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'S PETITION FOR PANEL REHEARING

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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*

The American Antitrust Institute (AAI) is an independent and nonprofit 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. *See* http://www.antitrustinstitute.org. The AAI believes that rehearing is necessary in this case to ensure that Second Circuit precedent does not evolve to permit agreements to raise prices artificially underneath price ceilings in market-based rate (MBR) regimes, or to create "radical deregulation" where markets operate without either sectoral regulators or "private attorneys general" acting as a check on anticompetitive conduct.[1]

SUMMARY OF ARGUMENT

The AAI, which wrote in support of Plaintiff on appeal from the district court's dismissal, writes again in support of Plaintiff's Petition for Panel Rehearing to re-raise certain critical concerns that undermine foundational elements of the

[1] All parties have consented to the filing of this *amicus* brief. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to its preparation or submission.

The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. The AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

Panel's holding. *See generally* Brief of the American Antitrust Institute as *Amicus Curiae* in Support of Appellant and Reversal of the District Court's Decision ("AAI Brief"). The AAI agrees with Plaintiff that the filed rate doctrine should not apply on these facts, where the FERC has waived a competing mandatory statutory requirement that all prices be pre-filed and that only such pre-filed prices may be charged. *See generally* Plaintiff's Petition for Rehearing. But even if the Court does not adopt Plaintiff's view, rehearing is nonetheless necessary to prevent the development of erroneous case law implicating the filed rate doctrine in this Circuit.

The Panel held that the filed rate doctrine applies to bar Plaintiffs' claims "in the circumstances of this case, where [(1)] the auction process was circumscribed, and [(2)] the MBR process was reviewed by the regulatory body which determined the resulting rate to be reasonable." Slip op. at 18-19. Although the Panel was careful not to announce a per se rule, *id*. at 22, and specifically left open the question whether the filed rate doctrine applies to "all MBRs irrespective of the oversight of the regulator," *id*. at 21, the Panel did address the question whether the filed rate doctrine "*can* apply beyond rates set directly by an agency to MBRs set by a regulatory scheme," *id*. at 21 (emphasis added). In answering affirmatively, the Court relied on FERC's imposition of price caps to establish that the FERC auction process was "circumscribed." *Id*. at 24. The Court also relied on FERC's

authority to investigate market manipulation to establish that "the MBR process was reviewed by the regulatory body," and on FERC's staff report recommending against enforcement to establish that the regulatory body "determined that the resulting rates were reasonable." *Id*. at 25. On this basis, the Court held that "the MBR process established by the FERC in this case was sufficiently safeguarded such that the filed rate doctrine should apply." *Id*. at 24.

The Panel's opinion threatens to mislead future courts that encounter MBR regimes. First, the Panel's holding could create a misplaced reliance on aspects of MBR regimes that do not bear on the proper application of the filed rate doctrine. As discussed in the AAI Brief, the existence of a bid cap is not relevant in determining whether an MBR process is sufficiently safeguarded against anticompetitive conduct. The bid cap is a price ceiling rather than a fixed price, and thus it does not prevent the exercise of market power under the cap. Second, the Panel rests its holding on FERC having "mechanisms in place to remedy the kind of misconduct that allegedly occurred here," *id*. at 25, but it rules without examining the limitations of those mechanisms. The FERC's review power is restricted under the Supreme Court's *Mobile-Sierra* doctrine and is, in addition, limited to market manipulation. Moreover, retroactive refunds are available only for a violation of a tariff term, which is not alleged here. The FERC staff's recommendation against enforcement is informed by these limitations. Rehearing

is necessary to ensure that Second Circuit precedent does not evolve to permit agreements to raise prices artificially underneath price ceilings in MBR regimes, or to create "radical deregulation" where markets operate in an environment in which neither sectoral regulators nor "private attorneys general" operate as a check on anticompetitive conduct. *See* AAI Brief at 8 (citing Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1596 (2003) (discussing the dangers of radical deregulation whereby markets operate without common law and antitrust protections)).

ARGUMENT

I. The FERC's Price Cap Was Not A Safeguard Against Anticompetitive Conduct Under the Circumstances Because the Swap Agreement Altered KeySpan's Bidding Incentives

Plaintiff did not challenge the legality of the FERC price cap. Instead, Plaintiff challenged the anticompetitive swap agreement that encouraged KeySpan to continue bidding at the cap. Plaintiff did not dispute, for example, the level of the price cap or KeySpan's right to bid at the price cap. As the Court found, consistent with Plaintiff's allegations, KeySpan entered into the swap agreement in anticipation that "supply would increase," slip op. 6. "In the absence of the agreement, KeySpan would likely have had to bid competitively," *id.* at 7.[2] After it

[2] Indeed, Plaintiffs, like the Justice Department, alleged that prices *would have been below the cap* absent Defendant's anticompetitive agreement. *See* AAI Brief at 24. On a motion to dismiss, the court should accept all factual claims in the

entered the swap agreement, it continued to bid at its cap, "leaving a significant portion of its capacity unsold," and "the market price of capacity did not drop despite an industry-wide increase in generating capacity." *Id*. Far from evincing FERC's "tight control," *id*. at 24, these facts suggest that the presence of the price cap failed to prevent coordinated conduct that artificially elevated rates to the cap level.[3] Although FERC's 2008 Market Modification Order anticipated the market would clear at the major producers' cap, *id*. at 24, this does not suggest permission for producers to craft side agreements ensuring as much, particularly in response to a supply increase.[4] Indeed, KeySpan's apparent expectation that prices *would not* clear at its cap, and hence its willingness to participate in the swap agreement and cede fees to Morgan Stanley, is indicative of where the market was more likely to clear.

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complaint as true and draw reasonable inferences in the plaintiff's favor. Slip op. 3.

[3] As the Court itself notes, "FERC employed a bid cap to curb the market power of large firms," slip op. at 26. Yet none of the large firms here had market power following the construction of new generation capacity. The bid cap thus is not sufficient to police the coordinated, as opposed to unilateral, anticompetitive conduct of firms.

[4] This is particularly so here, where appeal was taken on a motion to dismiss and Plaintiff's complaint alleged that prices otherwise would have been below the cap. *See supra* note 3.

II. FERC's "Mechanism to Investigate and Rectify Fraudulent Market Manipulation" Does Not "Ensure That *Anti-Competitive* Practices [Do] Not Undermine the Process It Created" (Emphasis Added)[5]

FERC's ability to investigate and rectify market manipulation is constrained in three important ways. First, under the Supreme Court's *Mobile-Sierra* doctrine, rates established by contract enjoy a strong presumption of "justness and reasonableness." *Morgan Stanley Capital Gr., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Co., Wash.*, 128 S. Ct. 2733 (2008); *NRG Power Mktg., LLC v. Maine Public Utils. Comm'n*, 130 S. Ct. 693 (2010). FERC can specifically set aside rates only where they threaten some "unequivocal public necessity." This standard has been described as so "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).

Second, although FERC's market manipulation rule prohibits collusive conduct, this rule requires actual fraud to find a violation. Order 670, 71 Fed. Reg. 4244, 4251-54 (2006). Neither this rule nor other FERC conduct rules reach non-fraudulent anticompetitive practices. In the adoption and modification of its "Market Behavior Rules" since 2001, FERC has repeatedly considered and rejected the adoption of antitrust-like competition rules. *See e.g*. 105 FERC 61.218, 62,142 n. 4.

[5] Slip op. at 25-26.

Third, even if FERC can meet the stringent *Mobile-Sierra* standard and set aside rates, it can order retroactive refunds under FPA §§ 206 and 309, 16 U.S.C. §§ 824e and 835e only for a violation of a tariff term. In this case, Plaintiff did not allege a violation of a tariff term.

In holding that FERC's investigatory and remedial mechanisms are sufficient to safeguard its MBR process from anticompetitive conduct, the Panel disregards the fact that such mechanisms can be applied only in the event of an "unequivocal public necessity" or actual fraud, with retroactive refunds available only upon a violation of a tariff term. The Panel's opinion does not explore the possible conflict or complementarity between the FERC regime and private antitrust enforcement. Consequently, it threatens to aid in the proliferation of enforcement gaps and compromise the protection of consumers. Courts in the future may determine they need not evaluate the remedial limitations of MBR schemes in assessing whether the filed rate doctrine should apply. *Cf. Square D. Co. v. Niagara Frontier Tariff Bureau,* 760 F.2d 1347, 1354 (2d Cir. 1985) (Friendly, J.), *aff'd in part,* 476 U.S. 409 (1986) (carefully considering whether Congress might have intended for victims of illegal rates under the ICA to have an additional remedy under the antitrust laws)

CONCLUSION

For the foregoing reasons, those set forth in the AAI Brief, and those set forth in Plaintiff-Appellant's brief, the Plaintiff's Petition for Panel Rehearing should be granted. If the Panel's opinion is not reversed, the Court risks giving carte blanche to parties that seek to collude to raise wholesale power prices.

At the very least the Court should modify its opinion to affirmatively disclaim the creation of market-based rate regimes that are policed by neither regulatory bodies nor the "private attorneys general" empowered under the antitrust laws. It should also make clear that courts assessing the applicability of the filed rate doctrine to an MBR should inquire as to whether private enforcement would complement or conflict with the regulatory regime.

Respectfully submitted,

/s/ J. Douglas Richards

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October 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2012, a copy of the foregoing Brief For The American Antitrust Institute as Amicus Curiae in Support of Appellant's Petition for Panel Rehearing was served to the Counsel of Record via the Court's ECF system.

/s/ J. Douglas Richards

J. Douglas Richards