

# The Filed Rate Doctrine as Applied to Alleged Manipulation in the Wholesale Natural Gas Market: A Defense Perspective

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Application of the filed rate doctrine to antitrust suits brought by plaintiffs challenging the reasonableness of rates raises a number of important questions in litigation involving wholesale electricity and natural gas transactions. In this article, we analyze, from a defense perspective, how courts have evaluated preclusion arguments advanced by defendants under the filed rate doctrine, with a specific focus on application of the doctrine in natural gas litigation.

The filed rate doctrine is a judicially created rule that prevents collateral attacks on rates that are filed with and/or regulated by state and federal agencies. Principally, the doctrine forbids judicial rate-setting by courts and is applied to preserve the regulatory jurisdiction that is vested in state and federal agencies on matters pertaining to the regulation of rates.

The doctrine has been invoked by defendants to preclude state and federal antitrust litigation relating to wholesale electricity and natural gas rates. Both the Federal Power Act (FPA) and Natural Gas Act (NGA) grant exclusive jurisdiction to the Federal Energy Regulatory Commission (FERC) to ensure that wholesale electricity and natural gas rates are “just and reasonable.” The FPA and NGA vest FERC with sole authority to determine if wholesale rates are just and reasonable. In light of FERC’s exclusive jurisdiction, defendants often plead the filed rate doctrine as a bar to antitrust lawsuits alleging manipulation of wholesale electricity and natural gas rates.

One important question raised in applying the filed rate doctrine in natural gas litigation is whether the doctrine should be relevant when rates are not actually “filed” with FERC but rather are approved under a market-based rate regime established by FERC. On the natural gas side, some plaintiffs have argued that there is insufficient regulatory oversight by FERC under the NGA, and as such, contend that the filed rate doctrine should not apply to preclude antitrust claims challenging wholesale natural gas rates. On the electricity side, defendants have argued and courts have uniformly held that the filed rate doctrine bars antitrust litigation over wholesale electricity rates despite FERC’s transition to a market-based rate regime.

## Overview

The 2000–2001 California energy crisis spawned two waves of litigation. The first involved claims (primarily asserted by California state agencies and private plaintiffs, including industrial and individual consumers) that generators and traders of electricity had manipulated the wholesale electricity market, either on their own or collusively.<sup>1</sup> After it became apparent that a factor in the

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<sup>1</sup> A more detailed examination of the application of the filed rate doctrine to the electricity cases arising from the 2000–2001 California energy crisis is found in Rufus W. Oliver III & David M. Rodi, *The Filed Rate Defense: A Regulatory Doctrine Survives The Restructuring Of The Electricity Industry*, ENERGY ANTITRUST NEWS, Winter 2004, at 3.

increase of wholesale electricity prices in California was a rise in the wholesale price of natural gas, used to fire many of the plants generating electricity for use in California,<sup>2</sup> a second wave of litigation was filed in numerous federal courts and California state courts based on allegations that many of those same marketers had colluded to manipulate the natural gas market.

At the trial court level, the electricity cases have largely been resolved. The FPA requires that wholesale electricity prices be “just and reasonable” and delegates to FERC the authority to make such determinations. Trial courts uniformly have held civil actions alleging either state or federal claims for damages based on the alleged manipulation of the wholesale electricity market barred because the FPA preempts state law claims and/or because the filed rate doctrine bars all of the asserted damage claims, as only FERC may determine what a “just and reasonable” price for electricity would have been absent the alleged misconduct.<sup>3</sup>

Many of the electricity cases have also been decided at the intermediate appellate court level, with several panels of the Ninth Circuit Court of Appeals holding civil actions seeking to recover for alleged “overcharges” on wholesale electricity purchases barred by federal preemption and/or the filed rate doctrine, with the only avenue for recovery being an administrative complaint to FERC.<sup>4</sup> The natural gas cases have not yet resulted in any significant decisions at the appellate level in either federal or state court. Separate federal district courts have, however, decided motions to dismiss antitrust claims based upon preemption and filed rate doctrine arguments arising from the NGA. One case, *E&J Gallo Winery v. Encana Energy Services, Inc. (Gallo)*,<sup>5</sup> denied the motion to dismiss, and two others, *In re Western States Wholesale Natural Gas Antitrust Litigation (Texas-Ohio)*<sup>6</sup> and *Sierra Pacific Resources v. El Paso Corporation (Sierra Pacific)*,<sup>7</sup> granted motions to dismiss.

The state trial courts to address the issue have reached conflicting decisions: in *In Re: Natural Gas Antitrust Cases I, II, III and IV*,<sup>8</sup> the court denied the California procedural equivalent of motions to dismiss brought on filed rate doctrine/preemption grounds. In contrast, in *Phelps Dodge Corp v. El Paso Corp.*,<sup>9</sup> the court granted a motion to dismiss, finding the plaintiff’s antitrust claims preempted because the claims depended on the allegation that the defendants charged unreasonable rates for natural gas, a matter committed solely to FERC’s jurisdiction.

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<sup>2</sup> See, e.g., Amendments to Blanket Sales Certificates, 18 C.F.R. § 284.288.

<sup>3</sup> On June 14, 2005, U.S. Bankruptcy Judge Arthur Gonzalez held that the State of California’s state law claims based on Enron’s alleged “gaming” of the wholesale electricity market in 2000–2001 were barred by federal preemption and the filed rate doctrine. *In Re Enron Corp.*, No. 01B16034 (AJG), 2005 Bankr. LEXIS 1065 (S.D.N.Y. 2005).

<sup>4</sup> California *ex. rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1836 (2005); Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc., 384 F.3d 756 (9th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 5184 (June 27, 2005) (*Snohomish*); Public Util. Dist. No. 1 of Grays Harbor v. Idacorp Inc., 379 F.3d 641 (9th Cir. 2004) (*Grays Harbor*); California *ex rel.* Lockyer v. Transcanada Power, L.P., 110 Fed. App. 839 (9th Cir. 2004); T&E Pastorino Nursery v. Duke Energy Trading & Mktg., 123 Fed. App. 813 (9th Cir. 2005) (*Pastorino*).

<sup>5</sup> No. CV F 03-5412 AWILJO (E.D. Cal. May 14, 2004).

<sup>6</sup> 368 F. Supp. 2d 1110 (D. Nev. 2005).

<sup>7</sup> No. CV-S-03-0414-JCM-RJJ (D. Nev. Dec. 8, 2004).

<sup>8</sup> San Diego Superior Court Case Nos. JCCP 4221, 4224, 4226, 4228, (May 4, 2005 and June 29, 2005).

<sup>9</sup> Maricopa County Superior Court Case No. CV 2004-00281 (Aug. 23, 2005).

## FERC's Exclusive Jurisdiction to Ensure "Just and Reasonable" Wholesale Electricity and Natural Gas Rates: A Transition to Market-Based Rates

FERC has exclusive regulatory jurisdiction over matters pertaining to interstate sales of wholesale electricity and natural gas under the FPA and NGA. The FPA grants FERC exclusive jurisdiction to regulate interstate wholesale electricity sales and ensure the prices charged are "just and reasonable."<sup>10</sup> Just as does the FPA, the NGA requires that all rates charged for the wholesale sale and transportation of natural gas must be "just and reasonable," and the NGA vests "the authority to decide whether the rates are reasonable . . . solely in the [FERC]."<sup>11</sup> When FERC has jurisdiction, "the states cannot have jurisdiction over the same subject."<sup>12</sup>

In recent years, FERC has adopted a market-based rate scheme authorizing the wholesale sales of electricity and natural gas at negotiated, market-based rates. Specifically, FERC has shifted from a regulatory scheme requiring advance "filing" of specific rates for wholesale electricity sales to one permitting sellers to charge negotiated, "market-based" rates once FERC has determined that the entity lacks "market power" (e.g., the ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time") and on the condition that the seller file quarterly reports of the rates actually charged.<sup>13</sup> Numerous courts have held that FERC's shift to a market-based rate regime is authorized under the FPA.<sup>14</sup>

Similarly, Congress has enacted several statutes reflecting that the federal government has also "occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce,"<sup>15</sup> the NGA,<sup>16</sup> the Natural Gas Policy Act of 1978 (NGPA),<sup>17</sup> and the Wellhead Decontrol Act of 1989.<sup>18</sup> The U.S. Supreme Court has held the Congressional occupation of the field is "complete" and reflects a Congressional intent to provide uniform and comprehensive regulation of the natural gas wholesale market, exclusively under federal law.<sup>19</sup> And, as with the electricity market, regulation of the wholesale natural gas market has shifted in recent years to permit natural gas transactions to be conducted at market-based rates.

As distinct from the electricity market, the changes in the regulation of the natural gas market have occurred partly through legislation and partly through administrative rules and orders promulgated by FERC. First, Congress enacted the NGPA and the Natural Gas Wellhead Decontrol Act of 1989, which repealed Sections 3311–3320 of the NGPA.<sup>20</sup> Congress thereby eliminated price

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<sup>10</sup> 16 U.S.C. §§ 824(b), (d); *Entergy La., Inc. v. Louisiana Public Serv. Comm'n*, 539 U.S. 39, 41 (2003); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1011 (9th Cir. 2004) (*Lockyer v. FERC*).

<sup>11</sup> 15 U.S.C. §§ 717(b) and c(a); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1161–63 (D.C. Cir. 1996); *Texas-Ohio*, 368 F. Supp. 2d at 1114.

<sup>12</sup> *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J. concurring).

<sup>13</sup> *E.g., Lockyer v. FERC*, 383 F.3d at 1012–13; *Snohomish*, 384 F.3d at 760–61.

<sup>14</sup> *E.g., Lockyer v. FERC*, 383 F.3d at 1012–13; *Snohomish*, 384 F.3d at 760–61; *Grays Harbor*, 379 F.3d at 649.

<sup>15</sup> *Schneidewind*, 485 U.S. at 305; *Exxon v. Eagerton*, 462 U.S. 176, 184 (1983).

<sup>16</sup> 15 U.S.C. § 717 et. seq.

<sup>17</sup> 15 U.S.C. § 3301 et. seq.

<sup>18</sup> 101 P.L. 60, 103 Stat. 157.

<sup>19</sup> *Schneidewind*, 485 U.S. at 299–300, 310.

<sup>20</sup> *Texaco Inc. v. Duhe*, 274 F.3d 911, 916 n.5 (5th Cir. 2001).

controls as to “first sales” of natural gas, although that term was defined to *exclude* interstate wholesale sales by any natural gas pipeline, any distribution company, or any affiliate thereof.<sup>21</sup> Moreover, the NGPA does not create a regulatory vacuum that would allow direct or indirect challenges to the prices of interstate “first sales” in civil lawsuits; rather, it constitutes a Congressional determination that such sales are not subject to price regulation at all, given the Congressional intent to “occupy the field of wholesale sales of natural gas in interstate commerce.”<sup>22</sup> The Supreme Court has explained:

To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market. “[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much preemptive force as a decision *to regulate*.”<sup>23</sup>

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Second, in various orders promulgated starting in 1992, FERC loosened regulatory control of other aspects of the sale and transportation of wholesale natural gas. Chiefly, in 1993, FERC issued “blanket certificates” authorizing “sales for resale at negotiated rates in interstate commerce” of any natural gas subject to FERC’s jurisdiction under the NGA.<sup>24</sup> In granting natural gas wholesalers authority to sell at market-based rates, FERC reasoned that such “light-handed regulation” would be sufficient to ensure that rates for gas sales would remain reasonable, based on FERC’s finding that “adequate divertible gas supplies exist in all pipeline markets.”<sup>25</sup> Thus, while FERC required an individualized showing of lack of market power before granting an electricity wholesaler market-rate approval, FERC effectively made such a determination on an industry-wide basis for the natural gas market, resulting in the issuance of blanket certificates allowing all natural gas wholesalers to transact at market-based rates. Therefore, much like the electricity market, by the late 1990s, sellers of wholesale natural gas were authorized to enter into bilateral transactions at market-based rates, without needing to submit those rates directly to FERC for prospective approval and “filing,” but subject to FERC’s ultimate regulatory jurisdiction to ensure that the rates charged were “just and reasonable” as required under the NGA.<sup>26</sup>

As part of its regulatory jurisdiction, and in part as a response to the California energy crisis of 2000–2001, FERC implemented market conduct rules aimed at preventing abusive or anticompetitive conduct. Specifically, in 2003 FERC issued Order No. 644, amending the blanket marketing certificates to incorporate FERC’s Code of Conduct regulations and thereby expressly prohibit a broad range of objectionable conduct by market-based rate sellers, including collusive conduct aimed at fixing prices or manipulating market conditions.<sup>27</sup> FERC’s market conduct rules

<sup>21</sup> 15 U.S.C. § 3301(21)(B); *see* Reporting of Natural Gas Sales to the California Market, 96 F.E.R.C. ¶ 61,119, 61,463, 2001 FERC LEXIS 1802 (2001); Amendments to Blanket Sales Certificate, 105 F.E.R.C. ¶ 61,217, at ¶ 15, 2003 FERC LEXIS 2276 (2003) (Order No. 644); In the Matter of Amendments to Blanket Sales Certificates, 107 F.E.R.C. ¶ 61,174, at ¶ 28, 2004 FERC LEXIS 1022 (F.E.R.C. 2004).

<sup>22</sup> *Exxon Corp. v. Eagerton*, 462 U.S. at 184; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Miss.*, 474 U.S. 409, 421–22 (1986) (*Transcontinental*).

<sup>23</sup> *Transcontinental*, 474 U.S. at 422 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm’n*, 461 U.S. 375, 384 (1983)).

<sup>24</sup> 18 C.F.R. § 284.402.

<sup>25</sup> *United Distrib.*, 88 F.3d at 1125–26 (citing 18 C.F.R. §§ 284.281–284.288).

<sup>26</sup> 15 U.S.C. §§ 717(c) and (d).

<sup>27</sup> 18 C.F.R. § 284.403.

make plain FERC's authority and intention to take action against blanket marketing certificate holders who violate the Commission's rules, including authority to order "disgorgement of unjust profits," "suspension or revocation" of sales authority under FERC's blanket marketing certificates, and "other appropriate non-monetary remedies."<sup>28</sup>

The FPA and the NGA are "substantially identical" and, thus, "there is an established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes."<sup>29</sup> Some authorities suggest that, as a result of the statutory and regulatory changes since the late 1970s, case law may no longer be cited interchangeably when dealing with the NGA, as distinct from the FPA.<sup>30</sup> However, FERC has stated that a "blanket [gas] certificate has the same legal effect as the market based rate authority granted to sellers in the wholesale electric market."<sup>31</sup> Thus, it appears that FERC continues to believe that decisions concerning regulation of natural gas under the NGA and electricity under the FPA remain essentially interchangeable.

### **The Related Defenses of Federal Preemption and Filed Rate Doctrine and Their Preclusive Effect on Antitrust Claims**

The federal preemption doctrine and filed rate doctrine are closely related in that they both operate to protect the exclusive jurisdiction vested in a federal agency. The NGA vests sole authority in FERC to ensure that wholesale natural gas rates are just and reasonable and to the extent state laws, including state antitrust law, purport to challenge or regulate transactions that are within FERC's exclusive jurisdiction under the NGA, they are preempted. As with federal preemption doctrine, the filed rate doctrine similarly operates to preserve FERC's exclusive jurisdiction to regulate wholesale natural gas rates by precluding suits, including antitrust suits, that challenge wholesale natural gas rates.

With respect to interstate wholesale sales of natural gas, the U.S. Supreme Court has made it clear that:

No court may substitute its own judgment on reasonableness for the judgment of [FERC]. The authority to decide whether the rates are reasonable is vested by § 4 of the [Natural Gas Act] solely in [FERC], and 'the right to a reasonable rate is the right to the rate which [FERC] files or fixes. Congress here has granted exclusive authority over rate regulation to [FERC].<sup>32</sup>

FERC's determination of the reasonable rate is subject to review by the appropriate U.S. Court of Appeals, but the standard of review is deferential.<sup>33</sup> Thus, federal law preempts the application of state laws or regulations which would effectively change the prices of transactions within FERC's jurisdiction.<sup>34</sup>

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<sup>28</sup> 18 C.F.R. § 284.403(d).

<sup>29</sup> *Grays Harbor*, 379 F.3d at 649 n.8; *Lockyer v. Dynegy*, 375 F.3d at 842 n.8; *Hall*, 453 U.S. at 578 n.7.

<sup>30</sup> *Gallo*, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, at 13–14 (E.D. Cal. May 14, 2004).

<sup>31</sup> *Reliant Energy Serv., Inc.*, Order Approving Stipulation and Consent Agreement, 105 F.E.R.C. ¶ 61,008, at ¶ 29, 2003 FERC LEXIS 1958 (F.E.R.C. 2003).

<sup>32</sup> *Hall*, 453 U.S. at 577, 580.

<sup>33</sup> *Lockyer v. FERC*, 383 F.3d 1006, at 1012. See *City of Seattle v. FERC*, 923 F.2d 713, 715 (9th Cir. 1991).

<sup>34</sup> *Lockyer v. Dynegy, Inc.*, 375 F.3d at 850 n.17 (citing *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) ("The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas or for state regulations which would indirectly achieve the same result.")).

The filed rate doctrine is closely related to preemption; its “essential purpose . . . is to protect the jurisdiction of a regulatory body that Congress has designated to determine whether rates charged, such as those in the natural gas market, are just and reasonable.”<sup>35</sup> The doctrine precludes marketers from charging rates different from those filed with or fixed by FERC.<sup>36</sup> Thus, “[a]t its most basic, the filed rate doctrine provides that state law, and some federal law . . . [e.g., antitrust law], may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.”<sup>37</sup> The doctrine applies to rates charged by “interstate operators over whom federal agencies have exclusive power to set rates.”<sup>38</sup> Accordingly, the filed rate doctrine bars claims for damages dependent upon a hypothetical determination of the rates that would have been charged in a market subject to federal regulation, absent the alleged misconduct.<sup>39</sup> At its core, the filed rate doctrine prevents district courts from second-guessing agency rate-making decisions:

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This principle “prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority.” Thus, even if a claim does not directly attack the filed rate, an award of damages to the customer that would, in effect, result in a judicial determination of the reasonableness of that rate is prohibited under the filed rate doctrine.<sup>40</sup>

If applicable, the filed rate doctrine bars civil antitrust damage claims, whether asserted under state or federal law.<sup>41</sup> For example, in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, plaintiffs alleged that the defendants, motor carriers engaged in the transportation of freight between the United States and Canada, had conspired to fix prices in violation of the Sherman Act.<sup>42</sup> Because the defendants’ rates had been filed with the Interstate Commerce Commission, the Supreme Court found “the question presented is whether carriers are subject to treble-damages liability in a private antitrust action” for the alleged misconduct.<sup>43</sup> The Supreme Court squarely answered that question in the negative, reaffirming that the filed rate doctrine continues to bar private antitrust damage claims arising from filed tariffs.<sup>44</sup> The Supreme Court was careful, however, to explain that the filed rate doctrine did *not* provide a broad “immunity” from antitrust law because the defendants remained “subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief.”<sup>45</sup>

<sup>35</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1116; see *Grays Harbor*, 379 F.3d at 650 (the doctrine “is grounded in an agency’s exclusive rate-setting authority.”).

<sup>36</sup> *Hall*, 453 U.S. at 573, 577; *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1986); *Lockyer v. FERC*, 383 F.3d at 1012.

<sup>37</sup> *Lockyer v. Dynegy*, 375 F.3d at 852–53; *Transmission Agency v. Sierra Pac. Power Co.*, 295 F.3d 918, 929 (9th Cir. 2002) (citing *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 862–63 (9th Cir. 1997)) (*Stanislaus*).

<sup>38</sup> *Transmission Agency*, 295 F.3d at 929.

<sup>39</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1114–15.

<sup>40</sup> *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004) (citation omitted).

<sup>41</sup> *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 416–17, 422 (1986) (*Square D*); *Stanislaus*, 114 F.3d at 862–63 (citing *Hall*, 453 U.S. at 580); see also *Lockyer v. Dynegy, Inc.*, 375 F.3d at 852–853; *Texas-Ohio*, 368 F. Supp. 2d at 1116; *California ex rel. Lockyer v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1057 (N.D. Cal. 2003).

<sup>42</sup> 476 U.S. at 410–12.

<sup>43</sup> *Id.* at 410.

<sup>44</sup> *Id.* at 418–22.

<sup>45</sup> *Id.* at 422.

### Application of Filed Rate Doctrine/Federal Preemption to Manipulation Claims Pertaining to the 2000–2001 California Energy Crisis

The decisions in *Gallo*, *Texas-Ohio*, and *Sierra Pacific* raise significant questions pertaining to the propriety of applying federal preemption and filed rate arguments to preclude antitrust claims challenging wholesale natural gas rates when the rates are not directly filed with FERC but rather are authorized under a market-based rate scheme. The court in *Gallo* refused to apply the filed rate doctrine, in part, due to the lack of a specific rate filing with FERC. Conversely, the *Texas-Ohio* and *Sierra-Pacific* courts appear to have recognized that application of federal preemption and the filed rate doctrine is driven by the scope of jurisdiction granted to FERC to ensure just and reasonable rates rather than the specific regulatory mechanisms employed by FERC to achieve that result.

The complaints in each of *Gallo*, *Texas-Ohio*, and *Sierra Pacific* allege substantially similar misconduct, as do the various California state court cases pending as *In Re: Natural Gas Antitrust Cases I, II, III, and IV*. In particular, all of those cases allege that the defendants conspired to increase and/or fix the price of natural gas in violation of the Sherman Act, California's antitrust statute, the Cartwright Act,<sup>46</sup> and/or the California Unfair Competition Law.<sup>47</sup> Defendants are alleged to have carried out this purported conspiracy primarily by (1) reporting false price and volume information to the publishers of natural gas prices indexes that are used to establish the prices of certain natural gas transactions, and (2) participating in so-called "wash" trades, in which defendants would buy and sell the same volumes to one another at the same price, resulting in no net change of ownership or economic risk, but allegedly causing prices to increase due to the illusion of increased demand for natural gas and/or a collusive exchange of price information.<sup>48</sup> In each case, the defendants contend that the plaintiffs' antitrust and other claims were barred by federal preemption and/or the filed rate doctrine.

In *Texas-Ohio* and *Sierra Pacific*, the district courts found the claims barred because the alleged conduct concerned wholesale natural gas transactions within FERC's jurisdiction and, in particular, because the plaintiffs' damage claims would have required the court or jury to usurp FERC's function of determining whether the prices charged for the wholesale natural gas transactions at issue were "just and reasonable."<sup>49</sup> In *Gallo*, the court found that the filed rate doctrine did not apply, on the alternative grounds that (1) the plaintiff's allegations concerned retail, not wholesale sales, (2) resolution of the plaintiff's damage claims would not necessarily require a determination of whether the prices charged were "just and reasonable," which the court acknowledged remained within FERC's exclusive jurisdiction, and (3) there was no "filed rate" because FERC had granted blanket certificates to sell natural gas at market rates and, as distinct from its regulation of wholesale electricity sales, FERC did not make a prospective, company-specific, finding of lack of market power nor did it require the retrospective quarterly filing of rates that was required for electricity sales.<sup>50</sup>

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<sup>46</sup> Cal. Bus. & Prof. Code § 16720.

<sup>47</sup> Cal. Bus. & Prof. Code § 17200.

<sup>48</sup> *E.g.*, *Texas-Ohio*, 368 F. Supp. 2d at 1113.

<sup>49</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1114–17; *Sierra Pacific*, Order Granting Motions to Dismiss, at 1 (D. Nev. Dec. 8, 2004).

<sup>50</sup> *Gallo*, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, at 9–17 (E.D. Cal. May 14, 2004).

These cases pose several common issues and arguments relating to the filed rate doctrine and federal preemption for the various trial courts to address. First, there appears to be no significant dispute that the transition of regulation of wholesale natural gas transactions to a market-based regime overseen by FERC is authorized by the NGA.<sup>51</sup>

The next issue is whether the filed rate doctrine applies only if FERC has reviewed, and approved, a set “rate” which was then “filed” with FERC and available for public inspection. Numerous courts have held not only that the NGA and FPA permit FERC to establish a market-based regulatory scheme, under which market participants negotiate rates for their individual transactions under FERC’s oversight, but also that the filed rate doctrine applies to the prices established by this system.<sup>52</sup> For example, the *Grays Harbor* court held that, “while market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine.”<sup>53</sup> Similarly, in *Energy Louisiana Inc. v. Louisiana Public Service Commission*, the Supreme Court held that the filed rate doctrine barred state courts and agencies from assuming a rate different from one set under the federal regime, even though FERC did not actually set the rate but delegated that authority to a third party subject to federal regulation.<sup>54</sup> The Fifth Circuit has also recently indicated its acceptance of the view that the filed-rate doctrine applies to market-based rates, holding in *Texas Commercial Energy v. TXU Energy, Inc.* that the plaintiff’s state and federal antitrust claims arising from the defendant’s alleged manipulation of short-term energy markets were barred even though the Public Utility Commission of Texas permitted sales at market rates.<sup>55</sup>

The plaintiffs in the pending natural gas cases argue that the Ninth Circuit electricity market decisions, such as *Snohomish*, *Grays Harbor*, and *Lockyer v. Dynegy*, do not apply to claims alleging manipulation of the natural gas market because of alleged differences in the level of FERC’s regulation of the electricity market and the natural gas market. In particular, the plaintiffs argue that the filed rate doctrine should not apply to alleged misconduct in the wholesale natural gas market because that market has been “deregulated” by the NGPA and FERC has issued “blanket certifications” permitting the sale of natural gas at market rates. Specifically, the plaintiffs point to the statement in *Snohomish* that “the fundamental question in this case is whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws” and the court’s conclusion that FERC’s continuing control of the electricity market through its requirements of (1) an individual determination of lack of market power prior to granting market-rate authority, and (2) retrospective filing of rates on a quarterly basis, was “enough regulation” to justify preemption.<sup>56</sup>

The *Texas-Ohio* court rejected the plaintiffs’ argument that the filed rate doctrine is triggered only by the actual filing and approval of rates by the relevant federal regulatory body.<sup>57</sup> The court

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<sup>51</sup> *Lockyer v. FERC*, 383 F.3d at 1012–13; see *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993).

<sup>52</sup> *Grays Harbor*, 379 F.3d at 651–52; *Snohomish*, 384 F.3d at 760–61; *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000).

<sup>53</sup> 379 F.3d at 651–52.

<sup>54</sup> 539 U.S. at 49–50.

<sup>55</sup> *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 508–10 (5th Cir. 2005).

<sup>56</sup> *Snohomish*, 384 F.3d at 760–61. The plaintiffs similarly assert that the result in *Grays Harbor* depended upon FERC’s “continuing oversight” of the rates charged for wholesale electricity to ensure that prices are just and reasonable.

<sup>57</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1115–16.

held that *Stanislaus* did not limit application of the filed rate doctrine only to cases where FERC had prospectively reviewed and approved the allegedly manipulated wholesale prices.<sup>58</sup> Furthermore, the *Texas-Ohio* court concluded that the filed rate doctrine applied irrespective of the fact that FERC had moved to a market-based regulation system under which it no longer directly reviewed and approved on a prospective basis the terms of each transaction:

The essential purpose of the filed rate doctrine is to protect the jurisdiction of a regulatory body that Congress has designated to determine whether rates charged, such as those in the natural gas market, are just and reasonable. Under the Natural Gas Act, FERC retains statutory authority over wholesale natural gas prices and therefore the filed rate doctrine applies even though FERC, in exercising its authority, chose to move toward a market-based system.<sup>59</sup>

... the Texas-Ohio court concluded that the filed rate doctrine applied irrespective of the fact that FERC had moved to a market-based regulation system under which it no longer directly reviewed and approved on a prospective basis the terms of each transaction . . .

The court noted that, even though FERC had not required advance filing of the specific rates at issue, it (1) retained plenary jurisdiction over wholesale sales of natural gas in interstate commerce under the NGA; (2) remained vested with the statutory authority to ensure the rates for such transactions are just and reasonable; (3) has the sole authority under Section 4 of the NGA to determine whether the rates charged are just and reasonable; and (4) has initiated a regulatory investigation of the alleged false reporting and wash trading conduct upon which plaintiffs' claims are based.<sup>60</sup>

Similarly, in *Sierra-Pacific*, another district court judge dismissed claims alleging the defendants conspired to manipulate the price of natural gas through unlawful wash trades and false price reports to index publishers, even though the alleged misconduct occurred with respect to privately negotiated natural gas transactions and the rates had not expressly been filed with FERC.<sup>61</sup> The plaintiffs argued that FERC's regulation of the wholesale natural gas market had become too light-handed to justify application of the filed rate doctrine to bar the relief sought, which would have required a determination of the difference between the prices actually charged to the plaintiffs and the prices that purportedly would have been charged absent the alleged misconduct. The court rejected this argument, holding that FERC's regulatory authority and manner of regulation had been unchanged since the Ninth Circuit's decision of *Stanislaus* in 1993 and, as a result, the filed rate doctrine barred all of the plaintiffs' claims.

In denying the motion to dismiss in *Gallo*, the court applied a narrower interpretation of the filed rate doctrine, holding that it required, literally, that the "rate" be "filed."<sup>62</sup> The court acknowledged that "there is no doubt that the filed rate doctrine bars both federal and state claims against actors who 'game the system' in the context of wholesale trades . . ." <sup>63</sup> Nonetheless, the court regarded the question of whether the filed rate doctrine applied in circumstances "where the wholesale rates are no longer filed but are determined by the market itself, and are subject to retrospective FERC review" to be one of first impression. The court then ruled that the filed rate doc-

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1116.

<sup>60</sup> *Id.* at 1115–17 (citations omitted).

<sup>61</sup> *Sierra Pacific*, Order Granting Defendants' Motion to Dismiss, at 1.

<sup>62</sup> *Gallo*, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, at 15 ("In other words, the filed rate doctrine is essentially a rule of jurisdiction whose applicability is circumscribed by both the congressionally-mandated jurisdiction of the regulatory agency and the occurrence of the triggering event of filing a rate or tariff.").

<sup>63</sup> *Id.* at 9.

... the purpose of  
preemption and the  
filed rate doctrine is to  
protect the supremacy  
of federal law and the  
regulatory jurisdiction  
of FERC . . .

trine did not apply where the specific rates were not filed with FERC.<sup>64</sup> In particular, the court interpreted *Stanislaus*, which applied the filed rate doctrine to bar antitrust claims concerning natural gas prices, to have been dependent upon the fact that FERC had explicitly reviewed and approved the transactions at issue.<sup>65</sup>

In addition, the *Gallo* court distinguished the then-district court decision in *Snohomish* because it arose from the electricity market and questioned whether the reasoning of *Snohomish* could apply to alleged manipulation in the natural gas market in light of developing differences in the regulatory structures applicable to electricity and natural gas markets.<sup>66</sup> Because the *Gallo* order was issued before the Ninth Circuit's decisions in *Snohomish*, *Grays Harbor*, *Lockyer v. Dynegy*, and *Lockyer v. FERC*—all of which held that FERC's market-based rate approval under the FPA did constitute a "filed" rate sufficient to trigger application of the filed rate doctrine—it is questionable whether the court would decide the *Gallo* motion to dismiss in the same way today. The *Texas-Ohio* court dismissed the plaintiff's claims for manipulation of the natural gas market (despite being well aware of the differences in the manner in which FERC exercised regulatory oversight of the electricity and natural gas industries) and, in fact, specifically held that the differences in the regulatory regimes did not preclude application of the filed rate doctrine to bar plaintiff's claims.<sup>67</sup>

Although the Ninth Circuit likely will have to reconcile any perceived differences between the rulings in *Texas-Ohio* and *Gallo*, the decision in *Texas-Ohio* arguably is a more consistent application of relevant Supreme Court precedent than the decision in *Gallo*, which seemed to regard the absence of the prospective filing of a specific tariff and direct regulation of wholesale natural gas prices by FERC as dispositive. Specifically, the Supreme Court and appellate authorities make clear that the purpose of preemption and the filed rate doctrine is to protect the supremacy of federal law and the regulatory jurisdiction of FERC—both in instances where FERC has responsibility to determine the reasonableness of rates and in instances where Congress has determined that there is to be no regulation at all, either by FERC or by state law.<sup>68</sup> In particular, with respect to wholesale natural gas markets, state law claims are preempted regardless of whether FERC is or is not actively regulating the conduct at issue because Congress established a comprehensive federal regulatory scheme.<sup>69</sup>

Although the NGPA is often described as having "deregulated" wholesale natural gas transactions, the statute is better understood as reflecting a Congressional intent to shift from a system under which FERC directly regulated rates to one in which FERC's role is to "oversee a national market price regulatory scheme."<sup>70</sup> Thus, the NGPA "does not constitute a federal retreat from a comprehensive gas policy" and should not be construed as leaving the market "unregulated" or creating a regulatory vacuum that could be filled by state law.<sup>71</sup> In rejecting the argument

<sup>64</sup> *Id.* at 12–15.

<sup>65</sup> *Id.* at 12–13.

<sup>66</sup> *Id.* at 13–14.

<sup>67</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1117.

<sup>68</sup> *E.g.*, *Schneidewind*, 485 U.S. at 300–01, 305; *Miss. Power & Light*, 487 U.S. at 371; *Hall*, 453 U.S. at 577–78.

<sup>69</sup> *See Transcontinental*, 474 U.S. at 422.

<sup>70</sup> *Transcontinental*, 474 U.S. at 415, 421.

<sup>71</sup> *See id.* at 421.

that the “deregulation” of the natural gas market under the NGPA allowed for application of state law in *Transcontinental*, the Supreme Court reiterated that “a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.”<sup>72</sup> The question, thus, is

not whether FERC has affirmative regulatory power . . . but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC. The answer to the latter question must be in the negative.<sup>73</sup>

Also, because the filed rate doctrine protects the jurisdiction of the appropriate federal regulatory authority to determine the reasonableness of the rates at issue, and the applicable federal law precludes charging anything but the “reasonable” rate, the filed rate doctrine must bar any claim that would require damages to be calculated based upon the determination of a hypothetical different rate than the one actually charged.<sup>74</sup> While the *Grays Harbor* ruling was in the context of electricity rather than natural gas, the *Texas-Ohio* court applied the same rationale to hold that the filed rate doctrine barred both state and federal antitrust claims for manipulation of the wholesale natural gas market.<sup>75</sup> Specifically, the court concluded that “[t]he determination of damages as requested by *Texas-Ohio* would require this Court to speculate upon what rates would have been charged in the natural gas market absent Defendants’ alleged misconduct by assuming a hypothetical rate.” This speculation, the court found, was prohibited because it would “undermine the congressional scheme of uniform rate regulation” by “usurping a function that Congress explicitly has assigned to FERC”—determining “what a just or reasonable rate would have been.”<sup>76</sup> The court concluded: “Under the Natural Gas Act, FERC retains statutory authority over wholesale natural gas prices and therefore the filed rate doctrine applies even though FERC, in exercising its authority, chose to move toward a market-based system.”<sup>77</sup>

### **Impact of Blanket Marketing Certificates on FERC’s Regulatory Authority Under the NGA**

Some natural gas plaintiffs have urged that the filed rate doctrine should not apply in light of FERC’s elimination of rate-filing requirements through its issuance of blanket marketing certificates allowing market participants to charge unfiled, privately negotiated rates. This argument has proved unavailing to plaintiffs in the electricity cases and should prove equally unavailing to natural gas plaintiffs.

With respect to the current wave of natural gas cases, FERC has always had authority to regulate the alleged misconduct upon which the claims in *Texas-Ohio*, *Gallo*, *Sierra Pacific*, and *In Re Natural Gas Antitrust Cases I, II, III and IV* are primarily based: false reporting of prices to the index publishers and wash trading. As noted above, FERC has recently promulgated regulations

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<sup>72</sup> *Id.* at 422 (quoting *Arkansas Elec. Coop. Corp.*, 461 U.S. at 384).

<sup>73</sup> *Id.* at 422; *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 502–03 (1988).

<sup>74</sup> *E.g.*, *Grays Harbor*, 379 F.3d at 650–51; *Stanislaus*, 114 F.3d at 863; *Texas-Ohio*, 368 F. Supp. 2d at 1115–16.

<sup>75</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1115–17.

<sup>76</sup> *Id.* at 1115–16 (citing *Grays Harbor*, 379 F.3d at 651–52; *Arkansas La. Gas*, 453 U.S. at 579, 582; *Stanislaus*, 114 F.3d at 863).

<sup>77</sup> *Texas-Ohio*, 368 F. Supp. 2d at 1116.

that explicitly target the primary alleged misconduct in these cases.<sup>78</sup> The FERC regulations also expressly provide for various remedies, including disgorgement of unjust profits.<sup>79</sup>

Although the regulations were issued after, and as a response to, the 2000–2001 California energy crisis, for purposes of the preemption and filed rate doctrine defenses, the critical point is that FERC always had jurisdiction to issue such regulations under the pre-existing statutory scheme—Congress did not have to grant any new statutory authorization to FERC in order to enable FERC to issue regulations expressly precluding false reporting to the index publishers and wash trading. Because regulation of the alleged misconduct in these cases was always within FERC’s jurisdiction under the NGA and because the Supreme Court has repeatedly held that where FERC has jurisdiction, such jurisdiction is exclusive, the plaintiffs’ claims in the current wave of natural gas cases should all be found preempted and barred by the filed rate doctrine.

Moreover, the better-reasoned view is that FERC was “regulating” the wholesale natural gas market in a manner sufficient to justify application of the preemption and filed rate doctrine defenses and FERC’s regulation of natural gas is not substantially distinguishable from its regulation of the electricity market. Proponents of the opposite view assert that the wholesale natural gas market is “unregulated” (as opposed to the still-regulated electricity market) because of FERC’s practice of issuing blanket certificates authorizing wholesale natural gas sales at market rates to all entities subject to FERC’s jurisdiction under the NGA.<sup>80</sup> However, in determining to grant natural gas wholesalers authority to sell at market-based rates, FERC reasoned that such “light-handed regulation” would be sufficient to ensure that rates for gas sales would remain reasonable because of FERC’s finding that “adequate divertible gas supplies exist in all pipeline markets.”<sup>81</sup>

Thus, although FERC required an individualized showing of lack of market power before granting an electricity wholesaler market-rate approval, FERC effectively made such a determination on *an industry-wide basis* for the natural gas market, resulting in the issuance of blanket certificates allowing all natural gas wholesalers to transact at market-based rates. Logically then, the blanket certificates issued under the NGA should be accorded the same weight for purposes of application of the preemption and filed rate defenses as are the market-based rate approvals issued by FERC under the FPA to electricity sellers. FERC itself has expressly held that a “blanket [gas] certificate has the same legal effect as the market based rate authority granted to sellers in the wholesale electric market.”<sup>82</sup>

In addition, notwithstanding the absence of specific quarterly rate filing requirements, FERC also has always had statutory jurisdiction to remedy wrongs of the nature alleged. For example, FERC can address allegations of unjust and unreasonable rates:

Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged or collected . . . in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . is unjust [or] unreasonable . . . , the Commission shall determine the just and reasonable rate . . . and shall fix the same by order.<sup>83</sup>

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<sup>78</sup> Order No. 644.

<sup>79</sup> *Id.*

<sup>80</sup> 18 C.F.R. § 284.402.

<sup>81</sup> *United Distrib.*, 88 F.3d at 1125–26 (citing 18 C.F.R. §§ 284.281–284.288).

<sup>82</sup> *Reliant Energy Serv., Inc.*, Order Approving Stipulation and Consent Agreement, 105 FERC ¶ 61,008, at ¶ 29 (2003).

<sup>83</sup> 15 U.S.C. § 717d(a).

Any person can initiate a complaint with FERC.<sup>84</sup> In addition, FERC has stated that “the original grant of certificate authority to make jurisdictional sales of natural gas implicitly prohibited acts which would manipulate the competitive market for natural gas”; i.e., that FERC always had jurisdiction over such alleged misconduct.<sup>85</sup> Thus, claims that manipulation of the market-rate authority under the blanket marketing certificates resulted in unjust and unreasonable natural gas prices have always been remediable through FERC’s pre-existing administrative complaint mechanism.

For example, in *Enron Power Marketing, Inc. Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates*, FERC terminated the blanket natural gas marketing certificates of various affiliates of Enron found to have engaged in wash trades.<sup>86</sup> In so doing, FERC noted that, notwithstanding the issuance of the blanket marketing certifications, FERC had reserved authority to “monitor the operation of the market through the complaint process” and did not grant “gas marketers *carte blanche* to engage in any form of conduct in connection with their jurisdictional sales for resale no matter how deceptive, trusting solely in the market to cure any problems . . . .”<sup>87</sup> With respect to the available remedies, FERC stated that issuance of a blanket certificate “does not entitle the certificate holder to charge rates that are unjust and unreasonable under the NGA,” that the NGA affords “consumers a complete, permanent and effective bond of protection from excessive rates and charges,” and that FERC “has discretion to implement remedies when it finds conduct that has violated its policies or regulations,” which necessarily includes the action of terminating the marketing certificates.<sup>88</sup>

Finally, in certain of the cases, the plaintiffs also argue that the filed rate doctrine does not apply if the claimants are retail purchasers, because their grievances concern not the wholesale transactions that were directly the subject of the allegedly manipulative conduct (wash trades and false reports) but, rather, the damages allegedly suffered when the higher, manipulated, wholesale prices were passed through as higher retail prices. The *Gallo* court accepted this argument, concluding that the filed rate doctrine did not apply because the transactions giving rise to the plaintiff’s claimed damages were the retail purchases by Gallo, irrespective of whether the alleged overcharges at that level were simply being passed-through from the wholesale level at which the allegedly manipulative conduct had occurred.<sup>89</sup> In contrast, however, the Ninth Circuit in *Pastorino* reached a different conclusion with respect to claims related to California retail electricity prices. The court reasoned that, even though the transactions giving rise to damages were the retail sales, the claims were still preempted because the *conduct that formed the basis for the claims* had occurred within the wholesale market subject to FERC’s exclusive jurisdiction.<sup>90</sup> Specifically, *Pastorino* held that “[t]his court cannot apply state law to Defendants’ conduct in the wholesale

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<sup>84</sup> See 18 C.F.R. § 385.206.

<sup>85</sup> In the Matter of Amendments to Blanket Sales Certificates, 107 F.E.R.C. ¶ 61,174, ¶ 12, 2004 FERC LEXIS 1022 (May 19, 2004).

<sup>86</sup> 103 FERC ¶ 61,343, at ¶¶ 69–72, and n.52, 2003 FERC LEXIS 1212 (2003).

<sup>87</sup> *Id.* ¶ 69.

<sup>88</sup> *Id.* ¶¶ 70, 72 & n.52 (citing *Atlantic Refining Co. v. Public Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959)). See *Lockyer v. FERC*, 383 F.3d at 1016 (citations omitted) (“the power to order retroactive refunds when a company’s non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC’s authority to approve a market-based tariff in the first instance. . . . In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy, and the filed rate doctrine would preclude a direct action against the offending seller.”)

<sup>89</sup> *Gallo*, Memorandum Order And Opinion Denying Defendants’ Motion to Dismiss All Claims And Denying Motion To Strike, at 9–10.

<sup>90</sup> *Pastorino*, 2005 U.S. App. LEXIS 3315, at \*8.

energy market, an area regulated exclusively by the federal government, simply because it adversely impacted retail prices.”<sup>91</sup> So too, in *Stanislaus*, the court dismissed antitrust claims of retail natural gas consumers, holding that their effort to recover for alleged overcharges was “precisely what the filed rate doctrine prohibits.”<sup>92</sup>

### Key Questions for Courts to Answer

The resolution of these issues may turn on several key questions to be answered by the appellate courts:

- Is the market-based rate system adopted by FERC in the 1990s for wholesale interstate natural gas transactions sufficiently similar to FERC’s oversight of the wholesale electricity market to justify application of the filed rate doctrine?
- Does Congress’s so-called deregulation of certain aspects of the wholesale natural gas market through the NGPA and the Wellhead Decontrol Act reflect Congressional intent to permit state law to regulate aspects of the wholesale natural gas market not directly regulated by FERC or, instead, does Congress’s action reflect a federal decision, with preemptive effect, to leave the market regulated only by market forces?
- Are the scope of the filed rate doctrine and federal preemption of state law driven by the scope of regulatory jurisdiction granted to FERC or by the nature and extent of FERC’s actual regulation and oversight of matters within its jurisdiction?
- If FERC’s jurisdiction is limited to determining the reasonableness of wholesale rates, does the filed rate doctrine preclude claims asserted by retail consumers that allege misconduct in the wholesale market caused allegedly unreasonable prices to be passed through or charged at the retail level? ●

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<sup>91</sup> *Id.*

<sup>92</sup> *Stanislaus*, 114 F.3d at 863.