11-2265

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES SIMON, on behalf of himself and all others similarly situated,
Plaintiff - Appellant,

v.

KEYSPAN CORPORATION and
MORGAN STANLEY CAPITAL GROUP, INC.,
Defendants - Appellees.

On Appeal from the United States District Court
for the Southern District of New York in No. 10 Civ. 5437 (SAS)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT'S DECISION

Christopher L. Sagers
CLEVELAND-MARSHALL
COLLEGE OF LAW
CLEVELAND STATE UNIVERSITY
1801 Euclid Ave., LB 138
Cleveland, OH 44115
(216) 687-2319

Richard M. Brunell
AMERICAN ANTITRUST
INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
(617) 435-6464

J. Douglas Richards
Benjamin D. Brown
Counsel of Record
COHEN MILSTEIN
88 Pine Street
14th Floor
New York, NY
10005
(212) 838-7797

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*

All parties consent to the filing of this brief. The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 120 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

The Board of Directors[1] is particularly concerned that the order below expands the filed rate doctrine to bar antitrust damage remedies to markets subject to "market based rates," i.e., markets in which rates are set by competition and not filed with regulators. Such a result is not only unwise because it leaves a significant gap in antitrust enforcement that regulation does not fill, but is completely unmoored from the doctrine's original purposes, congressional intent, and recent Supreme Court precedent concerning market based rates. Moreover, the logic of the court's decision would not only bar private damages suits, but would

[1] The AAI's Board of Directors alone has approved the filing of this brief. The individual views of members of the Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than the AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief.

completely immunize conduct involving market based rates from antitrust liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's application of the filed rate doctrine was wrong.[2] The court applied the doctrine to "market based rates" ("MBRs"), in which sellers offer the prices the market will bear, and in which no actual rates are set by, filed with, or reviewed by government. The relevant tariff, a four-page, bare-bones document provided only that:

> All sales shall be made at rates established by agreement between the purchaser and KeySpan-Ravenswood. . . . All other terms and conditions shall be established by agreement between the purchaser and KeySpan-Ravenswood.

KeySpan-Ravenswood LLC, FERC Electric Tariff, Original Vol. 1, ¶¶ 3-4. Add1.

Filed rate treatment of MBRs under the Federal Power Act ("FPA") is an issue of first impression in this Circuit. To whatever extent authority from other Circuits supports the result below, this Court should break with it. We assert three principal grounds.

First, Supreme Court authority purportedly establishing FERC's "exclusive" jurisdiction actually merely allocates power between FERC and state regulators. Neither the terms of the FPA nor Supreme Court authority precludes antitrust damages claims under Section 4 of the Clayton Act where FERC has jurisdiction

[2] AAI also disagrees with the lower court's holding that plaintiffs lack standing under *Illinois Brick*, but does not address that issue here.

over wholesale rates. Moreover, if private antitrust claims were barred because of FERC's "exclusive" jurisdiction, the same logic would also bar government antitrust claims. Such a result would conflict with the Supreme Court's application of antitrust to electricity markets and with KeySpan's stipulation that the Justice Department's challenge to this same conduct states a Sherman Act claim.

Second, the filed rate ruling conflicts with *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213 (1966), and with the interpretation of it in *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), *aff'd* 476 U.S. 409 (1986). It also ignores the Court's general approach to the filed rate doctrine, which requires meaningful agency control over rates that are actually filed. When rates are set by market forces, rather than by a regulatory agency, the main rationale for the doctrine evaporates.

Third, the Supreme Court's recent application of the so-called *Mobile-Sierra* rule to MBRs militates against applying the filed rate doctrine. Insofar as filed-rate treatment depends on an agency's meaningful control over rates, it makes little sense to apply the doctrine to preclude an antitrust challenge involving "rates" that FERC has a limited ability to correct under *Mobile-Sierra*. This development further undermines the case law on which the district court's order rested, which predated the Supreme Court's *Mobile-Sierra* rulings, and which was premised on the availability of FERC's remedial powers.

Finally, the fact that KeySpan's offer prices were limited by a FERC-approved price cap and that FERC investigated KeySpan's conduct do not warrant the application of the filed rate doctrine.

If the ruling stands, ratepayers will be denied any remedy whatsoever, despite the Justice Department's having found a significant antitrust violation (and having secured a partial remedy that cannot benefit them). The result is unfair, undermines antitrust enforcement, and for these and other reasons it is not a result that Congress likely intended.

ARGUMENT

I. ALL ANTITRUST LIMITATIONS ARE DISFAVORED, AND THE FILED RATE DOCTRINE SHOULD BE NARROWLY CONSTRUED

A. All Limits on the Scope of Antitrust Are Disfavored

Defendants of every variety have argued, since the beginning of federal antitrust, that their special circumstances require relief from the rules that govern everyone else. The Supreme Court has ordinarily disagreed. "Language more comprehensive" than that in the antitrust statutes, the Court has said, "is difficult to conceive," *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), and accordingly the Court is convinced of Congress's desire "to strike as broadly as it could . . . ." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). Nearly one century of the Court's precedent has established that " '[r]epeals of [antitrust] by implication . . . are strongly disfavored' " because "antitrust . . . [is] a

fundamental national economic policy . . . ." *Carnation*, 383 U.S. at 217-18 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350-51 (1963)).

And so it is not surprising that if there is consensus in antitrust about any one issue, it is that exemptions, immunities, and other limitations on its scope are rarely justified. Each of the many official, blue-ribbon study panels set up during the past several decades, by Republican and Democratic Presidents and by Congress, has called for their repeal or restriction.[3] The enforcement agencies have agreed, whether under control of either party,[4] and the leading professional

[3] Antitrust Modernization Comm'n, *Report and Recommendations* 338 (2007) ("When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible . . . [and] should apply wherever regulation relies on the presence of competition . . . to achieve competitive goals."); 1 Nat'l Comm'n for the Review of Antitrust Law and Procedures, *Report to the President and the Attorney General 177-316 (1979); Report of the Task Force on Productivity and Competition*, *reprinted at* 115 Cong. Rec. 15933, 15934, 15937 (June 16, 1969); *Report of the White House Task Force on Antitrust Policy*, *reprinted at* 115 Cong. Rec. 13890, 13897 (May 27, 1969) (decrying the "bias" in "the regulated sector of the economy . . . against competition," and calling for "study of . . . the extent to which . . . the competitive standards of the antitrust laws can be substituted for at least some aspects of regulation"); Attorney General's Comm. to Study the Antitrust Laws, *Report* 269 (1955).

[4] *Compare* Christine A. Varney, Asst. Atty. Gen., *Antitrust Immunities*, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference (June 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/262745.htm, *with* Charles A. James, Asst. Atty. Gen., *Statement Before the Committee on the Judiciary of the U.S. House of Representatives Concerning H.R. 1253, The Free Market Antitrust Immunity Reform Act of 2001* (June 5, 2002), *available at* http://www.justice.gov/atr/public/testimony/11244.htm.

organizations do so as well, *see, e.g.*, Section of Antitrust Law, Am. Bar Ass'n, *Federal Statutory Exemptions From Antitrust Law* 291-315 (2007). The courts also agree. Even when Congress provides explicit exemptions, the courts disfavor them and read them narrowly. *See, e.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). *A fortiori*, judicially created limits inferred from inexplicit language, like the filed rate doctrine, should also be narrowly construed.

B. The Filed Rate Rule is Especially Disfavored

The filed rate doctrine is among the most criticized of these limitations, and "a doctrine [so] indefensible . . . should be narrowly construed." Herbert Hovenkamp, *Federal Antitrust Policy* § 19.6, at 782 (4th ed. 2011). Judge Friendly of this Court trenchantly critiqued it, effectively calling on the Supreme Court to discard it, *see Square D.*, 760 F.2d at 1352-55, as did President Reagan's Justice Department, *see* Br. for the United States as Amicus Curiae Supporting Petitioners, *Square D*, 476 U.S. 409 (No. 85-21), 1985 WL 670055. The Supreme Court declined, in deference to precedent, but recognized its deep flaws. *Square D*, 476 U.S. at 417-24 (calling Judge Friendly's critique "thoughtful and incisive," acknowledging that doctrine might be "unwise as a matter of policy," and that subsequent "developments [might] cast [the original *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156 (1922)] . . . in a different light"). Accordingly, because the Supreme Court's continued "endorsement of [the doctrine] was only lukewarm," the courts

should not "extend" it. *Cost Mgt. Servs., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937, 945 (9th Cir. 1996).

Since then, Judge Boudin, formerly Deputy Assistant Attorney General for antitrust, found "the law on the filed rate doctrine [to be] extremely creaky." *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000) (Boudin, J.). Other courts agree. *See Cnty of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 862 (9th Cir. 1997) (doctrine has been "the target of criticism since its inception"); *Capital Freight Serv., Inc. v. Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1195 (S.D.N.Y. 1988) (Leval, J.) (*Square D* "represent[ed] simply an unwillingness to deliver a coupe de grace to a weak and forcefully criticized doctrine because that function might be more appropriately carried out by Congress.").

Leading commentators agree as well. *See*, *e.g.*, Hovenkamp, *supra*, at 781 ("None of the[] arguments [in *Keogh*] had much to be said for them at the time they were originally made, and they are even less sensible today"); Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591 (2003) (calling for abolition). The doctrine's main vice is to create a special form of antitrust immunity that neither meets the demanding standards of implied immunity nor inquires whether damages actions would actually conflict with the regulatory statute.

The doctrine is least defensible under deregulation. "In deregulated markets," it has been observed, "compliance with [generally applicable] law is the norm rather than the exception." *Ting v. AT&T*, 319 F.3d 1126, 1143 (9th Cir. 2003). *See also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 341 ("The natural result of deregulation is an increased role for the antitrust laws."); Rossi, *supra* at 1596 (under deregulation, doctrine "can result in a type of radical deregulation of markets absent common law and antitrust protections").

II. THE FILED RATE DOCTRINE DOES NOT APPLY TO MARKET BASED RATES UNDER THE FEDERAL POWER ACT

A. FERC Does Not Have Jurisdiction "Exclusive" of the Antitrust Laws

The court below took the position that the FPA gives FERC "exclusive authority over wholesale rates (or any contract affecting such rates)." May 27 Order at 15. A-188. The court's primary authority is a statute, FPA § 201(b)(1), 16 U.S.C. § 824(b)(1), that emphatically does not so state. Section 201 literally says nothing about preempting any other law or the jurisdiction of any court or agency. It merely gives FERC "jurisdiction" over facilities for transmission or sale of electricity at wholesale in interstate commerce. It is just an allocation of power between FERC and state regulators.

Likewise, while the Supreme Court has sometimes observed that FERC has

exclusive jurisdiction over rates charged to wholesale customers, nearly every such case involved regulatory conflicts between FERC and state energy regulators. *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm'n,* 539 U.S. 39 (2003); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-77 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956, 963-64 (1986); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982); *FPC v. So. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964).

The Court's references to FERC's "exclusive jurisdiction" cannot mean "exclusive of the antitrust laws," because the FPA would then preclude even Justice Department enforcement. *Keogh*, as interpreted by *Square D*, held otherwise, *see* 476 U.S. at 422, and KeySpan itself has stipulated that the Justice Department's challenge to the conduct here stated a claim for relief.

In short the application of the filed rate doctrine here is not justified by language in the FPA or case law stating that FERC has "exclusive jurisdiction."

B. Deregulated Rates Are Inconsistent With Protection From Antitrust Law

For nearly twenty-five years FERC has managed an agency-initiated program of price deregulation. The program began in a series of ad hoc grants of MBR authority to individual power generators as early as 1988, *see, e.g., Ocean State Power*, 44 FERC ¶ 61,261 (1988), and ripened into a restructuring of the entire sector in the seminal Order 888, which facilitated competitive wholesale

generation markets, 61 Fed. Reg. 21,540 (May 10, 1996) ("Order 888"). Prior to the late 1990s, and except for those few generators with ad hoc MBR authority, all wholesale electricity rates were filed with FERC 60 days before effectiveness, with elaborate documentation, *see* 18 C.F.R. Part 35, Subparts A-C, and subject to a rule of non-discrimination, *see* FPA § 205(b), 16 U.S.C. § 824d(b).[5]

Where MBRs are permitted, an electricity generator sells at varying prices set in competition with other sellers, either through bilateral agreements negotiated with purchasers or through private market institutions established to facilitate trading. Section of Antitrust Law, Am. Bar Ass'n, *Energy Antitrust Handbook* 28-35 (2d ed. 2009) [hereinafter "*Energy Antitrust*"]. MBR authority is granted on the filing of a generic MBR tariff with FERC, but such a tariff does not itself fix any prices.

No price charged by an MBR seller is filed with or reviewed by FERC prior to effectiveness. Sellers are required only to summarize their activities in quarterly reports *id.* at § 35.10b, and large ones must show triennially that they do not possess market power, *id.* at § 35.37(a)(1). The vast majority of the millions of transactions now executed by MBR sellers will never be individually reviewed by

[5] Strictly speaking, the MBR program was fully codified only in Order 697, 72 Fed. Reg. 39,904 (June 21, 2007), which distilled established FERC decisional law into what is now 18 C.F.R. §§ 35.36 – 35.42. The year 1996 remains pivotal because, by mandating fully open transmission access, Order 888 made competitive generation through MBRs feasible on a nationwide basis.

FERC unless challenged under the Commission's very limited ex post review authority. *See infra* Part III.B.

While Congress has never specifically authorized FERC's efforts,[6] Congress has been extensively apprised of them, through reports and testimony,[7] and has frequently referenced them in committee reports.[8] Congress has also abetted and supported deregulation in various ways through incremental legislative changes, as in the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-45, and the Energy Policy Act of 1992, 16 U.S.C. §§ 824j-824*l*. *See* Order 888, at 21,547-48 & n.79. FERC, the agency directed to implement those statutes, and therefore entitled to deference in its interpretations, *TAPS*, 225 F.3d at 687, has found them

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[6] FERC has founded its deregulatory efforts on its authority to remedy discrimination, *see* Order 888, at 21,544-49 (invoking FERC's power to remedy discrimination under FPA § 206, 16 U.S.C. § 824e(a)), and on its view that rates set by competition are *ipso facto* "just and reasonable," *see California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247, 62,062 (2002). The lower courts have acquiesced, *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 685-87 (D.C. Cir. 2000) (*TAPS*) (upholding FERC's statutory authority to issue Order 888), though the Supreme Court has never addressed the lawfulness of the market-based tariff system. *Morgan Stanley Capital Gr., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Co., Wash.*, 128 S. Ct. 2733, 2741 (2008).

[7] *See, e.g.*, GAO, *Lessons Learned from Electricity Restructuring* (2002); *Electric Utility Industry Restructuring: Why Shouldn't All Consumers Have a Choice?, Hearings Before the Subcomm. on Energy and Power of the Comm. on Commerce, U.S. House of Representatives*, 105th Cong., 1st Sess. (1997).

[8] *See, e.g.*, Energy and Water Development Appropriations Bill, 2003, H.R. Rep. 107-681, at 104 (2002) (expressing Committee displeasure at slow pace of FERC approvals of pending MBR authority requests).

to demonstrate Congress's intent to encourage the partially deregulated markets that FERC has created. *See* Order 888, at 21,547-48 & n.79.

Thus, Congress has acquiesced in a plan that has completely ended the filing of individual rates, non-discrimination among ratepayers, and meaningful agency review. FERC rate regulation has been so far relaxed that it is no longer reasonable to infer that Congress desires Clayton Act § 4, authorizing private antitrust claims, to be repealed in this context.

C. The Supreme Court's Approach to Filed Rates Requires Meaningful Agency Authority to Review, and Its *Carnation* Decision Directly Conflicts With the Result Below

The Supreme Court has never considered whether the filed rate doctrine bars antitrust damage claims related to traditional regulated rates under the FPA or the parallel Natural Gas Act (NGA), 15 U.S.C. §§ 717-717, let alone to MBRs. Moreover, although it has sometimes applied the doctrine to non-antitrust claims involving FERC regulation, the Court has considered no such question since electricity deregulation began. That is to say, the Court's decisions applying filed rate protection to FERC-regulated conduct are inapt. Each involved non-antitrust claims and regulated firms that were required literally to file tariffs specific to rates charged or services offered, and those tariffs were subject to meaningful FERC

review.[9]

Indeed, in the Supreme Court's rare considerations of *antitrust* in energy markets, it has found antitrust broadly applicable, and in doing so it has stressed FERC's limited powers under the FPA and NGA. For example, in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-76 (1973), "the limited authority of [FERC's predecessor]" was insufficient to exempt an incumbent utility's exclusionary conduct from Sherman Act challenge. Likewise, because the NGA entrusts FERC with "no pervasive regulatory scheme," natural gas mergers remain open to challenge under Clayton Act § 7, even by private plaintiffs. *California v. FPC*, 369 U.S. 482, 485-86 (1963).

Moreover, wherever the Court has applied the filed rate doctrine—in FERC-regulated sectors or otherwise—it has inferred congressional intent to bar private damages actions from certain specific statutory elements. The Court has focused on one or more of the following statutory requirements: that rates be literally filed in some manner, that an agency have significant review power, or that the rate filed be uniformly charged. That was so in the original Interstate Commerce Act cases, *see, e.g., Keogh*, 260 U.S. at 163 (stressing statutory requirements of prior filing

[9] *Entergy*, 539 U.S. at 39, is not to the contrary. Though decided after wholesale electricity deregulation in 1996, *Entergy* involved no MBRs and no claims for private relief. It involved conflict with state regulators, who sought to exclude costs from a utility's retail rates even though the costs had previously been approved by FERC.

and uniform rates); *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439-41 (1907) (same), and it has also been true where the Supreme Court has expanded the doctrine to other regulatory contexts, *see, e.g.*, *AT&T v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 216-17 (1998) (stressing actual filing and uniform rate requirements under Federal Communications Act).

And indeed, it has been true of wholesale electricity. Most opinions discussing FERC MBRs observe that the Supreme Court has applied the filed rate doctrine to non-antitrust claims in FERC-regulated markets. They do not observe the venerable age of most of those opinions, the fact that literally none of them involved an MBR or anything even particularly like an MBR, or that they explicitly rely for their inference of congressional intent on the actual filing of rates, the need for rate uniformity, or the review of rates. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 576-77 (1981) (rejecting state breach of contract claims; stressing actually filed rates, agency review power, and rate uniformity); *Montana-Dakota Utils. Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 252-53 (1951) (rejecting purported federal fraud remedy; stressing that such claim could arise only from an order the Commission had already entered).

Tellingly, where the Supreme Court has *rejected* filed rate protection, it has emphasized the actual degree of regulatory oversight. *Carnation* is a key decision. There the Court held that ocean shipping regulation by the Federal Maritime

Commission ("FMC") did not preclude private antitrust damages. While the price-fixing agreement in question had not been filed with the FMC, the FMC's organic statute at that time required the rates themselves to be filed, 46 U.S.C. § 817(b)(1) (1964); *Carnation*, 383 U.S. at 215 (applying the "Shipping Act of 1916 . . . as [it was] amended" in 1961), and the rates that plaintiff challenged were in fact filed with the FMC, *see Square D*, 760 F.2d at 1361 (noting that the rates in *Carnation* had been filed); *In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235, 1240 (S.D.N.Y. 1980) (same). Those rates were also subject to an elaborate non-discrimination policy, 46 U.S.C. §§ 812-13, 815-16 (1964), and an administrative reparations claim for unreasonableness, *id.* at § 821.

Though *Carnation* did not explicitly identify *Keogh* or the filed rate doctrine by name, the opinion plainly rejected filed rate protection. Defendants argued that it should apply, citing *Keogh*, because the Shipping Act's then-strong policy of non-discrimination would be frustrated if some shippers won money damages and others did not. *See* Br. of Resp't Pac. Westbound Conf. 47, *Carnation*, 383 U.S. 213 (No. 20), 1965 WL 115685; Br. for Resp'ts Far East Conf. 44-45, *Carnation*, 383 U.S. 213 (No. 20), 1965 WL 130094. The Court disagreed, precisely because the agency had not been granted sufficient powers of oversight. *Carnation*, 383 U.S. at 219 n.3 (finding "no reason," having reviewed all terms of the Shipping Act, "to believe that Congress would want to deprive all shippers of their right to

treble damages merely to assure that some shippers do not obtain more generous awards than others.").

Critically, when this Court and the Supreme Court reaffirmed filed rate treatment under the Interstate Commerce Act in *Square D,* both courts found it necessary to distinguish *Carnation*. Both courts recognized that if *Carnation* could not be distinguished from *Keogh*, then *Keogh* had been overruled sub silentio. This Court distinguished *Carnation* on the fact that the FMC had less power to review and pre-approve rates than did the Interstate Commerce Commission. *See* 760 F.2d at 1362-63 & n.11. The Supreme Court agreed. *See* 476 U.S. at 422 n.29 (distinguishing *Keogh* from *Carnation* in part because "the Shipping Act [gave] the [FMC] far more limited authority over rates" than ICA gave ICC).

D. *Mobile-Sierra* Makes Filed Rate Protection Much Less Plausible

The Court's recent application of the *Mobile-Sierra* rule to MBRs, reducing FERC's ex post remedial authority, further undermines filed rate treatment. *See Morgan Stanley*, 128 S. Ct. 2733; *NRG Power Mktg., LLC v. Maine Public Utils. Comm'n,* 130 S. Ct. 693 (2010) (extending *Morgan Stanley* even as against non-parties to the underlying MBR contracts). Under *Mobile-Sierra*, rates set by contract instead of unilateral tariff enjoy a strong presumption of "justness and reasonableness." They can be set aside by FERC only where they threaten some "unequivocal public necessity," a standard described as so nearly "insurmountable

[that] the Commission itself is unaware of any case granting relief under it." *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983). *Mobile-Sierra* thus limits FERC's ex post review, on the view that an arm's length private contract is presumptively "reasonable."

The extension of *Mobile-Sierra* to market based rates is seriously at odds with filed rate protection for those same MBRs. The filed rate rule requires as a premise that there be some non-market, government-directed regulatory intervention into the actual content of the rates. But such intervention is at odds with *Mobile-Sierra*. That doctrine is a fundamentally free-market policy predicated on the "stabilizing force of contracts," *Morgan Stanley*, 128 S. Ct. at 2747, and Congress has directed that where private transactions are not controlled by government, they are subject to the "fundamental national economic policy" of antitrust enforcement, *Carnation*, 383 U.S. at 217-18. In short, the Supreme Court has not surprisingly found market based rates to be on the "free-market" side of the market/regulatory ledger, sharply limiting FERC's jurisdiction to adjust them, which dictates the full application of the antitrust laws, including private actions for damages.

E. This Court's Case Law Does Not Support the Result Below

Like the Supreme Court, this Court has never considered filed rate treatment of an MBR or any other scheme resembling an MBR. Moreover, field rate

protection for market based rates would serve neither of the two "companion principles" this Court considers in filed rate controversies. *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (1998) (citing *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994) (the "non-discrimination strand" "prevent[s] carriers from engaging in price discrimination," and the "non-justiciability strand" "preserv[es] the exclusive role of federal agencies in approving rates").

No one could seriously claim that non-discrimination plays any role in FERC MBR markets. In New York, generators are free to sell energy and capacity in dozens of auctions held each year, and to offer contracts for energy and capacity of varying durations. More importantly, they are free to enter bilateral contracts outside any organized auction. Thus, at any given time a retailer like ConEd might secure the capacity it requires more or less cheaply than its competitors.

Nor would private damages actions violate the non-justiciability strand. As noted above, the FPA does not explicitly give FERC preclusive authority over conduct relating to wholesale rates, and the only Supreme Court authority to apply filed rate protection against private (non-antitrust) claims long predates the beginning of deregulation. Under current circumstances, rates are neither filed with, approved, or even reviewed by FERC, except on complaint or the agency's motion. And such ex post authority that FERC retains is exceedingly limited. Allowing a private damages action based on an antitrust violation that resulted in

supracompetitive pricing would no more interfere with FERC's authority over market based rates than a government action challenging the same conduct, which is plainly permissible.

F. The Other-Circuit Authority Relied Upon Below, Driven by Two Opinions of the Ninth Circuit, Should Be Rejected

The court below cited opinions of the First, Third, Fifth and Ninth Circuits for its view that FERC MBR markets trigger filed rate protection. May 27 Order, at 6 & n.21. A-179. By far the dominant influence among them, and indeed in all filed-rate consideration of MBRs, is a series of Ninth Circuit opinions arising from the California electricity crisis. That court's opinions, and especially *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756 (9th Cir. 2004), and *Public Utility District No. 1 of Grays Harbor County v. IDACORP, Inc.*, 379 F.3d 641 (9th Cir. 2004), almost solely drove the opinion below. This is because the First Circuit opinion relied upon was actually inapt, while the Third and Fifth Circuit opinions contain essentially no analysis of the MBR distinction. To the extent that they cite relevant authority, they cite *Snohomish*.

Though the point requires careful reading, the First Circuit opinion in *Town of Norwood* did not involve any market-based or unfiled rates. The opinion contains one sentence quoted by the court below and by some of the authorities it relied on as an application of filed rate protection to FERC MBRs. *See* 202 F.3d at

419 ("FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review").

However, the only rates subject to antitrust challenge were fixed, uniformly charged liquidated damages provisions for early termination of supply contracts, filed with and approved by FERC as a part of the deregulation of New England markets. *See id.* at 413-14. The court explained this in the paragraph following the quoted language: "[W]hether or not [cost-of-service] . . . data were submitted," as would have been required under traditional rate regulation, "the relevant rates and termination charge were individually filed with FERC and are subject to ongoing FERC regulation." *Id* at 419.

The court below also cited one opinion each from the Third and Fifth Circuits. Both consist of rote application of authorities that involved nothing resembling MBRs, the only exception being the Fifth Circuit's citation to *Snohomish*. *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303 (3d Cir. 2004), did not even reflect upon the MBR distinction, or that every authority relied upon involved rates actually filed and subject to agency review. The court observed that filed rate treatment applies wherever rates are "in conformity with [apparently any] . . . FERC . . . approved market model . . . ." *Id.* at 306. For that the court cited only *Arkansas Louisiana* and *Montana-Dakota*, both of which involved actually filed rates and agency review. The court in *Texas Commercial*

Energy v. TXU Energy, Inc., 413 F.3d 503 (5th Cir. 2005), observed that the case involved MBRs, but found that fact irrelevant with essentially no analysis except for citation to *Town of Norwood*, a case that involved no MBRs, and to *Snohomish*. *Id.* at 509-10.

Only the Ninth Circuit cases remain, and they are seriously flawed. *Grays Harbor*, the first of the private claims to reach the appellate level, rejected state law equitable claims for contract rescission. The court held it could apply filed rate protection in two paragraphs, observing that FERC initially approves generic MBR tariffs, subject to market power findings, and retains ex post review authority. 379 F.3d at 651. *Snohomish* likewise rejected state antitrust and consumer protection claims on identical reasoning and with citation to *Grays Harbor*. 384 F.3d at 760-61. Both courts' analyses were short, though admittedly they were in turn driven by two opinions that examined FERC MBRs in some detail, *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), and *Duke Energy Trading & Marketing, LLC v. Davis*, 267 F.3d 1042 (9th Cir. 2001), and by an earlier FERC filed rate case, *Transmission Agency of Northern California v. Sierra Pacific Power Co.*, 295 F.3d 918 (9th Cir. 2002) ("*TANC*"). The court's other decisions on point mostly just extend these basic decisions to new claims and factual scenarios urged by plaintiffs. *See, e.g., Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225-27 (9th Cir. 2007).

This Court should reject the Ninth Circuit cases. First, they are inconsistent with the Supreme Court authority discussed above. Second, they were all decided before the Supreme Court's *Mobile-Sierra* rulings, and they were strongly premised on the availability of remedial power before FERC.[10] Indeed, *Morgan Stanley* effectively reversed a Ninth Circuit opinion ordering FERC to engage in that very ex post review of abusive MBRs that the Ninth Circuit's whole filed rate case law presumes. *Pub. Util. Dist. No. 1. of Snohomish Cnty., Wash. v. FERC,* 471 F.3d 1053, (9th Cir. 2006), *aff'd on alt. grounds, Morgan Stanley,* 128 S. Ct. at 2745-47. Accordingly, a basic premise of the Ninth Circuit cases has been undermined.

Finally, the Ninth Circuit's cases contain a significant internal conflict. In two separate series of cases not involving FERC MBRs, that court has reached results that cannot be reconciled with its FERC cases. First, the Ninth Circuit has held filed rate protection cannot apply unless some agency engages in "meaningful review" of the rates being charged. The mere presence of some theoretical review power, like FERC's prospective refund power for unreasonable rates under FPA §

[10] *Dynegy*, *TANC*, and *Duke Energy*—the cases on which the Ninth Circuit's response to the electricity crisis litigation was largely founded, and which are extensively relied on in the subsequent case law—emphasized the availability of FERC remedies. *See Dynegy*, 375 F.3d at 852 (stressing FERC's power to grant relief plaintiffs sought); *TANC*, 295 F.3d at 929 (same); *Duke Energy*, 267 F.3d at 1056-57 (noting that relief similar to that at issue had already been unsuccessfully sought before FERC).

206, is not enough. Thus, where

> rates [a]re the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the [agency], then the fact that they were filed does not render them immune from challenge.

Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992). Accordingly, even where rates have in fact been filed, "[t]he mere fact of failure to disapprove . . . does not legitimize otherwise anticompetitive conduct." *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337-38 (9th Cir. 1990).

Second, the court has required actual filing of rates. *See Ting*, 319 F.3d at 1139, 1142 (congressionally authorized "detariffing," requiring carriers to contract directly with consumers, defeats filed rate protection; "[t]he preemptive effect of the filed rate doctrine, as its name plainly implies, rest[s] entirely on the filing requirement."); *Cost Mgmt. Servs.*, 99 F.3d at 945 n.9 (observing that "*Keogh* only precludes claims based specifically on rates approved by the relevant regulatory agency," and holding that claims not based on tariffs actually filed were unaffected by filed rate rule). Bare-bones MBR tariffs stating only that all rates, terms and conditions will be set by the market can hardly be considered the type of filing to which the filed rate doctrine was directed.

III. THE "BID CAP" AND FERC'S REVIEW POWER DO NOT JUSTIFY FILED RATE PROTECTION

A. The "Bid Cap" Did Not Fix KeySpan's Rates

The district court suggested that the bid cap supported its filed rate determination. *See* March 22 Order at 7, 38. It does not. The cap is simply a price ceiling meant to constrain abuses by a party with market power; when such power is absent, market forces determine the actual prices. To that extent it is like a law against usury, which is hardly the sort of regulation that would preclude antitrust damages actions in lending markets.

The court appeared to believe the cap was more than just a ceiling, and that, given KeySpan's incentives, it was more like a price actually set by FERC.[11] However, it would improper to draw such an inference from the record in this case, especially on a motion to dismiss. The plaintiffs, like the Justice Department, alleged that prices would have been below the cap absent defendant's anticompetitive agreement. A-17.

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[11] *See* March 22 Order at 7 ("At the time FERC approved these rates, it expressly stated that it expected KeySpan to 'bid the price cap and set the market clearing price at that level even as new generation is added and supply increases.") A-134; May 27 Order at 7 ("the prices charged by KeySpan were consistent with FERC's expections"). A-180. Notably, in the FERC order speculating that KeySpan would "bid the price cap," FERC warned that none of its judgments in that order were based on independent investigation. They were based entirely on representations in the filing made by one private party. 84 FERC ¶ 61,287, at ¶ 61,287, n.20 (1998).

B. FERC's Remedial Power Is Severely Limited

FERC has two sources of authority that could address the misconduct in this case, and they do not satisfy the requirement of agency review power in the Supreme Court's filed rate case law. First, pursuant to § 1283 of the Energy Policy Act of 2005 ("EPAct 2005"), 16 U.S.C. § 824v(a), FERC adopted a "market manipulation" rule for MBR markets, now codified at 18 C.F.R. § 1c.2. But the rule reaches only "deceptive" conduct, and duplicates nearly verbatim the securities fraud rule of SEC Rule 10b-5. The rule contains the same fraudulent scienter requirement as Rule 10b-5, and FERC has been at pains to stress that violation requires actual fraud. Order 670, 71 Fed. Reg. 4244, 4251-54 (2006). FERC has elsewhere stressed that neither Rule 1c.2 nor its other conduct rules can reach non-fraudulent anticompetitive abuses. When FERC rescinded Rules 2 and 6 of its former "Market Behavior Rules,"[12] it emphatically rejected suggestions that any of those rules had ever reached non-fraudulent collusion or monopolization, and reiterated that its new Rule 1c.2 would not do that, either. 114 FERC ¶ 61,165, 61,532 (2006). In fact, throughout its long consideration of its market conduct

[12] In 2001, to address the California crisis, FERC initiated a proceeding for the adoption conduct rules for MBR markets, 97 FERC ¶ 61,220 (2001), and ultimately incorporated six "market behavior" rules into all MBR tariffs, 105 FERC ¶ 61,218 (2003). In February of 2006, after Congress directed the adoption of what would become FERC Rule 1c.2, FERC rescinded all but the most ministerial of these original "market behavior" rules. 114 FERC ¶ 61,165 (2006). What remains of them is now codified as 18 C.F.R. § 35.41.

rules, FERC repeatedly considered but rejected the adoption of antitrust-like competition rules. When it first began the deregulation of wholesale electricity, FERC proposed "a broad prohibition against 'anticompetitive behavior' and the 'exercise of market power,'" but dropped any such requirement following industry criticism. 105 FERC ¶ 61,218, 62,142 n.4 (discarding proposal FERC first made in 97 FERC ¶ 61,220 (2001)).[13]

Second, FERC can grant some refund relief under FPA §§ 206 and 309, 16 U.S.C. §§ 824e and 835h, where it finds rates to be have been illegal. However, FERC has no power to order retroactive refunds for rates that are merely unjust or unreasonable. It generally can do so only for violation of a tariff term, *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969-70 (D.C. Cir. 2003), and plaintiffs alleged no tariff violation. Moreover, as noted above, the prospective power to correct rates was significantly limited by the Supreme Court's recent application of the *Mobile-Sierra* rule to FERC MBRs.

Finally, as a practical consequence of FERC's procedural regulations and enforcement approach, ratepayers and other affected parties ordinarily have no

[13] Notwithstanding its sometimes limited view of its own authority, AAI believes that FERC is obligated to consider the anticompetitive effects of conduct under its jurisdiction. *See, e.g., Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747, 760 (1973) ("Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.").

opportunity to participate in FERC's remedial work. When FERC does bring an enforcement matter, it proceeds confidentially and often through "non-public investigation," 18 C.F.R. § 1b.4, typically announcing an investigation only at the same time that it announces a settlement of the matter. Non-party interventions generally are not permitted and its settlements are non-reviewable. *See, e.g., In re Edison Mission,* 125 FERC ¶ 61,020 (2008) (denying intervention to dozens of state governments, consumer interest groups, and ratepayers, following announcement of confidential settlement, which was itself non-reviewable), *app. dismissed, Am. Pub. Power Ass'n v. FERC,* No. 09-1051, slip op. (D.C. Cir. June 8, 2009) (unpublished). Add5.

C. FERC's Subsequent "Review" Actions Here Are Very Poor Support for Filed Rate Protection

The court pointed to FERC's review of the conduct and market at issue, *see* March 22 Order at 10-13, but this review does not support filed rate protection. FERC's 2008 order, 122 FERC ¶ 61,211, at ¶¶ 143-49 (2008) ("2008 FERC Order") emphatically did not find defendants' conduct lawful or wholesome. FERC (1) found that there was no violation of a *tariff*, and the agency so inquired only because tariff violation is a legal prerequisite for retroactive relief; and (2) it found that regardless how illegal, abusive, or anticompetitive defendants' conduct may have been, retroactive relief would cause FERC administrative difficulties and therefore that FERC could in its discretion deny such relief. *Id.* at ¶¶ 144-45.

In that same 2008 proceeding, FERC directed its enforcement staff to inquire whether KeySpan's conduct violated FERC's then-new market manipulation rule, Rule 1c.2. Staff recommended against enforcement. *See* Office of Enforcement, FERC, *Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market* (Feb. 28, 2008). That report is all but irrelevant because the only question for Staff was whether there had been a violation of Rule 1c.2, a rule which, as noted above, requires a showing of fraudulent scienter. The report repeatedly explained that Staff could find no violation even for seriously anticompetitive harms in the absence of fraud. *E.g.*, *id.* at 13-14, 17. Moreover, the report's conclusion depends in part on staff's understanding that FERC had always expected KeySpan to "bid its cap." *See id.* at 16 (citing Mitigation Order, ¶ 62,357 n.17). Staff neglected to add that, as explained above, FERC based that view on literally nothing except representations made by KeySpan's own predecessor.

In short, FERC's review of the matter can hardly substitute for the enforcement of the antitrust laws, as evidenced by the suit and settlement of the action by the Department of Justice.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand for proceedings on the merits.

Respectfully submitted,

/s/ J. Douglas Richards

CHRISTOPHER L. SAGERS
CLEVELAND-MARSHALL COLLEGE OF LAW
CLEVELAND STATE UNIVERSITY
1801 Euclid Ave., LB 138
Cleveland, OH 44115
(216) 687-2319

RICHARD M. BRUNELL
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
(617) 435-6464

J. DOUGLAS RICHARDS
Counsel of Record
BENJAMIN D. BROWN
COHEN MILSTEIN
88 Pine Street
14th Floor
New York, NY 10005
(212) 838-7797

September 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2011, a copy of the foregoing Brief For The American Antitrust Institute as Amicus Curiae in Support of Appellant and Reversal of the District Court's Decision was served by to the Counsel of Record via the Court's ECF system.

J. Douglas Richards
J. Douglas Richards

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(s) J. Douglas Richards

Attorney for Amicus Curiae

Dated: September 21, 2011

11-2265

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SIMON, on behalf of himself and all others similarly situated,
Plaintiff - Appellant,

v.

KEYSPAN CORPORATION and
MORGAN STANLEY CAPITAL GROUP, INC.,
Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of New York in No. 10 Civ. 5437 (SAS)

ADDENDUM
Add1 to Add6

Christopher L. Sagers
CLEVELAND-MARSHALL COLLEGE OF LAW
CLEVELAND STATE UNIVERSITY
1801 Euclid Ave., LB 138
Cleveland, OH 44115
(216) 687-2319

Richard M. Brunell
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
(617) 435-6464

J. Douglas Richards
Benjamin D. Brown
Counsel of Record
COHEN MILSTEIN
88 Pine Street
14th Floor
New York, NY 10005
(212) 838-7797

KeySpan-Ravenswood, LLC

Market-Based Sale of Capacity, Energy and Ancillary Services

1. Availability. KeySpan-Ravenswood, LLC ("KeySpan-Ravenswood") makes firm capacity and/or energy and non-firm energy and/or capacity available under this Rate Schedule to any purchaser for resale, except as prohibited in Paragraph 5.

2. Applicability. The Rate Schedule is applicable to all wholesale sales of firm capacity and/or energy and non-firm energy and/or capacity by KeySpan-Ravenswood not otherwise subject to a particular rate schedule of KeySpan-Ravenswood.

3. Rates. All sales shall be made at rates established by agreement between the purchaser and KeySpan-Ravenswood.

4. Other Terms and Conditions. All other terms and conditions shall be established by agreement between the purchaser and KeySpan-Ravenswood.

5. Affiliate Sales Prohibited. No sale may be made pursuant to this Rate Schedule to a public utility with a franchised electric service area that is owned or controlled by, under common ownership or control with, or that controls or owns KeySpan-Ravenswood, except pursuant to a separate filing under Section 205 of the Federal Power Act.

6. Effective Date. This Rate Schedule shall be effective on the date specified by the Federal Energy Regulatory Commission.

Issued by: Howard A. Kosel, Jr.
Title: Vice President
Issued on: June 18, 1999

Effective Date: June 18, 1999

Docket No: ER03-287-003
Company: KeySpan-Ravenswood
Sheet No.: 2
To FERC EL Tariff No.: 1
Filing Date: 12/17/03
Effective Date: 12/17/03

1. Availability. KeySpan-Ravenswood, LLC ("KeySpan-Ravenswood") makes ancillary services available under this Rate Schedule to the New York ISO or to any purchasers within or without New York State for self-supply or resale, except as prohibited in Paragraph 5.

2. Applicability. This Schedule is applicable to all wholesale sales by KeySpan-Ravenswood of spinning reserve, 10-minute non-spinning reserve, 30-minute reserve, regulation and frequency response services, energy and balancing services, reactive supply and voltage service, and black start capability.

3. Rates:

a. Sales of spinning reserve, 10-minute non-spinning reserve, 30-minute reserve, regulation and frequency response services, and energy and balancing services shall be made at rates established by agreement between the purchaser and KeySpan-Ravenswood, or at rates prescribed pursuant to rules of the New York ISO.

b. Sales of reactive supply and voltage service, and black start capability shall be made on a cost-basis in compliance with NYISO rules and procedures.

4. Other Terms and Conditions. All other terms and conditions shall be established by agreement between the purchaser and KeySpan-Ravenswood or pursuant to rules governing the New York ISO.

5. Affiliate Sales Prohibited. No sale may be made pursuant to this Rate Schedule to a public utility with a franchised electric service area that is owned or controlled by, under common ownership or control with, or that controls or owns KeySpan-Ravenswood except pursuant to a separate filing under Section 205 of the Federal Power Act.

6. Effective Date. This Rate Schedule shall be effective on the date specified by the Federal Energy Regulatory Commission.

Docket No. ER99-2387-002
Company: KeySpan-Ravenswood
Sheet No. 3
To FERC El. Tariff No. 1
Filing Date: 12/17/03
Effective Date: 12/17/03

Market Behavior Rules

As a condition of market-based rate authority, KeySpan-Ravenswood LLC (hereafter, Seller) will comply with the following Market Behavior Rules:

1. **Unit Operation:** Seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable power market. Compliance with this Market Behavior Rule 1 does not require Seller to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or requirement applicable to Seller.

2. **Market Manipulation:** Actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products are prohibited. Actions or transactions undertaken by Seller that are explicitly contemplated in Commission-approved rules and regulations of an applicable power market (such as virtual supply or load bidding) or taken at the direction of an ISO or RTO are not in violation of this Market Behavior Rule. Prohibited actions and transactions include, but are not limited to:

   a. pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called "wash trades");

   b. transactions predicated on submitting false information to transmission providers or other entities responsible for operation of the transmission grid (such as inaccurate load or generation data; or scheduling non-firm service or products sold as firm), unless Seller exercised due diligence to prevent such occurrences;

   c. transactions in which an entity first creates artificial congestion and then purports to relieve such artificial congestion (unless Seller exercised due diligence to prevent such an occurrence; and

   d. collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for electric energy or electricity products.

3. **Communications:** Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, or Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercised due diligence to prevent such occurrences.

Issued by: James K Brennan
Title: Vice President
Issued on: December 18, 2003

Effective Date: December 17, 2003

Filed to comply with order of the Federal Energy Regulatory Commission, Docket No. EL01-118, *et al.*, issued November 17, 2003, 105 FERC ¶61,218 (2003).

Docket No.:
Company: KeySpan-Ravenswood
Sheet No.: 4
To FERC Electric Tariff No.: 1
Filing Date: 12/17/03
Effective Date: 12/17/03

4. **Reporting:** To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas price indices, Seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No.PL03-3 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this tariff provision of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

5. **Record Retention:** Seller shall retain, for a period of three years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to this tariff or the prices it reported for use in price indices.

6. **Related Tariffs:** Seller shall not violate or collude with another party in actions that violate Seller's market-based rate code of conduct or Order No. 889 standards of conduct, as they may be revised from time to time.

Any violation of these Market Behavior Rules will constitute a tariff violation. Seller will be subject to disgorgement of unjust profits associated with the tariff violation, from the date on which the tariff violation occurred. Seller may also be subject to suspension or revocation of its authority to sell at market-based rates or other appropriate non-monetary remedies.

Filed to comply with order of the Federal Energy Regulatory Commission, Docket No. EL01-118, *et al.*, issued November 17, 2003, 105 FERC ¶61,218 (2003).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1051 **September Term 2008**

FERC-IN08-3-002

Filed On: June 8, 2009

American Public Power Association and
National Rural Electric Cooperative
Association,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

PJM Industrial Customer Coalition, et al.,
Intervenors

Consolidated with 09-1052, 09-1054, 09-1055

BEFORE: Rogers, Garland, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the response thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. Petitioners concede that the court lacks jurisdiction to review the order approving the settlement agreement between Edison Mission Energy and the Federal Energy Regulatory Commission. See Heckler v. Chaney, 470 U.S. 821 (1985); Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001); New York State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993). Moreover, Petitioners have failed to show they have a right to intervene in the agency's investigation. See 18 C.F.R. § 1b.11 ("There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.").

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1051 **September Term 2008**

Thus, the agency's denial of their motions to intervene is not judicially reviewable. See Action on Safety & Health v. Federal Trade Comm'n, 498 F.2d 757, 762-63 (D.C. Cir. 1974) (holding that the decision to grant or deny intervention in agency enforcement proceedings "is an agency action committed to agency discretion and therefore is specifically exempt from judicial review ....").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam