

A LIGHT IN THE DARKNESS:
THE CASE FOR JUDICIAL ANTITRUST ENFORCEMENT IN
THE ELECTRIC WHOLESALE INDUSTRY

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I. INTRODUCTION

At the crossroads of competitive and federally regulated markets, the interest in providing and protecting a competitive market gives way to the federal interests underlying regulation. Federal regulation of the electrical industry has traditionally sought to ensure that rates and terms are reasonable and do not unjustly discriminate against—or between—

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consumers.¹ Prior to the deregulation of the market in 1992, regulators used price controls, traditionally based on the cost of providing service, and required firms to submit tariffs that included rates, terms, and conditions.² Utilities that filed rates were absolutely prohibited from charging a rate other than the one filed, which precluded any special customer discounts.³ Against this backdrop, in 1922 a doctrine of judicial immunity arose in *Keogh v. Chicago & Northwestern Railway Co.* to prevent courts from interfering with and replacing the judgment of the regulators with their own.⁴ The filed-rate doctrine—which provides antitrust immunity for utilities against claims by consumers based on filed rates—as applied by the federal courts, is simply judicial deference to the regulatory authority.⁵ In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court declared the importance of deference to a regulatory agency where the agency already has an effective antitrust regime in place.⁶ Thus, the case for deference to regulatory agencies has become even stronger.

Despite the tradition of deference, since the (partial) deregulation of the electrical wholesale market beginning in 1992, the need for effective antitrust enforcement has become dire, but the problems remain unaddressed because litigation is blocked by the filed-rate doctrine. Utilities have been able to abuse the deregulated wholesale markets with impunity, engaging in anticompetitive and dishonest conduct with little threat of penalty. Where the appropriate regulatory body—in the case of the electrical industry, the Federal Energy Regulatory Commission (“FERC”)—cannot or does not adequately prevent or remedy such conduct, antitrust courts are well-positioned and competent to provide the necessary enforcement.

In this article I explain why antitrust enforcement is necessary in the context of deregulation in the electric power wholesale industry. In Part II I explain the electric utility industry and the recent changes in the laws that have largely deregulated it. I introduce FERC Order No. 888, issued to implement the changes of the law. Over the last few decades, the industry has undergone a long and somewhat tortuous process of deregulation, and the results have been mixed at best. I also briefly

1. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1593 (2003).

2. *Id.*

3. *Id.*

4. 260 U.S. 156, 163 (1922).

5. *See infra* Part II.B.

6. 540 U.S. 398, 412 (2004). Specifically, the *Trinko* Court held that a plaintiff could not incorporate the Telecommunications Act into the Sherman Act to find antitrust violation where otherwise there would be Sherman Act compliance. However, it is the Court’s focus on judicial deference to the regulatory agency, despite a specific antitrust savings clause, that is important here.

introduce the filed-rate doctrine and its application by the courts, as well as its exceptions. In Part III I discuss the current state of affairs. I describe two markets created in response to Order No. 888 and elaborate on the problems encountered in those markets. Anticompetitive conduct arises in these markets, unchecked by FERC. In Part IV I trace the history of the filed-rate doctrine as applied to the electric industry and discuss its recent application in the federal district courts. Courts have continued to apply the filed-rate doctrine to find immunity in cases involving market-based rates. Continued application of the doctrine is both inappropriate under deregulation and unhelpful in establishing effective markets. Confusion reigns: some courts apply branches of the filed-rate doctrine to the cases before them that do not apply,⁷ while courts that engage in the correct analysis extend the reach of the filed-rate doctrine to market-based rates without significant consideration of whether this is appropriate or helpful post-deregulation. Both applications harm competition and consumers. In Part V I discuss the recent decision in *Trinko* and its applicability to judicial involvement in the electrical utility industry. I conclude that *Trinko* deference is unnecessary in the electric industry, which does not have a comprehensive regulatory antitrust regime. I also note how the interest in deference can be better served by other doctrines. In Part VI I explain what antitrust enforcement in this arena would look like and how it could effectively maintain the competitive wholesale electricity markets envisioned by Congress. I conclude that judicial antitrust enforcement is possible in the electric wholesale industry. Although FERC authorizes only those firms who can demonstrate limited market power to charge market-based rates, the firms in question *do* exercise monopoly power and therefore come under the purview of the Sherman Act.⁸

II. THE LEGAL FRAMEWORK

Until recent deregulation, the electric industry consisted mainly of investor-owned, vertically integrated utilities in natural and government-sanctioned monopolies.⁹ A federal agency (now FERC) regulated rates, terms, and conditions of the sale of wholesale electricity and transmission

7. See *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003). The filed-rate doctrine encompasses several principles. At issue here is the principle that a firm is immune from claims of anticompetitive conduct for charging rates filed with FERC. Other courts, such as the *California Wholesale* court, have incorrectly applied other branches of the filed-rate doctrine, such as the principle that filed rates preempt state regulation to the discussion of judicial antitrust immunity. See also *infra* Part IV.C.

8. 15 U.S.C. § 1 (2006).

9. Harriet Liza Moses, *The Changing Regulatory Framework: Federal Legislation*, in REINVENTING ELECTRIC UTILITY REGULATION 38 (Gregory B. Enholm & J. Robert Malko eds., 1995).

of electricity in interstate commerce.¹⁰ Before the Public Utility Regulatory Policies Act of 1978 (“PURPA”),¹¹ wholesale and retail rates were cost-based, and services were generally bundled, although unbundled transmission service (known as *wheeling*) could be ordered by antitrust courts.¹² PURPA allowed private sector generating facilities to substitute for utilities.¹³ Many of these, called independent power producers (“IPPs”), also compete in power generation. Although IPPs are public utilities under the Federal Power Act of 1935 (“FPA”),¹⁴ they do not have the monopoly power of the old-model vertically integrated utilities.¹⁵ FERC therefore waived many of the regulatory obligations for IPPs, allowing them to charge market-based rates.¹⁶ Under PURPA, FERC required entities seeking to file market-based rates to demonstrate that they lacked the market power in the relevant generation and transmission markets, generally by showing a market share of 20% or less.¹⁷

A. Recent Legislation and Rulemaking

The Energy Policy Act of 1992 (“EPAAct”)¹⁸ enacted two major changes. First, it exempted firms that exclusively sold wholesale electric energy from the Public Utility Holding Company Act’s (“PUHCA”)¹⁹ ownership restrictions,²⁰ allowing for a more competitive and unregulated wholesale market.²¹ Second, it authorized FERC to order the transmission of wholesale power by transmission facilities, known as wheeling.²² FERC has jurisdiction over the resale and transmission of wholesale electric energy in interstate commerce and the facilities that are used for those purposes.²³ State regulation covers retail sales of electric energy and local generation and distribution facilities. FERC’s major initiative to effect the EPAAct was 1996 Order No. 888, which required that all public utilities that own, control, or operate electricity transmission facilities must file open-access transmission tariffs with

10. *Id.*

11. 16 U.S.C. §§ 2601–45 (2006).

12. Moses, *supra* note 9, at 38–39.

13. *Id.* at 39.

14. 16 U.S.C. §§ 792–814 (2006).

15. *Id.*

16. *Id.*

17. ABA SECTION OF ANTITRUST, ENERGY ANTITRUST HANDBOOK: A GUIDE TO THE ELECTRIC & GAS INDUSTRIES 22–23 (2002).

18. Pub. L. 102-486, 106 Stat. 2776 (1992) (codified in scattered sections of 42 U.S.C.).

19. 15 U.S.C. §§ 79 to 79z-6 (2006) (repealed 2005).

20. *See* Moses, *supra* note 9, at 45.

21. Joseph P. Tomain, *Whither Natural Monopoly?*, in THE END OF A NATURAL MONOPOLY: DEREGULATION AND COMPETITION IN THE ELECTRIC POWER INDUSTRY 118 (Peter Z. Grossman & Daniel H. Cole eds., 2003).

22. *Id.*

23. Moses, *supra* note 9, at 48.

minimum terms and conditions.²⁴ Utilities must provide non-discriminatory rates, terms, and conditions and must unbundle transmission services.²⁵ To comply with Order No. 888, utilities must file separate tariffs including rates, terms, and conditions for each activity: wholesale generation and service, transmission and service, and ancillary services.²⁶ Order No. 888 also established an electronic information system, called the Open Access Same-Time Information System (“OASIS”), that gives existing and potential transmission customers equal access to transmission information as the owner.²⁷ The switch to market-based rates was intended to encourage competition in power markets, while limiting participation in the new scheme to firms below a certain threshold of market power.

B. *The Filed-Rate Doctrine*

The filed-rate doctrine provides immunity from antitrust enforcement for federally regulated utilities, such as electric utilities.²⁸ Historically, rate filings and price controls helped agencies to control “natural” or government-granted monopolies in electric power.²⁹ Firms submitted rates, traditionally based on a cost-of-service determination, to FERC (or its predecessor).³⁰ The approved rate is treated as a firm-specific regulation that precludes modification by anyone—including courts—other than the agency or the regulated firm (which may file new rates).³¹ Filed rates include service terms and conditions.³² Filing of rates prevents firms from offering discounts to certain customers, and its purpose is to prevent discrimination—deviation from the published rate—against customers.³³ In turn, firms that file rates with FERC are immune from antitrust liability and treble damages to consumers against claims that would arise under the filed rates when those rates are followed. The doctrine prevents federal court interference in agency regulation of the electric industry.

24. *Id.* at 119–120.

25. *Id.*

26. *Id.*

27. *Id.*

28. Note that a great deal of conduct by electric utilities is subject to antitrust enforcement: bid rigging, agreements on terms of sale and credit, predatory pricing, price squeezing, refusals to deal, agreements not to compete, anticompetitive conduct in mergers and acquisitions, etc. State action immunity, *Noerr-Pennington* immunity, and the filed-rate doctrine provide immunity in some contexts but certainly do not exempt all conduct in the highly regulated area of electrical energy.

29. Rossi, *supra* note 1, at 1591–1603.

30. *Id.* at 1592.

31. *Id.* at 1593.

32. *Id.*

33. *Id.*; see also *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922) (discussing the purpose of the Antitrust Act of July 2, 1890).

The filed-rate doctrine sweeps broadly to block antitrust litigation when a firm has a rate on file with an agency like FERC. Firms that are required to file rates by law are immune from lawsuits challenging those rates and from court orders that impose a rate other than the filed rate.³⁴ The doctrine specifically precludes recovery of “damages measured by comparing the filed rate and the rate that might have been absent the conduct in issue.”³⁵ The filed-rate doctrine was established in *Keogh v. Chicago & Northwestern Railway Co.*, in which a private shipper claimed that rates filed with the Interstate Commerce Commission (“ICC”) had been fixed by a conspiracy that violated the Sherman Act.³⁶ The Court rejected the claim, granting absolute deference to the ICC on the reasonableness of the filed rates.³⁷ The Court found:

This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under section 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.³⁸

The absolute immunity of the filed-rate doctrine goes to the heart of would-be antitrust litigation: with few exceptions, courts may not reach anticompetitive behavior affecting the rates filed with FERC.³⁹

There are some exceptions to the filed-rate doctrine. It does not prevent antitrust enforcement by the federal government. In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.* the Court found that the filed-rate doctrine did not provide “immunity” from the antitrust laws since the “alleged collective activities of the defendants in both [*Keogh* and *Square D*] were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief.”⁴⁰ However, given the paucity of cases prosecuted by the Department of Justice and the Federal Trade Commission against corporations filing rates with regulatory agencies, this method of antitrust enforcement is not

34. *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1077 (S.D. Cal. 2003).

35. *Id.* (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992)).

36. *Keogh*, 260 U.S. 156.

37. *Id.* at 162.

38. *Id.* at 163.

39. Exceptions to this general rule include cases involving bid rigging, price squeezes, and agreements not to compete. The doctrine also applies only to customers and does not prohibit cases brought by competitors or the government.

40. 476 U.S. 409, 422 (1986).

a particularly effective deterrent to anticompetitive conduct. The filed-rate doctrine also does not preclude claims for declaratory or injunctive relief.⁴¹ Competitors are not barred from suit under the filed-rate doctrine because “competitors are not the intended beneficiaries of that rule of public utility regulation.”⁴² Additionally, courts have accepted other types of antitrust claims without rejection based on the filed-rate doctrine, including bid rigging and tying claims.⁴³ Likewise, the filed-rate doctrine does not necessarily prohibit claims that utilities compared bids prior to submission, knowingly submitted noncompetitive bids, or agreed to rig bids by creating sham competition.⁴⁴ However, such conduct is immune from antitrust liability when it is the basis for rates that are filed with FERC. In reality, the filed-rate doctrine essentially provides absolute immunity for firms that file rates.

III. THE CURRENT STATE OF AFFAIRS

A. *The California Experience*

The effect of Order No. 888 has been to create competitive wholesale markets nationwide; retail markets have attempted to follow suit in some markets but not others. California provides the most poignant example, and its experience has spawned the most litigation. In response to Order No. 888, California began to restructure its electric industry in 1995 from investor-owned, vertically integrated regulated public utilities to a deregulated retail market that exemplifies the type of electricity auction market created by FERC and local regulatory agencies to comply with Order No. 888. State regulation required the major investor-owned, vertically integrated utilities to divest power generation plants to unregulated, non-utility entities.⁴⁵ After the divestiture of most of their generation assets, investor-owned utilities were required to sell their output to a wholesale clearinghouse created by state regulation and

41. *See id.*; *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456–59 (1945).

42. *Essential Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979); *see also Pa. R.R. Co.*, 324 U.S. at 443 (permitting the State of Georgia to sue in both the *parens patriae* capacity on behalf of its residents and as the owner of a competing railroad company); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (holding that the filed-rate doctrine did not preclude railroad's competitors from bringing antitrust suits). *But see Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000) (holding that a competitor's claim is precluded by the filed-rate doctrine when that competitor is suing in its capacity as a consumer).

43. *See United States v. MMR Corp.*, 907 F.2d 489, 496–98 (5th Cir. 1990) (finding that agreements to submit bids and to refrain from bidding are illegal per se); ABA SECTION OF ANTITRUST, ENERGY ANTITRUST HANDBOOK: A GUIDE TO THE ELECTRIC & GAS INDUSTRIES 137–41 (2d ed. 2009).

44. *See generally* ABA SECTION OF ANTITRUST, *supra* note 43, at 115.

45. *Pub. Utils. Comm'n of Cal. v. Fed. Energy Regulatory Comm'n*, 462 F.3d 1027, 1037 (9th Cir. 2006).

regulated by FERC, called California Power Exchange (“CalPX”).⁴⁶ CalPX provided a centralized auction, in which the investor-owned utilities were required to purchase all their required electrical energy.⁴⁷ The auction initially comprised only a single price spot market.⁴⁸ Sellers and buyers submitted a series of bids; CalPX then used these bids to set a market-clearing price at which every exchange was made.⁴⁹ The motivating theory behind CalPX was that the investor-owned utilities would be unable to exercise market power in the transparent spot market, in which all prices were posted and every participant was paid the same price.⁵⁰ Additionally, an Independent System Operator (“ISO”), which operated an electrical grid for the state, maintained reserves and purchased electricity as necessary to assure reliability.⁵¹

In practice the CalPX spot market created both price uncertainty and a wealth of opportunities for power generators to create and abuse market power. Even those with a very small percentage of the market were able to skew the market artificially.⁵² Electricity wholesalers manipulated the CalPX spot market “by withholding power from the spot market to create scarcity and then demanding extremely high prices when scarcity was probable.”⁵³ The energy market’s dependence on the weather made it even easier for wholesalers to anticipate demand and scarcity.⁵⁴ Further, bad actors, such as the Enron Corporation, “gamed the California markets with impunity,” by closing plants to artificially create scarcity in times of high demand or fraudulently “moving” electricity from one place to another.⁵⁵

B. The Pennsylvania Experience

Pennsylvania employed a spot auction market similar to that in California, generating similar (though less egregious) problems followed by the inevitable litigation regarding the misconduct. In Pennsylvania the federally-created market interacted with state regulation to create a space for wholesalers to engage in anticompetitive conduct. The Third Circuit encountered this problem in *Utilimax.com, Inc. v. PPL Energy Plus LLC*,

46. *Id.* at 1038. CalPX is a public utility under the FPA and is therefore regulated by FERC; it “operated pursuant to FERC-approved tariffs and FERC-approved wholesale rate schedules.” *Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042, 1045 (9th Cir. 2002).

47. *Duke Energy*, 267 F.3d at 1045.

48. *Id.*

49. *See id.*

50. *Id.*

51. *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1074–75 (S.D. Cal. 2003).

52. *Pub. Utils. Comm’n of Cal. v. Fed. Energy Regulatory Comm’n*, 462 F.3d 1027, 1039 (9th Cir. 2006).

53. *Id.*

54. *Id.*

55. *Id.* at 1039–40.

which held that a competitor/customer of an electricity wholesaler (and retailer) was barred from suing by filed-rate doctrine when it sued in its customer capacity.⁵⁶ To implement Order No. 888, FERC established a regional wholesale auction market, PJM Interconnection (“PJM”).⁵⁷ On the auction market, sellers set a price called a “sell offer,” and the retail suppliers purchasing capacity credits placed an offer called a “buy bid.”⁵⁸ The *Utilimax* court explained:

Once all the sell offers and buy bids were placed, PJM set the market-clearing price by ranking all sell offers and buy bids and determining at what price the next sell offer is equal to or less than the next buy bid. Once the market-clearing price was set, sellers who offered energy at or below that price received the market-clearing price and buyers who bid at or above that price paid it to obtain the capacity they need.⁵⁹

This system enabled wholesalers with limited market power like “PPL [to] simply position[] itself in the wholesale capacity market to be able to charge exorbitant rates for capacity.”⁶⁰

Wholesalers could act anticompetitively to raise rates because retailers were required by state regulation to have sufficient capacity to provide one day’s worth of electrical energy to the retailers own customers. A retailer could cover this obligation by generating its own energy.⁶¹ Alternatively, it could purchase energy in one of two ways: (1) by entering into a bilateral agreement with another entity that could supply it, or (2) by purchasing the capacity it needs in the spot auction market.⁶² If a retailer failed to meet capacity at the auction, it had to pay a penalty called the “capacity deficiency rate” (“CDR”) which was paid to the entities that had unused capacity that had been made available to the auction; that is, retail suppliers not meeting capacity had to purchase needed capacity from entities with excess at the CDR.⁶³

Utilimax argued that PPL, which is both a retailer and wholesaler of electricity, had “ensure[d] that it would receive the CDR for its excess energy either by offering it for sale in the daily auction market at the CDR price or by simply collecting CDR revenues from any retailer supplier that failed to meet its capacity obligations,” and therefore violated the antitrust laws.⁶⁴ Utilimax claimed that PPL was able to use its

56. 378 F.3d 303 (3d Cir. 2004).

57. *Id.* at 305.

58. *Id.*

59. *Id.*

60. *Id.* at 308.

61. *Id.* at 305.

62. *Id.*

63. *Id.*

64. *Id.* at 306.

“temporary monopolistic position in the wholesale capacity market that was established and approved by FERC and PJM” to exert undue influence on the market and charge excessive rates.⁶⁵

The *Utilimax* court not only adopted the filed-rate doctrine whole, but also limited the competitor exception (although arguably correctly, on its own facts). *Utilimax* claimed that it was not barred from suing by the filed-rate doctrine because it competes with PPL in the retail electrical market.⁶⁶ The court was unconvinced because *Utilimax* was PPL’s consumer in the relevant market, and was therefore barred from suit by the filed-rate doctrine.⁶⁷ However, the court lost a valuable opportunity to narrow the doctrine.

IV. THE QUESTIONABLE VIABILITY OF THE FILED-RATE DOCTRINE

As the above discussion makes clear, anticompetitive conduct runs rampant in deregulated markets with virtually no judicial recourse. Where the regulatory scheme contemplates charging market-based rates and creates the relevant market, it opens the door to anticompetitive conduct. Market-based rates are not *filed* in the traditional sense: firms no longer determine their cost of service and then submit a number for approval. Under the new schemes, FERC approves the method and the market and grants authority to specific firms to participate in that method. So long as firms are “in conformity with the requirements of the . . . market model” approved by FERC, they may act anticompetitively, game the system, or artificially withhold supply to skew the market without fear—or even possibility—of real repercussions.⁶⁸ With FERC out of the business of examining and approving individual rates, the absolute deference of the filed-rate doctrine is both unnecessary and inappropriate. Antitrust courts are uniquely competent to tackle the problems arising from the spot-market auctions. Though the purpose and need for continuing application of the filed-rate doctrine is less clear in the context of the deregulation of the electrical industry, it is clear that the doctrine has seen enduring vitality.

A. *The Supreme Court’s Missed Opportunities*

In a closely divided opinion, the Supreme Court first applied the filed-rate doctrine to the electrical industry in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*⁶⁹ In *Montana-Dakota* two electric utilities under joint management interchanged electricity under rates that

65. *Id.*

66. *Id.* at 307.

67. *Id.* at 308.

68. *See id.* at 306.

69. 341 U.S. 246 (1951).

had been filed with the Federal Power Commission (“FPC”) and made contracts with others establishing rates that were also filed with the FPC.⁷⁰ After the two companies split, the successor of one alleged that its predecessor had been dominated by the other company and had been paid an unreasonably low rate for the electricity it supplied to the defendant and charged unreasonably high rates for the electricity it purchased from the defendant.⁷¹ The plaintiff in *Montana-Dakota* argued that the rates were unreasonable under the FPA and made a common law claim of fraud, but it did not plead an antitrust claim. In rejecting both the FPA and fraud claims, the Court held:

[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission’s orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.⁷²

The Court refused to consider the anticompetitive conduct alleged.

Most recently the Supreme Court reaffirmed application of the filed-rate doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*⁷³ The *Square D* Court applied the filed-rate doctrine to protect rates that were “duly submitted, lawful rates” despite not having been challenged in a formal hearing.⁷⁴ Because of the longstanding enforcement of the doctrine, the Court refused to reconsider *Keogh*, regardless of whether it was good or bad policy with regards to interstate shipping rates, because Congress had not chosen to remove the antitrust exemption when it made changes in the relevant area of law.⁷⁵ The Court reasoned that the filed-rate doctrine is a “longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting this specific area of law.”⁷⁶ In *Keogh* Justice Brandeis found that the “stringent rule” of the filed-rate doctrine “prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.”⁷⁷ However, that stringent rule was more appropriately applied under the tightly regulated scheme in effect before EPAct. The prevention of unjust discrimination is now one of many important purposes of Congress, and absolute immunity for firms based on filed rates does not make sense in the new deregulated system.

70. *Id.* at 247–48.

71. *Id.*

72. *Id.* at 251–52. The Court rejected the fraud claim specifically for want of jurisdiction as it was a state claim and there was no diversity of the parties.

73. 476 U.S. 409, 417 (1986).

74. *Id.*

75. *Id.* at 420.

76. *Id.* at 422.

77. *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922).

B. The Filed-Rate Doctrine is Inappropriate Post Deregulation

The deregulation after the EPAct and Order No. 888 has generated a great deal of litigation. Important cases have arisen in the First, Third, Fifth, and Ninth circuits. Courts applying the filed-rate doctrine have done so with little or no examination of whether the doctrine is actually appropriately applied to market-based rates. Rather, they simply assume its relevance with slight discussion. In *Town of Norwood v. New England Power Co.* plaintiffs argued that the filed-rate doctrine “should not apply where the ‘regulated rates’ have been left to the free market.”⁷⁸ The First Circuit rejected this argument because “wholesale power rates continue to be filed and subject to agency review.”⁷⁹ The *Town of Norwood* court found the filed-rate doctrine applicable where rates were market-based rather than cost-of-service-based based on two different theories. On the one hand, the *Town of Norwood* court found the filed-rate doctrine preemptive of judicial action stating that, “It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed-rate doctrine.”⁸⁰ On the other hand, the *Town of Norwood* court also spoke in terms of deference to FERC authority, noting that it was declining to intervene where “FERC *did* address the concerns . . . about the potential anticompetitive behavior.”⁸¹

The Third Circuit also found the filed-rate doctrine applicable to market-based filed rates in *Utilimax*, although its inquiry was less comprehensive than that in *Town of Norwood*, finding that the filed-rate doctrine bars suits “based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.”⁸² Without discussing the implications or propriety of applying it to rates determined in a competitive market, the *Utilimax* court held that absent an exception, the filed-rate doctrine applied to bar antitrust claims to rates charged “in conformity with the requirements of the FERC and PJM-approved market model.”⁸³

In the face of the deregulation of the electric industry, a Ninth Circuit court has recently applied the federal preemption strand to bar antitrust claims, finding rigid application of the doctrine “across all regulated industries to which it pertains.”⁸⁴ In *County of Stanislaus v. Pacific Gas & Electric Co.* the petitioners alleged a price-fixing conspiracy in violation of Section 1 of the Sherman Act and sought treble damages for inflating

78. 202 F.3d 408, 419 (1st Cir. 2000).

79. *Id.*

80. *Id.* (citing *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986)).

81. *Id.* (emphasis added).

82. *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004).

83. *Id.*

84. *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1038 (N.D. Cal. 2002).

the price of natural gas.⁸⁵ However, the rates at issue had been filed with both the Economic Regulatory Administration (“ERA”) and FERC.⁸⁶ According to the court, FERC “reviewed” the price that the retailer paid the importer for the gas, which was imported from Canada, but the court did not examine the method of review.⁸⁷ The court further determined that the respondent’s “import practices,” rather than specific rates, reviewed and approved by ERA, were a “filed rate” for purposes of the filed-rate doctrine.⁸⁸ This filed rate was sufficient for immunity under the filed-rate doctrine.

In *In re California Wholesale Antitrust Litigation* and in *California ex rel. Lockyer v. Mirant Corp.* federal district courts in California have followed *Utilimax* and *Town of Norwood*, applying the filed-rate doctrine in cases involving market-based rates.⁸⁹ This approach has also been followed by district courts in the Fifth Circuit in cases involving state regulation, although the analysis regarding state regulation is somewhat different.⁹⁰ In *California Wholesale* the district court found that the filed-rate doctrine barred plaintiff’s claim for damages for “overcharges” in FERC-approved rates caused by alleged antitrust violations.⁹¹ Based on its understanding of Ninth Circuit precedent in *County of Stanislaus*, the district court found that this claim would require it to “measure the difference between the allegedly fixed wholesale price and an otherwise ‘just and reasonable’ wholesale price,” which is exactly the inquiry precluded by the filed-rate doctrine.⁹² The *California Wholesale* court further found that federal preemption of the field barred the plaintiff’s state law antitrust claims as well as any court action that “would operate within the exclusive federal domain of wholesale energy rates.”⁹³

C. The Current Confusion

It is possible to distinguish between two strands of cases applying the filed-rate doctrine to bar antitrust claims: federal preemption analysis and

85. 114 F.3d 858, 860, 863 (9th Cir. 1997) (citing 15 U.S.C. § 1 (2006)).

86. *Id.* at 861.

87. *Id.* at 863.

88. *Id.* at 864.

89. See *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003); *Cal. ex rel. Lockyer v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1062–63 (N.D. Cal. 2003).

90. See *Util. Choice, L.P. v. TXU Corp.*, No. Civ.A.H-05-573, 2005 WL 3307524, at *2–3 (S.D. Tex. Dec. 6, 2005) (applying the filed-rate doctrine to bar antitrust litigation where retail rates were filed with the state counterpart to FERC); *Tex. Commer. Energy v. TXU Energy, Inc.*, No. CA NO. C-03-249, 2004 WL 1777597, at *11–12 (S.D. Tex. June 24, 2004) (following *Town of Norwood* and applying the filed-rate doctrine to bar antitrust litigation where retail rates were filed with the state counterpart to FERC).

91. *In re Cal. Wholesale*, 244 F. Supp. 2d at 1078.

92. *Id.*

93. *Id.* at 1082.

deference to regulatory agencies.⁹⁴ Where state action would interfere with the federal regulatory scheme, federal preemption analysis is appropriate. Where federal courts choose not to interfere with the decisions and actions of federal regulatory agencies, they act out of deference. Preemption analysis is particularly appropriate when state actors attempt to interfere with federal regulation. An important example is Governor Gray Davis' attempt to commandeer the expensive wholesale power contracts during the California energy crisis.⁹⁵ State regulators are also prohibited "from trapping the costs prudently incurred pursuant to FERC-filed tariffs."⁹⁶ Federal preemption analysis applies against action by state courts.⁹⁷ As applied to the federal courts, the filed-rate doctrine is "not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies."⁹⁸

However, in the current litigation, it seems that courts are confusing the two strands. The *Pacific Gas & Electric Co. v. Lynch* court explains, "judicial enforcement of the filed-rate doctrine is a 'matter of enforcing the Supremacy Clause.'"⁹⁹ This is true in the context *Lynch* encounters: *Lynch* applies the filed-rate doctrine against state regulation—a rate freeze—that conflicted with the FERC scheme established by Order No. 888 and resulted in essentially regulating a California electrical company out of business.¹⁰⁰ In that context, the *Lynch* court explained that "the filed-rate doctrine applies [for market-based rates] in much the same way as it does under a cost-of-service regime."¹⁰¹ However, other courts have misapplied this rule by incorrectly transposing it to other contexts: the *California Wholesale* court adopted it wholesale, misapplying it to find that "the filed-rate doctrine applies to bar claims challenging the rates set by FERC in a market-based rate system."¹⁰² Ironically, as it cited *Lynch* for the proposition that market-based rates and cost-of-service rates should be treated the same for purposes of the

94. See Rossi, *supra* note 1, at 1640.

95. Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1047 (9th Cir. 2002).

96. Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1039 (N.D. Cal. 2002).

97. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963 (1986). The *Nantahala* Court actually stated that the filed-rate doctrine applies "also to decisions of state courts. In this application, the doctrine is . . . a matter of enforcing the Supremacy Clause." *Id.* (emphasis added).

98. *Id.*

99. *Lynch*, 216 F. Supp. 2d at 1033 (quoting *Nantahala*, 476 U.S. at 963).

100. *Id.* at 1034–35. The court stated:

The filed-rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.

Id. (quoting *Nantahala*, 476 U.S. at 970).

101. *Id.* at 1038.

102. *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1079 (S.D. Cal. 2003).

filed-rate doctrine, the *California Wholesale* court claimed that the *Lynch* “court addressed the filed-rate doctrine in the same context as presented here,” the market-based scheme at issue in California.¹⁰³ Unfortunately for *California Wholesale*, the *Lynch* court was referring to a different filed-rate doctrine. This shining example elucidates the trouble district courts are having in simple application of the filed-rate doctrine, even where the waters are not muddied by the more complex questions posed in FERC regulation of state-created markets. The situation is further complicated by the fact that the state spot markets at issue in many of these cases are themselves utilities under the FPA. For example the CalPX market at issue in the California energy crisis was created by state legislation, California Assembly Bill 1890 (1996).¹⁰⁴ However, CalPX is a public utility under the FPA and is therefore regulated by FERC; it operated pursuant to FERC-approved tariffs and FERC-approved wholesale rate schedules.¹⁰⁵ This integrated system is truly problematic for courts struggling in their encounters with a very complicated regulatory scheme and an even more complicated industry. Courts applying the federal preemption strand of the filed-rate doctrine to state-created spot markets are actually making the incorrect inquiry.

V. A CALL FOR REFORM

The filed-rate doctrine as applied to claims against anticompetitive conduct underlying filed rates is a doctrine of deference to federal regulatory agencies. Deference to regulators has become an even higher judicial priority since the Supreme Court’s recent decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*.¹⁰⁶ In *Trinko* the Court refused to find antitrust liability based on a claim under the essential facilities doctrine, despite an antitrust savings clause in the Telecommunications Act of 1996¹⁰⁷ because of deference to the Federal Communication Commission’s (“FCC”) own comprehensive antitrust enforcement scheme.¹⁰⁸ Although *Trinko* centers on the essential facilities doctrine, which is not at issue in the cases relevant here, its analysis of deference to a regulatory agency’s own antitrust enforcement scheme translates neatly into the electrical industry. However, the degree of deference exercised in *Trinko* is not appropriate in the context of the electrical industry because the comprehensive antitrust regime employed by the FCC does not exist under FERC. The attendant problems of

103. *Id.*

104. *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1045 (9th Cir. 2002).

105. *Id.*

106. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

107. Telecommunications Act of 1996, 47 U.S.C. § 251(c) (2006).

108. *Trinko*, 540 U.S. 398.

judicial antitrust enforcement in telecommunications do not exist in the electrical industry, and because of the less comprehensive antitrust regime in the electrical industry, greater reliance on judicial enforcement is necessary. Furthermore, neither Congress nor the Supreme Court intended that antitrust immunity for the electrical industry be absolute. Absolute immunity is also no longer appropriate in the competitive markets created by FERC. The deference envisioned by *Trinko* is better addressed by means other than the absolutist filed-rate doctrine.

A. Deference and the *Trinko* Decision

In *Trinko* the Court held that certain types of regulation diminish the likelihood of seriously anticompetitive behavior. The FCC's order allowing Verizon to provide long-distance access included extensive discussion of Verizon's commitment to provide nondiscriminatory access and provided for continuing oversight.¹⁰⁹ Further, after receiving complaints of anticompetitive behavior, the FCC "imposed a substantial fine and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure."¹¹⁰ The state regulatory agency also imposed fines and required daily reporting.¹¹¹ With such a comprehensive scheme of reporting and penalties, antitrust enforcement by the courts would impose the substantial costs of extensive litigation, the chilling of competition, and the necessary supervision by the courts.¹¹²

Justice Scalia, writing for the Court, found judicial interference inappropriate where "the regime was an effective steward of the antitrust function."¹¹³ The Court further found federal courts ill-suited to the job of providing the day-to-day enforcement that the sharing obligations of Verizon would require.¹¹⁴ Justice Scalia explained that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" is a factor of particular importance.¹¹⁵ He went on to state:

Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, '[t]here is nothing built into the regulatory scheme which performs the antitrust function,' the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as

109. *Id.* at 412.

110. *Id.* at 413.

111. *Id.*

112. *Id.* at 413–15.

113. *Id.* at 412.

114. *Id.* at 412.

115. *Id.*

a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.¹¹⁶

The deference in *Trinko* was especially appropriate because “[t]he complaint set forth a single example of the alleged ‘failure to provide adequate access to [competitive LECs¹¹⁷],’ namely the [operation support systems] failure that resulted in the FCC consent decree and [New York Public Service Commission] orders.”¹¹⁸ Thus, the very anticompetitive behavior alleged was under the control of the FCC at the time of the litigation. If deference to regulatory bodies is ever appropriate, surely it is while that regulatory body actively controls specific conduct, as by a consent decree. Although an antitrust-specific savings clause precluded the Court from finding implied immunity, the Court found no antitrust liability because the conduct in question—a refusal to deal—also violating a regulatory market obligation, did not in itself violate §2.¹¹⁹

B. Industry Differences and Degree of Deference

To apply the *Trinko* analysis to the electrical energy market, it is necessary to consider how comprehensive a regulatory structure designed to deter anticompetitive harm must be to justify deference. On the one hand, FERC is required under the FPA and PUHCA to evaluate the antitrust consequences of its regulations.¹²⁰ Further, the regulatory structure under FERC is designed to identify and remedy anticompetitive harm. In the face of deregulation, FERC’s responsibility to monitor anticompetitive effects has increased. As part of its monitoring, FERC requires utilities seeking market-based rate authority to file a market power analysis and is expanding that filing.¹²¹ Some utilities are required to supply this information every three years.¹²² On the other hand, FERC’s response to clearly anticompetitive conduct is a far cry from the comprehensive reporting and penalties structure employed by the FCC to monitor Verizon. For example, FERC has conducted serious investigations of many of the wholesalers involved in the California energy crisis, with remedies including fines, restitution, withdrawal of authority to charge market-based rates, and a “stringent compliance

116. *Id.* at 412 (citations omitted).

117. LECs stands for “local exchange carriers.” *Id.* at 402.

118. *Id.* at 405.

119. *Id.* at 406, 409.

120. *Mich. Pub. Power Agency v. Fed. Energy Regulatory Comm’n*, 963 F.2d 1574, 1578 (D.C. Cir. 1992) (citing *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747 (1973)).

121. Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 115 F.E.R.C. ¶ 61,210, 61,754 (proposed May 19, 2006) (to be codified at 18 C.F.R. pt. 35).

122. *Id.*

plan.”¹²³ Further, the economic analysis underlying FERC’s regulatory structure under Order No. 888 is suspect, and retailers are often left dependent on a single supplier, creating a limited sort of monopoly for that supplier.¹²⁴

There have been a myriad of problems with FERC’s response to anticompetitive behavior. First, its “new definition of anti-competitive behavior is criticized for being so broad that it is likely to snare the good with the bad, thus discouraging efficient behavior and investment in the power sector.”¹²⁵ FERC has also struggled with enforcement.¹²⁶ Further, FERC may be limited by its statutory authority in the remedies it can provide.¹²⁷ FERC lacks authority to order monetary penalties against the wholesale electricity generators for anticompetitive conduct.¹²⁸ There is also no evidence that FERC remedies deter future anticompetitive conduct. And in 2003, FERC acknowledged that price manipulation continues in the natural gas markets, which indirectly affect prices, and that energy markets require “more-aggressive oversight.”¹²⁹ In the face of suspicions of anticompetitive conduct during the California energy crisis, “FERC resisted imposing wholesale price caps for months because of [a] strong commitment to market approach and [a] strong reluctance to interfere in markets.”¹³⁰ Even more importantly, without a specific grant of authority, FERC does not have significant power to assess and enforce penalties against firms that engage in anticompetitive conduct.¹³¹ FERC’s power is limited to authorizing refunds and revoking licenses nationwide.¹³² Such a limited remedy hardly provides any deterrence for anticompetitive behavior, where the rewards can be substantial. The energy crisis in California and the extraordinary misconduct that ensued there is positive proof that FERC remedies lack deterrent power.

C. *Achieving Deference through More Flexible Means*

Justice Scalia’s concerns in *Trinko* may be addressed through less absolute means than the filed-rate doctrine. First, the doctrine of regulatory compliance has been accepted as a defense to antitrust

123. *Principals of Federal Prosecution of Business Organizations (January 20, 2003)*, 1536 PLI/Corp 231 (Mar.–June, 2006).

124. Jim Chen, *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 Nw. U. L. REV. 1617, 1703 (2004).

125. Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 94 (2004).

126. *Id.*

127. Robert B. Martin, III, *Sherman Shorts Out: The Dimming of Antitrust Enforcement in the California Electricity Crisis*, 55 HASTINGS L.J. 271, 300 (2003).

128. *Id.* at 304.

129. *Id.*

130. John R. Lange, *Today’s Energy Issues*, 683 PLI/Pat 875, 882 (Dec. 2001/Jan. 2002).

131. Rossi, *supra* note 1, at 1626.

132. *Id.*

claims.¹³³ Second, the doctrine of primary jurisdiction, under which courts may refuse jurisdiction over agency claims, also allows deference to regulators that actively monitor rates, terms, and conditions of service.¹³⁴ In applying the primary jurisdiction doctrine, courts generally stay the judicial proceedings pending agency regulation.¹³⁵ This allows both for deference to the agency and judicial enforcement of antitrust liability against anticompetitive conduct, without the absolutist immunity of the filed-rate doctrine.

There will be difficulties both in overcoming the filed-rate doctrine and in actually applying the Sherman Act to these cases. First, courts applying the filed-rate doctrine to bar antitrust claims based on rates filed with FERC do so with considerable support in recent cases. As recently as 1986, the Supreme Court upheld the filed-rate doctrine in *Square D*, citing the longstanding application of *Keogh*.¹³⁶ Also, a parade of appellate court decisions have insisted on applying the doctrine to the new market-based systems.¹³⁷ Second, electricity markets are particularly complicated, and “even with enormous hearing records and massive data collection and econometric simulations,” it is often difficult “to identify which parties have engaged in anticompetitive behavior and how their actions affected these quick-silver markets.”¹³⁸ That does not mean that judicial remedies are not the best ones, however, since regulatory remedies “enhancing price transparency by posting pivotal suppliers’ costs or bids can actually facilitate tacit collusion and gaming by market participants.”¹³⁹

D. *The Intended Scope of Filed-Rate Doctrine Immunity*

Neither Congress nor the Court intended the electrical industry to be accorded absolute antitrust immunity. The Supreme Court has held that FERC’s predecessor’s “broad regulatory power under the FPA ‘clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations.’”¹⁴⁰ In *Otter Tail Power Co. v. United States* the Supreme Court found that Congress did not intend “to insulate electric power

133. See *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 931–32 (2d Cir. 1981); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1109–10 (7th Cir. 1983).

134. Rossi, *supra* note 1, at 1649–50.

135. *Id.* at 1650.

136. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986).

137. See, e.g., *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303 (3d Cir. 2004); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000); *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858 (9th Cir. 1997).

138. Weaver, *supra* note 125, at 94.

139. *Id.*

140. *Mich. Pub. Power Agency v. Fed. Energy Regulatory Comm’n*, 963 F.2d 1574, 1578 (D.C. Cir. 1992) (citing *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747, 756 (1973)).

companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.”¹⁴¹ In *Cantor v. Detroit Edison Co.* the Court again affirmed that “since our decision in *Otter Tail Power Co. v. United States*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities.”¹⁴² More recently, the Court breathed more life into the use of the antitrust laws in electrical regulation in *New York v. Federal Energy Regulatory Commission*. In *New York* the Court yet again referenced *Otter Tail* and reaffirmed the deployment of the antitrust laws as a method of combating anticompetitive conduct “[i]n addition to policing utilities’ anticompetitive behavior through the various statutory provisions that explicitly address the electric industry.”¹⁴³ Much has changed since 1986, when *Square D* was decided. It is not at all clear that the “stringent rule” of the filed-rate doctrine should still prevail because the “paramount purpose of Congress” to prevent “unjust discrimination” must now be balanced against Congress’s very clear intention to create competitive markets in the electric industry.¹⁴⁴

E. The Problem of Application

It is problematic to apply the filed-rate doctrine against claims of anticompetitive conduct underlying market-based rates. This is because “[w]hen tariffs with market-based rates are approved by the Commission . . . rates could ‘fluctuate widely and rapidly (every hour or so . . .) according to supply and demand and any other consideration taken into account by buyers and sellers in the course of business.’”¹⁴⁵ The legal result of this depends on what it means to “fix” rates under the FPA,¹⁴⁶ but it at least arguably requires the actual rate itself to be specified.¹⁴⁷ In that case, application of the filed-rate doctrine is inapposite to market-based rates. With market-based rates, which have no fixed figure to evaluate, FERC does little more than evaluate the market share of individual wholesalers. In the electricity spot markets, however, market share is deceiving. Firms that control even 5% of the market can withhold electricity and drive up prices. Also, when

141. 410 U.S. 366, 373–74 (1973).

142. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976).

143. *N.Y. v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 8 n.6 (2002).

144. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986).

145. Gerald Norlander, *May the FERC Rely on Markets to Set Electric Rates?*, 24 ENERGY L.J. 65, 87 (2003) (citing *California ex rel. Lockyer v. B.C. Power Exch. Corp.*, 99 F.E.R.C. ¶ 61,247, 61,253 (2002)).

146. 16 U.S.C. § 824e(a) (2006).

147. Norlander, *supra* note 145, at 87.

anticompetitive conduct results in higher rates, it cannot be said that FERC approved the anticompetitive conduct. Except where FERC is involved in remedying anticompetitive harm, applying the filed-rate doctrine to approval of those market-based rates would merely pay lip service to the policy of agency deference.¹⁴⁸ Further, antitrust courts are competent to address this conduct: “Courts, unlike regulatory agencies, do not depend on budget allocations or limited statutory jurisdiction for their enforcement authority. Courts have greater political independence. Courts have wider remedial authority and discovery powers than do agencies.”¹⁴⁹

VI. JUDICIAL ANTITRUST ENFORCEMENT IN THE ABSENCE OF IMMUNITY

Once it is established that the filed-rate doctrine should not provide absolute antitrust immunity, this does not establish that claims of anticompetitive conduct by electricity wholesalers will necessarily violate the Sherman Act.¹⁵⁰ Plaintiffs must still make out viable claims, either alleging a “contract, combination, . . . or conspiracy, in restraint of trade”¹⁵¹ in violation of Section 1, or a monopolization in violation of Section 2. Some plaintiffs have made colorable allegations under Section 1. For example, in *County of Stanislaus* petitioners alleged a price-fixing conspiracy underlying a filed rate.¹⁵² A Section 1 inquiry would be possible in the electrical context because “a court need not determine whether the hypothetical rate would fit FERC’s standards; instead, the court need only estimate what electricity prices would have been absent anticompetitive conduct.”¹⁵³ Courts can engage in this inquiry while maintaining appropriate deference to the regulatory agency by referring questions of reasonableness to FERC.¹⁵⁴ Even the Supreme Court has used similar referrals several times since *Keogh*.¹⁵⁵

Section 2 of the Sherman Antitrust Act—which designates as a criminal “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States,”¹⁵⁶—does not specifically require monopoly power to generate

148. Martin, *supra* note 127, at 298–99.

149. Jim Rossi, *Beyond Goldwasser: Ex Post Judicial Enforcement in Deregulated Markets*, 2003 MICH. ST. DCL L. REV. 717, 721–22.

150. 15 U.S.C. §§ 1–7 (2006).

151. 15 U.S.C. § 1.

152. *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 860 (9th Cir. 1997).

153. Martin, *supra* note 127, at 301.

154. *Id.*

155. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1353 (2d Cir. 1985) (citing three Supreme Court cases referring questions of reasonableness of tariffs to ICC).

156. 15 U.S.C. § 2.

liability; rather market power is crucial to Section 2 analysis.¹⁵⁷ A threshold market power requirement is necessary because without market power, some anticompetitive practices may not be detrimental to consumers.¹⁵⁸ Judicial resources would be wasted on monitoring anticompetitive practices that do not harm consumers.¹⁵⁹ The problem of market definition has plagued courts for decades. The threshold requirement is particularly problematic in claims against firms filing market-based rates because they necessarily control only a small portion of the market (in order to gain authority to charge market-based rates), but their anticompetitive conduct *is* detrimental to consumers.

In the electrical spot market auctions authorized by FERC, monopoly power may be clear even where firms do not control a substantial portion of the market. For example, after the California energy crisis one manager from Enron described the situation: “There were days when we were making \$100 million. When you’re making that kind of money you have to ask yourself, ‘Are we the market?’”¹⁶⁰ The monopoly power here is clear, yet Enron itself was cleared by FERC—in an inquiry requiring firms to prove their own limited market power—to charge market-based rates. Enron used its market power and its fraudulent accounting practices to virtually destroy the California energy market, but it was not alone. As mentioned above, many wholesalers on the CalPX market artificially created scarcity to drive up market prices. Enron is clearly an extreme case, but demonstrates that markets may be defined temporally to properly identify those firms exercising monopoly power. Monopoly power can be demonstrated in Section 2 claims when firms gain a “temporary monopolistic position in [a] wholesale capacity market . . . established and approved by FERC.”¹⁶¹ Anticompetitive conduct that would only be made possible by such a temporary monopolistic position should be used as evidence to prove that monopolistic position. Judicial antitrust enforcement in the area of electric regulation does not require an *expansion* of Section 2 but, rather, an application of traditional concepts in an area that is already subject to a good deal of antitrust law and provided only limited protection by certain immunities.

157. PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 483 (6th ed. 2004).

158. *Id.*

159. *Id.*

160. Matthew Waldron, *Exploring Failed Electricity Deregulation: Lawyers’ Role in Supporting a Healthy Marketplace*, 19 *GEO. J. LEGAL ETHICS* 1005, 1009 (2006) (quoting David Barboza, *Former Officials Say Enron Hid Gains During Crisis in California*, *N.Y. TIMES*, June 23, 2002, at A1).

161. *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004).

VII. CONCLUSION

The creation of competitive auction markets after the EPAct changed the landscape of the electric industry dramatically. Electric utilities are no longer the tightly regulated entities they once were, and the rates they charge are no longer individually filed with and approved by FERC. Anticompetitive conduct by electric wholesalers has become a bigger threat than ever before, and at its worst has devastated whole markets, driving retailers into bankruptcy and causing millions of consumers to lose power. The absolute antitrust immunity of the filed-rate doctrine no longer makes sense in this new context. FERC's remedial powers are impotent against anticompetitive conduct; judicial enforcement is necessary. Deference to the regulatory scheme, while laudatory, can and should be accomplished through less extreme measures. Courts have the institutional competence to deter and remedy anticompetitive conduct in the electrical wholesale industry. The Sherman Act can reach this conduct. Although FERC only authorizes firms with limited market power to charge market-based rates, the reality is that these firms can and do act as monopolies. When claims of anticompetitive conduct underlying market-based rates that are "filed" with FERC arise, federal courts have both the ability and duty to act.