

Summary of Contents

<i>Summary of Contents</i>	<i>v</i>
<i>Detailed Table of Contents</i>	<i>vii</i>
<i>Figures</i>	<i>xvii</i>
<i>Preface to the Second Edition</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>About the Author</i>	<i>xxv</i>
<i>Abbreviations</i>	<i>xxvii</i>
1. Regulatory Law: Purposes, Powers, Rights and Responsibilities	1
PART ONE	
Market Structure: From Monopolies to Competition— Who Can Sell What to Whom?	11
2. The Traditional Utility Monopoly	13
3. Authorizing Competition	85
4. Making Competition Effective	141
5. Monitoring Competition for Anticompetitive Conduct	225
PART TWO	
Pricing: How Much Can Sellers Charge— and Who Decides?	249
6. Just-and-Reasonable Prices in Noncompetitive Markets: Cost-Based Rates Set by the Regulator	251
7. Just-and-Reasonable Prices in “Competitive” Markets: Market-Based Rates Set by the Seller	305

8. Rate Discrimination: When Is Favoritism Undue?	325
9. Filed Rate Doctrine: The Filed Rate Is the Only Lawful Rate	343
10. Retroactive Ratemaking: The Prohibition and the Exceptions	369
11. The <i>Mobile-Sierra</i> Doctrine: When Does “Contract Sanctity” Give Way to Government-Ordered Amendments?	385
PART THREE	
Jurisdiction: State, Federal and Future	405
12. The Federal–State Relationship	407
13. Jurisdiction’s Future	471
<i>Selected Bibliography</i>	483
<i>Table of Authorities</i>	495
<i>Index</i>	535

Detailed Table of Contents

<i>Summary of Contents</i>	<i>v</i>
<i>Detailed Table of Contents</i>	<i>vii</i>
<i>Figures</i>	<i>xvii</i>
<i>Preface to the Second Edition</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>About the Author</i>	<i>xxv</i>
<i>Abbreviations</i>	<i>xxvii</i>
1 Regulatory Law: Purposes, Powers, Rights and Responsibilities	1
1.A. Purposes of Regulation	2
1.B. Purposes of Regulatory Law	3
1.B.1. Powers	3
1.B.2. Responsibilities	4
1.B.3. Rights	5
1.B.4. Procedures	6
1.C. Subjects and Sources of Regulatory Law	6
1.C.1. Subjects	6
1.C.2. Sources	9
PART ONE	
MARKET STRUCTURE: FROM MONOPOLIES TO COMPETITION— WHO CAN SELL WHAT TO WHOM?	11
2 The Traditional Utility Monopoly	13
2.A. Exclusive Retail Franchise	15
2.A.1. Exclusivity Express in Statute	15
2.A.2. Seven Variations on Exclusivity	17
2.A.2.a. New Service Offered by Nonincumbent	17
2.A.2.b. Customer Self-Service	21
2.A.2.c. Group Self-Service	25

2.A.2.d.	Adjacent Monopolies as Rivals: Locational and Fringe Competition	31
2.A.2.e.	Exclusive Franchisee for a Specific Service	33
2.A.2.f.	Competition for the Historic Exclusive Franchise	33
2.A.2.g.	No Statutory Exclusivity	35
2.A.3.	Franchise Revocation	38
2.A.3.a.	Revocation Authority	38
2.A.3.b.	Revocation Justifications	38
2.A.4.	Regulatory Options for Franchise Accountability	42
2.B.	Obligation to Serve	43
2.B.1.	The Antidiscrimination Objective	44
2.B.2.	The Citizen Access Objective	45
2.B.3.	The Economic Development Objective	47
2.B.4.	Limits on the Obligation to Serve	47
2.B.5.	Contracts That Undermine the Obligation	48
2.C.	Consent to Regulation	50
2.D.	Quality of Service	53
2.D.1.	Statutory Bases	53
2.D.2.	Components of Quality: Traditional and New	54
2.D.3.	Regulatory Requirements	57
2.D.3.a.	Legal Sources: Rules, Statutes and Orders	58
2.D.3.b.	Types of Regulatory Requirements: Inputs and Outcomes	60
2.D.3.c.	Remedies: Financial Penalties and Directed Actions	61
2.D.3.d.	The “Management Prerogative” Constraint	64
2.E.	Eminent Domain	68
2.E.1.	Power, Purposes and Limits	68
2.E.2.	Public-Private Overlap	70
2.E.3.	Federal Roles	71
2.F.	Limited Liability for Negligence	72
2.F.1.	General Limitation and Its Justifications	73
2.F.2.	Plaintiffs and Defenses	75
2.F.3.	Exceptions to the General Rule	76
2.F.4.	No Immunity: Gross Negligence	77
2.F.5.	Federal-State Relations	77
2.G.	What Is a “Public Utility” Today?	78
2.G.1.	Uber, Lyft and the Like	79
2.G.2.	Third-Party Solar Leasing	80
2.G.3.	Electric Vehicle Charging Stations	81
2.G.4.	Transmission of Renewable Energy	82

2.G.5.	Gathering Shale Gas for Export	82
2.G.6.	Regional Transmission Organizations	83
3	Authorizing Competition	85
3.A.	Historical Summary	87
3.A.1.	Electricity	87
3.A.2.	Gas	95
3.A.3.	Telecommunications	98
3.A.4.	Recap: Three Variables in the Authorization Process	105
3.B.	Eliminating the Legal Monopoly at Retail	106
3.B.1.	Exclusive Franchise	106
3.B.2.	Obligation to Serve	109
3.B.3.	Consent to Regulation	112
3.B.4.	Quality of Service	115
3.B.5.	Power of Eminent Domain	118
	3.B.5.a. Type of Seller	118
	3.B.5.b. Type of Technology	120
3.B.6.	Limited Liability for Negligence	121
3.C.	Constitutional Questions: Sunk Cost, Stranded Investment and Future Profit	122
3.C.1.	Definitions and Examples	122
3.C.2.	Shareholder Expectations of Future Profits	126
	3.C.2.a. Contract Protecting Exclusivity	127
	3.C.2.b. No Contract Protecting Exclusivity	128
3.C.3.	Shareholder Expectations of Sunk Cost Recovery	130
	3.C.3.a. Takings Clause	131
	3.C.3.b. Case Law	132
	3.C.3.c. Policy Outcomes	135
	3.C.3.c.i. Wholesale Electricity Sales	135
	3.C.3.c.ii. Retail Electric Sales	136
	3.C.3.c.iii. Natural Gas: Transportation and Wholesale Sales	137
	3.C.3.d. Contract Clause	138
3.C.4.	Concluding Constitutional Thoughts	140
4	Making Competition Effective	141
4.A.	Effective Competition: Competition on the Merits	143
4.A.1.	Understanding Competition: Conduct and Structure	143
4.A.2.	Goals of Competition	144
4.A.3.	Metrics for Effective Competition	145

4.B.	Reducing Bottleneck Control: Unbundling and Nondiscriminatory Access	147
4.B.1.	Unbundling and Nondiscriminatory Access Defined	147
4.B.2.	Antitrust Foundation	151
4.B.2.a.	Monopolists May Not Monopolize	151
4.B.2.b.	Essential Facilities Doctrine: Origins	161
4.B.2.c.	Essential Facility Examples	163
4.B.2.d.	Incumbent's Refusal to Share: Business Justifications	169
4.B.2.e.	Antitrust's Contribution to Utility Regulation	171
4.B.3.	Statutory Foundation: The Prohibition against Undue Preference	172
4.B.3.a.	Gas and Electricity at Wholesale	173
4.B.3.b.	Gas and Electricity at Retail	177
4.B.3.c.	Telecommunications	177
4.B.3.d.	Limits on Incumbent's Obligation to Share Facilities	178
4.B.4.	Unbundled Rates for Competitive Neutrality	180
4.B.4.a.	Cost Unbundling	181
4.B.4.b.	Total Element Long-Run Incremental Cost	182
4.B.5.	Separation to Reduce Temptation	183
4.B.5.a.	Functional Unbundling	183
4.B.5.b.	Corporate Unbundling	184
4.B.5.c.	Codes of Conduct	185
4.B.5.d.	Transfer of Monopoly Asset Control to an Independent Entity	187
4.B.5.e.	Divestiture	189
4.B.6.	Unbundling's Effects on Vertical Economies	192
4.B.6.a.	Electricity's Ancillary Services	192
4.B.6.b.	Gas Marketing Data	194
4.B.6.c.	Telecommunications: From Alien Attachments to Broadband	195
4.C.	Reducing Entry Barriers to Eliminate Incumbents' Unearned Advantage	199
4.C.1.	Entry Barriers Defined	200
4.C.2.	Product Promotion Advantages	201
4.C.3.	Entrenched Customer Preferences	202
4.C.4.	Long-Term Contracts	203

4.C.5.	Entry Barriers in Retail Utility Markets	204
4.C.5.a.	Customers' Ability to Switch Suppliers	205
4.C.5.b.	Monthly Billing	205
4.C.5.c.	Knowledge of the Customer Base	207
4.C.5.d.	Incumbent's Name Recognition	209
4.D.	New Technologies: Opportunities and Tensions	211
4.D.1.	Wholesale Electricity: Integrating 21st-Century Resources into 20th-Century Markets	211
4.D.1.a.	Demand Response	212
4.D.1.b.	Frequency Regulation	212
4.D.1.c.	Integration of Variable Energy Resources	214
4.D.1.d.	Storage	214
4.D.2.	Broadband: Connecting Content and Customers	215
4.D.3.	Electricity Distribution: Democratizing Demand and Diversifying Supply	218
4.D.3.a.	Distributed System Platforms	218
4.D.3.b.	Smart Grid	220
5	Monitoring Competition for Anticompetitive Conduct	225
5.A.	Anticompetitive Pricing	227
5.A.1.	Price Squeeze	228
5.A.2.	Predatory Pricing	233
5.B.	Tying	235
5.B.1.	Definition and Examples	235
5.B.2.	Technology Tying	237
5.C.	Market Manipulation	239
5.D.	Rethinking Separation	243
5.D.1.	Sufficient Competition Scenario	244
5.D.2.	Insufficient Competition Scenario	246
PART TWO		
PRICING: HOW MUCH CAN SELLERS CHARGE—AND WHO DECIDES?		249
6	Just-and-Reasonable Prices in Noncompetitive Markets: Cost-Based Rates Set by the Regulator	251
6.A.	The Two Rate-Setting Equations	253
6.B.	The Statutory Just-and-Reasonable Standard	256
6.B.1.	Statutory Purposes: Seller Interests, Buyer Interests, Public Interest	256

6.B.2.	Constitutional Constraint: The Takings Clause	259
6.B.2.a.	Regulator's Duty: Honor Shareholders' Legitimate Expectations	259
6.B.2.a.i.	Substantive Expectation: Opportunity to Earn a Fair Return on Capital Prudently Invested	259
6.B.2.a.ii.	Procedural Expectation: Opportunity for Hearing	263
6.B.2.b.	Which Shareholder Expectations Are Legitimate?	265
6.B.3.	Regulatory Discretion under the Just-and-Reasonable Standard and the Constitution	267
6.B.4.	Roles of Legislature, Commission and Court	271
6.C.	Imprudent Actions and Inactions: Who Bears the Cost of Inefficiency and Waste?	272
6.C.1.	Prudence Principles	273
6.C.2.	Imprudent Actions	277
6.C.2.a.	Poor Performance Relative to Objective Indices	277
6.C.2.b.	Failure to Use Reasonable Management Practices	278
6.C.2.c.	Failure to Oversee Contractors and Employees	279
6.C.2.d.	Failure to Heed Official Criticisms	282
6.C.3.	Imprudent Inaction	283
6.C.3.a.	The Imputation Solution	283
6.C.3.b.	Imputation Analogy: Who Gets the Gain on Sold-Off Capacity?	284
6.C.4.	Defense against Disallowance: The "Management Prerogative"	286
6.C.5.	Evidentiary Burdens for Prudence and Imprudence	286
6.C.6.	Financial Consequences of Cost Disallowance	289
6.D.	Prudent Actions, Uneconomic Outcomes: Who Bears the Risk of Bad Luck?	291
6.D.1.	Prudence Does Not Guarantee Cost Recovery	291
6.D.2.	Three Points on the Risk-Assignment Spectrum	292
6.D.3.	Four Limits on Regulatory Risk-Assignment	293
6.E.	Variations on Cost Bases	297
6.E.1.	Area Rates	297
6.E.2.	Price Caps	297
6.E.3.	Alternative Form of Regulation	298
6.F.	Departures from Cost Bases	299
6.F.1.	Is the Departure Necessary to Carry Out a Statutory Purpose?	300

6.F.2.	How Does the Rate Compare to Cost?	302
6.F.3.	Loosening the Connection between Rate and Result	303
7	Just-and-Reasonable Prices in “Competitive” Markets: Market-Based Rates Set by the Seller	305
7.A.	Seller-Set Prices Can Be “Just and Reasonable”— If the Seller Lacks Market Power	306
7.A.1.	Regulatory Withdrawal from Price-Setting: Statutory and Administrative Paths	306
7.A.2.	Wholesale Electricity: Seller-by-Seller Review	309
7.B.	The Courts Speak: To Prevent Market Power, Regulators Must Screen and Monitor	311
7.B.1.	The Obligation to Screen	311
7.B.2.	The Obligation to Monitor	313
7.C.	The Agencies Act: Techniques and Procedures for Screening and Monitoring	314
7.C.1.	Screening Sellers	314
7.C.1.a.	Market Power Screens: Horizontal and Vertical	314
7.C.1.a.i.	Horizontal Market Power	315
7.C.1.a.ii.	Vertical Market Power	318
7.C.1.b.	Other Entry Barriers	319
7.C.1.c.	Affiliate Transactions	319
7.C.2.	Monitoring Sellers and Punishing Violators	320
7.D.	Scarcity Prices: Are They Just and Reasonable?	322
7.E.	The Future of Market-Based Rates	322
8	Rate Discrimination: When Is Favoritism Undue?	325
8.A.	Undue Discrimination	327
8.A.1.	Rate Differences Not Justified by Cost Differences	327
8.A.2.	Rate Differences with Anticompetitive Effect	329
8.B.	Due Discrimination	330
8.B.1.	Different Customer Profiles	330
8.B.2.	Different Settlement Strategies and Contract Histories	331
8.B.3.	Price Discounting to Retain Customers	332
8.B.4.	Product Differences	333
8.C.	Cost Allocation within Holding Company Systems	334
8.C.1.	Systems That Plan and Operate Utility Assets Centrally	336
8.C.2.	Systems That Mix Utility and Nonutility Businesses	340

9	Filed Rate Doctrine: The Filed Rate Is the Only Lawful Rate	343
9.A.	Filed Rates: Purposes and Principles	344
9.B.	Commission Decisions Constrain Courts	346
9.B.1.	Federal Courts	346
9.B.2.	State Courts	347
9.C.	Federal Commission Decisions Constrain State Commissions	349
9.D.	Commission Must Respect Its Own Rates	351
9.E.	Application to Market-Based Rates	353
9.E.1.	General Rule: The Market-Rate Authorization Is the “Rate”	353
9.E.2.	Seller Violates Market-Rate Condition? Disgorgement	354
9.F.	Application to Antitrust Law	355
9.G.	Application to Non-Rate Terms and Conditions	359
9.H.	Fraud Does Not Block the Filed Rate Defense	361
9.I.	Bankruptcy Law: Does It Preempt the Filed Rate Doctrine?	364
10	Retroactive Ratemaking: The Prohibition and the Exceptions	369
10.A.	Three Bases	370
10.A.1.	Statutory Basis	370
10.A.2.	Constitutional Basis	371
10.A.3.	Policy Basis	371
10.B.	Five Illustrations	372
10.B.1.	Tax Payments Lower Than Estimates	372
10.B.2.	Tax Depreciation Differences	372
10.B.3.	Tax Rate Changes	373
10.B.4.	“Direct Billing” of Gas Production Costs	373
10.B.5.	Someone Else’s Cost	374
10.C.	Seven Exceptions	374
10.C.1.	Regulatory “Notice”	374
10.C.2.	Utility “Deferral” of Expenses	377
10.C.3.	Affiliate Transactions	379
10.C.4.	Hard-to-Predict Costs	379
10.C.5.	Commission Self-Correction	380
10.C.6.	Judicial Reversal of Commission Rate Decisions	381
10.C.7.	Disgorgement of Illegal Gains	382
11	The <i>Mobile-Sierra</i> Doctrine: When Does “Contract Sanctity” Give Way to Government-Ordered Amendments?	385
11.A.	Principle: FERC May Not Change a Contract Unless Both Parties Consent	386
11.B.	The “Public Interest” Exception	388
11.C.	One Standard—with a Rebuttable Presumption	390

12.C.2. Federal Enlists State	461
12.C.3. Federal Helps State	462
12.C.4. Federal Avoids Conflict with State	464
12.C.5. Joint Boards	466
12.C.6. Regional Compacts	467
12.C.7. Concurrent Jurisdiction	468
13 Jurisdiction's Future	471
13.A. Market Structure	473
13.A.1. Evaluating Alternative Arrangements	473
13.A.2. Defining Obligatory Service	475
13.A.3. Universal Service	475
13.A.4. Other Market Structure Features	476
13.B. Pricing	476
13.C. Federal–State Jurisdictional Relationships	477
13.C.1. Interdependencies	477
13.C.2. Obligation to Serve	478
13.C.3. Infrastructure Readiness	479
13.D. Corporate Structure and Changes in Control	479
<i>Selected Bibliography</i>	483
<i>Table of Authorities</i>	495
<i>Index</i>	535

Figures

1. Decisionmakers Use Law to Regulate Actors and Their Actions	10
2. How Exclusive Is the Exclusive Franchise?	37
3. Authorizing Competitive Entry: Who Did What, When?	107
4. Essential Facilities × 3	179
5. Price-Squeeze Strategy	229
6. Paths to Cost Recovery	296
7. FERC’s Pivotal Supplier Test	317
8. Two Holding Company Systems	335
9. Filed Rate Doctrine Applies to All Fora, All Types of Rates and All Types of Law	367
10-A. Avoiding Retroactive Ratemaking: “Interim Rates Subject to Refund”	376
10-B. Avoiding Retroactive Ratemaking: “Deferral” of Storm Costs	378
11. <i>Mobile-Sierra</i> Doctrine: When May FERC Change the Parties’ Contract Terms?	403
12. The Federal–State Relationship: Powers and Limits	451