ENERGY LAW IN A NUTSHELL

By Joseph P. Tomain & Judge Richard D. Cudahy, West 2011, 2nd Edition

Reviewed by Jonathan P. Trotta*

In a light-hearted moment at his Supreme Court confirmation hearing, Justice Clarence Thomas memorably quipped, in response to a question on the merit of cameras in the court room, that having "had their fill of three or four FERC cases, [viewers] would probably tune out."[1] Happily, the Honorable Richard D. Cudahy and Professor Joseph P. Tomain,[2] co-authors of *Energy Law in a Nutshell*, have remained tuned in and have taken an avid interest in energy law and regulation throughout their distinguished careers. As a former Chairman of the Wisconsin Public Service Commission and as a Seventh Circuit judge for over thirty years,[3] Judge Cudahy is a long-time friend of the Energy Bar and peerless in the judiciary in his interest in energy law and practice, having enthusiastically penned numerous articles and opinions on energy issues which have shaped the industry and its regulation.[4] While on the Seventh Circuit, he has chronicled the evolution of an industry from the days of natural gas deregulation[5] and was a senior member of the panel that decided *Illinois Commerce Commission v. FERC,* the latest judicial word on transmission cost allocation.[6] In 2010 Judge Cudahy received the President's Award from the Energy Bar Association for his lifetime work in the area of energy law. Professor Tomain, a scholar in the field and former Distinguished Visiting Energy Professor at Vermont Law School, has written extensively on the topic of energy law.[7] He teaches energy law and policy and served for seven years as Vice Chair of the American Bar Association's Committee of Energy Industry Restructuring, Finance, Mergers, and Acquisitions.[8]

It is fitting, then, that Judge Cudahy and Professor Tomain share their passion and experience with a rising cohort of legal minds in *Energy Law in a Nutshell*, a précis of all that has come to define energy and regulatory law and policy, and will shape its future. The piece also outlines the authors' own regulatory philosophies and includes a thoughtful reflection on the development of energy law and policy that transcends what one would generally expect of a law school *Nutshell*.

---

* Attorney, Stinson Morrison Hecker LLP, Washington, DC.

1. *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Committee on the Judiciary*, 102nd Cong. 284 (1993), *available at* www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf. Justice Thomas, of course, was well attuned to the niceties of the energy practice as an Associate Justice on the D.C. Circuit Court of Appeals.

2. Joseph P. Tomain is Dean Emeritus and Wilbert & Helen Ziegler Professor of Law at the University of Cincinnati College of Law.

3. Jim Rossi & Thomas G. Hutton, *Judge Cudahy's Energy Vision* 1 (FSU College of Law, Pub. Law Res. Paper No. 551, Aug. 27, 2011) (forthcoming publication in YALE JOURNAL ON REGULATION), *available at* http://ssrn.com/abstract=1918052.

4. *Id.*

5. *See, e.g.,* Hartigan v. Panhandle E. Pipeline Co., 852 F.2d 891 (7th Cir. 1988).

6. Illinois Commerce Comm'n v. FERC, 576 F.3d 470 (7th Cir. 2009).

7. *Joseph P. Tomain, Faculty Biography*, UNIVERSITY OF CINCINNATI COLLEGE OF LAW, http://www.law.uc.edu/faculty-staff/faculty/joseph-p-tomain (last visited Oct. 7, 2011).

8. Joseph P. Tomain, Curriculum Vitae at 3, *available at* http://www.law.uc.edu/sites/default/files/tomain.pdf.

As the neophyte and seasoned practitioner alike will agree, much can be said for a concise, comprehensive accounting of the political history and economic precepts of our practice, as well as a practical look at the industry apparatus. In this, *Energy Law in a Nutshell* excels. Judge Cudahy and Professor Tomain have now updated this classic, as of 2011, and while it may not have the most detailed account of late-breaking developments, it carefully chronicles a generation of legal and policy developments. The authors' treatment of the historical, economic, and political theories of energy and regulatory law, and underpinnings of the industry, make *Energy Law in a Nutshell* an unmatched resource.

The 2011 version of *Energy Law in a Nutshell* opens with an updated introduction which reviews recent natural and man-made events that have animated the discussion of energy law and policy of late and have contributed to the increased politicization of the topic. Judge Cudahy and Professor Tomain speculate as to why there has been so little policy direction in the United States, and they bemoan a lack of adequate diversity in the nation's energy portfolio, which continues to rely on fossil fuels for a significant percentage of our energy needs. While Judge Cudahy and Professor Tomain predict little change through Congressional action in the near term (noting that energy policy has generally been resistant to political change),[9] they argue that studies and empirical evidence increasingly support the conclusion that global warming has an anthropogenic element.[10] The authors conclude that U.S. energy policy must transition to a low-carbon future built on "increased energy efficiency and renewable resources" which, in turn, may lead to more competitive energy markets.[11]

Turning to less political matters, Chapter 1 provides a review of economic theory as applied to energy, with an emphasis on supply and demand in the context of scarce natural resources – a perennial tussle underlying much of today's energy goals and policies. The authors are careful to note the limitations of economic analysis in assessing normative value to these policies. *Energy Law in a Nutshell* offers a thoughtful look at the virtues and pitfalls of a market economy and the role of regulation in responding to failures in the marketplace. According to the authors, "the general intent of federal energy regulation was to promote energy production and industrial stability and, occasionally, to smooth out gross social and economic distortions caused by the exercise of market power caused by some energy firms."[12]

In Chapter 2, *Energy Law in a Nutshell* carefully walks through the evolution of energy policy and regulation beginning in the late nineteenth century and proceeding through the New Deal era, the Arab Oil Embargo of 1973 and subsequent presidential administrations. The regulatory experiences of the early 20th century form the basis for what the authors refer to as the "dominant model" for energy policy, the hallmark of which is "support of conventional resources, and recognition that some segments of the energy

9. JOSEPH P. TOMAIN & RICHARD D. CUDAHY, ENERGY LAW IN A NUTSHELL 2 (2d ed. 2011).

10. *Id.* at 3.

11. *Id.* at 4.

12. *Id*. at 70.

industry possess market power requiring regulation."[13] The authors comment that the nation has never had what would be described as a coherent energy policy and observe that neither the Carter nor Reagan administrations much altered the face of the utility industry and its heavy reliance on coal, though each took dramatically different approaches toward government involvement in the development of fuel resources. The Chapter goes on to chronicle the efforts (or lack thereof) of various administrations, including the Obama administration, to develop an energy policy and to promote alternative energy resources. As Judge Cudahy and Professor Tomain note, the majority of these initiatives were destined to fail and have yielded little meaningful change in energy policy.

Chapter 2 traces the concept of the natural monopoly and historical price setting by administrative agencies which, the authors observe, forms a "dominant model" of energy policy – a pattern of energy decision-making under which regulatory objectives are limited to energy production and industry stability.[14] Judge Cudahy and Professor Tomain posit that the federal government historically has resisted transition in the energy marketplace towards newer, cleaner fuel resources, instead supporting use of older resources in an effort to promote industrial stability.[15] They point to the coal industry, in particular, noting that despite an eventual post-Industrial Revolution transition in marketplace from solid to liquid and gaseous fuels in the railroad, commercial, and residential sectors, the federal government continued to support the coal industry through such policies as were implemented during the New Deal in support of minimum coal prices designed to assist labor in the coal industry.[16] Judge Cudahy and Professor Tomain reason that such limited regulatory objectives principally are responsible for the failure of numerous administrations to craft a cohesive, long-term energy policy and have resulted in policymakers favoring archetypical energy firms over smaller alternatives (e.g., wind and solar) based on the belief that larger firms can continue to realize greater energy efficiencies which, in turn, will fuel economic development.[17] The authors predict there to be little change in the nation's fossil fuel-based policies so "long as energy production, consumption, and prices remain stable" and so long as policymakers resist internalizing environmental and societal costs in energy prices.[18]

Chapter 3 reviews the state and federal regulatory web within which the energy industry operates. The chapter opens with a useful review of administrative law generally and the principal features of the Administrative Procedure Act (APA) – most notably the APA rulemaking procedures and requirements. The Chapter provides an overview of the Federal Energy Regulatory Commission (FERC), as well as other energy-related agencies within the federal government. The Chapter follows with a concise summary of public utility regulatory principles and ratemaking. In Chapter 4, the authors review a number of ratemaking concepts, including the general rate formula and cost-

13. *Id.* at 103.
14. *Id*. at 69-70, 74, 82.
15. *Id*. at 71, 74.
16. *Id*. at 80-81.
17. *Id*. at 103-04, 564-65.
18. *Id*.

benefit analysis. Perhaps most useful for today's practitioner is the treatment of contemporary ratemaking issues, including incentive rates, market-based rates, feed-in tariffs, and decoupling.

In the second part of *Energy Law in a Nutshell*, Judge Cudahy and Professor Tomain examine individual energy resources with a careful look at oil (Chapter 5); natural gas (Chapter 6); coal (Chapter 7); electricity (Chapter 8); nuclear (Chapter 9); hydropower (Chapter 10); and "clean energy" (Chapter 11). Each chapter features an overview of relevant industry conditions and the regulatory climates within which these respective industries operate. This portion of the book presents a helpful primer for anyone in need of a thoughtful introduction to these sectors.

Of particular interest is Chapter 8, which offers a thorough look at the history of the electricity industry from the days of Edison and Samuel Insull, the architect of the Edison empire. The Chapter accounts for the evolution of the industry from an era of competition and expanding economies of scale, through consolidation vis-à-vis public utility holding companies and ensuing corporate abuses. Judge Cudahy and Professor Tomain reflect with some detail on the regulatory model that came to be and more recent FERC initiatives designed to promote development of independent generation and open, non-discriminatory transmission access. The Chapter reviews the FERC's unbundling initiatives under Order Nos. 888, *et al.,* its promotion of competition in electric generation, and support for the regional transmission organization (RTO) model. The volume stops short of covering later FERC initiatives, such as Order Nos. 890 and 1000, addressing transmission planning and cost allocation for the development of new regional transmission facilities. Some limited attention is devoted to section 215 of the Federal Power Act, establishing the framework for the regulation of electric reliability. Chapter 8 concludes with a useful overview of developments in the implementation of Smart Grid technologies.

In concluding Chapter 11, Judge Cudahy and Professor Tomain review clean energy sources, energy conservation methods and various state and federal policies aimed at strengthening the role of these resources in the nation's energy mix. The authors review such state efforts as renewable portfolio standards and feed-in tariffs and close with a look at the history of alternative energy policies from the late 1960s through more recent efforts. In this context, the authors summarize some of the thinking now being advanced by think tanks and non-governmental organizations calling for a move towards a clean energy economy and a policy which "promotes a *diversity* of energy resources, in *efficient* and effective ways, while acting *environmentally* responsible and fostering national and international security."[19] To be sure, these are laudable goals though, as the authors observe, it remains to be seen if Washington can successfully muster the political will necessary to implement these objectives.

Energy Law in a Nutshell is a resource keyed to a wide audience and will appeal equally to today's energy lawyer and tomorrow's. It serves its audience and the Energy Bar well in meeting its objective as a convenient primer of all that has come to shape our practice.

---

19. *Id*. at 559 (emphasis in original).