Thirty Cases in One Hour:
Precedents Every Regulatory Attorney Should Know

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Regulatory Discretion
Market Structure
Regulated Pricing
Federal-State Jurisdictional Relations

I. Regulatory Discretion

A. The power to regulate

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

Chicago occupied a strategic location between (a) the grain-producing regions of the Midwest, and (b) the water ports that moved the grain to the East Coast and Europe. The elevators were controlled by only nine firms.

An Illinois statute capped the prices charged by grain elevators and warehouses. Their owners argued that the cap violated the Constitution's Fifth and Fourteenth amendments by "taking" their property-their profits associated with the higher prices-without "just compensation."

While this "virtual monopoly" was a justification for regulation, it was not a necessary justification. The real justification for regulation, therefore, was that the grain-storage business affected the public. When someone "devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may

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withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

That the price cap decreased the businesses' market value did not make it unlawful:

> "It matters not in this case that [the owners] had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good."

B. Judicial deference to agency's statutory interpretation

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *City of Arlington v. FCC*, 2013 U.S. LEXIS 3838 (2013)

Legislature creates an agency to exercise powers delegated by the legislature, and those powers only. A party aggrieved by an agency's decision can therefore argue that the agency has exceeded its legislated authority. When this argument arises under federal law, courts apply a special rule of interpretation, one that rests a thumb on the agency's side of the scale.

First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter

Second, If the statute does not bar the agency's action, that is, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the agency's interpretation is consistent with the statute, the court may not "simply impose its own construction on the statute." (State courts vary in whether they apply Chevron-type deference to state agency decisions under state law.)

C. Limits of the "public interest"

National Association for the Advancement of Colored People v. FPC, 425 U.S. 662 (1976)

The "public interest" phrase in the Federal Power Act does not authorize FPC to remedy racial discrimination by regulatees.

The National Association for the Advancement of Colored People (NAACP) and several other organizations petitioned the Commission to issue a rule "requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees."

The Commission refused to adopt the proposed rule, holding that it had no jurisdiction to do so because "the purposes of the Natural Gas and Federal Power Acts are economic regulation

of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify [adopting petitioners' proposed rule]."

The Court upheld FERC.

"The question presented is not whether the elimination of discrimination from our society is an important national goal. It clearly is. The question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority."

"The Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs. To the extent that such costs are demonstrably the product of a regulatee's discriminatory employment practices, the Commission should disallow them."

"In the case of the Power and Gas Acts it is clear that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices. n5 While there are undoubtedly other subsidiary purposes contained in these Acts, n6 the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates."

II. Market Structure

A. No exclusive franchise is permanent

"The legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it". *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 552 (1905).

"[I]n every grant of franchise is the implied condition that it may be lost by misuse." *Redfield Tel. Co. v. Ark. Pub. Serv. Comm'n*, 621 S.W.2d 470, 471-72 (Ark. 1981) (citing *Pub. Serv. Comm'n v. Havemeyer*, 296 U.S. 506 (1936) (upholding Puerto Rico's power to revoke a utility's franchise).

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837)

This cases discusses the tension between the private investor's desire for certainty and the government's desire for "creative destruction.

The state chartered a toll bridge. Later it chartered a second bridge, reducing the traffic over, and therefore the revenues from, the first bridge. Owners of the first bridge sued the state. There the parties fought over the best ways to cross the Charles River.

> "It is well settled, by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights; and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract."

> "Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving."

If plaintiffs like Charles River Bridge could block legislative decisions like this one, public improvements would be impossible, with dire consequences:

> "[Y]ou will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of [dollars] which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."

New Orleans Waterworks Co. v. Rivers, 115 U.S. 674 (1885)

An 1877 state statute authorized the City of New Orleans to establish a private corporation, New Orleans Waterworks Company, and to grant the company a fifty-year "exclusive privilege of supplying the City of New Orleans and its inhabitants with water…." After fifty years, the city could buy the physical plant; if the city did not do so, the grant would extend for another fifty years, "but without any exclusive privilege or right to supply water."

The city granted the franchise authorized by the statute, and New Orleans Waterworks Company commenced service. Two years later, Louisiana changed its mind. A new state constitution, adopted in 1879, contained this provision: "[T]he monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby repealed." Acting under this "no more monopolies" provision, the City Council eliminated Waterworks's monopoly. It passed an ordinance authorizing Robert C. Rivers to lay pipes under City streets to provide water to his hotel.

Waterworks sued to stop Rivers and won. The City's exclusive grant to Waterworks was a contract, which even a state constitution could not impair:

> "The permission given to [Rivers] by the city council to lay pipes in the streets for the purpose of conveying water to his hotel is plainly in derogation of the state's grant to [Waterworks], for, if that body can accord such a use of the public ways to [Rivers], it may grant a like use to all other citizens and to corporations of every kind; thereby materially diminishing, if not destroying, the value of [Waterworks'] contract, upon the faith of which it has expended large sums of money, and rendered services to the public which might otherwise have been performed by the state or the city at the public expense."

B. To what extent are state-protected monopolies subject to federal antitrust law?

A monopoly can be lawful, but monopolizing is not. Consequently, a utility cannot claim immunity from antitrust law just because the government regulates it as a monopoly. Two landmark court decisions illustrate this principle: *Otter Tail Power Co. v. United States* applied the principle to federal regulation, while *Cantor v. Detroit Edison Co.* applied it to state regulation.

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

Otter Tail was a vertically integrated utility with captive retail and municipal customers. The municipal customers wanted to shop for competitive wholesale power once their contracts with Otter Tail expired. Otter Tail engaged in anticompetitive activities to prevent the municipals from shopping competitively. The United States Dept of Justice sued under antitrust law. Otter Tail's defense: We have a monopoly granted by the state. Antitrust law applies. Otter Tail argued that its economic fate depended on keeping its customers.

The Court didn't bite:

> "[The Sherman Act] assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anti-competitive uses of its dominant economic power. . . . "[T]he public interest is far broader than the economic interest of a particular power supplier.""

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

Detroit Edison applied for and received state commission permission to give away free light bulbs, with the costs recovered in everyone's retail rates. Cantor, owner of a drugstore that sold light bulbs, sued in antitrust law. Detroit Edison defended saying it had a monopoly authorized by the state, and the program itself was authorized by the state.

Antitrust law applies. The question was whether is whether "the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." In Detroit Edison's case, "there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's."

> "[E]ven if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs." Outlawing the anti-competitive giveaway would leave the state's legitimate interest in utility regulation "almost entirely unimpaired."

Parker v. Brown, 317 U.S. 341 (1943),

The U.S. Supreme Court upheld a California statutory program to allocate production among raisin growers. The Court there noted that nothing in the language or history of the Sherman Antitrust Act revealed an intent to preempt official state action.

The state action doctrine exempts qualifying state and local government regulation from federal antitrust law even in instances where the regulation at issue compels an otherwise clear violation of federal antitrust laws. Underlying the doctrine is a judicial view that federal antitrust laws should not intrude too deeply into state regulatory process.

Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)

The wholesale service requirements imposed on ILECs by the 1996 Act rendered antitrust law unavailable as an alternative or additional remedy. Trinko, a customer of AT&T (who was, at the time, merely a CLEC) argued that Verizon, an ILEC, violated the Sherman Act by failing to provide AT&T non-discriminatory access to Verizon's operations support systems

(OSS) and local loop, as required by the 1996 Act.41 The FCC and the New York Public Service Commission had already penalized Verizon for its misbehavior.

The Supreme Court dismissed Trinko's antitrust claim. In determining whether anti-competitive actions trigger antitrust liability, the Court explained,

> "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anti-competitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."

The Court described (a) the ILECs' obligation to provide wholesale services, and (b) the 14-point "competitive checklist" ILECs had to satisfy before receiving permission to provide long-distance service (see Chapter 3.A.3). This regulatory regime "significantly diminishes the likelihood of major antitrust harm" and was "an effective steward of the antitrust function." Against antitrust's "slight benefits" in this context, "we must weigh a realistic assessment of its costs." Those costs include (1) the risk of "false positives" (i.e., penalizing aggressive competitive behavior that enhances rather than weakens competition); (2) "a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs"; and (3) involvement of courts in technical matters beyond their abilities.

C. In regulation, the public interest takes into account antitrust principles

Gulf States Utils. Co. v. FPC, 411 U.S. 747 (1973)

Enforcement of federal antitrust law is the responsibility of the U.S. Department of Justice and the Federal Trade Commission. But its principles apply to federal utility regulators too.

III. Regulated Pricing

A. Constitutional constraints on regulated prices

Missouri ex rel. Sw. Bell Tel. Co. v. Public Serv. Comm'n of Mo., 262 U.S. 276 (1923)

When there is a government taking of property, the Fifth Amendment requires "just compensation" to the property holder. Applying this requirement to public utility ratemaking, we ask three questions: What is the "property"? How is it "taken"? What is "just compensation"? Justice Brandeis supplied the answers:

> "The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return." Missouri ex rel. Southwestern Bell Tel. Co., 262 U.S. at 290 (1923) (Brandeis, J., concurring).

The property is the shareholder's investment, the "taking" occurs when the utility invests capital to carry out its public service obligation, and the "just compensation" occurs when the regulator sets rates sufficient to "guarantee[] to the utility the opportunity to earn a fair return."

Bluefield Water Works & Improvement v. Pub. Serv. Comm.of W. Virginia, 262 U.S. 679 (1923)

The Commission authorized rates that produced a return on equity of under six percent. This was too low to constitute "just compensation," the Court found. The low and irregular income resulting from the rates would reduce the prices of the utility's securities, causing investors to demand higher rates of return. The Court described the utility's entitlement and the regulator's obligation:

> "[A] public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties."

Hope Natural Gas v. Fed. Power Comm'n, 320 U.S. 591 (1944)

The Federal Power Commission set Hope's rates using Justice Brandeis's approach: A rate base consisting of historical (original) cost less depreciation, an authorized rate of return based on market facts, and operating expenses based on reasonable projections. The utility attacked the Commission's authorized return as unconstitutionally low if calculated under the "fair value" method. The Supreme Court upheld the Commission, rejecting not only Smyth's insistence on fair value, but more broadly, the need for any "single formula or combination of formulae."

The focus, instead, must on the rate order's "end result" and "total effect": "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base":

> "[T]he Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate making function, moreover, involves the making of "pragmatic adjustments." ... And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. ... Under the statutory standard of "just and reasonable" it is the result reached not the method employed

> which is controlling. ... It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

In *Hope*, the Court emphasized the investor's interest in the utility's "financial integrity." Financial integrity requires "enough revenue not only for operating expenses but also for the capital costs of the business." The capital costs, in turn, "include service on the debt and dividends on the stock." The equity owner's return "should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."

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

Under the Supreme Court's prior *Phillips* decision, the Federal Power Commission set natural gas producer rates under the Natural Gas Act.32 One of the FPC's ratemaking techniques was to set general price ceilings, called "maximum rates," for each of several gas-gathering areas. An area's maximum rate applied to all producers in that area, regardless of an individual producer's costs. Some producers challenged the concept, arguing that if their costs were high relative to these ceilings, the constitutional requirement of "just compensation" entitled them either to cease production (regardless of any contractual obligation to produce), or to seek from the FPC "special relief," that is, a producer-specific rate increase. The FPC's policy indeed allowed producers to request special relief hearings. As the Supreme Court explained:

> "The Commission acknowledged [these area rates] might in individual cases produce hardship, and declared that it would, in such cases, provide special relief. It emphasized that exceptions to the area rates would not be readily or frequently permitted, but declined to indicate in detail in what circumstances relief would be given."

The Court did not decide whether actually granting special relief would be "in every situation constitutionally imperative, for such arrangements have here been provided by the Commission, and we cannot now hold them inadequate." The Commission's procedure protected its policy against constitutional attack.

B. No constitutional obligation to save the company

Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 596-97 (1896)

> "If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. . . . If a corporation cannot maintain such a

> highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens on the public."

Market Street Ry. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945)

> "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or restore values that have been lost by the operation of economic forces."

C. No constitutional obligation to allow recovery of prudent costs

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)

Statute or commission can constitutionally disallow prudent costs under the "used and useful" and "utility bears the risk" approaches.

A Pennsylvania statute prohibited return on, and recovery of, investment in assets not "used and useful" to customers. An abandoned or canceled plant is not used and useful, so the Commission disallowed the utility's cost, while acknowledging its prudence. The Supreme Court upheld the statute: "[A] state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public.'" Focusing on the "end result" as required by *Hope*, the Court found the economic effect of disallowance non-confiscatory because it was so small.

The intervenor, Pennsylvania Electric Association, separately sought a ruling that the Constitution necessarily requires recovery of prudent costs, regardless of their usefulness and regardless of the economic effect of a disallowance. That argument, if accepted by the Court, would have prohibited regulators from allocating to shareholders the risk of prudent but uneconomic outcomes. The Court rejected the argument as inconsistent with *Hope*:

> "We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. *Hope* clearly held that "the Commission was not bound to the use of any single formula or combination of formulae in determining rates."

The Court thus reaffirmed a line of cases holding that that the Constitution does not insulate a utility from uneconomic outcomes, whether in the form of market forces, obsolescence or bad luck, even when the utility has acted prudently. If an asset is not "used and useful," the Constitution does not make customers pay.

Caution: A regulatory "decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others" would raise constitutional eyebrows.

D. FERC has no statutory obligation to base rates on costs, but it cannot authorize pricing discretion casually

Montana Consumer Counsel v. FERC, 659 F.3d 910 (9th Cir. 2011)

What is the legal authority for trusting market forces to discipline prices? There are two sources. The first is *Hope Natural Gas*: What matters is not the methodology but the "end result." Cost-based pricing is only a methodology; it has no exclusive claim to justness and reasonableness. The second source is economic theory: "[W]here neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

But:

> "FERC's discretion is not without limit. FERC may not determine in advance that the prevailing market rate is by definition just and reasonable. . . . Comparisons of the rates charged by sellers to the rates charged by other sellers are insufficient- such comparisons tell FERC nothing about whether the rates are just and reasonable. FERC may not substitute prevailing market prices for its own judgment."

Two regulatory obligations: screen, monitor.

E. Filed rate doctrine

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 453 U.S. 571 (1981)

Montana-Dakota Utilities Company and Northwestern Public Service Company were affiliates: They had common management, interlocking directorates, and joint officers. They also exchanged wholesale power, buying from and selling to each other at rates authorized by the Federal Power Commission under the Federal Power Act. Eventually they separated, disharmoniously. Montana-Dakota then sued Northwestern in federal district court, seeking compensation on grounds that Northwestern had overcharged and unpaid.

The court dismissed the suit.

> "[Montana-Dakota] cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment. . . . It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

IV. Federal-State Jurisdictional Relations

A. Tenth Amendment

New York v. United States, 505 U.S. 144 (1992)

The Low-Level Radioactive Waste Policy Amendments Act of 1985 gave each state a choice, with respect to radioactive waste generated within its boundaries: Either dispose of it consistently with federal rules, or take title and possession. If the state does not take possession timely, it "shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste." Supreme Court invalidated: Giving a state a choice between two forms of coercion is still coercion.

> "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power."

Congress can preempt states but it cannot commandeer them. "As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."

Congress can regulate the actions of individuals but it cannot regulate the actions of States:

> "In providing for a stronger central government, ... the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."
>
> "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."
>
> "Moreover, where Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of "cooperative federalism," offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."

B. Dormant Commerce Clause--Discrimination

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

Acting under a state statute, the New Hampshire Commission prohibited New England Power Company from selling outside the state hydroelectricity generated inside the state. The U.S. Supreme Court struck the statute.

The Commerce Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom."

State regulations that discriminate against interstate commerce are "virtually per se invalid."

C. Dormant Commerce Clause--Excessive Burden

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

How does the *Pike* balancing test apply to public utility regulation? Utility regulation is "one of the most important of the functions traditionally associated with the police power of the States." Courts have recognized the states' need to "prevent, on the one hand, the evils of an unrestricted right of competition and, on the other hand, the abuses of monopoly." This need is sufficient constitutional justification for state regulation of multiple actions.

D. Supremacy Clause

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988)

Mississippi Power & Light was one of four retail utility subsidiaries in the Middle South holding company system (now called Entergy). For several decades, the system had conducted joint, centralized planning among the subsidiaries. The utility subsidiaries shared the costs of all system assets under a System Agreement. For the Grand Gulf nuclear plant, cost-sharing placing the plant in a wholesale generating company, Middle South Energy (MSE). MSE would sell Grand Gulf's capacity and energy to each retail utility subsidiary under a FERC-jurisdictional contract. That contract allocated percentages of cost responsibility among the four utilities.

Grand Gulf's construction cost rose from an original estimate of $1.2 billion to an actual $3 billion. The Mississippi Attorney General, representing retail customers, asked the state commission to investigate MP&L's prudence in buying its share of Grand Gulf power. The state commission declined, citing preemption. The Mississippi Supreme Court reversed the state commission.

The U.S. Supreme Court reversed the Mississippi Supreme Court. It described Mississippi Power & Light as having been "ordered [by FERC] to . . . purchase" its FERC-designated share of Grand Gulf. Having been so "ordered" by FERC, MP&L had no choice but to buy its share. From this fact, the court reasoned that Mississippi Commission was preempted from investigating MP&L's prudence. Any state disallowance for imprudence would put MP&L in an impossible situation: penalized by the state for doing what FERC "ordered" it to do. The state disallowance would conflict with the FERC-approved contract, in violation of the filed rate doctrine, a federal legal principle applied to the states through the Supremacy Clause.

Kentucky W. Va. Gas Co. v. Pennsylvania Publ. Util. Comm'n, 837 F.2d 600 (3d Cir. 1988);
Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, 465 A.2d 735
(Pa. Commw. Ct. 1983)

Retail-utility-as-wholesale-buyer, acting autonomously, purchases under a FERC-approved contract, but does so imprudently (e.g., the utility bought more than was prudent given that lower-priced alternatives were available). State commission disallows imprudent costs There is no preemption because the state's review of the utility's prudence is analytically distinct from FERC's approval of the seller's price.

> "Since the question here of whether the retailer acted with economic prudence in purchasing from one wholesaler rather than another is never before FERC, the PUC is not regulating the same activity. Consequently we find no conflict between FERC's authority and that granted to the PUC [by the applicable state statute]."

It is crucial to understand the difference between the Mississippi fact situation and the Kentucky West Virginia situation.

Hughes v. Talen, 136 S.Ct. 993 (2016)

Maryland ordered its retail utility to sign a contract with a wholesale supplier. The contract said that if the supplier's revenue from the FERC-jurisdictional organized wholesale market fell below a level established by the state commission, the utility would supplement that revenues with additional payments, using captive ratepayer funds.

Maryland was preempted by the Federal Power Act. A state may not substitute its view of appropriate wholesale compensation for the wholesale rates authorized by FERC. In the context of an organized wholesale market, the rates produced by market forces are the FERC-authorized rates.