

**Renewable Energy, Internet, Uber:
Bringing Competition to Monopolistic Industries**

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Mondays, 9–11 a.m. | McD 492

Canvas site: <https://georgetown.instructure.com/courses/84678>

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Overview: Monopoly vs. Competition

The U.S. energy and telecommunications industries both display contradictory trends. Originally monopolistic, they host ambitious entrants: in electricity, providers of renewable energy, storage, modular nuclear plants, and energy efficiency services; in telecommunications, cellular phones, broadband access and content and more. But juxtaposed with this energetic activity is a three-decade parade of mergers and acquisitions, with which the original monopoly companies consolidate and complicate their industries and markets. Your local electric company, independent 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 reintegrated, while major communications incumbents are merging with major content providers.

What some euphemistically call a struggle is more accurately called a war: the incumbents, still advantaged by their historic monopoly status; versus the new entrants, seeking to inject diversity, innovation and competition. That war is the subject of this seminar.

For over a century, our nation has depended on regulated companies, often monopolies, for electricity, gas, telecommunications, transportation and water. Regardless of the industry or era, the regulatory process 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);

reliance on multiple *professions* (law, economics, finance, accounting, management, engineering and politics); and

formal administrative procedures, such as adjudication and rulemaking.

While these common elements remain, new political challenges are causing policymakers to stretch regulation's core principles and processes. Three examples of these challenges are:

climate change (e.g., To what extent should we make utilities and their customers responsible for "greening" energy production and consumption?);

universal service (e.g., Should we bring broadband to every home, and at whose cost?); and

privacy (e.g., 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, then advance the causes of effective regulation and effective competition by assessing and recommending solutions.

With baby boomers retiring, there are many jobs in this field. New lawyers who prove themselves 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 Intend for You to Learn

On completing this course all students 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 the legal principles regulators use to (a) *induce the performance of monopolies* and (b) *convert monopoly markets into effectively competitive markets*.

Understand the *complementary and conflicting roles of competition and regulation*, not as ideological poles, or as weapons in a century-long struggle for market control, but as tools that can be combined, productively or counterproductively, to *induce market performance*.

Understand that today's regulated industries reflect both "*old world*" policies and "*new world*" technologies—the combination of which can either sustain or impede performance progress; and then, see why efforts to transform historically monopoly markets into competitive markets is exceedingly difficult legally, economically and politically.

Evaluate the effectiveness of a regulatory policy, in terms of the multiple dimensions of performance; e.g., *costs, quality, competitiveness, innovation*.

Understand how our *federal-state, dual-jurisdictional system* makes regulatory policymaking simultaneously rich and frustrating, requiring decision-makers to grasp and value 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.

Understand the *multiple roles lawyers play* in this field (*e.g.*, drafting legislation, planning and executing adjudication, advising decision-makers, drafting regulatory decisions, defending decisions on judicial review); 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 problem* in utility policymaking, then identifying and evaluating solutions in a substantial scholarly paper.

Required Materials

Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (American Bar Association 2013).

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

Each is available at the Georgetown Law bookstore and on Amazon. Other cases and materials listed in the Course Outline are on the course website on Canvas, organized in modules by week. Also on Canvas is a module called "Assets for Excellence," containing suggestions for clear writing and effective oral presentations, along with examples of past successful papers. ***Be sure to sign on to the Canvas site well before the course starts.*** The url for the site is: <https://georgetown.instructure.com/courses/84678>. Ignore anything on the Canvas course site about grades, quizzes, rubrics, conferences, discussions, or outcomes. ***Be sure to set your Canvas settings to receive all "announcements."*** Otherwise you will miss emails I send to the entire class. If Canvas is new to you, be sure to master it prior to the first class. General questions about Canvas go to the school's Canvas experts. Specific questions about our site go to me—do let me know of any problems.

Weekly Questions

For each of Weeks 2 through 11, each student will submit to Canvas, **by Saturday 5pm in the week before class**, a Word document containing at least *two useful questions* about the readings assigned for that week. Our class time is better spent addressing what stimulated you

than by my repeating-by-lecture the material you've read. The questions should be related to that week's readings but can be of any type. Examples:

A request for clarification or explanation of a complicated topic (Be sure the question describes what you don't understand or what is not clear; merely saying "Please explain return on equity" is not useful. Display your struggle. Everyone will learn.)

A question about how the week's readings applies to current structures or actions in a regulated utility industry. Provide the background to your question.

A question that relates the week's readings to your semester paper. Again, 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 in brackets. Do not number the questions or use bullets. That way I can organize them by topic quickly and we can know who asked what. Useful questions reflect your deep engagement with the readings and contribute richness to the upcoming class discussion. The quality of the class thus depends on the quality of your questions, which in turn depends on how well you engage with the assigned readings.

Our Canvas site contains a separate "assignment" for each week's submission (along with submissions of your paper synopsis, abstract and outline, draft, and final paper). I will organize all the questions into a single document that I will circulate via Canvas announcement by **6p the Sunday before class. Be sure to review this document before class and be prepared to discuss at least a few of the questions.** Your participation helps us all.

Here's a bonus: I have compiled all the student questions, and my written answers, in a document called "Student Qs and Prof As...." It is on Canvas in the Module labeled Assets for Excellence. I was pleased by the insightfulness and depth of all the questions. Try to model that quality. And—reading the 10 or so pages of Q/A associated with each week's chapter will deepen your understanding of the chapter—almost like sitting through last year's class before taking this year's class.

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, the three-credit students create an outline and a draft, meet with the professor on at least two occasions and produce a 6000-word paper of publishable quality. Two-credit students do not have to take those extra steps; their paper must be at least 4000 words. (Two-credit students are welcome, of course, to produce outlines and drafts and to meet with me. I am here to help you excel.) The deadlines below reflect these requirements.

My recommendation: It's your decision, but I would do the three-credit option. The two-credit students last year had to work nearly as hard as the others. Given all the upfront work in choosing, researching and organizing a subject, you might as well get your writing requirement done. You'll also have a strong piece to use as a write sample when you job-hunt. Yes, the 2000 extra words is plenty of work, but it's return on the investment you'll have made doing the readings, learning in class and scoping your topic.

About paper topics: Working with colleagues throughout the country at regulatory agencies and nonprofit organizations, I am collecting frontier research projects. A document detailing possible projects—and giving guidance on planning your papers—is on Canvas in the module labeled Assets for Excellence. Each topic relates to one or more of our course's substantive topics. I also have included the titles of papers written by last year's students. Notice how broad is the range and how rich is the substance. Taken together, these topics illustrate in practical, current terms the diversity and breadth of our course's subjects. Be sure to study the full list, because we will be discussing all the projects throughout the semester. I will update it as I get more topics from colleagues.

In creating papers, all students (WR students, non-WR students and LLM students) will do the thesis statement and the abstract and outline steps discussed below. WR students will also do the full polished draft, as required by Georgetown. Per Georgetown, non-WR students are not required to submit a full polished draft. I will offer this option, however, to the WR-students who want it. My aim to help everyone succeed.

Try to submit these items ahead of schedule. Understand that with as many as 16 students, I cannot review everyone's outlines and drafts overnight. There is likely to be a 5-10 day lapse between the time I get these items and I return them with detailed comments. The earlier I get these items the sooner in the semester you get my comments, and thus the more time you have to work on your papers.

Prior to the thesis statement—*indeed at any time, starting now*—students are welcome to contact me to discuss their topic of interest, and to ask for ideas about angles. 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 Sept. 21 5pm):** The thesis statement is a one-paragraph description of the topic and the problem or problems you wish to solve. It's your preliminary idea of what subject and problem you wish to address. Include enough detail, based on enough reading and research, so that I can guide you.

Week 5 **Abstract and outline (due to Canvas Oct. 5 5pm):** You will prepare this piece after you have done substantial research and thinking. These two items will 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 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, along with sources where possible. It is customary for the outline to change during the research and writing process, but at this stage it still needs clarity and coherence.

These first five weeks are crucial, because a detailed, logical outline is essential for success. This Week 5 submission should reflect your full thinking at this point. 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 submit thoughts for my comment, provided these submissions reflect solid thinking or probing questions. For these interactions, you should treat me as a colleague rather than an evaluator. 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 Nov. 2 5pm):** The draft submitted to me should reflect your best work at this stage. It should not be your first draft; it should be your third or fourth. Treat the draft as if it is your final product. That way, I can focus my attention on the quality of your thinking, and engage with you as a colleague. Otherwise our interaction risks being distracted by problems of clarity, organization or writing glitches. In my law practice 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.”*** A draft must be your best work. Ok, at this stage not every footnote need be perfectly 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. The point is: Put us in a position where those elements become the focus of our conversations.

Dec. 20: **Final paper:** Deliver the final paper to *the Registrar and to Canvas* by the school's official deadline: Dec. 20 at noon. Use proper Bluebook form. Do not omit periods at the end of footnotes. Do not rely on spellcheck. 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 11.59am to submit the paper. One glitch and the paper's late, and all manner of official people above my pay grade get involved.

I will meet with each three-credit student on the semester papers at least three times for these three purposes: (1) ensure understanding of the assigned topic, (1) discuss the abstract and detailed outline, and (3) discuss the polished draft. These meetings will usually occur in person on announced days, per a schedule I will determine by Week 3. 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.

See "Suggestions for Producing a High-Quality Paper" on Canvas in the folder titled "Assets for Excellence."

For deserving papers, ***I will recommend publication*** and/or circulation by my regulatory colleagues throughout North America. 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 section of our course site on Canvas.

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 helps each student master his/her own topic by having to explain it to someone else, while diversifying and deepening each student's exposure to the class's topics. **Each pair should find a way to meet or talk at least once a week, for at least 30 minutes, to discuss each other's progress.** In the law practice world, even those who work alone do not work alone.

Class Participation

Each week, I will identify several students to be the initial discussants during class the following week. This approach ensures that everyone gets crucial practice thinking on their feet and articulating orally. But: ***The remaining students are not off-duty.*** Everyone comes to class prepared, anyone can ask a question at any time, and anyone can be questioned at any time.

Grading

25%: Class participation. This portion of the grade reflects the quality of your weekly questions, your in-class contributions and your oral presentation. **Weekly attendance is mandatory.** Family emergency, your illness or unavoidable interview conflicts are grounds for missing class but you must clear same with me, in advance (except for emergencies). If you do miss class, be sure to access the recording. Also, I post my informal class notes on Canvas the evening after each class.

75%: Final semester paper: For the paper, aim for professional quality. If you start early, sweat out the first 3 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.

Communicating with Me

You can communicate with me in three ways. **First**, I will meet with each three-credit student three times to discuss the paper. These meetings will usually occur at the school on class days. We will work out those scheduled slots after the first class. **Second**, you can email me ahead for appointments to talk by Z. I prefer such meetings to be in the afternoons or evenings, weekends included. When you email for a Zoom meeting, indicate the purpose of the meeting and **all your available time slots over the next few days (including eves up to 9p)**. I will select one and inform you. (No need then to write back; we're all trying to reduce email traffic). **Third, I always arrive at the classroom Mondays by 8.15 a.m. for informal discussion.** In past years, students have made productive use of this time by coming in with thoughtful questions about the weekly readings. Informal discussion does not require an appointment. However, at times I will have used this slot for a specific student appointment, and will let you know.

Here are instructions for meeting me by Zoom (by appointment):

1. Click on this Zoom link: <https://zoom.us/j/8444938186>
2. Your browser will open a Zoom landing page. Select “**join from your browser.**” You will see those words as the last sentence in the middle of the screen.
3. Enter your first and last name at the prompt.
4. When I see your name, I will admit you.

If you join before me, your browser will display the message: “The meeting has not started....” The meeting will start once I enter the meeting room.

Be sure you know how to make your computer's camera and audio work. That is the only reason zoom fails.

Class Recordings, Laptops, Syllabus Changes

All classes will be recorded via the Echo system, with recordings available to you as you wish. I also post my class notes on Canvas within 24 hours of class.

At the outset I will allow laptops. But I urge you to use them solely to jot down insights or questions, not to take verbatim notes, definitely not to search the web and double-definitely not to check email. If I sense the laptops are distracting us from engaging with each other, we'll shut them down in favor of paper and pen.

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

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

Georgetown strongly urges teachers not to assign more than a few hours of reading. I therefore do not require you to read cases; the book chapters will fill your time. But I wish to be straight: Students learn best by sweating through cases. I urge you to try to make time to read at least one case each week. You will stretch and strengthen your mental musculature. In addition, during our private discussions of your papers I will recommend specific cases. (For syllabus cases, use the Canvas copies, because I often have highlighted and annotated most of them.)

About *Preside or Lead*: Effective lawyers study not only the law; they also study their 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.

Week 1: Regulation's Purposes, Dimensions, and Professions [Sept. 9]

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. Take note of the 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 12 chapters; then each subsequent page has 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 Sept. 7 at 5 p.m.*
7. Visit 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.
8. Feel free to email me with thoughts or questions about your possible paper topics. (See Assets for Excellence module in Canvas for a list of possible paper topics.)

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? What entry barriers exist?); *sales of goods and services* (What standards apply to 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. 16]

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 (or municipal government, acting under state-granted powers). The granting of a utility franchise, "far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 669 (1885). Since the 1980s we have introduced competition in segments of all these industries (competition being the subject we'll cover in Weeks 3-5). But features of the monopoly structure remain present and pervasive in all markets in which these utilities exist.

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, Ch. 2*
 Preside or Lead, Essays 6, 10, 11, 12, 49

Optional:

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. 23]

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).

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

Optional:

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 Com'n (stranded investment)
Hempling article on stranded cost

Week 4: Market Structure III: Making Competition Effective [Sept. 30 to be rescheduled due to religious holiday]

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, Ch. 4*
Preside or Lead, Essays 26, 27, 28, 29, 30

Optional:

- a. New York Commission order on *Reforming the Energy Vision* (see Week 3), pages 62, 66-72
- b. *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)
- c. FCC Fact Sheet on 2015 *Open Internet Order*, plus paragraphs (not pages) 1-36, 75-85, 102-137, 564-573. Read text carefully but skim passages that seem repetitive. Footnotes are optional, but read a few to see the richness of the record. Note: The FCC order is being appealed. *U.S. Telecom Association et al. v. FCC*, Nos. 15-1063 et al. (D. C. Cir. filed March 23, 2015)
- d. <http://codes.ohio.gov/orc/4928.17> (Ohio statute on corporate separation)

Week 5: Market Structure IV: Monitoring Competition for Anticompetitive Conduct [Oct. 7]

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*
Preside or Lead, Essays 33, 34, 35
Kahn, "Deregulatory Schizophrenia," *California Law Review*

Optional:

1. <http://www.scotthemplinglaw.com/essays/reforming-the-energy-vision-did-new-york-get-everything-right>
2. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (market power)
3. Sherman and Clayton Acts, 15 U.S.C.A. secs. 1-7; 12-27
4. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (state-created monopolies are subject to antitrust prohibition against "monopolizing")
5. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (same)
6. *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)
7. *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)
8. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F. 2d 980, 1001 (D.C. Cir. 1984) (entry barriers)
9. *Fed. Trade Comm'n v. Procter & Gamble* (entry barriers)
10. Tying Excerpt from Dept. of Justice

Weeks 6-8: 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 6: Sales of Goods and Services I: Cost-Based Ratemaking [Oct. 15 *This is a Tuesday*]

For a century, the standard method for setting utility rates for regulated monopolies has been "embedded cost" regulation (sometimes referred to as "rate of return" regulation or "cost-plus" 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, Ch. 6*
Preside or Lead, Essays 44, 45
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:
"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 7: Sales of Goods and Services II: Market-Based Rates [Oct. 21]

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 8: Sales of Goods and Services III: Four Doctrines [Oct. 28]

1. Prohibition against undue discrimination

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

Optional:

Citizens Utilities Company, 151 PUR4th 238 (1994)

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)

3. Prohibition against retroactive ratemaking

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

Optional:

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

4. Mobile-Sierra doctrine

Optional

Regulating Public Utility Performance, Ch. 11

Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, No. 06-1457, 554 U.S. ____ (U.S. June 26, 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 9: Corporate Structure, Mergers and Acquisitions [Nov. 4]

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: to be announced

Optional:

1. Hempling draft book chapters on corporate structure and mergers: Read Overview and Sections 12.A, 12.B, 12.C.1, 12.C.2, 12.C.3, 12.C.4, 13.A, 13.C.1, 13.D (introduction only; stop at beginning of 13.C.1)
2. Peter Bradford, "Gorillas in the Mist"
3. Corporate Structure Issues diagram and table
4. Exelon-Constellation corporate diagram
5. Montana Public Service Commission, *Statement of Factors* re future acquisitions
6. *WICOR, Inc.*, 83 P.U.R.4th 639 (Wisc. Pub. Serv. Comm'n, May 21, 1987)
7. *Tucson Electric Power*, 167 P.U.R. 4th 211 (1996) (describing "diversification" failure)

Weeks 10-11: The Federal-State Jurisdictional Relationships

Our regulated industries live with two historical legacies: the Framers' 1789 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 10: Federal-State Jurisdictional Relationships I: Congress's Commerce Authority, Tenth Amendment [Nov. 11]

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*, Ch. 12.A
Preside or Lead, Essays 33-40

Optional:

- a. *U.S. v. Lopez*, 514 U.S. 549 (1995)
 - b. *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.
 - c. *Federal Energy Regulatory Commission v. Electric Power Supply Assoc.*, No. 14-840 (2016).
2. **Does the federal statute violate the Tenth Amendment because it interferes with powers reserved to the states?**

Optional

- a. *New York v. U.S.*, 505 US 144 (1992)
- b. *FERC v. Mississippi*, 456 US 742 (1982)

Week 11: Federal-State Jurisdictional Relationships II: Dormant Commerce Clause, Preemption [Nov. 18]

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

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

a. Violations

Optional:

- (1) *New England Power Co. v. New Hampshire*, 455 US 331 (1982)
- (2) *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)
- (3) *New Energy Co. of Indiana v. Limbaugh*, 486 U.S. 269 (1988)

b. Non-violations

Optional:

- (1) *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) [Caution: Court found violation but the case's criteria are often cited as support for non-violations]
- (2) *Alliant v. Bie*, 330 F.3d 904 (7th Cir. 2003) (upholding some provisions and rejecting another), *rehearing denied*, 336 F.3d 545 (7th Cir. 2003)
- (3) *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)
- (4) *General Motors Corp. v. Tracy*, 519 U.S. 278, 305-06 (1997) (same)
- (5) *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 19 (1986) (same)

4. Is the state action preempted by federal law?

Optional

- a. *Pacific Gas and Electric v. Energy Resources Conservation and Development Comm*, 461 U.S. 190 (1983) (not preempted)
- b. FCC's 2015 Open Internet Order (See Week 4), paras. 431-433
- c. *Arizona v. United States* (U.S. 2012) (Ariz. Immigration law preempted)
- d. *Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988) (not preempted)
- e. *Pike County Light and Power Company v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268; 465 A.2d 735 (1983) (not preempted)
- f. *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986) (preempted)
- g. *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (preempted)
- h. *Louisiana PSC v. FCC*, 476 U.S. 355 (1986)
- i. *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999)
- j. *Hughes v. Talen*, No. 14-614 (2016) (preempted)

5. Current challenges in fed-state relationships

- a. 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)?

Optional

NRRI tables on electricity and telecom jurisdiction (in Week 1 materials)
Regulating Public Utility Performance, Ch. 13

Weeks 12 and 13: Student Presentations [Nov. 25, Dec. 2]

In the final two classes, each student will present his or her semester paper (as it stands at that point) in 15-minute sessions: 10 minutes for the presentation and five minutes for comments and questions. (I might adjust this time period depending on the number of students.) Each student will be paired with another student, the latter having five minutes to comment, ask questions and field questions from others. Each pair will share with each other presentation outlines (not the entire paper, which you will not have completed yet) in advance. See the "Notes on Successful Oral Presentations" in the Canvas module "Assets for Excellence."