Energy Law: Electricity & Resources

This is a submission for the final examination in the Fall 2020 iteration of UNC School of Law’s course entitled Energy Law: Electricity and Resources (LAW 489.001).

# Local Electric Utility v. Power From Poop

**Q**: A new company, Power From Poop (PFP), has developed an electric generator that converts hog waste to electricity. The process can produce enough electricity to power an entire hog farm using only manure stored at the farm. PFP recently entered into a financing agreement with the owner of Happy Hog Farm whereby PFP installs the generator at the farm, owns and maintains the generator, and provides electricity to the farm. In exchange for the electricity, the owner of Happy Hog Farm pays PFP a monthly fee. The fee is based on the estimated savings on Happy Hog’s monthly electricity bill. (In other words, the fee is roughly the amount that Happy Hog would pay to local electric utility if PFP did not install the electric generator.) All electricity produced by PFP is consumed at the farm (meaning electricity generated by PFP does not enter the local electric utility’s grid). According to the agreement, PFP retains ownership of the equipment used to generate the electricity.

The local electric utility sues, claiming that PFP is operating as a “public utility” in violation of state law. The relevant law defines a “public utility” as any entity that sells electricity “to the public.” The law allows property owners to generate their own electricity on-site, but the law does not specify whether this exemption applies when the property owner does not also own the electric generator. If the court finds that PFP is a public utility, state law would prohibit PFP from selling electricity to Happy Hog Farm because the farm is located within the exclusive service territory of the local electric utility. PFP argues that its actions do not fall within the definition of a “public utility.”

**You are clerking for a judge who will hear the local utility’s lawsuit. Draft a memo for the judge that (a) explains the rationale for exclusive service territories, (b) explains how other courts have addressed similar questions about what qualifies as a public utility, and (c) recommends how she should rule in this case. Explain your reasoning.**

**A**: (word count: ?/2300)

* Eisen et al. (2019)
* Gilstrap (2015)
* (“Tripp V. Frank” 1792)
* (“Munn V. Illinois” 1877)
* Lazar (2016)
* (“Smyth V. Ames” 1898)
* (“Market St. Railway Co. V. Railroad Commission” 1946)
* (“Jersey Cent. Power & Light Co. V. Ferc” 1987)
* Cross (2014)
* (“FPC V. Southern Cal. Edison Co.” 1964)
* Kerr (2019)
* (“Federal Power Act” 1920)
* (“Public Utility Regulatory Policies Act” 1978)
* (“State V. Nc Waste Awareness and Reduction” 2017)
* (“PW Ventures, Inc. V. Nichols” 1988)
* (“Sz Enterprises, Llc V. Iowa Utilities Bd.” 2014)
* (“Proprietors of Charles River Bridge V. Proprietors of Warren Bridge” 1837)

## Rationale for Exclusive Service Territories

Service to public Monopoly power Fixed territory Duty to serve (“Tripp V. Frank” 1792) Technological limits (monopoly does not have absolute protection) (“Proprietors of Charles River Bridge V. Proprietors of Warren Bridge” 1837; “Market St. Railway Co. V. Railroad Commission” 1946) Reasonable prices (“Munn V. Illinois” 1877) Fair return (“Smyth V. Ames” 1898; “Bluefield Co. V. Pub. Serv. Comm.” 1923)

## Decisions in Similar Cases

* (“State V. Nc Waste Awareness and Reduction” 2017)
* (“PW Ventures, Inc. V. Nichols” 1988)
* (“Sz Enterprises, Llc V. Iowa Utilities Bd.” 2014)
* (“Proprietors of Charles River Bridge V. Proprietors of Warren Bridge” 1837)
* (“Market St. Railway Co. V. Railroad Commission” 1946)

## Recommendation

# Natural Gas GenCos v East Carolina

**Q**: The state of East Carolina restructured its electricity sector in 2005. As a result, numerous companies built new natural gas-fired power plants in the state. Other companies own coal-fired power plants. All power plants in the state participate in a competitive, interstate wholesale electricity market managed by a regional transmission organization (RTO). The RTO manages a wholesale electricity market covering 5 states. Low natural gas prices are making it difficult for coal-fired power plants and nuclear power plants to compete in the RTO market. Some coal-fired power plants in East Carolina have already retired because they could not successfully compete with the newer, more efficient natural gas-fired power plants in the region. Other coal-fired power plants have announced that they will retire by 2022 if wholesale electricity prices do not increase.

Legislators in East Carolina fear that losing more coal-fired power plants will jeopardize the electric grid’s reliability. They pass a new law that requires the state government to purchase “State Reliability Credits” from coal-fired power plants located within the state. According to the law, the cost of the State Reliability Credits will fluctuate depending on the RTO’s wholesale electricity prices. If wholesale prices are high, the state will pay less for the State Reliability Credits. If wholesale prices are low, the state will pay more for the State Reliability Credits. The additional revenue from these credits will allow the state’s remaining coal-fired power plants to remain in operation.

A coalition of companies operating natural gas-fired power plants opposes the new state law and challenges the law in court. **In your opinion, is a court likely to uphold the state law? Why or why not? Are there alternate strategies that state officials could implement to support coal-fired power plants within the state? If so, describe the other strategies and identify any legal vulnerabilities.**

**A**: (word count: ?/2300)

* (“Hughes V. Talen Energy Marketing, LLC” 2016)
* (“Coalition for Competitive Electricity V. Zibelman” 2018)
* (“FERC Order 636” 1992)
* (“FERC Order 2000” 2000)
* (“Ferc V. Electric Power Supply Ass’n” 2016)
* (“FPC V. Southern Cal. Edison Co.” 1964)
* (“Pub. Util. Comm. V. Attleboro Co.” 1927)
* Spitzer et al. (2010)
* (“FERC Order 719” 2008)
* (“FERC Order 888” 1998)
* EPA (n.d.)

## Will the Law Stand?

Pike test interfering with wholesale transactions

## Alternate Strategies

Pay for power Coal energy credits (akin to ZECs) Securitization

# TarHeel Energy Rate Case

**Q**: TarHeel Energy is a monopoly electric utility operating in a state with a traditional regulatory structure. According to the utility’s analysis, electricity demand in the area is expected to grow significantly over the next decade. A local nonprofit organization has commissioned its own analysis that concludes electricity demand will not increase for the foreseeable future. TarHeel Energy is able to meet current electricity demand, but will need additional generation if electricity demand increases.

TarHeel Energy has announced plans to build a new type of nuclear power plant to meet the projected increase in electricity demand. According to the utility, this new type of nuclear power plant is safer, produces less waste, and is cheaper to operate than a conventional nuclear power plant. The estimated construction cost is $5 billion. If TarHeel Energy completes this project, it would be the first power plant of its kind.

State law allows the Public Utilities Commission (PUC) to increase electricity rates prior to the completion of a new nuclear power plant to help cover planning and construction costs (referred to as Construction Work in Progress, or CWIP). The utility will request a CWIP rate increase that will raise electricity bills approximately $100 per year for the average household. The utility will not move forward with the project unless the PUC approves the CWIP rate increase. The utility also has other options for new electricity generation, including natural gas and various forms of renewable energy.

## 3(a)

**Based on your understanding of current factors affecting electricity sector decision-making, what arguments could the utility make in support of its plans to build a new nuclear power plant?**

## 3(b)

**You are a commissioner on the state’s PUC. Based on the facts presented here, would you approve the CWIP rate increase? Why or why not?**

## 3(c)

Assume your state legislature is debating a bill to enact a Clean Energy Standard that would require 100% carbon-free electricity generation by 2040. The state’s current generation mix is approximately 50% carbon-free (a combination of renewable energy and existing nuclear power plants). **You are still a commissioner on the state’s PUC. Would this new law influence your decision about the CWIP rate increase? Why or why not?**

## 3(d)

Now assume the PUC did approve the CWIP rate increase. The utility started construction, but a change in market conditions prevented the utility from completing the project. The utility spent $2 billion before deciding to cancel the project. Prior to announcing the cancellation, the utility recovered $500 million through the CWIP rate increase. The PUC must determine whether the utility may recover the remaining costs through electricity rates, or whether the utility’s shareholders should be responsible for some or all of the costs for the unfinished power plant. **As a PUC commissioner, how would you allocate the planning and construction costs? Explain your decision and identify any legal and economic factors that you would consider.**

**A**: (word count: ?/3000)

* (“FPC V. Hope Natural Gas Co.” 1944)
* (“Jersey Cent. Power & Light Co. V. Ferc” 1987)
* (“Duquesne Light Co. V. Barasch” 1989)
* Cross (2014)
* Kerr (2019)
* Boyd (2014)
* Monast and Hoppock (2014)
* Rossi and Hutton (2013)
* Selden and Makhijani (2007)
* Cory and Swezey (2007)

## Arguments in Favor of Proposed Plan

just and reasonable

## Commission Approval

end results test

## Impact of Proposed Clean Electricity Standard

## Hypothetical Project Cancellation

used and useful viability of utility shareholder vs ratepayer risk / moral hazard

# References[[1]](#footnote-36)

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“Sz Enterprises, Llc V. Iowa Utilities Bd.” 2014.

“Tripp V. Frank.” 1792.

1. All sources are from the course materials including those cases and resources cited by Eisen et al. (2019). [↑](#footnote-ref-36)