

Course Outline

The Natural Gas and Electric Industries

University of Houston Law Center

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Spring 2010

Persons who may need special accommodations with respect to this course should contact Mr. May at their earliest convenience.

Laptop computers may be used in class except when Mr. May asks that such use be discontinued.

Students will be evaluated based upon a final examination and upon class participation. The final examination will be in writing and will be “closed book”. The examination will consist of up to four essay questions, up to six short answer questions and up to 20 multiple choice or true/false questions (with explanations of the answers). Three hours will be allowed for the examination. The final examination grade will be raised by up to one grade level (*e.g.*, from a B+ to a B) for adequately preparing for class.

Mr. May is available for “office hours” before or after class. Please advise Mr. May by e-mail, if you would like to visit prior to a class.

This outline and the assigned reading are subject to change.

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All readings are from judicial decisions, agency proceedings, or are available on the internet. Additional reading may be assigned as the course progresses. Reference may be made to the web sites of the U.S. Energy Information Administration, www.eia.doe.gov and the Federal Energy Regulatory Commission, www.ferc.gov.

Class 1: Overview

Reading: None

1. What this course will be about.
2. The nature and extent of regulation.
 - a. Justifications
 - b. Extent—Economic, Health, Environmental
3. A short history of utility theory.
4. “Natural” monopolies and the argument for utility rate regulation.
5. The influence of 19th Century railroads on regulatory theory.
6. The early gas industry.
7. The early electric industry.

Class 2: The Regulatory Compact

Reading: *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 36 U.S. 420 (1837) (selected portions)

Discussion of *Charles River Bridge*.

Class 3: Discrimination By a Regulated Monopolist – Or Why Lower Prices Are Bad

Reading: *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1940)
(selected portions)

1. Discussion of *Union Pacific*
2. The Trunk Line Cartels and The Interstate Commerce Act – Lecture.

Class 4: Regulation Prior to the New Deal

Reading: *The Pipe Line Cases*, 234 U.S. 546, (1908); *Pub. Utils. Comm'n of Rhode Island, et al. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)

1. A short history of natural gas, electricity, water, telecommunications, railroads and airlines.
 - a. Utilities v. Common Carriers
 - b. The structure of the five industries prior to the New Deal.
 - c. Law and policy prior to the New Deal.
 - d. Discussion of *The Pipe Line Cases*.
 - e. Discussion of *Attleboro*.
2. The Roosevelt Era reforms
 - a. Passage of the Natural Gas Act and amendments to the Federal Power Act.
 - b. Samuel Insull and the Public Utility Holding Company Act of 1935.

Class 5: The Post New Deal Regulatory Structure

Reading: Selected portions of the Natural Gas Act, the Federal Power Act, and the Public Utility Holding Company Act.

1. A close reading of the Roosevelt-era statutes.
2. The effects of regulation on industry structure.
3. Ronald Coase and “The Theory of Firm”.

Class 6: An Introduction to Ratemaking

Reading: *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (S.Ct. 1944) (read dissents as well as majority).

Discussion of *Hope*.

Class 7: Traditional Utility Ratemaking in a Nutshell

Reading: *Consolidated Gas Supply Corp.*, 734 F.2d 1486 (D.C. Cir. 1975)

1. Cost of Service.
 - a. Rate Base.
 - b. Depreciation.
 - c. Expenses.
 - d. Cost of Capital.
 - e. Taxes.
 - f. AFUDC.
2. Cost Classification and Allocation.
3. Rate Design.

Class 8: The Limits of Federal Regulation in the Gas Industry

Reading: *California v. Lo-Vaca Gathering Company*, 379 U.S. 366 (1965); *Criteria For Reassertion of Jurisdiction Over the Gathering Services of Natural Gas Company Affiliates*, 118 FERC ¶ 61,114 (2007); Order 63, ___ FERC ___ (1980)

1. Production Gathering Transmission and Distribution.
2. The Comingling Doctrine.
3. The “Gathering” Exemption.
4. Intrastate Pipelines.
5. Section 311 of the Natural Gas Policy Act of 1978.

6. Hinshaw Pipelines.
7. Discussion of reading.

Class 9: The Limits of Federal Regulation in the Electric Industry

Reading: *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981), *order on reh'g* 18 FERC ¶ 61,100 (1982), *modified*, 40 FERC ¶ 61,077 (1987); *Kiowa Power Partners LLC*, 99 FERC ¶ 61,251 (2002)

1. Generation, transmission and distribution.
2. The construction of facilities.
3. ERCOT.
4. Discussion of cases.

Class 10: “Natural Monopolies” In the Real World

Reading: *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1944)

1. “Mutually exclusive” applications for a “scarce resource”.
2. Certificates, service territories and the creation of monopolies.
3. Regulatory versus market competition.
4. Who can decide what the market wants?
5. The elimination of “harmful” competition by regulation—Railroads and the Interstate Commerce Act as a case study.
6. Discussion of *Ashbacker*.

Class 11: The Relationship Between Antitrust Laws and Utility Regulation

Reading: *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)

1. Basic antitrust concepts.
2. The difference between “natural” and “unnatural” monopolies.
3. Competing monopolies—an oxymoron.
4. Price Fixing.

5. Joint Ventures.
6. Monopolization Issues.
7. Merger Policy.
8. Discussion of *Otter Tail*

Class 12: The Failure of Regulation

Reading: *Market Street R.R. Co. v. R.R. Comm. of California*, 324 U.S. 548 (1945); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954)

1. Prices in a competitive market.
2. Monopoly prices in a regulated market.
3. Prices in a regulated competitive market.
4. The creation of scarcity.
5. Discussion of cases.

Class 13: The Deregulation Movement

Reading: *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987)

1. From the *Phillips* decision to the Natural Gas Policy Act of 1978.
2. Partial deregulation and the creation of the take-or-pay crisis.
3. Order 380 and the destruction of the prevailing industry structure during the 1980s.
4. Criticisms of traditional utility ratemaking—Paul MacAvoy and The Elimination of Wellhead Gas Price Controls.
5. Alfred E. Kahn and the Deregulation of the Airline Industry—Jimmy Carter's real legacy.
6. Economic changes in regulated industries—natural gas, oil pipelines, airlines, communications, railroads and trucking.

7. The Public Utility Regulatory Policy Act of 1978—The law of unintended consequences.
8. Deregulation—Partial Regulation—Restructuring.
9. Discussion of *Maryland People’s Counsel and Associated Gas Distributors*.

Class 14: Contemporary Efforts to Restructure the Natural Gas Industry

Reading: *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996)

Natural Gas

1. Open Access and Unbundling—The problems of applying tele-communications concepts to the gas industry.
2. Order 636 and the restructuring of the gas industry.
3. Transaction costs in a restructured industry.
4. Transition costs in a restructured industry.
5. Discussion of *UDC*

Class 15: Current Efforts to Increase Market Efficiency in the Gas Transmission Industry

Reading: *Promotion of a More Efficient Capacity Release Market, Order No. 712*, 123 FERC ¶ 61,286 (2008); *Promotion of a More Efficient Capacity Release Market, Order 712-A*, 125 FERC ¶ 61,216 (2008)

Class 16: Contemporary Efforts to Restructure the Electric Industry

Reading: *Transmission Access Policy Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom.*; *New York v. FERC*, 535 U.S. 1 (2002) (Read both decisions)

Electricity

1. The structure of the traditional electric industry.
2. The advent of independent power.
3. The use of the gas industry as a model.

4. Fundamental differences between the gas and electric industries.
5. Order 888—The limits of federal jurisdiction.
6. Discussion of cases.

Class 17: Contemporary Efforts to Restructure the Electric Industry (cont'd)

Reading: Blumsack, “Measuring the Benefits and Costs of Regional Grid Integration,” 28 ENERGY LAW JOURNAL 147 (2007) (www.felj.org)

1. Discussion of cases and law review article continued.
2. The elimination of vertical integration—costs and benefits.
3. Who will build the transmission lines?

Class 18: Current Electric Transmission Integration and Reliability Issues

Reading: [To Come]

1. Promoting the expansion of the interstate high-voltage electric grid.
2. ISOs and RTOs.
3. Incentives for transmission investment (Order No. 679).
4. Regional planning.

Class 19: Contemporary Alternatives to Traditional Utility Ratemaking

Reading: *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984); *Alternatives to Traditional Cost-of-Service Ratemaking For Natural Gas Pipe Lines*, 74 FERC ¶ 61,076 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *order on reh'g*, 75 FERC ¶ 61,024 (1996); *Entergy Servs. Inc.*, 58 FERC ¶ 61,234; *State of California, ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 72 Fed. Reg. 39,904 (July 20, 2007) and 73 Fed. Reg. 25,833 (May 7, 2008)

1. Price setting in a free market.
2. Alternatives to cost-based ratemaking.
3. “Negotiated Rates” in the natural gas industry.
4. Market-based rates in the natural gas industry.
5. Market-based rates in the electric gas industry.
6. Discussion of cases.

Class 20: Contemporary Alternatives to Traditional Utility Ratemaking (cont’d)

Class 21: The Role of the Contract in the Regulatory Context—The “Mobile-Sierra” doctrine

Reading: *Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *Morgan Stanley v. P.U.C. No. 1 of Snohomish County*, 128 S.Ct. 2733 (2008)

Class 22: Wind Energy in Texas – Siting and Transmission

Reading: *Cross Texas Transmission LLC, et al.*, 129 FERC ¶ 61,106, EL09-66-000 (Nov. 5, 2009)

Class 23: Contemporary Cost Allocation Issues

Reading: [To Come]

Class 24: Separation of Functions and Standards of Conduct

Reading: *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *Standards of Conduct for Transmission Providers*, 125 FERC ¶ 61,064 (Oct. 16, 2008) (selected portions)

Class 25: Enforcement Authority

Reading: *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121 (July 24, 2003); *Order Further Clarifying Policy Statement on Natural Gas and Electric Price Indices*, 112 FERC ¶ 61,040 (July 6, 2005); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (May 15, 2008); *Seminole Energy Services, LLC*, 126 FERC ¶ 61,041 (Jan. 15, 2009); *Florida Blackout, Order Approving Stipulation and Consent Agreement*, 129 FERC ¶ 61,016 (Oct. 8, 2009) (read concurring Opinion)

Class 26: Enforcement Authority (cont'd)

Class 27: Makeup

Class 28: Makeup

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