, transportation and water. Because these companies were, and often still are, monopolies, and because we need them (or alternatives to them) for both economic and physical health, state and federal legislators have created commissions to regulate their performance.

Regardless of the industry or era, and whether state-based or federally based, this regulatory activity has had five common elements:

Mission: to align utility performance with the public interest;

Legal principles: ranging from the state law on exclusive monopoly franchise to federal constitutional protection of shareholder investment;

Policy flexibility: accommodating multiple market structures, from monopolies to competition; and multiple public purposes, from reliability to environmental accountability;

Use of multiple professional disciplines: law, economics, finance, accounting, management, engineering and politics; and

Administrative procedures: such as rulemaking and adjudication.

Today, new political challenges are causing legislators and regulators to stretch regulation's core principles and processes. Three examples of these challenges:

Climate change: To what extent should we make utilities and their customers responsible for "greening" energy production and consumption?

Universal service: Should we promise broadband to every home and business, and at whose cost? Should all content have nondiscriminatory access to all users?

Privacy: How do regulators induce personal changes in energy consumption while protecting the related data from public exposure?

And then there are two constants: *ideological debate* (e.g., private vs. public ownership, government intervention vs. "free market"); and *state–federal tension* (e.g., Which aspects of utility service are "national," requiring uniformity, and which are "local," warranting state experimentation?).

These traditional elements, new challenges and constants comprise the subjects of this seminar. In our weekly two-hour class will address substantive law—*market structure, pricing, corporate structure, and federal-state jurisdiction*. For the semester papers, each student will identify a regulatory problem needing solutions, analyze that problem, then recommend and assess solutions.

Using the principles and analytical techniques they learned from the readings and class discussions, students have written papers on such diverse topics as renewable energy penetration, internet access, movie production, chicken slaughtering, student loans, pharmaceutical research, Uber, Flint's water crisis, utility corporate form, cloud storage, electric storage, and telemedicine at the Veterans Administration, the law school market, banking services for the poor, sale of seeds and pesticides, home food delivery. Some of these papers have made their way into professional journals or law journals.

With baby boomers retiring, there are many jobs in this field. New lawyers who prove their worth get major responsibilities early. And throughout a career, regulatory lawyers can play varied roles: advising clients who are suppliers or customers of regulated services, representing parties before regulatory tribunals, advising those tribunals or their legislative overseers, and defending or critiquing tribunals on judicial review. As a result of playing all these roles, in addition to acting as an expert witness before state agencies and federal courts, I have contacts throughout the fifty states and in federal agencies, many of whom are willing to help students plan career strategies. If your interests bend in this direction, don't hesitate to discuss opportunities with me.

What I Hope for You to Learn

On completing this course you will be able to:

- recognize and critique the *multiple and conflicting purposes of economic regulation*; then articulate your own law-based definition of the "public interest"—a phrase appearing in every regulatory statute.

- develop a mental file cabinet that stores and organizes the legal principles regulators use to (a) *induce the performance of monopolies* and (b) *convert monopoly markets into effectively competitive markets*.
- describe the *complementary and conflicting roles of competition and regulation*, not as ideological poles, not as weapons in a century-long struggle for market control, but as tools one can combine, productively or counterproductively, *to improve or diminish a market's performance*.
- explain that today's regulated industries reflect both *old world policies and new world technologies*—and then see why efforts to transform historically monopoly markets into competitive markets is exceedingly difficult legally, physically, economically and politically.
- evaluate the effectiveness of a regulatory policy, in terms of the multiple dimensions of performance; *e.g., costs, quality, competitiveness and innovation*.
- describe how our *dual-jurisdictional system*, federal and state, makes regulatory policymaking simultaneously rich and frustrating, requiring decision-makers to grasp and value both the local and the national.
- see how the major forms of government decision-making—*legislation, rulemaking, adjudication and judicial review*, at the *state and federal levels*—work together, or in conflict, to produce or undermine policy.
- compare the *multiple roles lawyers play* in this field; and how those roles make use of experts and expertise from the disciplines of economics, accounting, finance, engineering, management and politics.
- contribute to the field by *exposing a serious policymaking problem*, then identifying and assessing solutions in a substantial scholarly paper.

Required Materials

Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction, Second Edition* (American Bar Association 2021).

Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators* (2d ed. 2013).

National Regulatory Research Institute, *Effective Regulation: Guidance for Public Interest Decisionmakers*.

Hempling diagrams (located in the Module entitled “Assets for Excellence”).

Regulating Public Utility Performance will be available at the Georgetown Law bookstore. *Preside or Lead?* is available for free download from my personal website, www.scotthemplinglaw.com. I will bring copies of *Effective Regulation* to the first class. The Hempling diagrams are in the Canvas Module named Assets for Excellence. I suggest you print out the full set of diagrams, as we will refer to them during class.

Other cases and materials listed in the Course Outline are on the course's Canvas website, organized in modules by week. Also on Canvas is a module called "Assets for Excellence." It contains recommendations for clear writing and effective oral presentations, along with examples of past successful papers. On the Canvas site, ignore anything on the Canvas template about grades, quizzes, rubrics, conferences, discussions, or outcomes. ***Be sure to set your Canvas settings to receive all "announcements,"*** since I will group-communicate with you that way. Be sure though that you ***contact me directly not through Canvas but through my personal email, shempling@scotthemplinglaw.com.***

Also in the "Assets for Excellence" Module is a 150-page document that has the notes I will use for each week's class. These notes are not polished. Also I don't guarantee that I will adhere to every sentence, or address issues in the notes' precise sequence. But their availability allows you to focus on the class discussion.

Weekly Questions

For each of Weeks 2 through 11, each student will submit to Canvas, **by Sunday 4pm on the weekend preceding class** (remember we have no class on Tues. Oct. 10, so no submission on the Sunday preceding that day), a Word document containing one useful question about that week's readings. We will build each class around your questions—a more stimulating, productive approach than my repeating-by-lecture the material you've read. While the questions should relate to the week's readings, they can be of any type. Examples:

A request for clarification or explanation: Not every concept in the book will be immediately clear to you. Feel free to ask for clarification. Try to specify what you don't understand or what is not clear. Doing so helps everyone learn and helps me teach.

A question about how to apply the week's readings to a current industry challenge. Please provide the background to your question.

A question that relates the week's readings to your semester paper. Again, please provide background.

A question probing a case you read. Provide background on the case, so others understand the question.

Always precede each question with your *first name only, in brackets*. I will send you via Canvas announcement a document containing all 16 questions, organized by subtopic, **by 6.30p each**

Sunday before class. **Please review that document before class and be prepared to discuss at least a few of the questions asked by your fellow-students.**

Here's a bonus: I have compiled several years of student questions, and my written answers, in a document called "Student Qs and Prof As...." It's on Canvas in the Module labeled Assets for Excellence. These prior student questions display real insightfulness and depth. If you can find the time each week, read a few pages of Q/A associated with that week's chapter. It will deepen your understanding of the chapter—almost like sitting through last year's class.

Here's another bonus: In the Canvas module Assets for Excellence is a doc named 2021 Fundamentals of Utility Law Webinar Links.doc. I taught this entire course by webinar to a group of 40 regulatory professionals in U.S. and Canada over 12 weeks January-March 2021. Each link takes you to one of the 90-minute sessions. So if there's ever a topic you want to study more closely, either before or after class, you can access the recordings. Unfortunately these are lectures without interaction, other than chat questions, due to the webinar medium and the large number of attendees.

Semester Paper

This course is available for two credits or three credits. The three-credit version satisfies Georgetown's Writing Requirement. Under the Writing Requirement rules, each three-credit student (a) creates a thesis statement, an abstract and outline, and a polished draft; (b) meets with me at least three times (to discuss each of those three deliverables); then (c) produces a 6000-word paper of publishable quality. The deadlines below reflect these requirements. Two-credit students do not have to take those extra steps; they need only submit a final paper of 4000 words.

About paper topics: In the Assets for Excellence module, take a look at the titles of prior student papers. Notice how broad is the range and how rich is the substance. How do you choose a topic? Consider asking these questions, in sequence:

1. *What problem do you wish to solve? More specifically: For the industry of your interest, what about its performance is suboptimal?*
2. *Which actions, of which actors, need to change so that the industry's performance satisfies your vision for its performance?*
3. *What regulatory decisions—whether by legislation, rulemaking or adjudication, federal or state or both—are necessary to cause those actors to change those actions?*

Why these questions? The purpose of regulation is performance. The effective regulator (a) has a vision for performance; (b) identifies the industry actors whose actions conflict with that vision for performance; then (c) designs legislative or regulatory solutions that align those actors and actions with the desired performance. Students have applied this analytical approach

to diverse industries, from renewable energy sellers' market entry to Youtube's and Facebook's market power.

So my recommendation: For now, choose a few industries and services that interest you. Do some reading on each industry's current challenges, including the actors and actions that are creating or resolving those challenges. Develop your own public interest vision for that industry's performance. Then start thinking about the questions above.

Prior to the thesis statement—*indeed at any time, starting now*—you can contact me to discuss your interests. I'm not expecting you to know this field before you've taken the course. The more help I give you and the earlier I give it, the better your chance at success.

Here are the deadlines associated with the semester papers:

Week 3 **Thesis statement (due to Canvas Saturday Sept. 7, 4pm):** The thesis statement is a one- or two-paragraph description of the problem or problems you wish to solve. Include enough detail, based on enough reading and research, so that I can guide you.

Filename: lastname.thesis

Week 5 **Abstract and outline (due to Canvas Oct. Saturday Sept. 21, 4pm):** You will prepare these items after doing substantial research and thinking. They should present the regulatory challenge you intend to solve, and your current plan for solving it. The abstract is a full-page, single-spaced description of the problem and plan, written so a layperson (like me, because you will quickly know more about your topic than I will) can understand it. The outline is detailed, resembling what will be the table of contents to your paper. Each element of this multi-level outline has complete sentences (which can be questions at this point, or propositions you intend to test, rather than actual conclusions), showing a logical structure of presentation and reasoning. It is customary for the outline to change during the research and writing process, but at this stage it still should have clarity and coherence.

File name: lastname.abstract.

These first five weeks are crucial, because a detailed, logical outline is the basis for productive discussions with me, and for your success. On Canvas, under Assets for Excellence, are examples of abstracts and outlines that led to successful papers. Aim to replicate that level of detail and clarity.

Sharing tentative ideas: During the research and writing process, you are welcome to send me your thoughts for my comment. Treat me as a

colleague. Take risks and learn. The earlier you seek this type of guidance, the more likely your final paper will succeed.

Week 9: *Full, polished draft (due to Canvas Oct. Saturday Oct. 28, 5pm):* This draft should reflect your best work. It should not be your first draft; it should be your third or fourth. Treat it as if it is your final product. That way, I can focus my attention on your reasoning and engage with you as a colleague. Otherwise our interaction risks being distracted by problems of clarity, organization or writing glitches that you likely would have solved yourself. I learned this the hard way: *Never submit to a boss or a client—or a professor—something that is not your best work, merely because it is a “draft.”* Ok, at this stage not every footnote need be bluebooked—but everything else about the draft should be polished. Exception: It is fine if there are some elements to the problem that you have not yet solved, the purpose of the draft being to at least get the problem stated with crystal clarity so that we can discuss it.

Filename: lastname.draft

Dec. 14: *Final paper:* Deliver the final paper to *Canvas* by the school's official deadline: Friday Dec. 15 at 5pm. Use proper Bluebook form. Margins should be about one inch (top, bottom, left, right), the paper should be double-spaced (except for footnotes), and the typeface should be 12-point Times New Roman (including footnotes). **Filename:** lastname.finalpaper.doc. Please do not wait until 4.55pm to submit the paper. One glitch and the paper's late, then all kinds of official people above my pay grade get involved.

Filename: lastname.finalpaper.doc.

I will meet with each three-credit student on the semester papers at least three times for these three purposes: (1) discuss the thesis, to ensure that we both understand your topic and your purpose, (1) discuss the abstract and detailed outline, and (3) discuss the polished draft. These meetings will occur on Zoom, during eves or on weekends. Other meetings are possible by Zoom, if a student wishes to discuss interim thoughts. I also welcome thoughtful questions by email. I am very accessible to my students.

My evaluative criteria: I assess your papers the way law firm partners assess associates' work, the way judges assess parties' submissions—by asking this question: *How well did you teach the reader?* I assess six categories: (a) clarity of your purpose, (b) logic of your organization, (c) analytical depth, (d) objectivity, (e) clarity of the writing, and (f) accuracy of the footnoting. See "Suggestions for Producing a High-Quality Paper" on Canvas in the "Assets for Excellence" module.

For deserving papers, *I will recommend publication* or circulation by my regulatory colleagues throughout North America, Europe, Latin America, India and China. Two of my

former students have had their semester papers published in prominent industry journals. Another student's paper won first place in a national competition sponsored by the *Berkeley Technology Law Journal*. One example is in the Assets for Excellence module.

Pairing with student colleague: I will create pairs of students who work on different paper topics, for purposes of informal discussion. Each member of a pair will be the other member's colleague—available to discuss, debate, devil-advocate, and advise. This approach—strongly recommended by pedagogical studies—helps all students master their topics, while diversifying and deepening each student's exposure to their peers' topics. Meeting with your student colleague each week for 30 minutes is a course requirement. In the law practice world, even those who work alone do not work alone.

Class Participation

In each class I try to call on each student. This approach ensures that everyone gets crucial practice thinking on their feet and articulating orally. Inevitably everyone has something valuable to offer and everyone has something to learn by doing. Please do not interpret my close questioning as unfriendly. Challenges make muscles.

Grading

20%: *Class participation.* This portion of the grade reflects the quality of your weekly questions and your in-class contributions. ***Weekly attendance is mandatory.*** Family emergency, your illness, religious observations or unavoidable interview conflicts are grounds for missing class, but please try to alert me ahead of time. If you do miss class, be sure to access the recording. I always offer class-missing students a chance to meet with me after they've watched the recording, so that they have a chance to engage with me like their peers did. I also have posted my informal class notes on Canvas. Students learn more by engaging in the class, less by trying to stenograph the discussions.

75%: *Final semester paper:* For the paper, aim for professional quality. If you start early, sweat out the first 5 weeks, follow all the guidance in the Assets for Excellence materials, and leave yourself time to rethink and revise, you have a good shot at excellence. And your Nov. 15-Dec. 16 period will be much calmer.

Communicating with Me

You can communicate with me in two ways. ***First,*** I will meet with each three-credit student three times to discuss the paper. We will work out those scheduled slots after the first class. ***Second,*** you can email me ahead for additional appointments to talk by Zoom. Due to my current job, I need these meetings to be in the eves or weekends. When you email for a Zoom meeting, indicate the purpose of the meeting and ***all your available time slots (afternoons and***

eves) over the next week. I will select a slot and inform you by email. For these meetings, always use my personal zoom url.

Class Recordings, Syllabus Changes

The school will record all classes, with recordings available to you as you wish.

Finally, this syllabus is accurate as of the day you receive it. Minor changes are possible; I will announce them well before they become relevant.

Course Outline and Weekly Readings

For each of Weeks 2–11, students will read the assigned chapter from *Regulating Public Utility Performance* (read the text and the footnotes). Also listed each week are of the short, easy-to-read essays from *Preside or Lead*. **All *Preside or Lead* readings are optional.** Under each topic below I have also listed the major cases, all of which you will find in the Canvas module for that week. **All case readings are optional.**

Georgetown strongly urges teachers not to over-assign readings. I therefore do not require you to read cases; the book chapters will fill your time. But I do recommend your trying to sweat through at least one case each week. You will stretch and strengthen your mental muscles. During our private conversations I will often recommend specific cases. (For syllabus cases, use the Canvas copies, because I often have highlighted and annotated key passages.)

About *Preside or Lead*: Effective lawyers study not only the law, but also the decision-makers. These essays address the positive and negative tendencies of regulatory decision-makers, hundreds of whom I have worked for or with, or appeared before—or challenged in appellate courts.

Background on utility industries: In the Canvas module Assets for Excellence, there is a doc titled *Effective Regulation: Guidance for Public Interest Decisionmakers*. It has four chapters, one on each of the main utility industries—electricity, gas, telecommunications, water. Each chapter describes the industry’s physical activities, market structures, transactions and legal jurisdiction. I would like you to pick one of those industry chapters and read it. Doing so will help you understand how to describe a regulated industry—which you will have to do for your paper.

Teacher’s notes: In each week’s Canvas module you will see my informal notes. I hope to minimize lecture time and maximize discussion time; these industries need your brains to solve problems. My notes—which are not much more than digests of the material you read in the book—are there to help me ensure we hit major points. I offer them to students so that they don’t have to do intense note-taking in class but instead can focus on discussing the problems our industries need to solve.

Accommodations: Please know that the school and your teacher stand ready to accommodate any disability. Please contact the Disability Office if you think an accommodation is necessary. Disability aside, I am here to make life livable for you. Family emergencies, religious observances, health issues—know that I will adjust your deadlines as necessary. Do your best to alert me ahead of time, but I recognize that will not always be possible.

Week 1: Regulation's Purposes, Dimensions and Professions [Aug. 27]

This session introduces the purposes of utility regulation, the actions and actors that regulators regulate, the contributions made by seven professional disciplines, and the regulatory lawyer's multiple roles. *For this week only, students should read all items.*

1. Read Alberta Utility Commission Chair's brief remarks on a century of regulation. His speech is a perfect summary of what regulation of monopolies and competition is about.
2. *Regulating Public Utility Performance:* Read Preface and Ch. 1.
3. Look at the Canvas document called “Hempling Legal Book: Table of Contents Diagrammed.” This document presents in diagram form every topic we will address in the course. The first page shows all of Chapters 1-12; then each subsequent page displays the detail for each chapter. Consider printing it out for regular reference. Visualizing structure aids absorption. This suggestion is especially relevant for your semester papers, since you will be starting on those papers well before you have studied all the course subjects. The more you know about subjects to come, the more likely you can see their relevance to your paper.
4. *Preside or Lead?* Read Essays 1-4, 53.
5. **Consider: Should Uber be regulated, and how?** On that subject, an optional reading is on Canvas under Week 1: the Maryland Commission's Order No. 86528 (Aug. 6, 2014); and the Maryland legislation, enacted soon after the Commission's Order.
6. Send your resume (*filename should have your last name first; please no "resume.doc"*) to me (shempling@scotthemplinglaw.com) *by Aug. 24 at 5pm, preferably sooner so that I can get to know you.*
7. Visit and review the website of any state utility regulatory commission, with attention to:
 - a. mission statement
 - b. industries, actors, and actions regulated
 - c. agency internal structure
 - d. types of proceedings and pending issues

To find state commission websites, go to <https://www.naruc.org/about-naruc/regulatory-commissions/>. Click on any state to get a summary page for that state's commission. On that summary page is the URL for the state commission's website.

Weeks 2-11

Substantive Law: The Rights and Obligations of Utilities and Their Regulators, Under Monopoly and Competitive Conditions

Most substantive regulatory law falls into three main categories: *market structure* (What types of entities are authorized to sell what products? How many sellers and buyers are in the market and what are their market shares? How easy is entry and exit?); *sales of goods and services* (What standards ensure that prices, and other terms and conditions are consistent with the public interest?); and *corporate structure* (What activities, conducted under what corporate arrangements, may exist within a utility's corporate family?)

Complicating the substantive picture is our *federal system*, in which policies, statutes, rules and orders emanate from both the federal and state levels, whose jurisdictional interactions can be exclusive, concurrent, or preemptive. (In 2016 there were two U.S. Supreme Court decisions relating to federal–state relations under the Federal Power Act.)

Week 2: Market Structure I: Rights, Obligations and Powers of the Traditional Utility Monopoly [Sept. 3]

For most of a century, the market structure for electricity, gas, telecommunications, and water utilities was a monopoly market, served by a local, vertically integrated utility holding a franchise granted by state government. Beginning in the 1970s, we have introduced competition in segments of all these industries (competition being the subject we'll cover in Weeks 3-5). Despite these competition efforts, features of the monopoly structure remain present and pervasive.

This week we will study the *seven rights, obligations or powers* that characterize most utility monopolies: exclusive franchise, consent to regulation, obligation to serve, quality of service, power of eminent domain, limits on tort liability, and the right to charge just and reasonable rates.

Required: *Regulating Public Utility Performance: Part One Intro, Ch. 2 (This is a long chapter.)*

Optional: *Preside or Lead, Essays 6, 10, 11, 12, 49*

Munn v. Illinois, 94 U.S. 113 (1877) (consent to regulation)

Application of Houston Lighting and Power, 50 PUR4th 157 (1982)
(quality of service)

Narragansett Electric Company, 65 PUR4th 198 (1985) (eminent domain)

Consumers Power Co., 140 PUR4th 332 (1993) (eminent domain)

Illinois Bell Switching Station, 641 N.E.2d 440 (Ill. 1994) (limits on tort liability)

Week 3: Market Structure II: Authorizing Competition in Traditional Monopoly Markets [Sept. 10]

The "central, continuing responsibility of legislatures and regulatory commissions" is "finding the best possible mix of inevitably imperfect regulation and inevitably imperfect competition." Alfred Kahn, *The Economics of Regulation* Vol. I, Introduction at xxxvii; Vol. II at 114.

Beginning in the 1970s and continuing today, federal and state regulators have been introducing "competition" at various levels of the electricity, gas and telecommunications industries. This forty-year experiment is complicated, controverted, and not always successful. *Authorizing* competition does not ensure *effective* competition, as a continuous flow of agency and court decisions reveals. In each regulated industry, the struggle over "Who should sell what?" continues today; most prominently in the area of "distributed energy resources" (distributed generation, renewable energy, storage, microgrids, community solar, energy efficiency and demand-side management); and broadband internet service.

The first step is to identify which products or services, among the many performed by a vertically integrated monopoly, should be subjected to competition. The next step is to modify each of seven legal features of the incumbent monopoly (discussed in Week 2), so that competition is legally permissible and possible. Then it is necessary to assess and adjust market features external to the incumbent, such as entry barriers, to make competition possible. Policymakers also must address the problem of "stranded costs": investments made by the utility, before the competitive era, to carry out its obligation serve, which might decline in value now that customers, in the competitive era, can shop elsewhere.

Required: *Regulating Public Utility Performance, Ch. 3*

Optional: *Preside or Lead, Essays 18, 19, 23, 24*

New York PSC on *Reforming the Energy Vision*, pages 1-4, 10-30, 31-35, 45-46

Pennsylvania statute on retail competition in electricity [highlighted provisions]

United Distribution (unbundling)

Energy Ass'n of New York State v Public Service Comm'n (stranded investment)

Hempling article on stranded cost

Week 4: Market Structure III: Making Competition Effective (Part 1) [Sept. 17]

Authorized competition is not the same as *effective* competition. The readings for this week describe how policymakers make competition effective. There are two main steps: first, eliminating the incumbent's control of strategic assets by "de-integrating" the vertically integrated utility; and second, monitoring market structure and seller behavior to prevent anticompetitive practices. The goal here is to separate monopoly assets and activities from competitive assets and activities, so that the incumbent's control of monopoly assets does not distort competition in the newly competitive markets. There are two main steps: "unbundling" competitive functions from competitive functions, and granting nondiscriminatory access to "bottleneck facilities."

Required: *Regulating Public Utility Performance, Chs. 4.A and 4.B (4.B.6 is optional)*

Optional: *Preside or Lead, Essays 26, 27*

New York Commission order on *Reforming the Energy Vision* (see Week 3), pages 62, 66-72

Verizon v. Federal Communications Commission, No. 11-1355 (Jan. 15, 2014) (discussing "common carrier" obligation in the context of broadband access) (read opening 5 paras. only)

<http://codes.ohio.gov/orc/4928.17> (Ohio statute on corporate separation)

Week 5: Market Structure IV: Making Competition Effective (Part 2) [Sept. 24]

Required: *Regulating Public Utility Performance, Chs. 4.C and 4.D)*

Optional: *Preside or Lead, Essays 28, 29, 30*

Week 6: Market Structure V: Monitoring Competition for Anticompetitive Conduct [Oct. 1]

Even after unbundling and nondiscriminatory access to bottleneck facilities, competition doesn't happen automatically. Other market structure features, plus profit-maximizing incumbent behavior, pose obstacles. The regulator must monitor and adjust.

Required: *Regulating Public Utility Performance, Ch. 5*

Kahn, "Deregulatory Schizophrenia," *California Law Review*

Optional: *Preside or Lead, Essays 33, 34, 35*

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)
(market power)

Sherman and Clayton Acts, 15 U.S.C.A. secs. 1-7; 12-27

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (state-created monopolies are subject to antitrust prohibition against "monopolizing")

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (same)

Conway Corporation v. FPC, 426 U.S. 271 (1976) (price squeeze under Federal Power Act Section 205; economic regulators must take antitrust principles into account when dealing with their jurisdictional transactions)

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) (utility financing under Federal Power Act Section 204; "public interest" phrase in regulatory statutes means that economic regulators must take antitrust principles into account when dealing with their jurisdictional transactions)

Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F. 2d 980, 1001 (D.C. Cir. 1984) (entry barriers)

Fed. Trade Comm'n v. Procter & Gamble (entry barriers)

Tying Excerpt from Dept. of Justice

Weeks 7-10: Sales of Goods and Services

Among the most controverted and time-consuming regulatory activities is setting prices for the goods and services that utilities sell. Five main legal principles guide and constrain regulators: the "just and reasonable" standard—which, absent statutory repeal, applies both in monopoly and non-monopoly (but still regulated) markets; the prohibition against undue

discrimination; the filed rate doctrine; the prohibition against retroactive ratemaking; and the *Mobile-Sierra* doctrine (which applies only under the Federal Power Act).

Week 7: Sales of Goods and Services I: Cost-Based Ratemaking [Oct. 8]

For a century, the standard method for setting utility rates for regulated monopolies has been "cost-based" regulation. The commission estimates what it will cost the utility annually to meet its public service obligations, then calculates rates that give the utility a fair opportunity to recover those costs plus earn a reasonable profit (sometimes called "return") on its capital investment. But as we learned in Chapter 3, since the 1980s, we have authorized competition in certain formerly monopoly markets. In one of those markets, wholesale electricity, we have added a new regulation option known as "market-based" rates. These rates are still subject to the statutory "just and reasonable" standard (that is, we have not "deregulated" in the sense of repealing the regulatory role in overseeing prices). But under market-based rates, the regulator does not set the rates. Rather, the seller sets its own rates, disciplined only by market forces (and regulatory intervention when market forces are insufficient). To gain permission to do so, the seller must prove that it is unable to exercise "market power."

Required: *Regulating Public Utility Performance, Part Two Intro, Ch. 6 (6.C.3.b, 6.F optional)*

Verizon Communications v. FCC, 535 U.S. 467 (2002) (containing a superb summary of the history and technique of cost-based ratemaking). Read Intro and Part I.A. only.

Optional: *Preside or Lead, Essays 44, 45*

"Ratemaking in 30 minutes" outline (highly recommended; it's short and easy)

Market St. Ry. Co. v. R.R. Comm'n of Calif., 324 U.S. 548 (1945)

Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276 (1923) (read only the highlighted portions of the Brandeis concurrence)

Bluefield Water Works & Improvement Company v. Public Service Comm'n, 262 U.S. 679 (1923)

Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591 (1944)

Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896)

Week 8: Sales of Goods and Services II: Market-Based Rates [Oct. 22]

Required: *Regulating Public Utility Performance, Ch. 7*

Optional: *Farmers Union Central Exchange, Inc. v. F.E.R.C.* (Farmers Union), 734 F.2d at 1486 (D.C. Cir.). [skim]

Week 9: Sales of Goods and Services III: Two Doctrines [Oct. 29]

1. Prohibition against undue discrimination

Required: *Regulating Public Utility Performance, Ch. 8*

2. Filed rate doctrine

Required: *Regulating Public Utility Performance, Ch.9*

Optional: *State of Calif. ex rel. Lockyer v. Coral Power et al.*, 383 F.3d 1006 (9th Cir. 2004) (read highlighted portion only for excellent overview of the doctrine)

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981)

Nantahala Power & Light v. Thornburg, 476 U.S. 953 (1986)

Mississippi Power & Light v. State of Mississippi, 487 U.S. 354 (1988)

Week 10: Sales of Goods and Services IV: Two More Doctrines [Nov. 5]

3. Prohibition against retroactive ratemaking

Required: *Regulating Public Utility Performance, Ch. 10*

Optional: *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977)

4. Mobile-Sierra doctrine

Required: *Regulating Public Utility Performance, Ch. 11*

Optional: *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008)

United Gas Pipe Line Co. v. Mobile Gas Service Corp.

Federal Power Commission v. Sierra Pacific Power Company

Permian Basin Area Rate Cases, 390 U. S. 747 (1968)

United Gas Pipe Line Company v. Memphis Light, Gas and Water Division

Week 11: Corporate Structure, Mergers and Acquisitions [Nov. 12]

Corporate structure involves the relationships among members and activities of a corporate family: holding companies, subsidiaries and affiliates, and their mix of utility and non-utility activities. The regulator has multiple concerns: Will the risks of non-utility businesses affect the cost of capital to the utility businesses? Will assets created with ratepayer dollars for utility purposes subsidize the utility's non-utility activities? Will management be distracted from its core purpose of delivering essential services to the public?

Corporate-structure issues involve both static analysis (corporate forms and intercompany relationships) and dynamic analysis (mergers and acquisitions). In the mergers and acquisitions area, the concerns include effects on competition, quality of service, rates, business risk and management distraction. On the positive side is the potential to realize economies of scale and scope, to strengthen a company financially and competitively. There is inherent tension between the private interests of the merging companies and public interest as defined by statute. The regulatory question is always: Is this use of corporate resources an efficient contribution to customer welfare?

Required: Hempling merger book excerpts

Peter Bradford, "Gorillas in the Mist"

Corporate Structure Issues diagram

Exelon-Constellation corporate diagram

Montana Public Service Commission, *Statement of Factors* re future acquisitions

Weeks 12-13: The Federal-State Jurisdictional Relationships

Our regulated industries live with two historical legacies: the Framers' 1787 decision to embed in our Constitution separate governmental structures at the federal and state levels; and Congress's 1930s decisions to create separate roles for federal and state regulators, for industries whose geographic and technological features were then very different. The introduction of competition and the growing interconnectedness (both commercial and physical) across state lines have injected multiple tensions and unpredictabilities into what used to be a calm, amicable, and unremarkable federal-state jurisdictional relationship. These two weeks describe the legal fundamentals of the federal-state regulatory relationship and discuss today's multiple jurisdictional awkwardnesses.

Week 12: Federal-State Jurisdictional Relationships I: Limits on Federal Authority; Federal-State Models [Nov. 19]

1. Does the federal government have the power to regulate; *i.e.*, is there an interstate-commerce basis? And is the federal agency acting within its authority?

Required: *Regulating Public Utility Performance, Part Three Intro, Ch. 12.A.1*

Preside or Lead, Essays 33-37

Optional: *U.S. v. Lopez*, 514 U.S. 549 (1995)

National Federation of Independent Businesses v. Sibelius (U.S. 2012): Highlighted sections only. They include the Commerce Clause section of Chief Justice Roberts's opinion *and* the Commerce Clause section of Justice Ginsburg's dissent. It is hard to imagine a better way to master the Commerce Clause than to study this immensely erudite dialogue, in which each writer addresses the other over a dozen times.

2. Does the federal statute violate the Tenth Amendment because it interferes with powers reserved to the states?

Required: *Regulating Public Utility Performance, Ch. 12.A.2*

Optional: *FERC v. Mississippi*, 456 US 742 (1982)

3. Is the federal agency acting outside its authority?

Required: *Regulating Public Utility Performance, Ch. 12.A.3*

Optional: *New York v. U.S.*, 505 US 144 (1992)

4. What are some models for federal-state regulatory relationships?

How do federal and state statutes assign jurisdiction over the activities that regulators regulate (market structure, sales of power and transmission, quality of service, corporate structure, financial structure)?

Required: *Regulating Public Utility Performance, Ch. 12.C*

NRRI tables on electricity and telecom jurisdiction (in Week 1 materials)

Week 13: Federal-State Jurisdictional Relationships II: Limits on State Authority [Nov. 26]

Required: *Regulating Public Utility Performance, Chap. 12.B.*

1. Does the state program violate the dormant Commerce Clause by discriminating against interstate commerce?

a. Violations

Optional:

New England Power Co. v. New Hampshire, 455 US 331 (1982)

Wyoming v. Oklahoma, 502 U.S. 437 (1992)

New Energy Co. of Indiana v. Limbaugh, 486 U.S. 269 (1988)

b. Non-violations

Optional:

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) [Caution: Court found violation but the case's criteria are often cited as support for non-violations]

Alliant v. Bie, 330 F.3d 904 (7th Cir. 2003) (upholding some provisions and rejecting another)

Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) (discussing state's interest in regulating utilities as a value to be balanced)

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) (same)

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) (same)

2. Is the state action preempted by federal law?

Optional

Pacific Gas and Electric v. Energy Resources Conservation and

Development Comm, 461 U.S. 190 (1983) (not preempted)

FCC's 2015 Open Internet Order (See Week 4), paras. 431-433

Arizona v. United States (U.S. 2012) (Ariz. Immigration law preempted)

Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission, 837 F.2d 600 (3d Cir. 1988) (not preempted)

Pike County Light and Power Company v. Pennsylvania Public Utility Commission, 77 Pa. Commw. 268; 465 A.2d 735 (1983) (not preempted)

Nantahala Power & Light v. Thornburg, 476 U.S. 953 (1986) (preempted)
Mississippi Power & Light v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) (preempted)

Louisiana PSC v. FCC, 476 U.S. 355 (1986)

AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999)

Hughes v. Talen, No. 14-614 (2016) (preempted)

5. Final thoughts: Jurisdiction's Future

Optional: *Regulating Public Utility Performance, Ch. 13*