# ENERGY LAW OUTLINE
Spring 2012
Professor Lindh

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## Introduction

I. <u>Course Introduction</u>
   a. **Generally**:
      i. All 50 states have a Public Utility Commission—they regulate utility services (energy, gas, water, sometimes telephone service, airport shuttles, railroad safety)
      ii. North America has the most reliable electricity in the world—a lot of that is because of the regulation practices in place.
         1. The system is the largest system ever created by the human race.
      iii. There is a correlation between natural gas and its ability to generate electricity

   b. **CA Regional Utility Systems**
      i. LA & Sacramento: have government owned—electricity utilities that are not regulated by CA PUC—they are self-regulated
      ii. In San Francisco, the water system is regulated by the San Francisco PUC (local government)

   c. **Standard PG&E Bill**
      i. <u>Generally</u>
         1. Combined Gas and electric bill
         2. In California: Edison (electric) and a different gas company
         3. Lots o money is generated for social programs—courts defer to PIC as long as its "<u>cognate and germane</u>" to the public utility sector

      ii. <u>Gas Account detail:</u>
         1. No breakdown for gas portion of the bill to distinguish between the *infrastructure* charge and the *gas* charge—actual methane molecules—(for residential customers)
            a. I.e. to maintain pipes and to implement more—and delivery service
         2. PG&E doesn't sell gas to industrial retailers, for example
            a. There are other companies that will supply natural gas to businesses
         3. In this class: distinguish between the delivery service and actual product
         4. Deregulation of the sale of an actual product to businesses occurred in the late 1970s—so now there are lots of middle men: other companies coming in to sell the actual product
            a. These companies buy most of the natural gas in the summer months because companies like PG&E have a "winter peak" when people don't have much use for heaters
               i. The converse is true for electricity—which usually peaks in the summer months (because of air conditioning, i.e.)

      iii. <u>Electric Account Bill:</u>
         1. *Various charges*:
            a. Generation (the actual electricity), transmission (high voltage line), and distribution (lines through the city), public purpose programs, nuclear decommissioning, DWR bond charge, ongoing CTC, Energy Cost recovery amount
               i. Note that CA's power/day is 20% nuclear power—so we're using nuclear power all of the time

1. A trust fund has been established to dismantle a nuclear plant in norcal for whenever its done serving its purpose.

## II. Energy Infrastructure Basics

**a. Hydro-electric utilities**

i. Very important
ii. PG&E has the largest privately owned hydroelectric power facilities in the world
iii. Hydro-electric facilities emit no greenhouse gasses
iv. CA is blessed with this kind of energy because of the Sierra Mountains.

**b. Natural Gas:**

i. Electricity moves at the speed of light, but natural gas is fluid-like and must move through the pipeline—is methane→ therefore lighter than air, and is easily combustible.
ii. Comes out of the ground—and is transported through high pressure pipelines, not high voltage (that's in contrast to electricity)
iii. Most production is from South Taxes and the Gulf Coast
   1. CA: gets 1/3 of its natural gas from Alberta, Canada
      a. This is interstate commerce
      b. The federal government (not the state) regulates interstate commerce
      c. Only 5 pipelines service California:
         i. Gas Transmission Northwest
         ii. Kern River
         iii. Transwestern
         iv. El Paso
         v. Mojave Pipelines
      d. 2 big companies: PG&E and Southern CA Gas Company

**c. Three main components:**

i. Generally
   1. The three main components apply to both the natural gas industry and electricity
   2. With electricity, it was historically one company performing all three functions
   3. With natural gas, it has always been segmented out.

**(1) Generation**

4. Gas, coal, hydroelectric, wind, solar, etc.
5. For electricity, this includes generation of it at a power plant
6. For gas, this involves finding it and refining it.

**(2) Transmission/Transportation at a high voltage/high pressure**

1. Lose some power along the way in transmission of electricity (line loss)
2. In the transmission of gas there is fuel use to transport by periodically burning some of it
3. All wires are interconnected so companies share them and power can flow either way on them

**(3) Distribution at stepped-down voltage/pressure**

## III. The California Energy Crisis of 2000-2001

a. **Overview**

i. Generally:

1. Professor continues to spend 1/3 of his time on the energy crisis claims still
2. Like a group cult—scheme of selling plants to independent retailers would reduce cost to consumers—although this is bs because this didn't happen
3. The California energy crisis really depicts why we have these regulatory systems
4. Previously healthy companies went bankrupt because wholesale prices skyrocketed but retail prices remained low.

ii. De-regulation:

1. **Natural Gas Market**:
   a. So the notion that we need to de-regulate the commodity worked well for **natural gas** (and to this day, natural gas remains de-regulated)
      i. Companies that produce natural gas were always independent from producing companies (in natural gas markets)
      ii. They were always selling competitively
      iii. Natural gas production became de-regulated in the 1970s because people didn't want to abide by government imposed pricing (Rather than a supply issue)—so Congress de-regulated and the thought was that the market would provide good prices to consumers.

2. **Electricity Market**
   a. People, then wanted to do the same with **electricity markets**—create a de-regulated commodity market for electricity, which never happened before
      i. Before, the same company owned everything in the electricity markets (creation, delivery, storage, distribution)—was vertically integrated. The utility did the hole thing itself and had a complete monopoly (not the case with natural gas where we always had multiple companies do this)
         1. We allowed private companies and regulated by government to do this
         2. In 1990s in California, there was a decision to de-regulate electric industry and to let the market regulate
         3. Industrial customers were the main advocates of this position mostly because the cost of nuclear energy was too high
         4. The PUC was a proponent of this in CA and the legislature passed in California and was adopted unanimously
            a. Like a mass insanity/delusion that people thought it would reduce electricity costs

iii. Jaskow piece: Elements Leading to the Energy Crisis

1. Highest prices ever: summer 2000-February 2001

2. Factors Jaskow points to:
   (1) High demand due to hot weather
   (2) Market condition: worst drought in Northwest
   (3) Run-up in natural gas prices at California border
      i. When price of gas increases, it sets the price for electricity and raises it.
      ii. Jaskow claims that electricity is an inelastic demand.

iv. <u>Attorney General White Paper</u>
   1. This paper discusses the market manipulation that took place by market leaders like Enron
   2. Enron—archetype of typical manipulative trading company, but they were not the only ones
   3. Agency system in California: independent system operator (ISO)
      a. Function of purchasing any shortfall, in case there was not enough for demand
      b. ISO: victims of the manipulation
   4. Therefore, lots of incentives for sellers to sit on their supply, and then ISO calls you and you can ask for any price that you want
      a. These prices were completely unprecedented
      b. Clear that there was more supply and that demand was being out of whack
      c. PG&Es rates were frozen at retail level, but prices they were buying at wholesale level were 3x that amount—losing almost $50 million/day.

v. <u>Role of FERC</u>
   1. FERC (regulation body) did nothing to ensure that prices were just and reasonable, as it was bound to do
   2. Sempra Settlement: Professor negotiated the claim in 2010 and got $400 million back from an initial $2 billion claim.

**b. Market manipulation case against El Paso Pipeline and its marketing affiliate**

i. <u>El Paso Pipeline</u>
   1. 2 basins: Texas and New Mexico
   2. Serves West Texas to California
   3. Biggest pipeline system serving California (among others)

ii. <u>Basis Deferential</u>
   1. Pricing point: people sell at the beginning of the pipeline and then also Mojave Center (Far end of the pipeline)—another pricing point
   2. The difference in price between the beginning of the pipeline and the end is known as the basis deferential.

iii. <u>Commerce Clause</u>
   1. The Federal government has the power to regulate <u>inter</u>state commerce—states gave up this power
   2. Natural gas and electricity are both interstate industries
   3. The laws extend back to 1930s and the New Deal era.
      a. Idea that the federal law enacted to "fill the gap" by regulating areas is <u>not</u> subject to state regulations
         i. This is really to protect consumers

ii. Why feds are regulating interstate part of this
   1. <u>Federal Regulation of these industries:</u>
      a. (1) **Sale for resale** (wholesale)
      b. (2) **Transportation**
   2. <u>State Regulation</u>
      a. Gas producing states
         i. Production
         ii. Gathering – how much people are allowed to extract
         iii. <u>Intra</u>state pipelines
      b. Gas Consuming states
         i. Local distribution
         ii. "Hinshaw amendment" – gas transmission lines within the state of consumption
         iii. Regulates retail rates that PG&E provides.

iv. <u>El Paso Case:</u>
   1. *Generally*
      a. 2 main basins we're talking about: (both moving from east to west)
         (1) San Juan Basin
         (2) Permian Basin

   2. *Controversy*
      a. El Paso had 1/3 of its forward-haul capacity unrented—similar to a lease when u rent it
      b. 1.2 billion ft/day was not in the hands of any shipper; was unsubscribed
         i. Partly because Canada doubled how much it was selling to CA/day, so El Paso lost out
         ii. Loser in all of this: El Paso, because of new competition.
      c. That big amount (1.2 billion) was taken over by Dynegy (Very controversial) for 2 years.
      d. So El Paso gives all that amount after and rents it out to El Paso Merchant (which is affiliated with it:

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i. So EPP and EPM are 2 subsidiaries of the same company
ii. El Paso Corp wanted to capture basis deferential – exercise market power in order to make basis deferential very high
iii. Very anti-competitive
iv. During the crisis, the federal government ordered that energy companies continue to sell wholesale goods—even though the companies were nearly insolvent
v. Secretary of Energy—had the power to order these sellers to continue to sell during this time (electricity)
vi. Gas Side: insolvent bc of electricity run up—bc of price deferential

3. *CPUC Complaint*
   a. Challenged the arrangement bw EPP and EPM
   b. Federal Commission did not stop the arrangement initially
   c. Case theory: Pipeline has market power on gas transmission system and commodity is unregulated and was trying to raise the basis deferential and accomplish precisely what regulatory scheme was trying to protect
   d. El Paso did this to raise the basis deferential
   e. El Paso's controversial capacity arrangement coincided with severe spike in gas prices at Arizona—CA border during winter of 2000-2001→ So demand for gas so high and they were in a unique place with available gas.

4. *Ultimate Case Notes*:
   a. Does EPP or EPM posses market power?
      i. Yes
   b. Did they exercise market power?
      i. Inconclusive in Decision 1
      ii. Decision 2 Held: EPP had withheld "extremely large amounts of pipeline capacity "which substantially tightened the supply of natural gas at the CA border, significantly broadening the basis deferential"
   c. Did they violate FERC's affiliate rules?
      i. Yes

## Principles of Public Utility Regulation

I. **<u>Main Themes:</u>**

(1) Common law view of private property dedicated to public use
(2) Constitutional protection against governmental taking of private property w/o just compensation
(3) Cost-of-service ratemaking
(4) Opportunity to earn a return on investment as distinct from an assured return on investment.

II. **Theme 1: <u>Common law view of private property dedicated to public use</u>**

a. Case: <u>Proprietors of Charles River Bridge v. Proprietors of Warren Bridge (SC 1837)</u>

**Jud Pro**: Case came to the US SC from the Massachusetts SC on a writ of error

**Facts**: In 1785, the Mass. Legislature granted a charter to the Charles River Bridge Company to construct a bridge connecting Boston and Charlestown. The Charles River Bridge experienced great success and the original investors recouped their entire investment, to which they were entitled under their charter. As traffic increased, the public grew weary of the excess profits being made by the Charles River Bridge Company and wanted another bridge built. In 1828, the Mass. Legislature chartered a new group of investors to build the Warren Bridge. The Warren Bridge was a new bridge located next to the Charles River Bridge that would also connect Boston and Charlestown. Reacting to the new competition posed by the Warren Bridge, the Charles River Bridge Company (now composed of new investors who had bought stock in the Charles River Bridge at a high price) claimed that the MA Legislature had violated its contract with the Charles River Bridge Company. The Charles River Bridge Company claimed that the contract implied exclusive rights for the company to control bridge passage over the Charles River in perpetuity.

**Issue**: Did the MA Legislature violate Article 1 Section 10 of the Constitution (i.e. the Contract Clause) and infringe on the Charles River Bridge charter when it created a new charter for the Warren Bridge?

**Held**: The MA Legislature did not violate the Contract Clause of the Constitution when it granted a charter for the construction of the Warren Bridge.

1. Court refuses to read into the K a refusal by the state to allow others to build another bridge, or exclusivity to PCRB in constructing a toll-gathering bridge.
2. A key part of this: PCRB had time to recuperate their original investment (but if Warren bridge was built 5 years later—maybe court would hold off)
3. Ct refuses to read an implied covenant from the government that you get something in perpetuity—PCRB had to point to something in the charter to show something specific and it could not do so
    a. Rule: need some explicit language or else it will not be implied

**Reasoning**: The court reasoned that the case was about contract interpretation and that the Charles River Bridge charter contract should be interpreted as narrowly as possible. Under this narrow interpretation, the court found that the Charles River Bridge Company did not have exclusive rights over Charles River bridges. Also, the court stated that public grants should be interpreted closely and where there is uncertainty in a contract, the court should heavily weigh the public interest. The court feared that a decision in favor of the Charles River Bridge Company could choke off development and commerce in a booming industrial area.

**Takeaway**: This case is a good example of a state's police power to act on behalf of the public interest, especially in the case of necessary public utilities. Because there is a public interest aspect to the contract at issue (i.e. commerce), the court is inclined to rule in favor of the public interest.

4. There are some things in society that are vested in the public interest—like bridges, ferries
    a. Only certain places that are suitable for ferries
5. So the government has inherent power to take valuable thing and give it to a private company taking public interest into consideration
    a. Same philosophy permeates public utilities
    b. These companies—not like apple computer—they get something from the government to start with and in return, the government gets to regulate them heavily.

b. Case: Munn v. Illinois, (SC 1876)

**Jud Pro**: On writ of error to the US SC from the Illinois SC

**Facts**: In Chicago, there was a regulation re: grain warehouses—so you put in some grain and then you take it out (not the same grain you put in) but the same amount you put in (bc its fungible). The regulation that the Illinois legislature enacts—you needed a permit to do this and regulation of grain warehouses and elevator rates. Munn& Scott—built their grain elevator before the Illinois ordinance was passed. They also charged more for storage and handling of grains than was outlined by the state. They got a criminal conviction because they didn't have a license and they charged inadequate rates for storage of grains. (So the statute is setting a price for how much they can charge). The warehouse owners sue, arguing that the law violates their due process rights under the 14$^{th}$ Am because it deprives them of their due process right to property.

**Issue**: Whether the general assembly of Illinois can fixby law the maximum charges for storage of warehouses in Chicago?

1. Whether the State overstepped its bounds under the Commerce Clause (Should Congress be the one doing this)
    a. Not a commerce clause argument bc about regulation IN Chicago—intrastate commerce
2. Whether the State violated Munn and Scott's 14$^{th}$ Amendment Due Process rights?
    a. No—was in the public interest.

**Held**: The state can deprive people of property because they will pay a reasonable price for the services bc it is in the *public interest* that the state can do so and the warehouses in this cases were providing a public interest

**Takeaway**: These are vital industries having to do with the development of America. They have tremendous power in the society to rip people off without regulation

1. And so states –driving by the Populist movement—regulated the grain industry (& even railway industry) bc they were vital to the public interest. Under the DP Clause of 14$^{th}$ Amd, the court will not question the state legislatures—what SC is saying in this case
    b. 14$^{th}$ amendment did not deprive the state from regulating grain elevators—is a legislature question
2. The decision is really about if a private company can be regulated in the public interest
    c. Not a takings question—though there must still be fair and just compensation.

## III. Theme 2: <u>Takings: Constitutional protection against governmental taking of private property without just compensation</u>

a. Case: Smyth v. Ames (SC 1898)

   i. **Generally**:

      1. This case is 85% good law

      **Jud Pro**: When the regulation passed in April 12, 1893, the railroad companies sued Nebraska officials to enjoin enforcement. The Circuit Court of Nebraska enjoined state officials from implementing the Nebraska regulation. The Circuit Court claimed that the prohibition against charging usual rates and fees within Nebraska violated the Constitution's prohibition against confiscatory government action. The Supreme Court heard this as an appeal as of right. (There is federal question jurisdiction here—because of the 14th amendment).

      **Facts**: Nebraska legislature set law describing rates for maximum amount railroad companies could charge for transportation. 29% reduction in total earnings/revenues from in-state transportation for railroad companies. Plaintiff's claim: it deprived them of the DP of the law (under 14th amendment) because this constituted a taking and they were not justly compensated.

      **Issues**: Is this a taking? Was this deprivation of property without adequate compensation?

      **Held** (Harlan): The rate change is too much at 29.5%. This is a deprivation of just compensation and the railroads are entitled to recover the costs. The costs have to be recovered in rates, generally speaking.

      **Reasoning**: Normally rate setting is legislative and the states determine the reasonableness rate of return, etc. Courts only get involved when it becomes an issue of just compensation.

      2. Constitutional Standard for Reasonable Rate:
         a. Rate must be just and reasonable
         b. Includes profit= you're entitled to a profit
         c. Rate must cover= operating costs, equity costs, debts
      3. This Court's Mistake:
         a. The court says that the "fair value of the investment" is what is key—ultimately we'll see that this is wrong
            i. This case: "present" cost of the property
            ii. Now: "original" cost of the property

      **Takeaway**: One of Nebraska's big mistakes was trying to justify the reasonableness of their regulation by claiming that the railroads could re-coup their lost profits from the other states. Also apparently their had been a lot of droughts and that's the reason Nebraska took such a drastic measure.

b. Case: Clark's Ferry Bridge Co. v. Public Service Commission (SC 1934)

      **Jud Pro**: This started as proceeding by the Public Service Commission of the Commonwealth of Pennsylvania against the Clark's Ferry Bridge Company. An order of the Commission fixing tolls to be charged by respondent was modified, and, as modified, affirmed by the Pennsylvania Superior Court. Clark's Ferry Bridge Company appealed. SC of Penn declined to review the case. The US Supreme Court Affirmed. This was an appeal as of right and it comes from the state court system.

      **Facts**: The Clark's Ferry Bridge Company needed to build a new bridge because the previous bridge suffered flood damage and the concrete broke down faster than the engineers had estimated. The Pennsylvania Public Service Commission adjusted the rate but chose to exclude many of the company's estimated costs. The PSC ordered a 7% return on fair value of property and valued the bridge at $767,800. The Bridge company says the property is worth more than that so they're trying to get more profits. The Bridge company is claiming this is a taking under the 14th amd.

**Reasoning**: The Court upheld the Commission's modified rate evaluation and denied the bridge company's pleas to force the commission to include all sorts of estimated, intangible, and previously depreciated property in its rate setting. 7% profit and tax benefits qualify as a fair rate.

**Held**: Not a taking. Court looks to "original" expenditures to determine rates here

1. Bridge company's actual expenditures for intangible construction costs when bridge was built, rather than estimated percentages, calculated by engineers living at distance on basis of theoretical construction by new corporation, should be considered in valuation of bridge for toll-fixing purposes.
2. Illustration of how cost of service ratemaking worse—using principles discussed in Southwestern Bell. That's why they talk about "original" expenditures.

## IV. Theme 3: Cost of Service Ratemaking: Consult One Page Handout

### a. Generally:

- i. Been a struggle for the government to figure out if its constitutional or not
- ii. About a 100 year inquiry
- iii. Have to establish rate base: base at which the utility is allowed to earn its return
- iv. Big question: what is the rate base?
  1. If 1,000,000 investment—to get 6% return on investment, you'll have a $60,000 rate base
- v. If the government makes these utilities operate at $0 profit or even at a loss—it will be deemed confiscatory
- vi. Some costs: i.e. (a) investment (railroads, trains, etc.), and (b) operating costs (i.e. engineers, operators)
- vii. Big debate: how to determine rate base under the 14th amendment DP clause
  1. That we see in majority in Smyth and Brandeis's dissent in Southwestern Bell
- viii. When government fixes the rate – and doesn't allow it to be set by market rates—then it has an obligation to ensure that it is not confiscatory.

### b. Case: Southwestern Bell Tel. Co. v. Commissioner (Brandeis Dissent) (SC 1923)

- i. **Background**:
  1. Brandeis would take a lot of these railroad cases pro bono while running his practice in Boston
  2. Brandeis was the nemesis of all of these robber barons – really understood this stuff really well
  3. Wilson appointed him to the SC.
  4. Brandeis would represent consumer interests – so he was really the master on the SC about this matter
  5. His dissent in this case later becomes the law today.

**Jud Pro**: Case came on a writ of error (not cert) from the Supreme Court of Missouri (like Clark's Ferry Bridge) on federal question jurisdiction because its about the 14th amendment DP Clause

**Facts**: Case involves telephone rates (1st one of these that we've seen). Telephone rates (like railroad) have been set by the states—bc intrastate and set by Federal

Commission in Washington for <u>inter</u>state. The State can set limits rates when its <u>intra</u>state but if bw states we need a federal agency. This all goes on after WWI. During the war the government took over the telephone industries in Missouri and ran it and set the rates. After the war, the company reverted back to private ownership and then there's a regulation that decreases the rates that this company was charging consumers (like Smyth). Then the company challenged the rates in state court—saying that the rates were too low and that they were confiscatory under the 14th amendment DP Clause. The Majority says valuation should be $25 million, the State commission wanted $20.3 million and the company wanted a rate base of $35.1 million.

6. We're focusing on the Dissent which later on becomes the majority

**Dissent (Brandeis):** Dissenting from reasoning but concurs in outcome. He agrees that $25 million is the appropriate rate bas but for a different reason than the majority. Is about **<u>reproduction cost new</u>** (<u>present</u> value of investment—what it would mean to start from scratch today to determine rate base) *versus* **<u>prudent investment test</u>** (<u>original</u> value of investment—based on real facts—what it really cost, not about speculation).

7. Brandeis makes it clear (and reiterates Smyth holding) that these companies in the utility sector area substitute for the state in the performance of the public service, thus becoming a public servant.

c. Case: <u>Market Street Railway Co. v. Railroad Commission of State of CA</u> (SC 1945)

**Jud Pro**: Came from the CA Supreme Court, which affirmed the Commission's order to reduce passenger fares. The US SC reviewed the decision.
**Facts**: Facts: The Market Street Railway Company operated a system of passenger transportation by street car and by bus in San Francisco. The Railroad commission of California instituted on its own an inquiry into the Company's rates and service. It set an order reducing passenger fare from 7 cents to 6 cents.
**Issue**: Was the rate set at 6 cents confiscatory under the 14th amendment of the US Constitution?
**Held**: It is not a deprivation of property to set a rate when the failing industry is responsible for the implementation of the rate. The commission was authorized to set that figure because the company already offered its property at a lower rate base when selling it to municipal transportation. The normal rule for utility industries is inapplicable where the company cannot attract capital.
**Reasoning**: The rate is not a deprivation of property because the problem is that the railway system is losing consumers; the problem was a sick industry. Setting a higher rate could have the reverse impact of increasing revenue because fewer people would ride. The problem of reconciling the patrons' needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces and whose earning possibilities are already invaded by competition from other forms of transportation.
**Gist of the case**: The railway company no longer is in business because they've already sold it to the city of San Francisco. This case: about an industry that is failing—before railroads were owned privately—now all are mostly state owned – governments taking over public transportation. DP doesn't require the government to bail you out if you're in a <u>dying industry</u>. Honestly cannot raise rates to save the company. Normal justification: The investor in the utility is entitled to earn a fair return on the investment and cannot be forced by government regulation to operate at a loss because that is confiscation. However,

the test is inapplicable in an industry where the company is incapable of attracting capital.

V. **Theme 4: <u>Opportunity to earn a return on investment as distinct from an assured return on investment</u>**

a. Case: <u>Federal Power Commission v. Hope Natural Gas</u> (SC 1944)

**Jud Pro**: Came from Federal Power Commission (now FERC). Penn PUC filed a claim with FPC charging that rates collected by Hope from People's Natural Gas Co. and 2 non-affiliated companies was unreasonable. Came to SC from the 4th Cir re: the validity of the natural gas state of 1938 which states that rates must be just and reasonable so PIC wants companies' rates looked at. Circuit court set it aside bc statute said it could. All the other cases we have read about constitutional law. This case comes to the SC bc the federal statute says it can be subject to review. Section 19(b) of the statute gives Circuit Court jx. The 4th circuit maintained that reducing the rates was unfair for the gas company.

**Facts**: Hope Natural Gas was a subsidiary of Rockefeller Oil Company. Hope owns a lot of acreage for drilling gas wells and had several contracts with third parties to purchase the gas within West Virginia. The pipeline system serves consumers in West Virginia, Ohio and Pennsylvania. The issue deals with the interstate aspect of the company delivering gas to Pennsylvania and Ohio. Two cities began to complain about the rates of the gas company. The state of Ohio has a public utilities commission, but the request for cheaper rates would be declined because Ohio has no jurisdiction and the problem is coming from the Hope Company outside of the state. Hope wanted a rate base at $66 million and a return of 8%= $5.8 million/year. FPC wanted a rate base of $33,700,000 (bc that's the prudent investment—what you spent to build) and return at 6.5%= $2.19 million/year.

**Held**: For FPC. Court will not be picky about the methodology used for ratemaking—only will assess the legality. Just need to ask whether the rate is a reasonable balance.

1. Rates have to be "just and reasonable" and balance the consumer's interest in lowest feasible rates and the investor's interest in recouping cost and making profit for the service provided.

b. Case: <u>Duquesne Light v. Barasch</u> (SC 1989)

**Jud Pro**: Came from Penn SC. Penn SC was against PUC. Is about a review of the Penn PIC order in electric rate proceeding.

**Facts**: Is about investment in nuclear power plant. Pennsylvania electric utilities joined a venture to construct seven nuclear generating units. In 1980, because of intervening events, the participants canceled plans for construction of four of the plants. Appellant Duquesne Light Co. applied to the PUC to obtain a rate increase and to amortize its expenditures on the canceled plants over 10 years. The state passed a statute that provided that an electric utility's cost of construction of a generating facility shall not be made part of a rate base nor otherwise included in rates charged until such time as the facility is used and in service. The consumer advocate moved the PUC to reconsider the rates that had been set in light of this law so that the consumers would not have to cover the cost of amortization of the cancelled plants. The PUC denied a change in the rate base so it included the cost of the cancelled plants.

**Issue**: Whether PUC can amortize rates under the 14th Amendment (takings) DP Clause?

**Held**: PUC was wrong: it was a negligible amount of the rate base and revenue impact on these companies was very small. BUT it does not rise to the level of unconstitutional deprivation.

1. A state scheme of utility regulation does not "take" property, in violation of the fifth and fourteenth amendment, simply because it disallows recovery of capital investments that are not used and useful in service to the public. It is not the theory, but the impact of the rate order that counts. A state statute may be upheld that does not follow the ratemaking methodology of "prudent investments" because the state has the power to regulate rates.
2. Look at the end result: rates may be set as a result of the impact on the consumers. Microscopic focus is not a deprivation of property. Still left a 11% of debt and equity.

## State v. Federal Jurisdiction: Electricity and Natural Gas Regulation

I. **Role of the regulators: state and federal regulatory agencies**

   a. Case: Missouri v. Kansas Gas Company (SC 1924)

      **Jud Pro**: This case comes from 3 different cases:

         a. Case 1: Appeal from District Court of Western District of Missouri
         b. Case 2: Kansans Supreme Court (state court)
         c. Case 3: Federal District Court in Kansas

      2. These cases were asked to stop supply company from increasing the rates from 35 cents to 40 cents per 1000 cubic feet.
      3. Ultimately the case came from the Missouri SC on a writ of error, which means the US SC had to take it.

      **Facts**: There are three states involved here: Kansas, Missouri, and Oklahoma. KNG buys natural gas in Oklahoma. There is an interstate pipeline that goes from Oklahoma through Kansas into Missouri. KNG increased the rates for the gas from 35 cents to 40 cents. The gas is sold to wholesalers in each state. Missouri PUC tells KNG they can't raise their rates.

      **Issue**: Whether this pipeline should be seen as interstate and therefore not regulated by the state—about if the commerce clause applies because pipelines stop in these stations and sell new sources—so is it regulated by the states or not (at the time of the case no one is regulating the pipelines—Congress has done nothing to regulate at this time).

      **Held**: This is interstate commerce – not local. The focus of the opinion is about wholesale price—a **sale for resale**—to distribution utilities like PG&E.

      1. Sale for resale of gas for in interstate commerce is regulated by federal jx—so stuck with rate increase unless Congress does something about it
      2. Sale of gas is intrastate when it goes into a local company's mains for local distribution, but that is not the case here
      3. A state commission cannot tell interstate businesses to lower their prices because it is a direct burden on interstate commerce. So here the MO PUC can't tell KNG what prices to set. Wholesale transactions between interstate parties are interstate commerce, and states lack the power to regulate it.

   b. Case: PUC of Rhode Island v. Attelboro Steam and Electric Company (SC 1927)

      **Jud Pro**: After the Rhode Island PUC put in the order approving a new rate schedule to apply to certain Ks with minimal amount purchased (i.e. applies to Attelboro) Attleboro appealed to the Supreme Court of Rhode Island. Rhode Island SC found the order invalid as a direct burden on interstate commerce. Came to USSC on Cert for.

      **Facts**: Narragansett is a Rhode Island power generation company. Attleboro is a Massachusetts power supply company. There was a 20-year supply requirement K where Narragansett would sell to Attleboro all the power Attleboro needed. 7 years into the K Narragansett is bleeding money and tries to renegotiate the contract because it's losing too much money. It gets the Rhode Island PUC to

approve a new rate schedule to apply to certain Ks with minimal amount purchased (i.e. for the Attelboro contract). Attelboro sues.
**Issue**: Is the Rhode Island PUC order to change the price valid? Whether this kind of rate regulation by the Rhode Island PIC for a sale to a company in Massachusetts can be regulated by states bc of the dormant commerce clause?
**Held**: Its interstate commerce because the electricity is an uninterrupted flow of interstate commerce. Even thought the artificial transfer of title occurs at the border, the court things its predominantly interstate in character. Therefore it's a sale for resale just like Kansas Gas.

c. Case: Connecticut Light and Power v. FPC (SC 1945)

   i. **Background**:
      1. No longer strong central station power plants these days
      2. Now: smaller distribution lines to promote renewable energy
         a. Big priority for CA PUC today
      3. Need a lot of upgrading to ensure distributors are able to turn over more energy to other distribution lines
      4. Questions we're still debating—who sets the rules: Federal government or the state government
         a. This case gets to this point bc federal government will not have jx over these smaller distribution channels.

**Jud Pro**: Started at a commission hearing—court of appeals for the District of Columbia. Connecticut is the petitioner in the SC—so they lost at the Court of Appeals. The Court of Appeals sustained FPC jurisdiction and disposition that they had jx to regulate accounting practices of Connecticut Light and Power. The SC reversed and remanded (for state regulation and not federal regulation)
**Facts**: FPC required CLP to operate accounting practices according to federal accounting standards. I.e. how much you spend on operations, personnel, etc. Federal Commission has a series of accounting rules to ensure that people aren't screwing with the numbers. The CLP is giving a lot of pushback by claiming that there is no federal jx. CLP severed their connections. So some of the power that CP is delivering to CLP in Bristol is coming from Mass. CLP was selling power wholesale to Groton, which sold it to Fishers Island in NY—minute amount—about 1/5 of 1% of CLP's power generated was sold ultimately to Fisher's Island. FPC is saying this is interstate flow and so we can regulate. In Feb 1941, the Fisher's Island K is severed bc they (CLP) don't want to be regulated but when FPC asks them to show cause—in Jan 1941—should their system of accounts have been in order.
**Held**: Not important if out of state energy enters local distribution facilities; therefore all that matters is that there is local jurisdiction. The statute says: "no jx over facilities used in local distribution" so for there to be jx by FPC there needs to be (1) sale for resale and (2) transmission/transportation.
   1. So facilities may carry out-of-state energy exclusively and still be exempt under the Act. The test is whether they are local distribution facilities.
   2. To come under federal jurisdiction, the facilities can't just be used for local distribution, or even for local distribution and interstate transmission, there

must be an explicit finding that the facilities are not used in local distribution.

d. Case: FPC v. Florida Power and Light Co. (SC 1972)

**Jud Pro**: Came from 5th Cir. FPC lost the case. Same issue: re: federal accounting system and then the company says again that there is no federal jx. USSC granted cert. Case came from the 5th circuit when FPL appealed the ruling of the Federal Power Commission. When a person doesn't like the ruling they get from the FPC they can request a rehearing. If they still aren't happy they can get judicial review in federal court. In that appeal you can choose to get review either in the circuit court where you reside, or the DC circuit Note: you must maintain the claimed error in your rehearing petition to get judicial review of that issue.
**Facts**: Federal Power Commission claims authority over Florida Power and Light (FPL) to make them follow FPC accounting standards. FPL says they don't b/c all their lines and equipment is wholly within the state and they have no direct connections to out of state companies. But FPL is connected to Florida Power Corp., which connects to an out of state Georgia utility
**Issue**: Does FPC have authority over FPL despite no direct out of state connections?
**Held**: When a power company with no direct out of state connections sell energy to another company that does have interstate connections it is interstate commerce and the FPC can at least make them comply with accounting standards

1. FPC can probably regulate rates as well, but this case only goes to compliance with accounting standards.

**Reasoning**: The Federal Power Act gives the FPC authority over interstate electricity transmission. When FPL sends power to Florida Power Corp they are essentially commingling their electricity, then when Florida Power Corp sends it to Georgia, that commingled electricity is entering into interstate commerce. Therefore FPL is involved in interstate commerce.

1. Any moment you deliver to the corporation, the corporation is immediately flowing to Georgia, so there is interstate transmission and so we can make you follow our accounting regulations.

## Federal limits on state regulatory powers: Limits on their ability to harbor energy resources within their borders

I. **Overall Themes**:
   a. The role of the Constitution (Commerce Clause) and statutory law (Federal Power Act) in limiting the ability of the States to harbor energy resources w/in their own borders.
   b. State jurisdiction over construction of electric power plants and transmission lines—hidden veto over export of low-cost electricity to neighboring states.
   c. Federal "backstop" authority over construction of electric transmission lines.
   d. California's effort to exclude and prevent the importation of power from carbon-intensive electricity sources (such as coal-fired plants) located in other states

**II. Theme 1: The role of the Constitution (Commerce Clause) and statutory law (Federal Power Act) in limiting the ability of the States to harbor energy resources w/in their own borders**

   a. Case: New England Power & Light Co. v. Thornburg (SC 1982)

      i. **Background**:
         1. If any **navigable** river→ they are subject to **federal** jurisdiction
         2. Hydroelectricity—great, however, because it uses no fuel—it usually comes from water/rivers

      **Jud Pro**: Case came from SC of New Hampshire. The New Hampshire PUC made an order—and three parties appealed to the SC of NH and now there's an appeal to the US SC. The order: the NHPUC withdrew its permission that allowed the NEPC to export hydroelectric power, and ordered that it be sold to New Hampshire consumers. After the NHPUC put in the order, NEPC appealed to the New Hampshire Supreme Court. NHSC found the order valid. Came to USSC on Cert.

      **Facts**: The NH Commission passed a law in 1913 which stated that any energy produced by water was given authority to NH PUC to restrict exportation of energy if in the best interest of the citizens of NH. So this statute prohibits a corporation engaged in the generation of electrical energy by waterpower from transmitting such energy out of the state unless approved by the NHPUC. In 1980, the NH Commission suddenly revokes exportation of hydroelectric power and triggers the 1913 statute—so the NH Order: export authority revoked and the New England Power Company, Massachusetts, and Attorney General of Rhode Island appealed. The New England Power Company ("NEPC") is a public utility that generates and transmits electricity at wholesale; it sells most of its power in MA and RI. Its wholesale customers service less than 6% of the NH population. NEPC only deals with wholesale electricity not retail—which unusual bc usually companies do both. In NH, NEPC has a series of dams and generating units along the CT River. So the NHPUC withdrew its permission that allowed the NEPC to export hydroelectric power, and ordered that it be sold to New Hampshire consumers.

**Issue**: (1) Whether the NH PUC banning exportation violates the Commerce Clause? [Held= yes] (2) Has Congress sanctioned the restriction of exportation? [Held= 201(b)—no grant of additional power to the states—need explicit statement of intent from Congress]
**Rule**: The commerce clause and the FPA prohibit the exportation of States to harbor energy resources within their own borders. States cannot ban the export of precious resources and just keep them in the state.
**Conclusion**: NH could not, consistent with the commerce clause, restrict interstate transportation of hydroelectric power generated within New Hampshire and the Federal Power Act did not provide an affirmative grant of authority to New Hampshire to do so (preemption).

b. Case: <u>Natanhala v. Thornburg</u> (SC 1986)

| | Tapoco | Natanhala |
|---|---|---|
| Apportionment Agreement | 80% | 20% |
| FERC Orders | 77.5% | 22.5% |
| NCUC Orders | 75.5% | 24.5% |

**Jud Pro**: Appeal from the SC of North Carolina. The SC of North Carolina affirmed an order of the NC PUC which allowed there to be a discrepancy in allocation from which PUC said was ok and FERC said was okay. Ratepayers appealed from an order of the NC Utilizes Commission authorizing electrical utility to increase its rates. The NC Court of Appeals reversed and remanded. The utility appealed to the NC Supreme Court, which affirmed in part, reversed in part, and remanded to the Commission for further hearings. On appeal following the remand, the NC Court of Appeals affirmed. Utility again appealed. NC Supreme Court affirmed. USSC granted cert.
**Facts**: Nantahala Power & Light Co. is a wholly owned sub of Alcoa (think aluminum). Nantahala owns hydroelectric power plants on the Little Tennessee River, which the Tennessee Valley Authority ("TVA") operates in exchange for providing a fixed supply of low-cost "entitlement power." Nantahala also buys a variable amount of high-cost "purchased power" from the TVA's power grid. Nantahala serves public customers in NC. For the purpose of calculating the rate to be charged Nantahala's retail customers, the NCUC issued an order allocating entitlement and purchased power that differs from the allocation of entitlement power that was ordered by FERC in a wholesale ratemaking proceeding. The NCUC's order resulted from Nantahala's request to raise its intrastate retail rates.
**Issue**: Can NC Allocate more low-cost "entitlement power" from the Tennessee Valley Authority power grid to the utility than is allocated by FERC in a wholesale ratemaking proceeding involving utility?
**Reasoning**: FERC is the law of the land. NCUC can't trigger the allocations of wholesale power differently than FERC allows. Supremacy clause, not CC
**Held** (O'Connor): For purpose of setting intrastate retail rates, a State may not differ from FERC's allocations of wholesale power by imposing its own judgment

of what would be just and reasonable (preemption). So federal preempts because of the Supremacy Clause and NCUC's allocation of entitlement and purchase power is overruled. If a state law goes against statute enacted by Congress, it is preempted because you cannot reconcile FERC orders and NCUC orders.

1. **EXCEPTION**: Pike County: state commission is allowed to look at a company's decision to take a certain quantity from pipelines whose rates are set by FERC
    a. So when it's a choice between two federally set rates, its okay.

**III. Theme 2: State jurisdiction over construction of electric power plants and transmission lines—hidden veto over export of low-cost electricity to neighboring states**

a. **Generally**:
    i. These cases are not from the US SC—they come from the State Supreme Court.
    ii. Get to frictions bw state and federal power and ramifications of the Commerce Clause
    iii. These cases are more modern, more relevant

b. Case: Tampa Electric Co. v. Joe Garcia (FL Public Service Commission (Fla 2000)

**Jud Pro**: In the FL SC, came on appeal from order of Public Service Commission. Challengers: Tampa Electric Co., Florida Power Corp., and Florida Power and Light. Challengers: each of the utilities have defined geographic monopolies and these are retail costumers and millions of them. The Public Service Commission, pursuant to Florida Statutes, found a "need" for Duke to build—a license to construct a public utility of some kind. If you get a "need" finding—it's a permit to build your power plant and the incumbent utilities protested this and then they lost the order and now they appeal to the Florida SC.
**Facts**: Duke: a company from North Carolina and they have a deal with New Smyra where 30 mw goes to New Symra at wholesale rats and the rest is also open to be sold. Within Duke—(1) Duke Energy= builds merchant plants in other places (States) and (2) Duke Power: is the utility. The Duke plant has a 514 mw capacity and contracts only 30 mw to New Symra. The Florida statutes are interpreted to say—you cannot get "need" unless fully integrated retail company in Florida—so Duke would be ok in North Carolina if NC had a "need standard" but cannot get it under Florida statute.
**Holding**: Duke is not a proper applicant under the Florida statute to qualify for "need."
**Takeaway**: This is a good case to show the ability States have to parochially limit the production of power, and openly limit producers abilities to export power to other states. U.S. Supreme Cert. denied.

c. Case: Arizona Corporation Commission v. Southern California Edison (2007)

**Facts**: There was a deal with Palo Verde in Arizona to sell nuclear power to Riverside County and Southern California Edison. As a general rule, the states decide where and when transmission lines get built. The CA commission approves the line but Arizona says no. Press release is conspicuous in how it feels: "extension cord." Being totally parochial about the issue. Indirect economic protectionism for Arizona. Main concern: when a state's export capacity is limited—if there's a lot, locally it'll be sold for super cheap. Arizona Commission: wants to protect consumers in Arizona—don't want an export line to California because otherwise price will increase in Arizona for consumers because less capacity will be made available to them. Legal Standard in AZ – ARS §§40-360.06 and 40.360.07(B) – balance environmental impact against the need for new transmission lines in light of the broad public interest, the need for adequate, economical and renewable supply of e- power and the desire to minimize the effect on the environment and AZ ecology. Window dressing in decision: environmental concerns. But really just trying to prevent export from the state. Got away with it… did not get built.
**Held**: Whether a line will be built is up to the states. Arizona can keep the prices low for its consumers (they got away with Commerce Clause agreement) because of the fact that the Federal Power Act § 202 (b) leaves the building of the power lines to the states.

**IV. Theme 3: Federal "backstop" authority over construction of electric transmission lines**

a. Generally:
   i. For electric transmission line siting—its done by the states
   ii. Each individual state gets to decide where electric transmission lines are sited
   iii. Congress stepped in and passed this backstop legislation—that says when there's nasty situations where state is denying the ability to build transmission line—we will allow commission in Washington to come in and allow transmission lines being built
      1. Congress didn't make this easy—obviously were lobbied by the states.
      2. Piedmont—invalidated the FERC rule—so FERC doesn't have much of anything.
      3. California Wilderness is the death nail to the backstop authority of federal government
   iv. Not a big of a deal
   v. Not really on the exam

b. Case: Piedmont Environmental Council v. FERC (4th Cir 2009)
**Jud Pro**: It is at the 4th circuit court of appeals on appeal from FERC's decision. Appeal to the FERC has been given authority to cite transmission lines within transmission corridors—referred to as a "backstop" authority because states still have primary authority with some exceptions when it comes to transmission lines.

FERC interpreted §216(b)(1)(C)(i) "withheld approval [of a permit application] for more than 1 year" as permitting FERC jurisdiction to grant permits for the construction or modification of e- transmission facilities in national interest corridors when a state commission denies an application w/in the 1-year time frame.

**Issue**: Was FERC' definition of § 216 acceptable? (Interpreted to say that if an application for transmission is denied or withheld for over one year, FERC can step in. Does FERC authority to step in when state withholds approval of an application under FPA § 216(b)(1) ("withheld approval for more than 1 year") include when a state denies the application?

**Held**: This interpretation is contrary to the plain meaning of the statute. Agency doesn't have to give a good interpretation—it just cannot be contrary to the plain meaning—not a lot of deference given to FERC here. Denying permit outside of FERC's reach; declining to conduct EIS not in error.

1. Decide that withholding approval does not include an outright denial
2. Also, no legal error occurred by not preparing an ES/EIS. The question was whether the FERC rule adoption triggered an obligation to do an ES/EIS. The court says that the mere promulgation of rules by FERC is not enough to trigger the need for one.

**Dissent**: Reading denial as a discrete event which is outside the statutory meaning of withholding an application erroneous both in plain meaning and the intent of Congress. Congress used denied in another part of the statute. The act noted the shift in geographical transmission of electricity from local to national; point to sig reduce transmission congestion in national interest corridor.

**Notes**: consensus in the legal community that 4th Circ misinterpreted (but cert still denied)

c. Case: California Wilderness Coalition v. US Dept. of Energy (9th Cir 2011)

i. **Facts**: (same issue as Piedmont). FERC was given authority to authorize the construction of lines in a two-step process: (1) Secretary of energy must do a congestion study and (2) must designate corridors where FERC has authority. The states are upset because they feel that the federal government is impeding on their authority. CPUC brought action to determine whether Department of Energy properly consulted with states in designating a national interest corridor for the entire Southwest. DOE failed to properly consider environmental consequences - Environmental in mid spectrum – no one could build under DOE order – but setting so FERC has authority over project require req for **EIS**. Designation of the corridor arbitrary, capricious and unsupported by the evidence. In the congestion study, the DOE claimed it provided sufficient ops for input via notice and discussions with officials and Governors but consultation with affected States not clearly defined.

ii. **Held**: The failure to consult was not harmless error (via the Chevron test) – The Burden of Proof is on petitioner; shows that prejudice clear despite lack of clarity on how the nature of the consequences. Must consult before agency makes a decision.

iii. **Issue**: does this trigger an ES/EIS? Because they are stating that these are the corridors where transmission can be built

1. Decide that this was enough to trigger obligation to perform ES/EIS
2. Contrasted with Piedmont.

iv. **Closing point**: Still checkerboard on e-, diff for gas (theory because Big Oil owns, has diff needs)

V. **Theme 4: <u>California's effort to exclude and prevent the importation of power from carbon-intensive electricity sources (such as coal-fired plants) located in other states</u>**
   a. Case: <u>CA PUC Order 1/25/2007: Greenhouse emissions Performance Standard</u>
      i. **Background**:
         1. Generally there are several regulatory claims:
            a. DP Clause: rate setting (14th amendment)
            b. Commerce Clause: Most important principle—states ceded authority to federal government and lost dormant commerce clause—cannot regulate interstate commerce
            c. Federal Preemption: This has really taken over—Congress filled in "Attelboro gap" with Federal Power Act and Natural Gas Act
               i. New cases that come along and say "a state has gone too far"—the answer will come from statutory interpretation
               ii. Does state action preempt the Congressional/federal legislation? Comes from Supremacy Clause
               iii. Federal preemption clause—so no inconsistency
         2. State authority is more likely to be familiar with geographic and other local conditions
            a. Citizens and political representatives will have readier access to state agencies
            b. FERC is experienced in siting large energy projects
            c. FERC has well-established procedures—like local public hearings—to allow for local citizens to make their views known.
            d. No reason to think FERC will be less sensitive to environmental issues
            e. Is still constrained by federal environmental statutes
            f. FERC is better situated to assess the overall need for a project and to look into alternatives
            g. FERC may also be better insulated from purely local political pressures
               i. Changing the location of one proposed transmission project will almost inevitably affect other segments as well. FERC may be better able to deal with this interconnectivity

**Jud Pro**: Comes from the California PUC (2007 Decision)—this is a <u>rulemaking</u> order.

**Facts**: The rule that was adopted by the PUC: limits the amount of greenhouse gases and adopts emissions performance standard for people who buy power (load serving entities)—doesn't apply to generators—applies to PG&E, Southern California Edison, and SDG&E. CPUC adopted a GHG emission standard establishing an interim floor for GHG emissions while providing an analogous standard to one rating household appliances. (1-5 stars etc). Emissions rate of 1,100 pounds of $CO_2$ per megawatt hour chosen based on intent of legislature. This rate does not allow for blended estimates. (One efficient plant, one inefficient plant, delivering energy that on average does meet emissions requirements). Renewable energy credit are not allowed to be used to effect the $CO_2$ emission standard.

**Reasoning/Held**: This was never an appeal—and PUC got the last word. CA is really a coal-free generating state. So this is a clean energy rule for the utility companies in CA to meet this standard bc they're just purchasing.

**Legal Issues**: (1) Violates US foreign policy? (Not really—no preemption for states to regulate) (2) Federal Power Act Preemption? (No—PUC: we're not preempted at all) (3) Commerce Clause (Non discriminatory on its face—although in practice there are dirtier plants outside states, so impact of the rule will be felt more outside CA).

## Federal Siting Authority

**I. Generally**

a. If it's an INTRAstate pipeline—states have authority to determine siting.

b. If its INTERstate pipeline—it's federal authority that determines siting.

**II. Role of the nuclear regulatory Commission**

a. Case: Vermont Yankee Nuclear Pwr Corp. v. Natural Resources Defense Cl (SC 1978)

**Jud Pro**: From the Circuit Court of the District of Columbia because of judicial review under the Atomic Energy Act. Five member nuclear regulatory commission (made up of President, VP, etc). In SC—these commissions are kind of legislative in nature—6 year appointments as commissioners. There was a license granted by the NRC and Vermont Yankee applies for operating license and the NRDC challenges it. Atomic Energy Commission granted license to Yankee to operate a nuke plant. Then afterwards the AEC instituted rule making to deal with uranium fuel cycle. AEC did not use full formal rulemaking. Fuel cycle rule implemented and procedures were approved citing to the record and indicating the there was adequate data basis for the rule. Held, unnecessary to apply the new fuel rule to Vermont. NRDC appealed from both the adoption of the fuel cycle rule and the decision for the AEC to grant Vermont Yankee a free pass. SC grants the writ bc they think its an important statute: Atomic Energy Act.

**Facts**: Two licensing decisions are on appeal to the USSC from the DC Circuit. Vermont Yankee was trying to get its operating permit from FERC. There was a dispute over whether the analysis under NEPA was sufficient. The Atomic Energy Commission was ready to grant the permit, then initiated a rulemaking proceeding about nuclear waste. In the rulemaking they decided to the fuel cycle would not have a major impact and could be controlled. Environmental impacts were determined to not be an issue—NRDC challenged. Consumers Power Co, who is also on appeal, was challenged by a group wanting them to consider alternatives such as energy conservation to avoid the need for the new plant.

**Reasoning**: The court thinks that the DC Circuit overstepped itself when it struck both permits down. The policy of whether to develop nuclear energy lies with the federal government and the states. There was nothing in the relevant statutes to justify what the circuit court did. The court's place is more around safety and administrative process/procedure and not whether the energy is needed or other economic considerations. Was a unanimous decision—remanded to look at the rule itself with regard to Vermont Yankee. Consumers Power pretty much walks out with their permit.

**Held**: Administrative agency gets tremendous discretion when it comes to rulemaking procedures/powers and defines what it does—so broad rulemaking powers.

1. Separate permitting process for construction and operation of nuclear facilities. Construction permits require: safety analysis report, environmental report, antitrust report. Hearings and reports are filed and put on record. To operate a reactor the permit is similar but without the public hearing. Congressional intent is to encourage nuclear energy. But it isn't for the judiciary to impose their views on an administrative process. So basically, the commission doesn't have to consider alternatives in conservation that either, aren't raised by intervening parties, or that a reasonable person wouldn't think of. NRC job is to safely oversee the

construction and maintenance of nuclear facilities, not to weigh every environmental concern.

b. Case: PG&E v. State Energy Resources Conversation and Development Cmmn (SC 1983)
**Jud Pro**: From 9th Cir to SC. Moratorium in CA for building of nuclear facilities by the Energy Commission. PG&E and Edison didn't like this and federal law – Atomic Energy Act—gives federal authority over nuclear energy. So they file a claim in Federal district court where it could rule on preemption of federal statute—federal question bc of Supremacy Clause. The DC said that the federal rule preempted. 9th Cir reversed. Now in SC
**Facts**: PG&E and Edison's argument—the Atomic Energy Act needs to preempt the California moratorium.
**Held**: The SC upheld the 9th Circuit and said the state law could do this because state was within its traditional domain of determining economic provisions (moratorium is still in effect in CA today)

III. FERC licenses for hydroelectric power plants on navigable waterways of the US

a. **What constitutes "navigate waterways" of the United States for purposes of conferring licensing jurisdiction on FERC?**

i. Case: US v. Appalachian Electric Power Co. (SC 1940)

**Jud Pro**: In the SC on cert from the 4th Cir. The District Court affirmed the decision that the water wasn't navigable and so state law should govern and the US is arguing that federal law should govern. The US filed the lawsuit for injunctive relief against the developer (saying the water is navigable. Initially—the FPC said it was not navigable and then they flipped and said that it was navigable. If the water is navigable, no federal license/federal authority. DC said that the water was not navigable and therefore has nothing to do with interstate commerce. COA affirmed this ruling. In this case SC reverses and says there is federal jurisdiction.
**Held**: Does not have to cross state lines to be navigable and if its navigable must get a federal license because its falling under Congress's Commerce Clause Powers—so federal government can control even if River doesn't cross state lines—as long as its navigable

a. Think: is it something that's useful for commerce? (when determining navigability)
b. Ct relies on report that showed improvements were happening on (2) and as long as improvements on a River occur—it will qualify as navigable.

ii. Case: Federal Power Commission v. Union Electric Co. (SC 1965)

**Jud Pro**: Started in FERC—said licenses was needed. Court of Appeals said a license was not needed—came to the 8$^{th}$ cir on judicial review. Now SC reverses and says a license is needed. 8$^{th}$ circuit because union electric company was located in 8$^{th}$ circuit.
**Facts**: Respondent, Union Electric, filed a declaration of intention with the FPC pursuant to § 23(b) of the Federal Power Act to construct a pumped storage plant on the East Fork, a non-navigable tributary of the Black River, a navigable stream. A pumped storage plant uses power during non-peak demand period to pump water to an upper pool to be used to generate energy during peak period. The energy created will be used in Missouri, Illinois, and possibly Iowa. The FPC found that the non-navigable tributary is a stream over which Congress has jurisdiction because it is a headwater of a navigable river system and held that a license is required because it would use water power for the interstate transmission of electricity and because it would affect downstream navigability
**Issue**: Whether the non-navigable tributary is a stream over which Congress has jx and which requires a license for the purposes of building a hydroelectric plant?
**Held**: "Whether interests of interstate or foreign commerce would be affected" is enough to trigger federal licensing authority—even if its non-navigable—so still need a federal license because its in the interests of interstate and/or foreign commerce which are affected.

a. The commerce power encompasses the interstate transmission of electric energy and this project is within the purview of that power. Statutory grant of authority to FPC includes the licensing authority for this type of facility on a navigable water and also for a tributary of the navigable water.

**b. The preemptive effect of FERC's licensing jurisdiction over the States**

i. Case: First Iowa Hydro-Electric Cooperative v. FPC (SC 1946)

**Jud Pro**: FPC dismissed FIHE's application for hydroelectric plant. They then appealed to the DC Circuit which affirmed and they are now appealing to the SC on a writ of cert.
**Facts**: First Iowa applied to the FPC for a license to construct and operate a dam, reservoir, and hydroelectric power plant on the Cedar River in Moscow, Iowa. The Cedar River rises in Minnesota and flows through Iowa to Moscow, which is 10 miles west of Mississippi, and then flows to

join the Iowa River and returns to Mississippi. Scheme is to divert water from the Cedar River into the power plant, and then dumping into the Miss River about 20 miles before where the Iowa River meets Miss River. First Iowa did not attempt to comply with Iowa Code which forbids the construction of dams and the diversion of water for industrial purposes without a permit from the State Executive Council and authorizes the issuance of a permit upon finding that "any water taken from the stream is returned at the nearest practicable place." Iowa intervened and urged that the application be denied

**Issue**: Is evidence of compliance with Iowa statue required for a federal license? Does FIHEC have to apply for a license from the state before applying for a federal license

**Held**: No: compliance with requirements for a state permit under the Iowa code is <u>not</u> a condition precedent to or an administrative procedure that must be exhausted before securing a federal license.

a. Key Part: <u>Savings Clause</u>—no federal preemption for proprietary rights
    i. Section 27 of the Federal statute—is about not interfering with the state's control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.
    ii. So state is after something else with respect to the statute it passed.

ii. Case: <u>California v. FERC</u> (SC 1990)

**Jud Pro**: Hydroelectric project asked FERC to build plant in CA and FERC was going to say yes but then California intervened through the water board but FERC went forward and said yes. Then California appealed to the 9th Circuit—which affirmed FERC. Then CA appealed through a writ of cert to the SC and the SC unanimously affirmed the 9th Circuit (CA loses).

**Facts**: The American River is navigable. Rock Creek is a tributary to American River (flows into it). The Project has a diversion—draws water from Rock Creek to a power plant and then back into the River for about one mile. FERC said the Power Plant is ok as long as there is a minimum flow rate of 11-15 cubic ft/sec. California water resources control board wants more minimum flow of 30-50 cubic ft/sec. Because if you divert more water—you generate more electricity and can recoup less if there's a lower standard—otherwise the project stands to lose more.

**Held (O'Connor):** looks back at <u>Savings Clause</u> from First Iowa case and holds the California requirements for minimum stream flows cannot be given effect and allowed to supplement the federal flow requirements.

a. The FPA and federal license conditions established pursuant to the act preempt the CA stream flow requirements. The State's requirements conflict with FERC's licensing authority and with the balance struck by the federal license condition.

i. Federal Power Act provision superseded state laws relating to distribution of water used in irrigation or for municipal or other uses did not apply to state's minimum stream flow requirements, and

ii. California's requirements for minimum stream flow for river on which federally licensed hydroelectric project was located were preempted by Federal Power Act.

**IV. <u>Certificates of public convenience and necessity for natural gas pipelines</u>**

a. **Main Themes**:

i. FERC authority to approve construction and operation of interstate natural gas pipelines

ii. Factors FERC takes into account in granting such authority

iii. The importance of transportation service agreements between shippers and the pipeline developer

iv. Role of state commissions in approving utility contracts with pipeline project developers for gas transportation services from supply basins to consuming markets

b. Case: <u>PUC Decision Approving Gas Transportation Arrangements</u> (2007)

**Jud Pro**: PG&E applied to California PUC for long-term Ruby Pipeline capacity contract approval.
**Facts**: PG&E would be an anchor capacity buyer (25% of total capacity) of the Ruby Pipeline (owned by the nation's largest interstate pipeline operator) delivering natural gas from the Rocky Mountains to PG&E's existing transmission system at the California-Oregon border. PG&E had, prior to its December 2007 application, also contracted an option to purchase 25% equity in the Ruby Pipeline. In May 2008, PG&E terminated this option. PG&E stated need to access the growing Rocky Mountain supply and removing its dependence on the diminishing Canada supply while increasing its total *delivery* capacity (though its *receipt* capacity would remain unchanged).
**Issue**: Whether approving the Ruby Pipeline being purchased by PG&E (their agreements) is in the best interest of the California rate-payer?
**Held**: Yes, it is in the best interest of the ratepayer so PG&E may enter into the agreement.
**Reasoning**: The agreements are approved because since the Canadian supply is diminishing (both in absolute terms and due to Canada's increased gas use for oil sand petroleum extraction) and Rocky Mountain's supply growth is significant, a cost effective *diversification* by PG&E is justified (reliability and cost effectiveness are key CPUC concern). Declining Canadian supplies will assuredly result in higher prices. Also, the step down provisions in the contract provide the flexibility to reduce capacity if needed, maintain diversity, and promote competition (all putting downward pressure on prices). Further no better alternative to the Ruby Project has been proposed.

c. Case: FERC Decision Ruby Pipeline (2009)

**Overview**: Ruby Pipeline filed an application pursuant to section 7(c) of the Natural Gas Act for authorization to build and operate a new natural gas pipeline from Opal Hub Wyoming to Malin Oregon. Ruby has already received approvals to "do business" in the states it would be passing though an it has secured an agreement with PG&E and other companies to transport and purchase gas from the completed pipeline. Several companies and organizations however filed interventions and comments to FERC with concerns about the proposed pipeline, including BP Energy, the CPUC, Texas Gas, and GTN.

**FERC Findings:** Subsidization – Ruby was financially prepared to fund the project without customer subsidization therefore there were no adverse effects to existing customers.

1. Effects on existing pipeline and their captive customers – FERC considered the comments and notices filed by competing pipelines from both the Texas area and the northwest/ Canadian areas. They found that there will be no adverse effects on those pipelines or customers. Since the Canadian supply was dropping off while the demand in Canada and the US Northwest was increasing a new pipeline could help increase supplies to this area upstream instead of take away business. The request from the Texas companies amounted to basic economic protectionism on their part. Since the new pipeline would increase capacity it should have a positive effect on the market.
2. Eminent Domain – since more than half the land the proposed pipeline would be located on was state or federal land there was no significant disruption.

**FERC Denied Stay**: Later on, when the pipeline had already been approved and construction on several portions of it had begun, a Native American tribe in Nevada (Summit Lake Tribe) filed a motion requesting the Commission issue a stay from construction between mileposts 438 and 588.3 of the pipeline. This section was not on the Tribe's land but was on adjacent land and the Tribe was concerned about the environmental impact. They thought a proposed different route would be better, however, the commission had already determined that the other route would actually have a larger environmental footprint and rejected that route.

1. The Commission will grant a stay when "justice so requires." The factored the commission typically considers are: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. The general policy is to refrain from granting stays
2. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.25 Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.
3. The tribe did not meet this burden. Further any delays in construction the a stay would cause would be against the pubic interest.
4. Therefore the tribe was unable to show that justices required a stay and the motion was denied.

**Outcome**: FERC found that the demand for the pipeline outweighed any potential adverse consequences and therefore approval the project. THIS ORDER DID NOT INCLUDE ANY ENVIRONMENTAL CONSIDERATIONS

**Takeaway**: looking for signs of economic viability—look to private contracts bw the developer and shipper.

## Drilling, Producing, and Processing of Natural Gas

I. **<u>The reach of the Natural Gas Act over natural gas producers</u>**
   a. **Main Themes:**
      i. Regulation of natural gas production and sales of gas by producers, including "correlative rights" in natural gas producing fields
      ii. The "production and gathering" exemption from federal regulation under the Natural Gas Act

   b. Case: <u>Phillips Petroleum Co. v. Wisconsin</u> (SC 1954)

**Jud Pro**: FPC started an investigation to see if Phillips fells under "natural gas company" to determine rates. FPC said no. So a bunch of states appealed. And COA said no it is a national gas company and falls under Natural Gas Act. US SC affirms US Court of Appeals for the SC Circuit. Came to the SC on a write of cert.
**Facts**: Phillips is drilling for oil and natural gas they have (a singhead gas) runs it through their pipelines (in conjunction with other oils). There's a network of converting pipelines going to 12 centers but they're located in different states (and once it goes through the processing plant, its sold). 50% of the gas is produced by Phillips and the rest is produced by other companies.

1. Phillips is an integrated oil company that is also in the business of production, processing and sales of natural gas. It s an independent natural gas producer and does not engage in transmission directly to consumer markets. Its sells its own natural gas as well as gas from other independent producers wholesale into the interstate pipeline system. The FPC found that since Phillips was a producer of gas that only sold its gas wholesale and did not itself sell into the interstate market. The company fell under the exception in the Natural Gas Act that stated there was no jurisdiction over local distributors or facilities used for production.

**Issue**: Whether Phillips is under the jx of the FPC? Is this a sale for resale in interstate commerce? Thus, is it a natural gas company within the meaning of the statute? (if yes, then FPC can regulate rates and what it can sell for)
**Holding**: The Supreme Court did not read the Act as narrowly as the FPC and found that Phillips was involved in the sale of natural gas in interstate commerce and therefore was a natural gas company within the jurisdiction of the FPC.
**Reasoning**: The Court reasoned that the purpose of the act was to protect consumers from unreasonable pricing of natural gas. If the Act did not cover the producers who sold into interstate commerce this would leave a large hole in the protections that would allow for prices to be inflated prior to the gas entering into the jurisdiction of the FPC. These inflated prices would then run down to consumers and defeat the purpose of the Natural Gas Act, therefore it must apply to producers who sell into interstate commerce.

c. Case: Northwest Central Pipeline Corp. v. State Corporation of Kansas (SC 1989)

**Jud Pro**: Interstate pipeline having long-term contract for gas from particular field challenged state regulation providing that producers' entitlements to assigned quantities of gas would permanently be cancelled if production were too long delayed. The District Court, Gray County, agreed with the state Corporation Commission that federal law did not preempt regulation, and appeal was taken. The Kansas Supreme Court, affirmed. The U.S. Supreme Court vacated and remanded. On remand, the Kansas Supreme Court, affirmed. The case returned to the U.S. Supreme court on appeal.
**Facts**: The Hugoton field of Kansas consisted of several gas producers. Many were under contracts for production regulated by the old NGA and one major producer sold exclusively within the state and so was not under federal regulation. After the new NPGA was passed purchasers of gas began buying more gas from other producers under new contracts regulated by the NPGA, which did not have take or pay clauses. This meant that there was an imbalance in the Hugoton field where producers under the old contract were not producing (meaning they were building up obligations for future production under take or pay clauses) and the local producer who was not regulated federally was producing great amounts. The Kansas Corp. Comm. wanted to prevent this imbalance so it enacted regulation canceling the obligations under the take or pay clauses from the old contracts, in effect forcing production. Northwest challenged this state regulation as 1. A violation of the Supremacy Clause of Art. VI and therefore pre-empted by the federal regulation, and 2. A violation of the commerce clause
**Held**: The United States Supreme Court, Justice Brennan, held that: (1) state's regulation was not preempted under supremacy clause—no preemption of state statute, and (2) regulation did not violate commerce clause: the state statute is allowed to regulate intrastate commerce—state of Kansas is justified.
**Reasoning**: 1. In enacting the federal legislation the congress specifically left regulation of production to the states. The regulation at question by the Kansas Corp. Comm. is specifically the kind of regulation that congress left to the states control, even if it has incidental effects on the interstate market. 2. Kansas's regulation does not amount to per se unconstitutional economic protectionism since it is neutral on its face and it applies evenly to by interstate and intrastate production.

# Contemporary Trends in Electricity and Natural Gas Regulation

I. <u>**FERC initiatives to "unbundle" the interstate natural gas and electric power industries**</u>
   a. **Generally**:
      i. Initially in the natural gas industry, beginning in the mid-1980's, and then later in the electricity industry during 1990's, the Federal Energy Regulatory Commission, acting largely on its own initiative, embarked on major restructurings of these industries. The goal of these rulemaking orders was to create a competitive market for sales of natural gas and electricity as *commodities* in wholesale markets. FERC did this by imposing new "open access" rules on the infrastructure operators – the natural gas pipelines and the electric transmission lines – in effect converting them by regulatory mandate into *common carriers* for shipments of gas and transmissions of electric energy on behalf of third-party sellers of these products.

   b. Case: <u>United Distribution Companies v. FERC</u> (D.C. Cir 1996)

      i. **Generally**:
         1. About unbundling of natural gas

      **Jud Pro**: Transferred from 11th Circuit to DC Circuit. This was an appeal from a ruling that FERC made—order 636 (rulemaking order).
      **Facts**: FERC instituted order 636 which mandated companies to separate transmission and local distribution for sale of natural gas. This was the result of failed Federal price control regulations which severely depressed supply of interstate natural gas. The order forced pipelines to be common carriers of natural gas, while owners of capacity in the transport of natural gas. Also producers were no longer subject to price regulations so as to increase supply.
         2. The case is talking about the three stages: (1) Production, (2) Transmission, and (3) Distribution.
         3. The Natural Gas Act preserves state jx over distribution, processing, and gathering but preserves federal jurisdiction over sales for resale and interstate transmission/transportation
         4. FERC orders here—mandated that companies had to separate transmission and local distribution for the sale of natural gas.

      **Issue**: There were two main issues on review:
         1. <u>The Commission's decision to prohibit buy/sell agreements</u>
            a. Challenge to rules on part 284 firm transportation. Customers must retain contractual firm-transportation capacity for which the pipeline receives no other offer
            b. Commission's award of pre-granted abandonment to long-term firm-transportation service, subject to the existing shipper's "right of first refusal" (ROFR). Pipelines are no longer required to go through § 7 abandonment proceedings when a transportation contract expires. In return, the existing customer has the right to retain service if it matches the terms of a competing offer for that capacity.

c. The Commission adopted a uniform capacity-release program--a regulated market that allows capacity-holders to re-sell the rights to pipeline firm-transportation capacity. The court says the Natural gas act authorizes this federal action, and the authority of FERC preempts contrary state law.
d. Commission required that pipelines adopt a new rate-design methodology known as straight fixed/variable (SFV). Under SFV, pipelines must allocate fixed costs to the reservation charge, and variable costs to the usage charge. Because the shift from the previous modified fixed/variable (MFV) rate design would disadvantage low-load-factor customers (customers who use gas continually as opposed to needing gas all at once), the Commission adopted various SFV mitigation measures to protect those customers. Court upheld the Commission's SFV mitigation measures against most challenges. The court concluded that the Commission failed to explain why it ordered some mitigation measures on an individual-customer basis and others on a customer-class basis and why it did not require pipelines to offer small-customer discounts to former customers of downstream pipelines.
e. Order No. 636 imposes all the costs of realigning unneeded producer-pipeline contracts on pipeline customers. The Commission authorized pipelines to recover 90% of the GSR costs from current firm-transportation customers (including customers who converted from being bundled firm-sales customers under Order No. 436) and 10% of the GSR costs from interruptible-transportation customers. Court upheld the Commission's decision to allow pipelines to recover GSR costs from customers who converted to open-access transportation before Order No. 636, but remand the decision that pipelines must allocate 10% of GSR costs to interruptible-transportation customers for further explanation.

2. <u>The Commission's decision to end capacity-brokering programs.</u>
    f. In Order No. 636, the Commission instituted a uniform national "capacity release" program, and exercised its power under NGA § 5 to conform pipelines' existing capacity brokering certificates to that program. While both capacity brokering and capacity release arrangements involve the releasing shipper's decision to sell excess capacity, capacity release requires the central involvement of the pipeline in the transaction. Under capacity release, each interstate pipeline is required to establish and administer an electronic bulletin board ("EBB"), which is a computer through which putative releasing and replacement shippers may communicate.
    g. Holding - FERC's capacity release program is a legitimate exercise of its jurisdiction over the interstate transportation of natural gas.

c. Case: <u>NY v. FERC</u> (SC 2002)

i. **Generally**:
   1. About unbundling of electricity

**Jud Pro:** Review of FERC order 888—a rulemaking order. So Circuit Court for the District of Columbia was doing a judicial review of the FERC order 888. So FERC order 888 was on appeal. Enron was questioning FERC's refusal to assert jx over bundled retail transmissions.

**Facts**: The first part of the decision is a background on electricity regulation in the United States. FERC distinguished between transmission and sales (distribution). It regulates transmission and not distribution. FERC says high voltage transmission companies must now be common carriers of electricity. The purpose of the order 888 is to let electric producers compete with utilities. Utilities used to own all powerplants. Now there are independent power producers. Everyone gets equally priced access to transmission lines no matter who they are.

**Issue 1**: if a public utility unbundles i.e., separates the cost of transmission from the cost of electrical energy when billing its retail customers, may FERC require the utility to transmit competitors electricity over its lines on the same terms that the utility applies to its own energy transmissions?

**Holding 1**: Yes. The Federal Power Act supports FERC.s claim of federal jurisdiction. This is because FERC is regulating transmission. FERC has not attempted to control local distribution facilities through Order No. 888.

**Issue 2**: Must FERC impose that same requirement on utilities that continue to offer only bundled retail sales (transmission and distribution)? FERC answered yes to the first question and no to the second.

**Holding 2**: The Federal Power Act allows but does not require FERC to regulate the transmission component of a bundled retail sales. FERC has discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues

## II. <u>Challenging the reasonableness of FERC Jurisdictional Contracts</u>

a. **Main Topic:**
   i. Court-developed rules applying a presumption of reasonableness to jurisdictional contracts at FERC, in the context of "seller's remorse" and "buyer's remorse," as well as challenges by interested third parties (such as state public utilities commissions)

b. Case: <u>Morgan Stanley Capital Group v. Public Utility of Snohomish County</u> (SC 2008)

**Jud Pro**: FERC said no way we will not amend this agreement. 9th circuit—rates are only presumptively reasonable if FERC looks at it first to begin with. The threshold for just and reasonable is different if we're talking about the seller versus the buyer who is trying to amend the agreement (so if it's the seller who's being a cry baby 9th circuit says we don't care you have seller's remorse).
   1. In US SC on writ of cert from the 9th Circuit. Is an appeal from a FERC decision denying a request by Snohomish County to modify and re-price their electricity contract for wholesale electricity from Morgan Stanley.

**Facts**: In this case, its about buyer's remorse (with the California energy crisis). FPA requires all wholesale k to be "just and reasonable". But parties may choose to negotiate a contract price.  Mobile-Sierra Doctrine says that freely negotiated contract is presumed to be just and reasonable unless harms public interest. Here there are super high contracts from the energy crisis being challenged for reasonableness.

2. Around Jan 2001-Feb 2001—at this point lots of long term contracts were being entered into by counties like Snohomish at astronomical rates for wholesale prices and many of them continue till this day. Snohomish is asking FERC to modify their own contract. The seller was Morgan Stanley and the Buyer was Snohomish. Snohomish Country tells FERC that this wasn't a fair arms length transaction and Morgan Stanley was a bad actor in this whole energy crisis so you should bring the prices down—Snohomish County wants a lower price term because its too expensive—Snohomish is claim the rates were not *just and reasonable*.

ii. **Held** (Scalia): it's the presumption of reasonableness attaches to the buyer AS WELL as to the seller. The buyer is also stuck with the presumption of reasonableness (cry baby rule also attaches to the buyer—unless some very compelling public interest reason and no such reason here)—So Snohomish loses here.