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The Legal Case against Standby Rates

Under rates approved by many state commissions, on-site investments are blocked and/or dis-incentivized by policies that place the interest of utility shareholders before the interests of the public.

Sean Casten and Myra Karegianes

One of the most pervasive barriers to the deployment of clean, low-cost electricity is the prevalence of rate structures that penalize locally sited generation. By blocking the deployment of local power, these rate elements raise the cost of electricity, decrease system reliability, and unnecessarily increase the pollution associated with power generation. They are also incompatible with modern utility law.

I. Background

A grid with multiple local generators provides reliable service with less generation and transmission capacity

than one that relies on remote, central generation, saving ratepayer capital. Local generation also enables lower on-peak grid loads, reducing system losses and the need for expensive marginal generation sources.

Typical local generation is available over 95 percent of the time,¹ with approximately half of the outages due to planned maintenance. The remaining 2.5 percent outage rate is random and could occur during the local utility's peak demand, but the 2.5 percent maintenance outage rate can be scheduled during periods of low load on the local grid.²

Thus, there is a 97.5 percent probability that the local

generation will be operating during local grid peak and reduce the need for grid wires and generation, as compared to a 2.5 percent probability that the grid will need to supply the load during peak. A grid with multiple local generators therefore provides reliable service with less generation and transmission capacity than one that relies on remote, central generation, saving ratepayer capital. Local generation also enables lower on-peak grid loads, reducing system losses and the need for expensive marginal generation sources.

Despite such benefits, rates developed for on-site generators focus almost exclusively on the costs needed for backup during those rare 2.5-percent-probability events. Ignoring the benefits that accrue during the remaining 97.5 percent of the time creates a windfall for utility investors at the expense of their customer base.³ Why?

II. Typical Standby Rate Design

In theory, electricity prices ought to serve both as a means for utilities to recover their costs and as an incentive for consumers to use power efficiently. In practice, conventional rate structures often make a kilowatt-hour of conservation much less valuable – on a cent/kWh basis – than a kilowatt-hour of consumption.

From declining-block pricing schedules to demand ratchets, a host of rate elements insulate utility shareholders from the downside risks of sales volatility – and thereby lower the economic incentive for efficiency. In so doing, these rate structures implicitly shield regulated utilities from competitive market discipline. The anti-competitive consequences are seen most starkly in standby rates, where

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the economic disincentive to reduce purchases from the utility is applied selectively to those customers who elect to source their electricity from a competitive, on-site generator.

While standby rates vary, the most common replaces a variable energy charge (\$/kWh) with a demand charge (\$/kW) calculated on a rated generator's output. As a result, customers considering an on-site generator in order to save \$/kWh fees find those savings offset by increased \$/kW payments to their electric utility.

The first and often most glaring flaw in these rates is one of simple

logic. Rate-making theory says that rates should – to the extent possible – be based on marginal costs, the better to ensure economically optimal decision making by electricity consumers. But consider the signal sent by conventional standby rates: If a customer increases her electricity consumption, utility revenues rise through kWh sales – but if that same customer decreases her load by using an on-site generator, utility revenues remain essentially flat as \$/kW fees offset falling kWh demand. This result is consistent with marginal-cost rate making theories only if utility cost structures magically shift from fixed to variable when consumption increases. Of course they do not, so these rates fail even the most cursory considerations of rate-payer equity.

These logical failings of standby rates have been detailed by one of the authors elsewhere,⁴ as have the adverse policy consequences of the regulatory paradigm from which these rates derive.^{5,6}

Yet comparably little has been written to counter the assertions by regulated utilities that – policy consequences notwithstanding – utility commissioners are legally obliged to approve those rate elements. While these arguments vary from rate case to rate case, they can be broadly generalized as follows: Utility monopoly franchises provide a guaranteed recovery of commission-approved costs. Ergo, according to these arguments, any reduction in utility

returns caused by competitive power sources constitutes a "takings violation" under the Fourteenth Amendment. Since commissioners are understandably reluctant to approve rates that might face constitutional challenge, these utility arguments have tended to prevail.⁷ But at the same time, it is reasonable to wonder why we are legally obliged to oppose technologies that lower the cost of power, reduce greenhouse gas emissions, and facilitate a more competitive and resilient U.S. electric grid.

This article has been written to refute the assertion that utilities have a constitutional right to cost recovery where that cost recovery comes at the expense of the consumer interest. We urge state and federal utility commissions to counter those claims not with policy – which sadly has little place in the resource-constrained environment of the modern rate case – but rather with direct citation of those federal cases that have considered the appropriate way to balance the interests of utility shareholders and utility customers in the face of declining utility revenues and competitive sources of supply.

III. Case Histories

We explore three cases that form the basis of modern ratemaking law as it applies to adjustments in revenue recovery in the wake of declining utility

sales.⁸ *Federal Power Commission v. Hope Natural Gas*,⁹ *Market Street Railway v. Railroad Commission*,¹⁰ and *Public Service Company of Indiana, Inc. v. Federal Energy Regulatory Commission*.¹¹ Collectively, these cases provide ample legal framework to challenge most standby rates and to help commissioners reconcile the good of the consumer with the financial desires of regulated utilities.

This article has been written to refute the assertion that utilities have a constitutional right to cost recovery where that cost recovery comes at the expense of the consumer interest.

A. Federal Power Commission v. Hope Natural Gas

On its face, *Hope* simply reviewed the best way to calculate total capital costs for the purposes of determining appropriate rates from regulated commodities. However, its scope and precedent were much larger, going to the heart of the regulatory compact and the need for regulators to balance the conflict between shareholders and the public interest that is innate to all regulated monopolies. By exposing this conflict, *Hope* directed regulators to consider the

broader public interest when crafting rates.

Questions about the appropriate way to quantify utility capital costs had risen to the Supreme Court in multiple cases before 1944. In the 1898 case *Smyth v. Ames*,¹² the Court said that capital costs should be determined

... upon the basis of what it would cost to duplicate the property at the present time.¹³

This approach theoretically ensured that technological innovation would always lead to lower costs, even if affected utilities did not embrace new, lower-cost approaches. Regulated utilities, however, contested the ruling, arguing that their obligations to the public service often compelled them to make capital investments based on urgent public needs and, thus, that a purely "replacement cost methodology" could encourage a conservative approach to capital deployment that conflicted with the public interest. These arguments prevailed in the 1923 case *Southwestern Bell Tel Co. v. Public Service Company of Missouri et al*,¹⁴ when the Court overruled *Smyth* and said that utilities could earn returns on

... capital prudently invested in the utility ...¹⁵

By shifting from a replacement-cost to a prudent-cost methodology, *Missouri* lowered the capital risks associated with the utility enterprise, but it provided no quantitative way for

a utility regulator to ensure fiscal discipline. Prudence is, after all, in the eye of the beholder.

When the *Hope* case reached the Supreme Court in 1944, the time was ripe to develop a more solid foundation for future rates that would not be subject to subsequent modification.

The Court quickly rejected the absolutism of earlier decisions, but did so in such a way that has direct relevance to today's standby rate design when they held not only that the Constitution does not prescribe any one ratemaking methodology, but also that *there is no constitutional guarantee of recovery for utility costs*. In the Court's words:

... [r]ate-making is indeed but one species of price-fixing. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.¹⁶

Citing its decision in *Federal Power Commission v. Natural Gas Pipeline Co.*¹⁷ the Court stated:

... the Commission was not bound to the use of any single formula or combination of formulae in determining rates... 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.¹⁸

This finding raises the obvious question as to what "impacts"

ought to factor into rate design. The Court was not proscriptive on this point, except to note generally that rate setting:

... involves a balancing of the investor and the consumer interests... [and] regulation does not insure that the business shall produce net revenues.¹⁹

In this specific instance, the justices found that the interests of investors had already been met,

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and further price increases were not warranted by this need for balance. Commenting on existing rates, the Court stated:

... [r]ates 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...²⁰

B. Application to modern standby rates

Hope clearly establishes a framework within which commissioners could justify a consumer interest that must be

satisfied even if that satisfaction does not allow for the recovery of utility capital at the same rate contemplated in an earlier rate case. Indeed, by contemplating the potential for negative "net revenues," the decision allows for the consumer interest to trump even when utility returns are non-existent. Further, while not explicitly contemplated in the case, the decision suggests that the consumer interest might include not only the cost of utility services, but also its reliability and environmental consequences. On all of these grounds, *Hope* provides a solid framework to challenge standby rates through specific references to the public benefits that accrue from cleaner, cheaper, privately owned generation.

Hope also makes it quite clear that the interests of investors and consumers are not perfectly aligned. This clarity is of particular relevance to standby rates, which are typically framed as if the conflict between these two interest groups does not exist. Regulated utilities often argue that absent a standby rate, they will be compelled to raise other rates, creating an apparent conflation of their interests with those of their customers. This argument is politically crafty, but – as *Hope* makes clear – financially dubious, as well as worthy of much greater vigilance than is found in many standby rate proceedings.²¹

However, we should be clear that while *Hope* provides a

framework within which utility returns might be reduced in the name of the public interest, it does not provide a specific precedent for same. This precedent would come a year later in *Market Street*.

C. *Market Street Railway v. Railroad Commission*

Market Street took *Hope* a step further by explicitly recognizing the beneficial effects of unfettered economic forces *external* to the regulated enterprise. It also strongly suggested that utility rates should not exist solely to protect utility shareholders from those same market forces.

In this particular case, the Court considered the appropriateness of a rate increase to a San Francisco cable car line that had suffered steadily decreasing customer use due (among other things) to the advent of the automobile. This situation is interesting in the context of standby rates, which exist solely to increase utility revenues in order to make up for those lost to competition. Where a strict interpretation of *Hope* argues that standby rates are at best overstated, a similarly strict interpretation of *Market Street* implies that all standby rates should be eliminated in the name of the public interest.

Prior to the case, the state railroad commission reduced the rates of a San Francisco street car utility company. The utility asserted that this reduction deprived it of its property without

due process and was contrary to the Fourteenth Amendment – precisely the same argument advanced by modern electric utilities to justify standby rates. This case, therefore, deserves careful review.

In concluding that there was no due process violation, the Court held:

... it may be safely generalized that the due process clause never has been held by this Court to

The Market Street case strongly suggested that utility rates should not exist solely to protect utility shareholders from market forces.

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.²²

Under the facts of *Market Street*, the Supreme Court found that

the utility company's investment was economically impaired and its earnings abilities reduced by competition from alternative forms of transportation, such as the automobile and other bus lines. In noting that:

... no responsible person would think of reproducing the present plant, consisting in substantial part of cable cars and obsolete equipment,²³

the Court implicitly acknowledges the market-constraining impacts of regulated utilities and that utility shareholder interests in the recovery of past investments cannot be allowed to interfere with economic progress. The benefits of economic progress that accrue to consumers, even at the expense of utility shareholders, thus emerge from *Market Street* as a part of the "balancing of investor and consumer interests" provided by *Hope*.

D. Application to modern standby rates

When an *unregulated* monopoly can use price controls to prevent competitors from entering its market or to prevent the arrival of competitive technologies, it is understood to be contrary to the public interest and no shortage of legislation has been crafted to protect against this abuse of market power. When a *regulated* monopoly seeks the same ends, however, it pursues this path through commission-approved rates that are not subject to antitrust legislation. In *Market*

Street, the Court acknowledges the adverse consequences of such action, and it provides a legal basis for utility commissions that seek to protect consumers from this form of abuse.

But perhaps the most interesting question that *Market Street* raises with respect to standby rates is whether a “responsible person” would reproduce the electric grid in its current configuration. Rigorous analysis of capital deployment by regulated U.S. utilities over the past three decades shows that utilities have consistently failed to deploy the most cost-effective technologies to serve new load.²⁴ Moreover, this work concludes that the most cost-effective investments have been local on-site generators. These installations by unregulated market participants are precisely the competition from which regulated utilities seek protection through standby rates.

Unregulated consumers install on-site power – even after taking into account higher costs-of-capital and no rate-payer guaranteed recovery – because such generators provide their owners with lower electricity costs than utilities can provide. Thus, standby rates block precisely the same “economic forces” that led the Court to condemn the rates sought by the streetcar utility in *Market Street*. Most – if not all – standby electric rates presently in effect could be overturned on the same grounds.

E. Public Service Company of Indiana, Inc. v. Federal Energy Regulatory Commission

Our final review is of a case that stipulates the acceptable range within which different customers can be charged different rates. By the Court’s principles, virtually every standby rate in the



country can be deemed unduly discriminatory.

Why do we have regulated monopolies? At core, because we believe certain public benefits would not otherwise be realized in an unregulated market. Alfred Kahn, former chairman of the Civil Aviation Administration, Federal Communications Commission, and New York Public Service Commission, pointed out as much when he described one of the challenges of deregulatory processes as follows:

... [utilities have a] corollary goal of preserving those distorted, cross-subsidizing rate structures... [and] regulators and incumbents alike attempt to pre-

serve the artificially elevated prices needed to finance cross-subsidies.²⁵

From low-income housing support to rural electrification, it is widely understood that a goal of regulation is to provide discriminatory rate treatment to disparate customers. However, it is also understood that this motivation conflicts with the “cost-causer pays” principles associated with economic efficiency. The 1935 Federal Power Act sought to distinguish between these two conflicting motivations with the word “undue:”

No public utility shall... (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

So when does good prejudice become undue prejudice? Clarity on this question would not arrive for another 43 years, in the form of the 7th Circuit Court’s 1978 decision in *Public Service Company of Indiana*.²⁶

The case consolidated five appeals from the Federal Power Commission’s²⁷ (FPC’s) prior approval of wholesale power rates the Indiana electric utility could charge its wholesale customers. Specifically, the Court was asked to consider whether the increases passed along to five municipal customers were “just and reasonable,” and whether the large disparity between those

rate increases was "unduly discriminatory," as those terms were defined in the 1935 Federal Power Act. The appeal was based in part on the city of Frankfort's contention that its higher rate was unduly discriminatory.

The Court, quoting *St. Michaels Util. Comm'n v. FPC*,²⁸ first acknowledged that price differentials between customers are not *per se* unduly discriminatory, because

... [d]ifferences in rates are justified where they are predicated upon differences in facts.²⁹

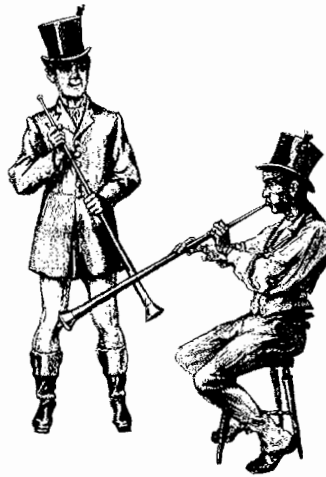
The Court found that these "facts" were not established since the FPC had not conducted the analysis necessary to refute Frankfort's claims.³⁰ The Court's framework, as noted below, is that once a customer shows a disparity in rates, the utility must justify the specific rate differences and the commission must analyze whether the facts of a particular case justify the difference in treatment.

[A]ll that [a customer] was required to do was show that a substantial disparity in rates existed between customers of the same class. It then became incumbent on [the utility] to justify that disparity on the basis of factual differences. The [commission]... must show not only that factual differences justify some rate differences, but also that the factual differences justify the specific rate differences permitted.³¹

The Court went on to consider the definition of the qualifier "undue" in the FPA's prohibition

of undue discrimination, first by noting that:

... the difference between the rates charged to Frankfort and the other cities may be excessively discriminatory. That conclusion does not require, *a fortiori*, the conclusion that the rates are unduly discriminatory. ... The purpose behind section 205(b) [of the Federal Power Act] is the protection of



the consumer's interest ... and the purpose behind section 206 [of the Federal Power Act] is the protection of the public interest. Discriminatory rates that are inconsistent with the interests of a consumer need not be inconsistent with the public interest.³²

Thus, by implication, a rate is not unduly discriminatory unless it is contrary to the public (as opposed to a specific consumer's) interest. The Court then outlined a test driven by a consideration of the impacts on so-called "similarly situated" consumers.

In our view the anti-discrimination policy in section 205(b) is violated in a case such as this where one consumer has its rates raised significantly above what other similarly-situated consumers are

paying. In such a case, the lone consumer would be placed in an unjustifiably non-competitive position, and thus should have recourse to the FPC under section 205(b). Section 206's ban on [undue] discrimination may be breached in a case where one customer is afforded, without any factual justification, a contract rate that is significantly lower than the pre-existing rates for all other members of the class.³³

This decision suggests two clear tests for undue discrimination. First, the class must be defined under which differential rate treatment is sought. Second, the factually justified cost characteristics of that class must be compared to those of similarly situated customers. Absent a demonstration that there is either a unique definable class, or that this class has differentiable cost characteristics, one would necessarily conclude that differential rate treatment between those classes is unduly discriminatory.

We are aware of only one standby rate case that has even applied this test, much less accepted or rejected a standby rate on its conclusions. But that case is instructive. The 2003 standby rate case filed by NSTAR in Massachusetts³⁴ was opposed by a large coalition of industrials, manufacturers, and on-site generation developers, which mounted a vigorous refutation of the facts presented by the utility. The analysis mirrored an informal review done for MassElectric in 1999. In both instances, the load

characteristics of customers with on-site generation *as a class* were compared to other, similarly situated customers in the same rate classification who did not have on-site generation. The explicit purpose of the analysis was to test whether the utility's assertion that the reduction in sales caused by on-site generation led to a class-differentiable impact on the utility's fixed-cost recovery. The class-specific nature of the analysis is critical, since no two customers have identical load profiles. Changing rates because a specific customer's kWh usage falls after she installs an on-site generator is unduly discriminatory unless such charges are equally applied to other customers whose kWh usage falls in a similar manner but for other reasons (e.g., more efficient motors, shifting manufacturing schedules, etc.). Of course, differential rate treatment would be justified if all customers with on-site generation were to show loads that are demonstrably "peakier" than other similarly situated customers.

The reviews found no statistically significant difference between the two Massachusetts populations. Thus, under the principles established in *Public Service Company of Indiana*, the application of a standby rate in this instance would have been unduly discriminatory.³⁵

But this case is the exception. Most standby rates are justified

simply because a *specific* customer will purchase fewer kWh after she installs an on-site generator, rather than any consideration of those customers as a class. Such customer-specific analyses not only fail to perform the "similarly situated" test, but also fail to demonstrate that the requested rates are justified by "factual differences" in the load



characteristics of the affected class.

We acknowledge that in many instances – including the Massachusetts example cited above – the resulting rates are approved in spite of (or in lieu of) the factual analysis urged by *Public Service Company of Indiana* (e.g., by settlement external to formal Commission vote). These settlements are politically tempting, especially given the charged nature of many standby rate cases. However, they are chronically prone to faulty outcomes due to the inequity of resources between the utility and other parties. More perniciously, most of the parties who realize negative consequences from the

standby rate are not parties to the settlement, significantly biasing the settlement process in favor of utility shareholders.³⁶ For example, industrials that have not yet considered on-site generation will find themselves with less economic incentive to make those future investments if a standby rate is approved – but they have no obvious reason to participate (or even to be aware of the need to participate) in most rate cases. In addition, manufacturers of on-site generation equipment often have operations in multiple utility jurisdictions and cannot afford to engage in every rate case in every state in which they operate. Even in the rare instance where all sides are amply represented, many commissions accept settlements that are not enjoined by all intervening parties, thus allowing for the appearance of agreement in situations where the majority of the affected parties disagree.³⁷

This inherent inequity argues against settlement processes in standby rate proceedings, and it highlights the need for commissions to assess facts and "balance investor and consumer interests." Settled rates, in short, are rife for partial and/or faulty factual analysis.

IV. Conclusions

The U.S. electric system is in desperate need of economic and environmental reform, but neither is possible without rate and/or regulatory change. We face increasing bottlenecks in the

transmission grid, as well as capacity constraints in the coal and nuclear fleet that has long formed the low-cost, baseload floor on power prices. Having used up the reserve margin built into the coal fleet before the Clean Air Act was passed, new coal facilities will be drastically more expensive – and even more so if legislators enact carbon restraints. Meanwhile, the Clean Air Interstate Rule, Clean Air Mercury Rule, and the recent Supreme Court ruling in *Environmental Defense et al. v. Duke Energy Corp. et al.*³⁸ have forced existing coal plants either to comply with the Clean Air Act (mandating more capital and less fuel efficiency) or to shut down. All of these trends are conspiring to drive up the cost of electric power, as recent rate filings attest.

Despite these macro trends, the political reality is that the public holds present slate of elected officials accountable when rate increases come, even if the underlying causes were many electoral cycles in the making. Legislators in Maryland and California know this far too well. Commissioners and governors throughout the nation, therefore, are looking for ways to blunt the political fallout of the seemingly inevitable rate increases.

On-site generation may not be able to reverse these big trends completely, but it at least moves in the right direction. It eases the burden on constrained distribution grids. It reduces the need for more inefficient (and dirty) central power. By

generating at or near the load, it both reduces distribution losses and enhances overall system reliability. And when it is installed by unregulated actors (as virtually all of it, to date, has been), on-site generation achieves these benefits without burdening ratepayers.

Yet under rates approved by many state commissions, these



on-site investments are blocked and/or dis-incentivized by policies that place the interest of utility shareholders before the interests of the public. Although the policy arguments for greater deployment of these technologies are no longer debated by anyone without a financial interest in the status quo, narrow, legalistic arguments too often have favored utility cost recovery. Those arguments, fortunately, are refutable, and it is our hope that this review of relevant court cases helps commissioners do so. ■

Endnotes:

1. Energy and Environmental Analysis, *Distributed Generation*

Operational Reliability and Availability Database, Arlington, VA, Jan. 2004. Prepared for Oak Ridge National Laboratory under ORNL Subcontract No. 400021456. This database is a compilation of actual, in-field data from the installed fleet of distributed generators.

2. While these maintenance outages can be scheduled to occur during off-peak times, it bears noting that many standby rate structures are based on 12-month ratchets and thus provide no differential incentive for local generator owners/operators to schedule their outage around grid needs. Thus, notwithstanding this article's larger conclusions, those standby rate tariffs that have been passed by state commissions can often provide no incentive for affected customers to operate their generators in way that would create maximum grid benefit.

3. Readers interested in more statistically rigorous analysis of local generation's impact on the grid are encouraged to review "Electric Power Systems Under Stress: An Evaluation of Centralized Versus Distributed System Architectures," the Ph.D. thesis of Hisham Zerriffi (Carnegie Mellon University, Engineering and Public Policy Department, 2004).

4. Sean Casten, *Are Standby Rates Ever Justified? The Case Against Electric Utility Standby Charges as a Response to On-Site Generation*, "ELEC. J.", May 2003.

5. Thomas Casten and Sean Casten, *Transforming Electricity*, NORTHEAST MIDWEST ECON. REV., Nov./Dec. 2001, at 3–7.

6. Sean Casten, *Five Aces and a Winking Dealer*, STRAT. PLANNING FOR ENERGY AND ENV'T., 23:2, Fall 2003, at 61–80.

7. Indeed, this is precisely the logic that led the restructured states to allow "stranded cost" recovery for utility assets that were not expected to be competitive once exposed to market forces.

8. Although the cases cited herein are federal cases, the utility regulatory rate setting theories, including the concepts of "just and reasonable," "prudent costs," "undue

discrimination," and others are universally accepted and can be found in state statutes and/or state case law.

9. 320 U.S. 591 (1944).

10. 324 U.S. 548 (1945).

11. 575 F.2d 1204 (7th Cir. 1978).

12. 169 U.S. 466 (1898).

13. *Id.*, at 549.

14. 262 U.S. 276 (1923).

15. 262 U.S., at 310.

16. 320 U.S., at 602.

17. 315 U.S. 575 (1942).

18. 320 U.S., at 602.

19. *Id.*, at 602.

20. *Id.*, at 605.

21. This would not be the last time that the Court rebuffed utility assertions that their shareholder interests were consistent with those of their customers. In the *Public Service Company of Indiana* case discussed later in this document, the Court comes close to ridiculing this assertion when they write that "It is somewhat incongruous for [the utility] to argue as to the best interests of [its customer]. It nonetheless has helped to make a persuasive showing that that [customer] might be injured by the rate disparity... While our decision potentially lowering the rates charged to [the customer] is not what [the utility] has requested, it should at least assuage its concerns about [their customer]." (575 F.2d 1204 (7th Cir. 1978)).

22. 324 U.S., at 567.

23. *Id.*, at 564.

24. Benjamin K. Sovacool and Marilyn Brown, Eds., *ENERGY AND AMERICAN SOCIETY: THIRTEEN MYTHS*. (Springer, 2007).

25. Kahn, Alfred E., *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*, AEI-Brookings Joint Center for Regulatory Studies, Washington, 2004, available at <http://www.aei-brookings.org/publications/abstract.php?pid=400>.

26. 575 F.2d 1204 (7th Cir. 1978).

27. The FPC was renamed the Federal Energy Regulatory Commission in the interval between the initial dispute and the decision in 1978.

28. 377 F. 2d 912, 915 (4th Cir. 1967).

29. 575 F.2d, at 1208.

30. Ironically, the FPC suggested that this analysis was Frankfort's responsibility.

31. 575 F.2d, at 1210.

32. *Id.*, at 1211.

33. *Id.*

34. MA DTE 03-121.

35. Ironically, in the case of the 1999 informal analysis the conclusion was that Mass Electric could not justify the imposition of standby charges because of the similarly situated test, but in the NSTAR case, the Commission approved a rate by settlement rather than make a decision on the facts of the case. While this speaks volumes about the politics of rate cases – and utilities' ability to steer outcomes accordingly – the case record is still worth the time to review for the way it thoroughly

dismantles all arguments in favor of the standby rate. Sean Casten was an intervenor and active participant in the DTE 03-121 proceeding.

36. It is axiomatic that all interests of utility shareholders will be represented in a standby rate case, but all interests of affected non-utility businesses and consumers will not be. Thus, a simple tabulating of the votes in a settlement is always prone to be overly biased in favor of utility shareholder interests.

37. This is what occurred in the Massachusetts case, where the affected industrials and large DG manufacturers who represented the majority of the affected kWh – but the minority of the intervening parties – were not party to the settlement. There are noteworthy state-specific efforts to address this particular failing, such as in Illinois, where settlements must be joined by all intervening parties in order to be accepted. However, even this approach does not address the inequities faced by parties who were unable or unwilling to intervene in the case.

38. 549 U.S. (2007).



New coal facilities will be drastically more expensive – and even more so if legislators enact carbon restraints.