IPU**MSU**
MICHIGAN STATE UNIVERSITY | INSTITUTE OF PUBLIC UTILITIES Regulatory Research and Education
Owen Graduate Hall | 735 E. Shaw Lane, Room W157 | East Lansing, MI 48825-1109
517.355.1876 | 517.355.1854 fax | ipu.msu.edu | ipu@msu.edu

CORE CASE LAW IN U.S. PUBLIC UTILITY REGULATION

© Janice A. Beecher, Ph.D., IPU-MSU*
June 2017 ▪ ipu.msu.edu

Common Law Heritage

Treatises of Lord Chief Justice Sir Matthew Hale (circa 1670):

- *De Portibus Maris:* When private property is "affected with a public interest" it ceases to be *juris privati* only.

- *De Jure Maris:* The king has "a right of franchise or privilege… and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is finable."

Constitutional Basis

Commerce Clause (Article I, Section 8, Clause 3) of the U.S. Constitution: Congress shall have the power "To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes." Establishes a strong *federal role* in interstate, wholesale markets; important and some controversy as to interpretation. The "Dormant Commerce Clause" implies that states cannot erect undue barriers to interstate commerce, including laws that favor intrastate over interstate businesses or allow for hoarding of local resources. Also empowers Congress "To establish Post Offices and post Roads"

Contract Clause (Article 1, Section 10, Clause 1): "No State shall… pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts…"

Fifth Amendment: "…nor shall private property be taken for public use, without just compensation" ("takings" clause viewed in context of 14th amendment protection of due process).

* With special thanks to Mr. Robert Burns and Mr. Harvey Reiter for their contributions and review.

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment: "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, states regulate intrastate commerce pursuant to their constitutions and/or police powers.

Judicial Decisions and Opinions

Federal authority to regulate commerce

- McCulloch v. Maryland, 17 U.S. 316 (1819).
- Gibbons c. Ogden, 22 U.S. 1 (1824). See re Dormant Commerce Clause.
- Brown v. Maryland, 25 U.S. 419 (1827).

Authority of the legislature to grant charters and franchises

The Charles River Bridge, having been granted a charter in 1785 by the state of Massachusetts to operate a bridge and charge a toll for service, sued a new bridge company also operating with state consent. In this early case of judicial review, the court sided with the state in finding that a monopoly had not been granted with the original charter and that economic development interests of the state took priority over the private interest of the company.
- Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

The granting by the state of an exclusive water service franchise established constitutionally protected property rights.
- New Orleans Water-Works Company v. Rivers, 115 U.S. 674 (1885).

Obligation to serve

The Wisconsin Supreme Court found that a gas company must furnish gas to anyone who has premises in a condition to receive service and who has complied with reasonable company regulation: "The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonably terms. And when the nature and objects of the corporation are considered, viz: the exclusive right to manufacture and sell gas, for the purpose of lighting the city of Milwaukee, and the dwellings and business places of its inhabitants, how can it be urged that this a mere private corporation for the manufacture and sale a commercial commodity."
- Shepard v. Milwaukee Gaslight Co., 6 Wis. 539; 70 Am. Dec. 479 (1858).

The New Jersey Supreme Court held that a gas company has no duty to furnish gas to all applicants on premises where gas company lines are situated. The Court supported its position by asserting that economic competition will bring about satisfactory service and low rates. Paterson was overturned in Public Service Gas Co. v. Newark, 86 N.J. Eq. 384; 98 Atl. 404 (1916).
Paterson Gaslight Co. v. Brady, 27 N.J.L. 245; 72 Am. Dec. 360 (1858).

"Where a corporation has granted a franchise to supply gas at reasonable rates mandamus will lie to compel it to do so, and if the gas supply has been commenced, a suit in equity may be maintained to enjoin the corporation from ceasing to supply."
- Public Service Gas Co. v. Newark, 86 N.J. Eq. 384; 98 Atl. 404 (1916).

Authority to regulate in the public interest

Upholding the statutory basis for commission regulation of maximum rates for grain storage, Chief Justice Waite echoed the common law heritage: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one 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 created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."
- Munn v. State of Illinois, 94 U.S. 113 (1877).

"It requires no comment to point out the radical differences between the cases of public mills and interest on money, and that of the warehouses in Chicago. No prerogative or privilege of the crown to establish warehouses was ever asserted at the common law… The business of a warehouseman was, at common law, a private business, and is so in its nature. It has no special privileges connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business… No reason can be assigned to justify legislation interfering with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful."
- Justice Stephen Field, dissenting in Munn v. State of Illinois, 94 U.S. 113 (1877).

"Laws requiring gas companies, water companies and other corporations of like character to supply their customers at prices fixed by the municipal authorities of the locality are within the scope of legislative power unless prohibited by constitutional limitation or valid contract obligation." Dissent by Justice Field: "…whether we regard the contract contained in the act of 1858 or treat the compulsory delivery of the property as a taking of it for public use -- there is no feature in the acts… which does not violate the constitutional rights of the plaintiff. In the enforced sale of its property at prices to be fixed by the agents of the consumers, the line is passed which separates regulation from spoliation.
- Spring Valley Waterworks v. Schottler, 110 U.S. 347 (1884).

Upholding the public interest basis of *Munn* with regard to the "proper exercise of the police power of the state" for setting the maximum charge for elevating, receiving, weighing and discharging grain.
- Budd v. New York, 143 U.S. 517 (1892).

Upholding *Munn,* finding that grain warehouse regulation "does not apply to elevators built by a person only for the purpose of storing his own grain, and… being so construed, it does not deny the equal protection of the laws to the owner of an elevator made a public warehouse by it, does not deprive him of his property without due process of law, does not amount to a regulation of commerce between the states, and is not in conflict with the Constitution of the United States."
- Brass v. North Dakota ex rel. Stoeser, 153 U.S. 391 (1894).

Regarding regulation of rates in the public interest.
- German Alliance Insurance Co. v. Lewis, 233 U.S. 389 (1914).

Narrowing the public-interest doctrine

"Legislative authority to abridge freedom of contract can be justified only by exceptional circumstances, and the restraint must not be arbitrary or unreasonable… A declaration by a legislature that a business has become affected by a public interest is not conclusive of the question whether attempted regulation on that ground is justified… The extent to which a business which has become 'clothed with a public interest' may be regulated depends upon the nature of the business, its relation to the public and the abuses reasonably to be feared…" In this case, Kansas was found to have exceeded "the limit of permissible regulation and deprives the employer of property, and both employer and employee of liberty, without due process of law in violation of the Fourteenth Amendment."
- Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

Regarding limits to extending the public-interest standard for economic regulation.
- Tyson & Brother v. Banton, 273 U.S. 418 (1927) (movie tickets).
- Ribnik v. McBride, 277 U.S. 350 (1928) (employment agency).

The State cannot fix commodity prices (in this case, gasoline) absent a public interest justification without violating due process. "By repeated decisions of this court, beginning with Munn v. Illinois… that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public… Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."
- Williams v. Standard Oil Co., 278 U.S. 235 (1929).

Expanding the public-interest doctrine

"In my opinion, the true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible... It is settled that the police power commonly invoked in aid of health, safety, and morals extends equally to the promotion of the public welfare… The existence of such power in the Legislature seems indispensable in our ever-changing society… To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory…"
- Justice Louis Brandeis, dissenting in New York State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

"Plainly the activities of the railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers… If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied… there is no closed class or category of business affected with a public interest"
- Nebbia v. New York, 291 U.S. 502 (1934).

Defining public utilities: "If a business is (1) affected with a public interest, and (2) bears an intimate connection with the processes of transportation and distribution, and (3) is under an obligation to afford its facilities to the public generally, upon demand, at fair and nondiscriminatory rates, and (4) enjoys, in a large measure an independence and freedom from business competition brought about either (a) by its acquirement of a monopolistic status, or (b) by the grant of a franchise or certificate from the State placing it in this position, it is… a public utility…"
- Judge Frederick Vinson, dissenting in Davies Warehouse Co. v. Brown, 137 F.2d 201, 209 (1943).

Utilities as Servants of the State

"A railroad is a public highway, and nonetheless so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state."
- Smyth v. Ames, 169 U.S. 466 (1898).

"The investor's "company is the substitute for the state in the performance of the public service, thus becoming a public servant."
- Justice Louis Brandeis, concurring in Southwestern Bell v. PSC, of Missouri 262 U.S. 276 (1923).

A utility franchise is “a special privilege” that is “granted or withheld at the pleasure of the state” and “the Federal Constitution imposes no limits upon the state's discretion in this respect.”
- Frost v. Corporate Commission of Oklahoma, 278 U.S. 515 (1929).

“[T]he true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection…”
- Justice Louis Brandeis, dissenting in New York State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

“[A] State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.”
- Nebbia v. New York, 291 U.S. 502 (1934).

“[P]rice must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it…”
- Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

Barriers to entry and exit

Regulatory barriers to market entry.
- Idaho Power & Light v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914).

Regulatory barriers to market exit (subject to overall profitability).
- New York and Queens Gas v. McCall, 245 U.S. 345 (1917).
- Puget Sound Traction, Light and Power v. Reynolds, 244 U.S. 574 (1917).

Protection of investors and fair returns

Reasonable opportunity to earn a return.
- Fifth and Fourteenth Amendments (non-confiscatory, “takings”).

“This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.”
- Stone v. Farmers' Loan & Trust Co. 116 U.S. 307 (1886).
- See also Georgia Railroad and Banking v. Smith, 128 U.S. 174 (1888).

“The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends… 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 upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service

rendered by the company, are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable… [Each] case must depend upon its special facts… together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."
- Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896).

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public… What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience, and on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."
- Smyth v. Ames, 169 U.S. 466 (1898); overturned by FPC v. Natural Gas Pipeline, 1942).

"On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."
- Cedar Rapids Gas Light Co. v. City of Cedar Rapids, 223 U.S. 655 (1912).

"Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service of the utility to the public are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment… A public utility is entitled to such rates as will permit it to earn a return on the value of the property it employs for the convenience of the public equal to that generally being made at the same time and in the same region of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures… The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain its credit and enable it to raise the money necessary for the proper discharge of its public duties… A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally."
- Bluefield Waterworks v. PSC of WV, 262 U.S. 679 (1923).

"The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable… The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred, and enough more to attract capital. The reasonable rate to be prescribed by a Commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory if it allows to the utility the

opportunity to earn the cost of the service as thus defined. To decide whether a proposed rate is confiscatory, the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return."
- Southwestern Bell v. PSC, of Missouri 262 U.S. 276 (1923).

"By longstanding usage in the field of rate regulation, the `lowest reasonable rate' is one which is not confiscatory in the constitutional sense… But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance are to be earned."
- Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

"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, is quite a different problem… [The] the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. 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 to restore values that have been lost by the operation of economic forces… Even monopolies must sell their services in a market where there is competition for the consumer's dollar and the price of a commodity affects its demand and use."
- Market St. Railway Co. v. Railroad Commission of California, 324 U.S. 548 (1945).

"[W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain… In such circumstances, the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory… [I]t is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility."
- Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).
- See also United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).
- See also Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County et al., 06-1457 (2008). Also decided 06-1462.

Standards of review for investments and costs

In accordance with due process, companies are not guaranteed but "entitled to ask" for fair returns on the value of property employed for the public convenience ("just compensation"), but rates cannot be burdensome.
- Smyth v. Ames, 169 U.S. 466 (1898).

Used and useful (excess capacity): "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not as yet have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated number should pay a full return."
- San Diego Land & Town Co. v. Jasper, 189 U.S. 439 (1903).

Prudence: "What will amount to a fair return cannot be ascertained by valuing the property as of past times without giving consideration to greatly increased costs of labor, supplies, etc., prevailing at the time of the investigation… A state Commission, in fixing the rates of a public utility corporation, cannot substitute its judgment for the honest discretion of the company's board of directors respecting the necessity and reasonableness of expenditures made in the operations of the company… The term 'prudent investment' is not used in a critical sense. There should not be excluded from the finding of the base investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment unless the contrary is shown."
- Justice Louis Brandeis, concurring in Southwestern Bell v. PSC, of Missouri 262 U.S. 276 (1923).
- See also Re Investigation Into Demand Side Management by Elec. Utilit. 127 PUR4th 516, 521 (PaPUC, 1991).

Cost forecasting: "It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service -- that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future."
- McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926).

Depreciation: "In determining what shall be deducted for depreciation, the testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities."
- McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926).

"Good faith on the part of the managers of a business is to be presumed, and, in the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay."
- West Ohio Gas Co. v. PUC of Ohio, 294 U.S. 63 (1935).
- See also, Mountain States Tel. & Teleg. Co. v. F.C.C., 939 F.2d 1021, 1034 (DC.Cir.. 1991); Re Consolidated Edison Co. of N.Y., Inc., 151 PUR4th 130, 137 (NYSPC, 1994).

"As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used at the time it is being used, to render the services. But it is not entitled to have included any property not used and useful for that purpose."
- Denver Union Stock Yard Co. v. U.S., 304 U.S. 470 (1938).

Overturning *Smyth v. Ames* with regard to "the fallacious 'fair-value' theory of rate making": "While the opinion of the Court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of Smyth v. Ames… which has haunted utility regulation since 1898.... [T]he Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of 'fair value'. The Commission may now adopt, if it chooses, prudent investment as a rate base…"
- Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

Protection of consumers by disallowance of "unnecessary or illegitimate costs."
- National Association for the Advancement of Colored People v. FPC, 425 U.S. 662 (1976).

A prudent investment may be disallowed if it is not "used and useful" (i.e., the disallowance is not a "taking"). Moreover, "The risks a utility faces are in large part defined by the rate methodology, because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's 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 serious constitutional questions. But the instant case does not present this question."
- Duquesne Light v. Barasch, 488 U.S. 299 (1989).

"It is the obligation of all regulated public utilities to operate with all reasonable economies. This applies to tax savings as well as economies of management. The net result of this, of course, it that such savings as are effected are passed on to the consuming public. This we consider to be the natural and necessary consequence of rate regulation… It is the duty of the Commission to fix a rate that represents the cost of service and a reasonable return on the investment, including compensation for consumption of the gas and an increment for incentive..."
- El Paso Natural Gas Co. v. FPC, 281 F.2d 567 (1960).

"[The] issue is not whether the company acted lawfully but whether it acted prudently—a higher standard… We are not unaware that the difficulties may be greater in practice than in philosophy in avoiding an improper usurpation of managerial discretion while conducting a proper review of abuse of that discretion, and that these difficulties are not lessened when Government officials have the 20-20 vision of hindsight."
- Trans World Airlines v. Civil Aeronautics Board, 385 F.2d 648 (1967).

Regulators must ensure that all costs are "necessary and prudent."
- Midwestern Gas Transmission Co., 36 F.P.C. 61 (1966), affirmed by Midwestern Gas Transmission Co. v. Federal Power Commission, 388 F.2d 444 (7th Cir.), *cert. denied*, 392 U.S. 928 (1968).

Reasonable, compensatory, and nondiscriminatory rates

"[W]hen a question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered… [T]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends… [J]ustice to the public and to stockholders may require in respect to one road rates different from those prescribed for other roads, and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road."
- Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896).

Pursuant to the Hepburn Act (1906), railroads began to bear the burden of proof for just and reasonable rates before the Interstate Commerce Commission.

Affirming the authority of the Interstate Commerce Commission under the Transportation Act of 1920 to raise intrastate railway rates to prevent undue discrimination against or obstruction of interstate commerce.
- Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563 (1922).

"The Constitution does not bind ratemaking bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made, and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."
- Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).
- See also Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

"Under the statutory standard of 'just and reasonable,' it is the result reached, not the method employed, which is controlling… The ratemaking process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests… From the investor or company point of view, it is important that there be enough revenue not only for operating expenses, but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard, the return to the equity owner 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… Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base… The fact is that, in natural gas regulation, price must be used to reconcile the private property right society has permitted to vest in an

important natural resource with the claims of society upon it – price must draw a balance between wealth and welfare."
- Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).
- See also Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968).

"So long as the public interest--i.e., that of investors and consumers--is safeguarded, it seems that the Commission may formulate its own standards. But there are limits inherent in the statutory mandate that rates be "reasonable, just, and nondiscriminatory." Among those limits are the minimal requirements for protection of investors outlined in the Hope case. And from the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates. Thus, there is a zone of reasonableness within which rates may properly fall. It is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates."
- Jersey Central Power & Light Company, Petitioner, v. Federal Energy Regulatory Commission, 810 F.2d 1168 (D.C. Cir. 1987).

Rates must be nondiscriminatory, as well as just and reasonable. "(T)he sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory… Discriminatory rates that are inconsistent with the interests of a consumer need not be inconsistent with the public interest."
- Public Service Company of Indiana, Inc. v. FERC, 575 F.2d 1204 (1978). Decided multiple appeals.

Proof of market manipulation would eliminate the premise on which the *Mobile-Sierra* presumption rests.
- Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County et al., 06-1457 (2008). Also decided 06-1462.

Commission jurisdiction and discretion

"Ratemaking is a legislative function, whether exercised by the legislature or by a subordinate body to which power has been delegated, such as a municipality. While courts may refuse to enforce legislation on constitutional grounds, the power should only be exercised in the clearest cases."
- Knoxville v. Knoxville Water Co., 212 U.S. 1 (1909).

"The ratemaking power is a legislative power, and necessarily implies a range of legislative discretion… The question involved is whether… the state has superseded the constitutional limit by making the rates confiscatory... There is no formula for the ascertainment of the fair value of property used for convenience of the public, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."
- Minnesota Rate Case, 230 U.S. 352 (1913).

A public service commission may continue to regulate utilities within its borders, and such regulation will not violate the commerce clause, so long as the subject-matter is not already regulated by congressional action.
- Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23 (1920).

Pursuant to the Federal Trade Commission Act, a commissioner may be removed only for "inefficiency, neglect of duty, or malfeasance in office."
- Humphrey's Executor v. United States, 295 U.S. 602 (1935)

"Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, the Commission is also free under § 5(a) to decrease any rate which is not the 'lowest reasonable rate.'"
- Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

Pursuant to the Commerce Clause, Congress may place structural boundaries on holding companies and other corporations (i.e., Securities and Exchange Commission authority under the 1935 Public Utility Holding Company Act).
- American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

Commission has authority to issue interim orders and grant interim rate relief.
- FPC v. Tennessee Gas Company, 371 U.S. 145 (1962).

"[C]ourts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness…' No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests. It is on these premises that we proceed to assess the Commission's orders… "[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders."
- Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968).

Federal jurisdiction for wholesale power is exclusive, pre-empting state authority.
- Narragansett Elec. Co. v. Burke, 119 R.I. 559, 381 A.2d 1358 (1977).

In cases preceding FERC Order 2000, federal pre-emption with respect to state prudence findings is limited to the establishment of wholesale rates, transactions among affiliated utilities engaged in an integrated power pool, and transactions that result from organized wholesale power markets.
- Pike County Light and Power Co. v. Pennsylvania Public Utility Commission, 465 A.2d 735 (Pa. Cmwlth. Ct. 1983).
- Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission, 837 F.2d 600 (3rd Cir. 1988). Writ of certiorari denied.
- Nantahala Power & Light v. Thornburg, 476 U.S. 953 (1986).
- Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988).

"Chevron deference" principle in administrative law holds that a reasonable interpretation of an ambiguous statute by an agency with subject matter jurisdiction prevails. It does don't apply if a court has found a statute to be unambiguous.
- Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Commissions are creatures of the legislature, possessing only powers specifically conferred by the law (i.e., ratemaking authority): "The relevant acts do contain specific grants of 'managerial' authority to the Public Service Commission, although the very specificity of these grants indicates that general managerial authority has never been conferred upon the PSC."
- Union Carbide v. Michigan Public Service Commission, 431 Mich 135, 147 (1988).
- See also, Colorado-Ute v. PUC, 760 P.2d 627 (Colo. 1988).

States may have authority for holding companies without pre-emption by the commerce clause or the Public Utility Holding Company Act.
- Baltimore Gas and Electric Company v. Public Service Commission of Maryland, 760 F.2d 1408 (4th Cir. 1985).

"The Constitution, within broad limits, leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public… It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature… This is not to say that any system of ratemaking applied by a utilities commission, including the specific instructions it has received from its legislature, will necessarily be constitutional. But if the system fails to pass muster, it will not be because the legislature has performed part of the work."
- Duquesne Light v. Barasch, 488 U.S. 299 (1989).

The entities contemplated with regard to FCC's authority to preempt stat interference with private-sector telecommunications "does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services."
- Nixon v. Missouri Municipal League et al., 541 U.S. 125 (2004).

"The 1996 [Telecommunications] Act is in an important respect much more ambitious than the antitrust laws. It attempts "to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises…" Section 2 of the Sherman Act, by contrast, seeks merely to prevent unlawful monopolization. It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the "Magna Carta of free enterprise…" but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the Sherman Act."
- Verizon v. Trinko, 540 U.S. 398 (2004).

Pursuant to the parameters of Chevron deference, the courts should defer to the FCC's reasonable interpretation of the federal telecom act by deciding that broadband cable companies did not provide a "telecommunications service."
- National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2004), 345 F.3d 1120, reversed and remanded.
- See also, United States Telecom Assn., et al v. Federal Communications Commission and United States of America, D.C. Circuit, No. 15-1063 (2016), upholding the FCC's net neutrality rules that treat broadband as a telecommunications service.

"The FPA provides FERC with the authority to regulate wholesale market operators' compensation of demand response bids… [T]his Court's important but limited role is to ensure that FERC engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that decision. Here, FERC provided a detailed explanation of its choice of LMP and responded at length to contrary views. FERC's serious and careful discussion of the issue satisfies the arbitrary and capricious standard."
- Federal Energy Regulatory Commission v. Electric Power Supply Association, et al., 577 (2016) U.S. Nos. 14-840 and 14-841.

"In an increasingly competitive interstate electricity market, FERC has undertaken to ensure "just and reasonable" wholesale rates, §824d(a), by encouraging the creation of nonprofit entities to manage regions of the nationwide electricity grid… FERC's decision to compensate demand response providers at LMP—the same price paid to generators—instead of at LMP-G, is not arbitrary and capricious. [T]his Court's important but limited role is to ensure that FERC engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that decision. Here, FERC provided a detailed explanation of its choice of LMP and responded at length to contrary views. FERC's serious and careful discussion of the issue satisfies the arbitrary and capricious standard."
- Federal Energy Regulatory Commission v. Electric Power Supply Association, et al., 577 (2016) U.S. Nos. 14-840 and 14-841.

The Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over interstate wholesale electricity sales. States regulate retail sales. In states that have deregulated their energy markets, "load serving entities" (LSEs) purchase wholesale electricity from generators for delivery to retail consumers... FERC has approved PJM's capacity auction as the sole rate-setting mechanism for those sales. Maryland attempts to guarantee CPV a rate distinct from the clearing price, contrary to the Federal Power Act's division of authority; states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority.
- Hughes v. Talen Energy Mktg., LLC, 578 U.S. (2016).