ENERGY LAW
Course No. 2503
Frank Lindh, Lecturer in Law
3 Units
Spring Quarter 2022
Mondays, 4:15 to 7:15 p.m.

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NOTE TO STUDENTS:
There is no required textbook for this course. All course materials referenced in this Syllabus will be posted on CANVAS.
# Course Syllabus

## I. Overview – Infrastructure Basics and Legal Framework

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ENERGY LAW  
Course No. 2503  
Professor Frank Lindh  
3 Units  
Spring Quarter 2022  
Mondays, 4:15 to 7:15 p.m.

Course Instructor
Frank R. Lindh – Lecturer in Law  
franklindh@comcast.net  
415-596-3931

Office Hours:
Mr. Lindh typically is on campus only on Mondays, the day when this course is taught. He is happy to arrange in-person meetings with students on campus, before or after class, upon request. He is also available for meetings with students via Zoom on other days and at other times, again upon request.

Instructor Biography:
Frank Lindh has been a practicing lawyer continuously since 1985 in the field of energy and public utilities law. He served for six years (2008-2014) as General Counsel of the California Public Utilities Commission, a major State agency. Early in his career, Frank served as an appellate attorney in the Office of the Solicitor of the Federal Energy Regulatory Commission in Washington, D.C., and in that capacity appeared and argued cases before numerous United States Courts of Appeals. He now has a solo law practice, representing clients in the field of energy and public utilities. His clients have included Google LLC, Citizens Energy Corporation, Consolidated Edison Development Company, Natural Resources Defense Council, and the California Forestry Association.
Mr. Lindh had the distinction of being the first person to serve as Law Clerk to the Solicitor General of the United States, during the Supreme Court’s 1984 Term.

Mr. Lindh served for 15 years as an in-house attorney with Pacific Gas and Electric Company, and for two years as General Counsel of a major, federally-regulated interstate natural gas pipeline serving markets in California and the Pacific Northwest.

Mr. Lindh is a 1985 honors graduate of Georgetown University Law Center. He earned his bachelor's degree at Pennsylvania State University and a master's degree at the University of North Carolina at Chapel Hill.

Mr. Lindh has taught courses on energy law at several law schools in the San Francisco Bay Area since 2009 – the University of San Francisco School of Law, the University of California Hastings College of the Law, and the University of California Berkeley School of Law. He has authored and co-authored several scholarly articles in the field of energy law.

Course Description:

All modern industrial economies, including that in the U.S., require massive energy infrastructure and a coherent legal framework to ensure that energy services are provided to consumers of all types in a manner that is safe, reliable and affordable. Because of climate change, it is also increasingly clear that our energy sources must be sustainable. The focus of this course is on the electricity and natural gas industries, which operate in the U.S. under a comprehensive legal and regulatory framework involving extensive interplay between federal and state authorities. This course provides a strong grounding in the governing legal principles. It draws upon case-law, primarily decisions by the U.S. Supreme Court, to bring these principles into focus. We will examine the respective roles of regulation and market forces in this field. Students who complete the class will gain a historical understanding of how economic regulation of the energy industry has evolved since its origins in the late 19th and early 20th Centuries, a durable conceptual understanding of current energy law and policy debates, and a practical grasp of the legal and regulatory framework for the energy industry in the U.S. Non-law
students interested in energy issues are welcomed and encouraged to take this course, as an understanding of the legal framework is essential to careers in the energy sector.

Course Materials:

There is no required textbook for this course. All of the materials for this course are set forth in this Syllabus, and condensed versions of the assigned cases are posted on CANVAS. Please note, in this Syllabus there are links to the full text versions of the cases, but students are expected to read only the condensed versions posted on CANVAS.

Class Preparation, Attendance and Participation:

Students are expected to prepare for class, attend all classes (unless excused, in advance), and participate in discussions during class. A substantial portion of the final grade (as described below) will be based upon in-class participation.

“Expert” designations: Most of our in-class discussion will center on assigned cases – decisions by courts and administrative agencies. The cases are set forth in this Syllabus. Condensed versions of all cases will be posted on CANVAS.

Every student is expected to read every case in preparation for the class for which the case is assigned.

For purposes of our in-class discussion, each case will have a designated “expert,” a student who will be primarily responsible for responding to the instructor’s questions about the case. Students will be asked to volunteer to be expert on a particular case at least one week in advance.

The goal, over the course of the Quarter, will be to have each student serve as an expert for a minimum of one case, and ideally (depending on the number of students enrolled) for two or more cases.

As the designated expert, the student should be prepared to describe, in response to the instructor’s questions, the facts of the case, the holding (i.e. the outcome), and the rationale offered by the decisional authority.

Other students, besides the designated expert, also may be called upon by the instructor in the course of the discussion.
Use of Computers During Class:

Students are permitted to use laptops and other computers during class, but should only access materials being used in the class session.

*Use of laptops and other computers during class for any purpose other than accessing class materials is not permitted and is strongly discouraged.*

Since the instructor cannot see what students are viewing on their screens, students are asked to please be on their honor about this!

Final Exam:

There will be a take-home, open-book final exam. Examples of final exams from past years will be posted on CANVAS.

Student In-Class Presentations:

Teams of four students will research and present a summary of a selected energy law or policy issue or case study. (Please note, if total class enrollment is not divisible by four, then we will adapt the size of at least some of the groups.)

The focus of the in-class presentations will be on contemporary and emerging issues in the energy industry, as distinct from historical matters.

Early in the Quarter, the instructor will provide list of suggested topics. Students thereafter will be required to form their teams and select a topic. Student teams can select a topic from the instructor’s list, or propose a topic of their own choosing (subject to the instructor’s approval).

In-class presentations will be scheduled later in the Quarter, on the schedule tentatively set out in this syllabus. Each team will have a total of 30 minutes, both to present its material and to respond to questions from the instructor and class members. Teams should focus on the relevant legal and policy aspects of their topics.

As noted below, the in-class presentation will account for 20% of each student's grade.
**Grading:**

Final grades will be determined by the following formula:

1. Class participation 20% (non-anonymous)
2. In-class presentation 20% (non-anonymous)
3. Final exam (take-home) 60% (anonymous)

**Communication:**

Professor Lindh’s preferred email address is: FrankLindh@comcast.net

**Diversity and Inclusion:**

Mr. Lindh is committed to a classroom environment that is welcoming and supportive for all persons, without regard to race, gender, gender identity, sexual orientation, national origin, disability, status as a military veteran, or other factors. If at any time a student enrolled in the course perceives a deviation from this policy, the student is encouraged to bring it to the instructor’s attention for remediation.
COURSE SYLLABUS

The following provides a brief summary of the topics covered in each class, as well as assigned readings.

Although this syllabus includes links to the full text of the assigned cases, students are expected to read only the condensed versions of the assigned cases, which will be posted on CANVAS.

I. COURSE INTRODUCTION

Class 1 – Monday March 28: Infrastructure Basics and the Corresponding Legal and Regulatory Framework – State and Federal

Topics: Scope and organization of the course; basics of electricity and natural gas industries, and why they are regulated; introduction to the law and regulatory principles governing these industries.

Please note: Unlike most of our classes, which will be based on decided cases (using the case law method), the first two classes will consist mostly of lecture-style presentation by the instructor and Q&As to students based on the readings and problem sets.

This first segment of the course is designed to acquaint all students with the key forms of energy infrastructure we will cover during the rest of the semester, as well as the basic legal and regulatory structure (federal and state) governing this critical segment of the U.S. economy.

Our goal in this segment is to ensure that all students have a common understanding of these industry basics. It is expected that some students may have prior backgrounds that already give them some degree of familiarity with the topics covered, while for other students this will be new information.

A. Energy Infrastructure Basics

In subsequent classes, we will study cases in which the courts and administrative agencies have resolved disputes and issued rules pertaining to the energy industry. Before doing so, however, it is helpful to gain an understanding of the underlying infrastructure.
Electricity, of course, is pretty much universally available in all developed nations, and natural gas service is almost equally ubiquitous in urban areas such as the San Francisco Bay Area. We enjoy these services for basic human comfort, but they are also essential for industrial and commercial applications. Every modern, industrialized economy, including ours, depends on a foundation of safe, reliable and affordable electricity and natural gas service. A massive infrastructure, traversing state, provincial and international boundaries, supports the electricity and natural gas industries, bringing these essential services to industry and consumers.

**Required Materials:**

Both the electric power industry and the natural gas industry are divided into three distinct sectors: (i) production, (ii) transmission, and (iii) distribution.

These distinctions are very important, not only from the standpoint of engineering and operations, but also from a legal perspective.

In the U.S., the individual States (or in some instances their political subdivisions) generally regulate the **production** sector (electricity generation and natural gas production) and the **distribution** sector (retail delivery of electric power and natural gas to end-use consumers).

In contrast, the federal government generally regulates the **interstate transmission and wholesale sales** activities.

**Assignment:** Please review and familiarize yourself with the two schematics below (electric and gas systems).
Electricity Infrastructure:

North America Electricity Grid:
Optional recommended reading: https://en.wikipedia.org/wiki/Continental_U.S._power_transmission_grid#Western_Interconnection
Assignment: Please review and familiarize yourself with the map below, depicting the high-voltage grid in North America:

Assignment: Please review and familiarize yourself with the schematics at the links below. (Copies of these schematics also are posted on Canvas.)

California Electric Utilities – Service Territories

California Electric Generation & Transmission System
Part 1 of 2:
California Electric Generation & Transmission System
Part 2 of 2:

Optional recommended reading:
Lazar, Electricity Regulation in the U.S.: A Guide (Regulatory Assistance Project, Second Edition, June 2016), Chapter 3, “Industry Structure” (pp. 11-24). (See especially figure 3-2 (electric system schematic) and figure 3-3 (US Electricity by Fuel)
Assignment: Please review and familiarize yourself with the chart below, focusing especially on California’s mix of resources.

Types of generating resources – Fossil fuels, nuclear, renewables (wind, solar, geothermal), hydroelectric, etc. (Note that California has zero coal and petroleum, and substantial hydroelectric, natural gas, nuclear, and renewables.)

[Net Generation of Electricity by State & Type chart]

- Texas
- Florida
- Pennsylvania
- California
- Illinois
- Alabama
- New York
- Georgia
- North Carolina
- Ohio
- Arizona
- Michigan
- Washington
- Louisiana
- Indiana
- South Carolina
- Virginia
- Missouri
- Kentucky
- Oklahoma
- Tennessee
- New Jersey
- West Virginia
- Wisconsin
- Mississippi
- Oregon
- Minnesota
- Iowa
- Arkansas
- Colorado
- Wyoming
- Kansas
- Utah
- Nebraska
- Nevada
- Connecticut
- North Dakota
- Maryland
- New Mexico
- Massachusetts
- Montana
- New Hampshire
- Idaho
- Maine
- Hawaii
- South Dakota
- Delaware
- Rhode Island
- Alaska
- Vermont

$mWh$
Three Recent Innovations in the Electric Power Industry:

(1) Independent System Operators and Regional Transmission Organizations
Under direction by the Federal Energy Regulatory Commission, substantial segments of the high-voltage transmission grid in the U.S. are operated in a coordinated manner by non-profit corporations. Interestingly, ownership of the underlying transmission assets remains vested with for-profit, investor-owned companies and others. (Canada has similar arrangements.) These regional grid operators coordinate electricity flows, and in some instances operate centralized markets for purchase and sale of energy and capacity by power plant owners and wholesale power marketers, for distribution by load-serving entities.

Optional recommended reading about RTOs & ISOs:
https://www.ferc.gov/electric-power-markets
(2) Microgrids

“A microgrid is a localized group of electricity sources and sinks (loads) that typically operates connected to and synchronous with the traditional centralized grid (macrogrid), but can disconnect and maintain operation autonomously as physical and/or economic conditions dictate.”

Optional recommended reading:
Berkeley Lab Microgrids Paper (Feb. 2006):

Optional recommended reading:
David Roberts & Alvin Chang, “Meet the microgrid, the technology poised to transform electricity” (May 2018)

(3) Community Choice Aggregation:
The rise of quasi-governmental providers of electricity supply, as distinct from electric infrastructure – known California as Community Choice Aggregators (CCAs).
Optional recommended reading:
http://innovation.luskin.ucla.edu/sites/default/files/CCAs%20and%20the%20Grid_0.pdf

The article at the link above is an optional recommended reading. Please see especially pp. 4-6 (Executive Summary), and pp. 11-16) (Part III, Community Choice Aggregation and its Impact on the Californian Electricity Sector).

Please note the distinction between a municipal utility (such as LADWP or SMUD) that owns and operates the electric infrastructure serving customers (including power plants, high-voltage transmission lines, the local distribution system, and the customer meters), and a CCA that provides electric supply using delivery infrastructure that remains 100% owned and operated by an investor owned utility.

Natural Gas Production, Pipelines and Distribution Utilities:

Optional recommended reading:
Energy Information Administration, “Where Our Natural Gas Comes From”
Where our natural gas comes from - U.S. Energy Information Administration (EIA)

U.S. Natural Gas Pipeline System
Assignment: Please review and familiarize yourself with the pipeline system map below.
Assignment: Please review and familiarize yourself with the two maps below (depicting the gas pipeline system serving California and the other western states):

Western U.S. Natural Gas Pipeline Network
Map of California Natural Gas Utility Service Areas.  (Copy also posted on Canvas.)

Map of California Natural Gas Pipelines and Storage Systems.  Copy also posted on Canvas.)
https://www.energy.ca.gov/sites/default/files/2020-10/Natural_Gas_Pipelines_ADA.pdf

Optional recommended readings about California’s natural gas system:

Supply and Demand of Natural Gas in California

Overview of Natural Gas in California
B. Legal and Regulatory Framework – State and Federal

Topics: Principal federal and state statutes, and related regulatory principles, governing the electricity and natural gas industries in the U.S.

The basic, overarching purpose of this complex system of regulation is to ensure safe, reliable and affordable electricity and natural gas service to consumers, primarily by investor-owned, for-profit enterprises.

Introduction
The electricity and natural gas industries in the U.S. are governed by substantially similar statutes at both the federal level (governing interstate aspects) and state level (governing local and intrastate aspects).

Most consumers in the U.S. (approximately 80%) get their electric and natural gas service from private, investor-owned companies (like PG&E), whose services are comprehensively regulated by government agencies.

The remainder of electricity and natural gas consumers are served by governmental entities (such as the City of Palo Alto (electric and gas), Los Angeles Department of Water and Power (LADWP) (electric and gas), Sacramento Municipal Utility District (SMUD) (electric only), and Irrigation Districts in the California’s Central Valley (agricultural irrigation, plus electric), or by self-regulating, customer-owned, non-profit cooperatives (typically electric only, generally in rural areas).

- Curiously, for water and sewer services in the U.S., the foregoing percentages are approximately reversed: Here in California, almost 90% of consumers get their water and sewer service from public, governmental utilities (these include entities such as San Francisco Public Utilities Commission (not to be confused with the California Public Utilities Commission, despite the similarity of names), Marin Municipal Water District, and LADWP). The other 10% of water consumers in California are served by private, investor-owned utilities (such as San Jose Water Company), which are regulated by the California Public Utilities Commission under the same Public Utilities Code that governs electric and gas utility companies.
Our primary focus in this course is on the statutes and regulatory structures (both federal and state) governing the **investor-owned electric and natural gas companies**. We touch only lightly on governmental entities or customer-owned cooperatives that provide electric and gas service.

**Key Federal Statutes:**


**Key State Statutes**

Public Utilities Acts (example: California Public Utilities Code)

1. **Provisions governing RATES AND CHARGES:**

- Rates must be “just and reasonable,” and also not “unduly discriminatory” nor “unduly preferential” as between customers and customer classes.

- In reading the statutory excerpts below, note that the language used is very similar – almost identical – in the federal and state laws, and also for both industries, i.e., electricity and natural gas.

**Federal Power Act § 205(a) & (b) and § 206(a)**

FPA Section 205(a):

(a) *Just and Reasonable Rates.*
All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
FPA Section 205(b):

(b) Preference or Advantage Unlawful
No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Natural Gas Act § 4(a) & (b) and § 5(a)

NGA Section 4(a):

(a) Just and Reasonable Rates and Charges
All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

NGA Section 4(b):

(b) Undue preferences and unreasonable rates and charges prohibited
No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

“All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.”

- Federal rates pertain to wholesale transactions in interstate markets, and the rates and terms of service for deliveries via interstate infrastructure.

Federal Power Act § 201(b)(1):

“The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce...”

Natural Gas Act § 1(b):

“The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale . . .”

- State rates pertain to retail services to the ultimate consumer, which are generally accomplished via extensive local distribution systems.

Assignment: See “Problem Set: Rates and Charges” posted on CANVAS. Please be prepared to answer the questions posed in the Problem Set.
2. Government Authorization TO CONSTRUCT AND OPERATE Energy Infrastructure Projects:

A government permit is typically required for an investor-owned, for-profit company to construct and operate electric and natural gas infrastructure.

Such a permit is often referred to in the statutes as a “Certificate of Public Convenience and Necessity” or a “License.”

Usually a single permit authorizes both construction and operation of the infrastructure project, but occasionally (in particular in the case of nuclear power plants) separate licenses are required for construction and operation.

• Note that an environmental assessment and mitigation measures to ameliorate any impact on the environment typically are required under either federal or state environmental statutes (and sometimes both) for such infrastructure projects.

  o The principal federal environmental statute is the National Environmental Policy Act (“NEPA”) of 1969, enacted under then-President Richard Nixon. [https://en.wikipedia.org/wiki/National_Environmental_Policy_Act](https://en.wikipedia.org/wiki/National_Environmental_Policy_Act)

  o The principal state statute of this type in California is the California Environmental Quality Act (“CEQA”), enacted in 1970 under then-Governor Ronald Reagan. [https://en.wikipedia.org/wiki/California_Environmental_Quality_Act](https://en.wikipedia.org/wiki/California_Environmental_Quality_Act)

• Note that certain of governmental permits give the infrastructure project sponsor eminent domain power (i.e., the power to legally condemn real property, in other words, to take the properly involuntarily, subject to paying fair compensation to the property owner). We usually think of eminent domain as something the government does in its own right, for example, to construct a public highway or a dam on a river that submerges upstream lands. In the case of energy
infrastructure, this is an example of the government’s delegating its eminent domain power to private enterprises. This authority to “take” private property by eminent domain is especially important for rights-of-way for transmission lines and pipelines that traverse extended geographic distances. If landowners could block a project simply by refusing to sell property to the project sponsor, such projects would be fraught with challenges and practically impossible to build.

**Assignment:** Please review one-page document, “Energy Infrastructure Authorizations,” posted on CANVAS, which lists and describes the governmental permits required for various types of energy infrastructure in the U.S. (distribution systems, power plants, transmission lines, etc.).

- Note that authorization to build *power plants generally* is reserved to the states (and in some instances local authorities), with only two exceptions:

  *Hydroelectric power plants* are licensed by FERC
  *Nuclear power plants* are licensed by the NRC

- An interesting feature of major energy infrastructure permitting in the U.S. is that interstate *high-voltage electric transmission lines* are built under state, not federal, authorizations, even though their services and charges are regulated by federal authorities (i.e., by the Federal Energy Regulatory Commission (FERC)).

- In contrast, construction and operation of *interstate natural gas pipelines* (i.e., those that cross state lines) can be done only with authorization from FERC (a “Certificate of Public Convenience and Necessity”), and the states have no authority to grant such permits.

  However, *intrastate natural gas pipelines* (i.e., those built wholly within a single state, for domestic consumption of locally-produced natural gas within the state) are built under state (and sometimes local) permits.
Yet another contrast is the example of *interstate oil pipelines* (i.e., pipelines for transporting crude oil or refined products across state lines), for which state-by-state construction authorization is needed (similar to electric transmission lines), even though the *interstate services* on these oil pipelines are *federally regulated*.

**Assignment:** See “Problem Set: Energy Infrastructure Permits” posted on CANVAS. Please be prepared to answer the questions posed in the Problem Set.

**II. EFFORTS BY STATES TO CONTROL THEIR ENERGY MIX (TWO CLASS SESSIONS)**

Class 2 – Monday April 4: U.S. Constitution’s “Commerce Clause” Limits on the States

**Constitution of the United States**

**Article I – Congress**

* * *

**Section 8: Powers of Congress**

The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

**Background**

The Commerce Clause is the Constitution’s affirmative grant of authority to the U.S. Congress (one of the “enumerated powers”) to regulate interstate and foreign commerce.

This was one of the most significant innovations in the
Constitution, as compared to the Articles of Confederation that it replaced.

In addition to granting power to Congress, the Commerce Clause also has long been held to restrict the authority of the individual States to regulate interstate or foreign commerce – an interpretation that has come to be known as the “Dormant Commerce Clause.” (The word “Dormant” signifies that no such restriction appears in the actual text of the Constitution; it is merely inferred by the courts when they evaluate evaluating challenges to actions taken by the states.)

Of course, Congress itself, by enacting a statute, can delegate to the states its powers under the Commerce Clause. But unless Congress has done so, an individual state is restricted in its ability to regulate, tax, or otherwise interfere with, interstate (or foreign) commerce.

For further background, see Interpretation – The Commerce Clause, by R. Barnett & A. Koppelman, National Constitution Center, at https://constitutioncenter.org/interactive-constitution/interpretations/section8-commerce

Readings:


This article explains how the Supreme Court, in a series of early 20th Century cases arising under the Commerce Clause, attempted to draw a bright line between the sphere of local or intra-state commerce (where the States are free to act) and the sphere of interstate commerce (where only Congress has authority to act). When Congress later, in the mid-1930’s, enacted the two principal federal regulatory statutes to regulated the “interstate” sphere of the electricity and natural gas industries (the Federal Power Act of 1935 and the Natural Gas Act of 1937), Congress attempted to codify these bright line distinctions and “fill in the gap” by
establishing federal regulation over the areas the States were unable to reach.

(2) **West v. Kansas Natural Gas Co.**, 221 U.S. 229 (1911)  
[https://supreme.justia.com/cases/federal/us/221/229/](https://supreme.justia.com/cases/federal/us/221/229/)

At issue in this case was a 1907 Oklahoma statute prohibiting the construction of natural gas pipeline facilities for exporting gas to neighboring states, and otherwise restricting construction and operation of such export lines. The statute was challenged by, among others, an interstate pipeline company engaged in the business of transporting natural gas from Oklahoma to Kansas and Missouri for consumption in those states.

(3) **Missouri v. Kansas Gas Co.**, 265 U.S. 298 (1924)  
[https://supreme.justia.com/cases/federal/us/265/298/](https://supreme.justia.com/cases/federal/us/265/298/)

In this case, regulatory authorities in two natural gas consuming states (Kansas and Missouri) tried to block an interstate pipeline that imported gas from Oklahoma from imposing a substantial price increase on its wholesale sales of natural gas to distribution utilities in Kansas and Missouri. The Supreme Court held that
Kansas and Missouri were precluded from doing so because of the Commerce Clause.

https://supreme.justia.com/cases/federal/us/273/83/

In this case, an electric utility serving retail customers in Providence, Rhode Island, entered into a long-term “requirements” contract with a similar utility located in Attleboro, Massachusetts, whereby the Rhode Island utility agreed to sell electricity to the Attleboro utility at a fixed rate for 20 years. This was a wholesale transaction. The power purchased by the Attleboro utility was used to supply its retail customers in Attleboro. The Supreme Court held that the Rhode Island regulatory authorities were precluded, under the Commerce Clause, from imposing a price increase requested by the Providence utility, after the Providence utility found it was losing money on the sale of power to the Attleboro utility. As it had in *Kansas Gas*, *supra*, the Supreme Court held that because this was a *wholesale* sale (a sale-for-resale) in *interstate* commerce, the State authorities were precluded from exercising regulatory authority to set the price.

https://supreme.justia.com/cases/federal/us/455/331/

At issue in this case was a 1913 New Hampshire statute requiring a state permit for export of hydroelectric energy generated on rivers within the state of New Hampshire. The challenger was a wholesale electric company that operated a large hydroelectric generating system in New Hampshire, primarily for export to neighboring states in New England. The challenge arose when New Hampshire in 1980 declined to renew an
export permit that theretofore had been granted by the state without controversy since the time the statute was enacted in 1913.


Topic: The role of two key federal statutes – the Federal Power Act of 1935 and the Natural Gas Act of 1938 – in limiting the authority of the states to regulate the electricity and natural gas industries

Cases:

(1) FPC v. Florida Power & Light Co., 404 U.S. 453 (1972)  

In this case, Florida Power & Light Company, a utility serving the southernmost portion of Florida, contested whether it should be subject to federal regulation. Its transmission system did not connect with any out-of-state transmission companies, but only with an intermediate utility in north Florida (Florida Power Corporation), whose facilities in turn were connected to an out-of-state system in Georgia.

[https://supreme.justia.com/cases/federal/us/489/493/](https://supreme.justia.com/cases/federal/us/489/493/)

This is a complex but important case involving state regulation of natural gas production, in particular, state rules requiring “pro rata” production from subterranean gas reservoirs. Such rules are common in all gas producing states. At issue in this case was an amendment to Kansas’s prorationing rules that adversely impacted producers who were chronically under-producing their allotted quotas, by permanently cancelling such
“underages” in certain circumstances. The Kansas rules were challenged by interstate pipelines that had contracts for the purchase of gas from the affected producers. They wanted to continue exercising their contractual right to not purchase the gas while keeping it under contract, in effect storing the gas for future use, so they could concentrate their purchases elsewhere for the time being. They claimed the modified Kansas rules interfered with the interstate gas markets and hence were preempted by federal regulation of the interstate markets. They also claimed the new Kansas rules violated the Dormant Commerce Clause. The Supreme Court in this case rejected both challenges.

https://supreme.justia.com/cases/federal/us/485/293/

In this case, two affiliated companies that operated federally-regulated interstate natural gas pipeline and storage facilities successfully challenged the authority of the Michigan Public Service Commission to require them to obtain approval from the State Commission for their securities issuances. The Supreme Court held that under the statutory scheme enacted by Congress (i.e., the Natural Gas Act), the authority to regulate such securities issuances was vested exclusively with federal authorities, and so the State was preempted from doing so.

In this case, the U.S. Supreme Court, in an opinion by Justice Ruth Bader Ginsburg, invalidated a Maryland program designed to encourage construction of new, in-state electric generating plants. (A companion case concerned a nearly identical New Jersey program, which also was invalidated.) The flaw in the Maryland program was that it included a pricing mechanism for a new power plant that tampered with the prices achieved through a multi-state, wholesale auction overseen by the Federal Energy Regulatory Commission. The Supreme Court agreed with FERC that the Maryland program was preempted because it interfered with the FERC-regulated wholesale auction.

III. PRINCIPLES OF PUBLIC UTILITY REGULATION (TWO CLASS SESSIONS)

Topics: Common law view of private property dedicated to public use; constitutional protection against governmental taking of private property without just compensation; cost-of-service ratemaking; distinction between rate-setting decisions that are “confiscatory” (and hence an unconstitutional
“taking”) verses those that are “compensatory” (and hence lawful); opportunity to earn a return on investment as distinct from an assured return on investment.

Class 4 – Monday April 18: Rate-Setting by Government Agencies for Services Provided by Private Sector Enterprises

Readings:

(1) Excerpts from the U.S. Constitution: Fifth and Fourteenth Amendments:

CONSTITUTION OF THE UNITED STATES

Amendment V, Section 1 (excerpt):

No person shall * * * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1 (excerpt):

* * * * * No state shall * * * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.


This case tested the ability of the State of Illinois, under the then-recently-enacted 14th Amendment (ratified in 1868), to impose price regulation on grain elevators in Chicago during a period of rapid, major economic growth in the Midwest. Note that the challenge in
this case concerned the authority of the state of Illinois to impose price regulation and other requirements on grain elevator companies, as distinct from the level of the rates that were set by the state.

(3) *Smyth v. Ames*, 169 U.S. 466 (1898)  

This was a significant Supreme Court decision under the 14th Amendment concerning the level of prices fixed by a state government (as distinct from cases such as *Munn v. Illinois*, which concerned whether the states could regulate at all). At issue in this case was whether the rates prescribed by the State of Nebraska for in-state freight railroad service were so low as to be confiscatory and hence unlawful under the Due Process Clause of the 14th Amendment. Please note the meticulous accounting methodology Justice Harlan used to analyze this question in his opinion for the Supreme Court.


This case is regarded as the definitive articulation by the Supreme Court concerning the legal limits on the powers of government agencies to set rates for service by public utilities and similar infrastructure enterprises. In this case, the Court set forth the principles that continue to this day to govern judicial review of rate-setting decisions by administrative agencies.  

Query: Is the requirement that rates be “just and reasonable” any different when analyzed from a statutory as distinct from a constitutional perspective?
(5) One-page handout: **Cost of Service Ratemaking Made Simple** (posted on CANVAS)

This one-pager explains how regulatory agencies, both federal and state, go about the task of setting cost-of-service rates for public utilities, under the judicial precedents we will have covered in class.

**Class 5 – Monday April 25:** The “Filed Rate Doctrine” – The Preclusive (and Preemptive) Effect of Federal Rate Orders on the Courts and State Agencies

Topic: The “filed rate doctrine” – requiring that courts (both federal and state) and state regulatory commissions must respect and uphold as “lawful” the rates set by federal regulatory authority (except, of course, for a court engaged in direct judicial review (i.e., appeal) of the federal agency’s rate-setting orders).

This legal doctrine, developed in the federal courts, treats a rate decision of the federal commission almost as the equivalent of a statute enacted by Congress, in terms of its preemptive effect on the courts (both federal and state) and on the decisions of state regulatory commissions when setting retail rates.
Cases:

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

[https://supreme.justia.com/cases/federal/us/341/246/](https://supreme.justia.com/cases/federal/us/341/246/)

In this case, a retail electric utility sued its former affiliate after being spun off as a separate company, alleging that a series of electric power transactions between the two companies had been tainted by fraud and self-dealing, to the detriment of the now-independent company and its customers. The challenged transactions all had received regulatory approval by the Federal Power Commission under the Federal Power Act when they were entered into. The Supreme Court held that the company had no right to sue its former affiliate under the Federal Power Act, because of the Federal Power Commission’s prior approval of the contested arrangements, which had been granted without controversy at the time.


[https://supreme.justia.com/cases/federal/us/453/571/](https://supreme.justia.com/cases/federal/us/453/571/)

In this case, a group of independent natural gas producers filed a breach-of-contract lawsuit against an interstate pipeline with whom they had contracted to sell the output of their gas wells from a certain gas field in Louisiana.
Unbeknownst to the producers, the pipeline later made arrangements to obtain additional natural gas from the same gas field through leases it purchased from the U.S. Government. Over a decade later, the producers learned about the pipeline’s acquisition of gas from its leases, and they sued the pipeline. They alleged the pipeline was contractually obligated to offer them any higher prices the pipeline paid for gas from the field in question (under what is referred to as a “favored nations” contractual provision), and that the pipeline had breached this obligation by acquiring the leases and failing to inform them that it was in effect procuring gas from the leaseholds at higher prices than it was paying the producers.

Despite these sympathetic facts, the Supreme Court, in a majority opinion by Justice Thurgood Marshall, held that Frank Hall’s lawsuit was preempted by federal law. Because the Federal Power Commission previously had approved the producers’ contract prices, and because the Commission had never been asked to approve any increase in those prices during the intervening years, the Supreme Court held that the “filed rate doctrine” preempted them from obtaining a remedy against the pipeline via the breach-of-contract lawsuit.

https://supreme.justia.com/cases/federal/us/476/953/

In this case, the Federal Energy Regulatory Commission was asked to make an allocation of
low-cost hydroelectric power between two affiliated companies, both of them owned by the Aluminum Company of America (Alcoa). Under an inter-company arrangement adopted by Alcoa itself, an aluminum manufacturing subsidiary in Tennessee got the bulk of the cheap power (80%), and a second affiliate, Nantahala Power & Light Co., an operating electric utility serving customers (both retail and wholesale) in neighboring North Carolina, got the remainder (20%).

Before the Federal Commission, the allocation was challenged as unfair by North Carolina parties, representing the interests of Nantahala’s retail customers in their state. The Federal Commission then ordered a reallocation of the low-cost power, giving 22.5% to Nantahala, the North Carolinautility, and cutting the aluminum manufacturer’s share to 77.5%. On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the orders. Thereafter, the North Carolina Utilities Commission issued its own orders in a case involving Nantahala. For purposes of setting Nantahala’s retail electric rates in North Carolina, the State Commission assumed an even more favorable allocation of the low-cost power (24.5%) than what the Federal Commission had approved (22.5%). In effect, this would force Nantahala to sell power to its retail customers in North Carolina at a cost lower than Nantahala itself paid in the wholesale market. Nantahala would have to absorb the loss. Nantahala challenged the North Carolina Commission’s orders, arguing they were preempted by the allocation of the low-cost hydroelectric power that the Federal Commission had made. The U.S. Supreme Court agreed.

https://supreme.justia.com/cases/federal/us/487/354/

This case, decided two years after *Nantahala*, supra,
involved in effect the converse situation: Rather than an allocation of low-cost power by the Federal Commission, this case involved an allocation of an extremely expensive power source, namely, a new nuclear power plant that had experienced enormous cost overruns during construction. As in *Nantahala*, the allocation was approved by the Federal Commission and upheld on appeal. Again, as in *Nantahala*, a state regulatory commission (in this case, the Mississippi Public Service Commission) attempted an independent approach that would not pass through to retail customers the economic effect of the allocation the Federal Commission had approved. The Mississippi Commission signaled that it would attempt to block Mississippi Power & Light Company from passing through in its retail electric rates the high costs of the nuclear power plant that the Federal Commission had allocated to MP&L. Again, as in *Nantahala*, the retail utility would be forced to bear the loss. Relying on its decision in *Nantahala*, the U.S. Supreme Court held that the Mississippi Commission’s action was preempted by the orders of the Federal Commission imposing a less favorable allocation (in this case a larger allocation of high-cost power than Mississippi wanted) upon MP&L.

**IV. IN-CLASS PRESENTATIONS**

**Class 6 – Monday May 2: In-Class Presentations (Part 1 of 2)**

Group 1

Group 2
Class 7 – Monday May 9: In-Class Presentations (Part 2 of 2)

Group 5

Group 6

Group 7

Group 8

V. INFRASTRUCTURE PERMITS

Class 8 – Monday May 16 – Permits to Construct and Operate Major Energy Infrastructure Projects

Topic: How government agencies (such as FERC and the California Public Utilities Commission) evaluate applications by private sector enterprises (utility companies and other developers) to build and operate major energy infrastructure projects. Such projects include power plants, electric transmission lines, and natural gas pipelines. Federal and state agencies have to assess the “need” for such projects. They also must evaluate their environmental impacts, and then adopt mitigation measures to alleviate the identified impacts. Once a permit has been issued, it conveys to the private company the governmental power of “eminent domain,” which is the power to “take” from its owners the land on which the infrastructure will be built, even when the landowner is not willing to sell the land. (Of course, the landowner is entitled to be compensated for the value of the land that gets
The power of eminent domain is an especially important tool for the developer when the facility is a long-line asset, such as a transmission line or a pipeline, traversing many miles across many parcels of land. This segment also includes a case on the licensing of nuclear power plants by the U.S. Nuclear Regulatory Commission and how this authority interacts with the authority of state officials over power plant siting.

Readings:

(1) *Ruby Pipeline, LLC*: This is a 680-mile long interstate natural gas pipeline from the Rocky Mountains gas producing region of Wyoming to a point of interconnection with existing pipelines at the California-Oregon Border.

We will briefly cover companion orders issued by (i) the California Public Utilities Commission (authorizing PG&E, a major California energy utility, to subscribe for capacity as the “anchor shipper” on a proposed new interstate natural gas pipeline from Wyoming to California), and (ii) the Federal Energy Regulatory Commission (authorizing the developer to construct and operate the new pipeline, based on a finding that the PG&E capacity contracts, along with contracts with other prospective shippers, confirmed the “need” for the new line)

a. California PUC Decision No. 08-11-032, *Decision Approving Gas Transportation Arrangements* (November 6, 2008) (authorizing PG&E to subscribe for long-term, firm transportation capacity on Ruby pipeline, and to recover costs of the subscription in its retail gas and electric rates)
Part 8 of the decision (pages 107-110)).
http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/93502.PDF

b. FERC Order Issued September 4, 2009, Docket No. CP09-54-000, reported at 128 FERC ¶ 61,224 (2009) (Please read only pages 1-16 (through Paragraph No. 42)). Posted on CANVAS.

Although labeled a “preliminary determination,” this order by the Federal Energy Regulatory Commission found that the project should be approved, subject only to a further environmental review. In its order, FERC found sufficient market “need” for the project based in part on the PG&E capacity contracts the California PUC previously had authorized PG&E to enter into. In April 2010, after the environmental review was completed, FERC issued a certificate of public convenience and necessity authorizing construction and operation of the Ruby project.

(2) Environmental Defense Fund v. FERC, Case No. 20-1016, U.S. Court of Appeals for the District of Columbia Circuit (June 22, 2021)
https://www.ferc.gov/media/environmental-defense-fund-v-ferc

Please read only the introduction (pp. 1-6), Part I (pp. 6-19), Part II-A (pp. 19-20), Part II-D (pp. 29-36) (entitled “FERC’s Grant of a Certificate of Public Convenience and Necessity Was Arbitrary and Capricious”), Part III, Remedy (pp. 36-37), and Part IV, Conclusion (p. 37).
Consistent with its approach in *Ruby Pipeline* and other cases, FERC granted a certificate of public convenience and necessity authorizing construction and operation of Spire STL Pipeline, a new interstate natural gas pipeline, based in substantial part on contract-based commercial arrangements the pipeline sponsor had entered into for the firm transportation capacity the pipeline would provide. In this case, however, only one shipper subscribed for capacity, and the shipper, a local gas distribution utility in St. Louis, Missouri, was a wholly-owned corporate affiliate of the pipeline project sponsor. The project was designed to give the utility access to gas from two regions to which it had not previously had access – the Rocky Mountains and Appalachia.

Of importance here, although the pipeline faced legal challenges from Environmental Defense Fund and others, FERC allowed the pipeline to get built before the appeal was heard and resolved.

On judicial review of the FERC orders, the U.S. Court of Appeals found that the contract between the pipeline and its wholly-owned affiliate was insufficient to form a basis for FERC’s finding of “need.” But rather than merely send the case back to FERC for further consideration in the normal fashion (as in the *Sierra Club v. FERC* case discussed above), the Court of Appeals *vacated* the certificate, meaning the pipeline no longer
has authority to operate. The Court appeared to be very displeased with the fact that FERC had allowed the pipeline to be built before the Court had had the opportunity to consider the legal challenge.

In late July 2021, the pipeline filed an “emergency” petition with FERC, seeking authority to continue operations, citing the risk of service disruptions for gas customers in St. Louis in the coming winter of 2021-2022. See news article at the link below:

[Spire seeks U.S. backing for Missouri natgas pipeline to avoid outages](https://www.reuters.com/business/energy/spire-seeks-u-s-backing-missouri-natgas-pipeline-avoid-outages-2021-07-28/) | Reuters

(3) *California v. FERC*, 495 U.S. 490 (1990)


In this case, the Federal Energy Regulatory Commission granted a license for a hydroelectric dam on Rock Creek, a small river in the Sierra Nevada Mountains in California. The Federal Commission imposed a minimum flow requirement to protect fish resources in the river, limiting the amount of water the hydroelectric project operator could divert from Rock Creek. The State of California, however, had adopted a more conservative (*i.e.*, higher) minimum flow requirement for the affected segment of Rock Creek. At issue was whether the FERC-adopted minimum flow requirement preempted the State’s higher minimum flow requirement. The U.S. Supreme Court held that it did.
This case involved a lawsuit by two California utilities, challenging a state statute that imposed a moratorium on construction of new nuclear power plants in California. By its terms, the moratorium would remain in effect until the U.S. Nuclear Regulatory Commission (NRC), a federal agency, approved a permanent repository for high-level nuclear waste produced by nuclear power plants in the United States. The utilities claimed the state statute was preempted by the authority Congress had conferred upon the NRC under the Atomic Energy Act to license construction and operation of nuclear power plants to ensure their safety. California defended the law on the ground that it was aimed at protecting in-state ratepayers from the prospect of economic harm, and that it was not a safety measure. California argued that the absence of a permanent repository for high-level nuclear waste exposed utility ratepayers to potentially high costs in the future for power generated by nuclear power plants. The U.S. Supreme Court upheld the state law on the basis of this asserted economic rationale, rejecting the
utilities’ claim that California was impermissibly attempting to regulate the safety of nuclear power plants, a responsibility that belongs exclusively to the NRC.

VII. FERC’S MODERN REGIME

Class 9 – Monday May 23: “Open Access” Transmission and “Market-Based” Rates for Wholesale Commodity Sales

Cases:


This case arose on judicial review of major rulemaking orders issued by FERC that required the owners and operators of interstate high-voltage electric transmission facilities to allow access to their facilities to third-party electric commodity vendors on a non-discriminatory, “open access” basis. FERC’s orders in this instance built upon earlier orders establishing similar “open access”
rules on the interstate natural gas pipelines. As a consequence of these FERC rules, which were upheld by the courts, both the interstate electric and gas system now operate as common carriers, and are not allowed to limit their services to their own proprietary business interests. The stated goal of these infrastructure access rules is to promote greater transparency and competition in commodity sales – i.e., wholesale sales of electricity and natural gas – in the interstate markets, in order to achieve “just and reasonable” rates for the ultimate retail consumers of these products.

https://supreme.justia.com/cases/federal/us/554/06-1457/

This case arose from a series of multi-year wholesale electricity contracts signed near the height of the Western Energy Crisis of 2000-2001, when prices in the short-term spot market for electricity were at extremely high levels throughout the West. The purchasers and consumer representatives later petitioned FERC to modify the contracts by lowering the prices, against the wishes of the sellers who
wanted to enforce them. The Supreme Court held that such contracts, having been freely negotiated between willing and sophisticated parties, should be presumed by FERC to be “just and reasonable” and hence enforced according to their terms, unless tainted by fraud or manipulation at the contract formation stage. The presumption that the contracts, including their pricing terms, were “just and reasonable” could be overcome only upon a showing that modification was “required in the public interest,” a high standard of proof.

(3) OneOk, Inc. v. LearJet, Inc., Case No. 13-271 (April 21, 2015)  

This case involved natural gas marketing companies that FERC found had engaged in market manipulation during the California Energy Crisis of 2000-2001. The marketers sold gas both to wholesale purchasers (gas utility companies) and to large retail consumers (large industrial companies and power plants). The marketers made false reports of their gas trades (both volumes and prices) to industry publications that were used to set prices for the sales. (Note, these were purely marketing companies; they were not
interstate pipeline companies – as Justice Breyer’s majority opinion incorrectly states.) The industrial consumers (retail customers) filed lawsuits against the marketers under state antitrust and unfair business practices statutes. The gas sellers argued such lawsuits were preempted by federal law, because the wholesale gas sellers were subject to FERC regulation, including a “code of conduct” adopted by FERC for gas marketers. But because the lawsuits were filed by retail customers, the Supreme Court held that the lawsuits should be allowed to proceed.