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Chair's Column  
*Bonny E. Sweeney*

Editor's Column  
*Mark Riera*

*Recent Developments  
in Competition and Antitrust Law*

**Articles**

**ANTITRUST DAMAGES CLAIMS ARISING OUT OF THE CALIFORNIA  
ELECTRICITY CRISIS: AN ANALYSIS OF FEDERAL JURISDICTION,  
PREEMPTION, AND THE FILED RATE DOCTRINE**

Geoffrey T. Holtz

**FILLING THE REGULATORY GAP:  
CALIFORNIA NATURAL GAS ANTITRUST LITIGATION**

Craig C. Corbitt and Jiangxiao Athena Hou

**THE SUPREME COURT'S *LEEGIN* DECISION ON RESALE PRICE  
MAINTENANCE: MAINTAINING UNCERTAINTY**

Brian Robison and Soña Garcia

***CREDIT SUISSE*: SUPREME COURT LIMITS ANTITRUST CLAIMS ARISING  
FROM REGULATED INVESTMENT BANKING ACTIVITY**

Howard M. Ullman

**AN IMBALANCE OF REPRESENTATION:  
A CRITIQUE OF THE ANTITRUST MODERNIZATION  
COMMISSION RECOMMENDATIONS REGARDING CIVIL REMEDIES  
IN PRIVATE ANTITRUST CASES**

Joshua P. Davis

**TYING LAW: THE CLASH BETWEEN THE SUPREME COURT  
AND LOWER COURTS**

M. Brian McMahon

# FILLING THE REGULATORY GAP: CALIFORNIA NATURAL GAS ANTITRUST LITIGATION

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## I. INTRODUCTION

The California Energy Crisis of 2000-01 saw record high prices paid by California businesses and consumers for electricity and natural gas. Numerous cases were filed alleging that these customers were overcharged in violation of federal and California antitrust laws and in violation of California unfair competition laws. This article discusses the antitrust and unfair competition class action litigation with respect to natural gas.

After the worst of the energy crisis had passed, the Federal Energy Regulatory Commission (“FERC”) directed its staff to investigate whether Enron and any other entities had manipulated short-term prices in the electricity or natural gas markets in the west.<sup>1</sup> After more than a year of investigation, FERC released its Final Report on March 26, 2003.<sup>2</sup> FERC found evidence of significant market manipulation in the western energy markets during 2000 and 2001. According to the Final Report, dysfunctions in the natural gas market in the western states stemmed, at least in part, from efforts by natural gas companies to manipulate price indices compiled by trade publications, including reporting false data on prices and volumes, as well as wash trading and other anticompetitive conduct.<sup>3</sup> However, FERC said it could not give natural gas purchasers relief, because it did not actually regulate the sellers’ anticompetitive conduct at the time it occurred.<sup>4</sup> Instead, FERC instituted prospective new rules to prohibit “jurisdictional” wholesale sellers of natural gas from engaging in market misconduct, including wash trades and submission of false information.<sup>5</sup>

Pursuant to its authority under the Commodity Exchange Act (“CEA”),<sup>6</sup> which prohibits the delivery of false price and volume information to influence pricing, the Commodities Futures Trading Commission (“CFTC”) conducted a separate investigation of false reporting and wash trading, and found that a number of companies had indeed

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1 FERC, Final Report on Price Manipulation in Western Markets, Docket No. PA-02-2-000, at ES-3 (March 26, 2003).

2 *Id.*

3 *Id.*

4 *See, e.g.*, Final Report, ES-5 (“Reliant’s churning did not violate the blanket certificate under which it sold gas because Section 284.402 of the regulations contains no explicit guidelines or prohibitions.”); VII-1 (“the Commission has no regulations on wash trading”).

5 *See* FERC Order 644, Amendments to *Blanket Sales Certificates*, 105 FERC ¶ 61,217 (Nov. 17, 2003).

6 7 U.S.C. §§ 9, 12b and 13(a) (2).

engaged in such practices.<sup>7</sup> Most of the named defendant companies entered into consent orders with the CFTC in which they agreed to cease and desist from further violations of the CEA and to pay substantial fines for their misconduct.<sup>8</sup>

With this background, a number of class actions as well as some non-class governmental and corporate plaintiff actions were filed in state and federal courts. These complaints were based in part on the FERC Final Report and the CFTC orders, and generally alleged that the defendant natural gas companies, in violation of federal and state antitrust laws and state unfair competition statutes, conspired to inflate natural gas prices by (1) reporting false price information and trade volume to private trade publications that compiled daily pricing indices, and (2) engaging in wash trading and churning of sales to drive up prices. Various complaints also alleged that the El Paso Corporation Sempra Energy (through their subsidiaries or affiliates) and others conspired to withhold pipeline transportation capacity to drive up natural gas prices in California.<sup>9</sup>

A central issue in these cases has been whether FERC natural gas regulation is sufficient to bar claims by private parties, either under the general law of federal preemption, or by application of the venerable “filed rate” doctrine of antitrust law. The federal and state courts have not reached uniform conclusions on this issue, but clarification finally was provided by the Ninth Circuit decisions in *E. & J. Gallo Winery v. Encana Corporation*, (“Gallo”), and related unpublished orders in three companion cases discussed below.

This article first briefly summarizes filed rate and federal preemption doctrines and then outlines the regulatory structure of natural gas market. It then summarizes the inconsistent results reached by various courts on the applicability of the filed rate and federal preemption doctrines to the conduct alleged prior to the *Gallo* decision and the various arguments made to those courts by the plaintiffs and defendants, including whether precedent involving the electricity market is applicable to the natural gas market. Finally, the article summarizes the Ninth Circuit’s *Gallo* decision.

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7 See *In re Natural Gas Commodity Litigation* 337 F. Supp. 2d 498, 510 (S.D.N.Y. 2004). For example, the CFTC sued El Paso Merchant Energy, L.P. in its administrative proceeding and found El Paso intentionally reported incorrect trade data to the reporting firms and knowingly attempted to manipulate the price of natural gas in violation of the CEA. *In re El Paso Merchant Energy, L.P.*, No. 03-89, 2003 WL 1539777, at \*1 (CFTC March 26, 2003). El Paso entered into a consent order and agreed to cease and desist from further violations of the CEA and to pay a civil penalty of \$20 million. *Id.* at \*5.

8 See, e.g., *In the Matter of Dynegy Market & Trade and West Coast Power, LLC*, CFTC Docket No. 03-03 (“Dynegy Order”); *In the Matter of Aquila Merchant Services, Inc.*, CFTC Docket No. 04-08 (“Aquila Order”); *In the Matter of E-Prime, Inc.*, CFTC Docket No. 04-12 (“E-Prime Order”); *In the Matter of El Paso Merchant Energy, LP*, CFTC Docket No. 03-09 (“El Paso Order”); *In the Matter of Duke Energy Trading and Marketing, LLC*, CFTC Docket No. 03-26 (“Duke Order”); *In the Matter of Williams Energy Marketing & Trading, The Williams Companies*, CFTC Docket No. 03-21 (“Williams Order”); and *In the Matter of W.D. Energy Services, Inc., f/k/a Encana Energy Services, Inc.*, CFTC Docket No. 03-20 (“WD Order”). These orders are available at <<<http://www.cftc.gov>>>.

9 See e.g., *In re Western States Wholesale Natural Gas Antitrust Litigation*, 408 F. Supp. 2d 1055, 1058-59 (D.Nev. 2005) *Natural Gas Anti-Trust Cases I, II, III, & IV*, 2003-1 Trade Cases ¶ 73,959 (Cal. Super. Ct. October 16, 2002).

## II. TRADITIONAL APPLICATION OF THE FILED RATE AND PREEMPTION DOCTRINES

The filed rate doctrine and federal preemption are related but not identical legal principles. The filed rate doctrine, insofar as relevant for the discussion here, provides that the rates approved by an agency are binding, and bar courts from granting relief that would require courts to determine what the rates would have been in the absence of the challenged restraint. The rationale is that this would undermine the agency's statutory authority over these rates in contravention of the Supremacy Clause, and that the agency is in a better position than a court to determine appropriate rates.<sup>10</sup> Federal preemption limits the application of state law in areas governed by federal law. The filed rate doctrine can be viewed as a form of preemption in that a tariff, considered to be "the law," limits a purchaser's recourse against the service provider.<sup>11</sup>

The filed rate doctrine was originally designed to "ensure equality of rates to all and destroy favoritism."<sup>12</sup> "The considerations underlying the [filed rate] doctrine are . . . preservation of the agencies' primary jurisdiction over reasonableness of rates and the need to ensure that regulated companies charge only those rates of which the agency has been made cognizant."<sup>13</sup> The Supreme Court first articulated the filed rate doctrine as a defense to antitrust liability in *Keogh v. Chicago N.W. Ry. Co.*<sup>14</sup> In *Keogh*, the plaintiff alleged that shipping rates filed by the defendant interstate freight carriers with the Interstate Commerce Commission ("ICC") were fixed at arbitrary and unreasonable high levels as a result of a conspiracy in violation of the federal antitrust law.<sup>15</sup> The Supreme Court held the plaintiff failed to state an antitrust claim because the shipping rates had been filed with and approved by the ICC.<sup>16</sup>

Over time, the Supreme Court has revisited the filed rate doctrine several times, and has expressed two policy reasons for its existence:<sup>17</sup> (1) potential discrimination in rates

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10 See, e.g., *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981) ("Arkla"); *Public Utility No. 1 of Grays Harbor County Washington v. IDA Corp, Inc.*, 379 F.3d 641 (9th Cir. 2004) ("Grays Harbor").

11 See *In re NRG Energy, Inc.*, 2006 WL 2385217, \*3 (S.D.N.Y., May 17, 2006).

12 *J. Rossi, Lowering the Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 *Vanderbilt L. Rev.* 1591, 1599 (2003) (quoting *New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n*, 200 U.S. 361(1906)).

13 *Arkla*, 453 U.S. at 571-78 (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)).

14 260 U.S. 156 (1922).

15 *Keogh*, 260 U.S. at 159-60.

16 The Court provided a number of reasons for its holding. First, the regulatory structure governing rates charged by carriers provided a mechanism for the recovery of damages. Second, antitrust liability requires a violation of a legal right of the shipper in respect to a published tariff. Third, an award of antitrust damages to the plaintiff may, like a rebate, give the plaintiff a competitive advantage. Fourth determining damages would require the court to "reconstitut[e] the whole rate structure for many articles moving in an important section of the country." Lastly, the damages alleged were purely speculative. *Id.* at 163.

17 See, e.g., *Montana-Dakota Util. Co. v. N.W. Public Serv. Co.*, 341 U.S. 246 (1951); *Arkla*, 453 U.S. 571; *Maislin Indus., U.S. v. Primary Steel, In.*, 497 U.S. 116 (1990).

between customers;<sup>18</sup> and (2) the justiciability of determining “reasonable” rates.<sup>19</sup> Price discrimination has been condemned because “it maximizes the monopolist’s profits ... while also encouraging the monopolist to waste resources in maintaining its dominant market position.”<sup>20</sup> The justiciability of determining reasonable rates, which is the later developed strand of the filed rate doctrine, “preserves the exclusive role of . . . agencies in approving rates for ... services that are reasonable by keeping courts out of the rate-making issues.”<sup>21</sup>

Potential discrimination of rates between customers is not implicated in the recent natural gas lawsuits.<sup>22</sup> Rather, the debate has involved the justiciability strand, which has been criticized as a rationale for applying the filed rate doctrine.<sup>23</sup>

Federal preemption requires the court to examine congressional intent.<sup>24</sup> The Supreme Court articulated this doctrine in *Schneidewind v. ANR Pipeline Co.*<sup>25</sup> Preemption by federal regulation may be found when (1) Congress explicitly defines the extent to which its enactments preempt state law; (2) Congress implicitly indicates intent to occupy a given field exclusively; or (3) when the state law actually conflicts with federal law.<sup>26</sup> Implied preemption may be found “where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.”<sup>27</sup> Conflict preemption will be found “when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>28</sup> In *Schneidewind*, the Court struck down a Michigan law requiring public utilities that sought to transport natural gas in Michigan for public use to obtain approval from the Michigan Public Service Commission before issuing long-term securities. The Court held that the state law was preempted, stating that the key issues were “whether the state act regulates within this exclusive federal domain” and whether it was “directed at precisely the things over which the FERC has comprehensive authority.”<sup>29</sup>

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18 *Wegoland Ltd. v. NYNEX Corp.*, 27 F3d 17, 19 (2d Cir. 1994).

19 *Id.*

20 Rossi, *supra* at 1599, n. 13.

21 *Marcus v. AT&T Corp.*, 138 F3d 46, 58 (2d Cir. 1998).

22 “To be sure, the concerns for discrimination are substantially alleviated in putative class actions.”  
*Id.* at 22.

23 *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423 (1986) (stating “the *Keogh* decision was unwise as a matter of policy). See also *Town of Norwood v. New England Power Co.*, 202 F.3d 308, 420 (1st Cir. 2000); *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.2d 937, 944-45 (9th Cir. 1996).

24 See *Fidelity Federal Savings & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 152 (1982).

25 485 U.S. 293, 296-97 (1988).

26 *Id.* at 299.

27 *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

28 *Id.*

29 *Id.* at 308.

### III. REGULATION OF THE NATURAL GAS INDUSTRY

Determination of whether the filed rate and/or federal preemption doctrines should apply in the context of the natural gas market preliminarily involves an examination of the scope of FERC's regulatory authority. The natural gas industry is functionally separated into production, transportation and distribution.<sup>30</sup> Traditionally, a natural gas producer extracted gas and sold it at the wellhead to a pipeline company, which transported the gas and resold the gas to local distribution companies ("LDCs"). The LDCs then distributed the gas to industrial and residential customers.<sup>31</sup> FERC has never retained jurisdiction over the direct sales for consumption by end users.<sup>32</sup> The Natural Gas Act of 1938, which was enacted "to protect consumers against exploitation at the hands of natural gas companies," empowered FERC with jurisdiction over sales of natural gas for resale but not over direct sales for consumption by end users.<sup>33</sup> FERC lifted its regulation of the other types of natural gas sales subsequently in deregulation.

In 1978, Congress began deregulation of the natural gas industry by passing the Natural Gas Policy Act ("NGPA")<sup>34</sup>, which deregulated gas prices at the wellhead. To further deregulate the market, FERC promulgated Order No. 436<sup>35</sup>, which provided for "open-access, non-discriminatory transportation to permit downstream users to buy directly" from production.<sup>36</sup> Subsequently Congress promulgated the Natural Gas Wellhead Decontrol Act of 1989,<sup>37</sup> which expressly removed all "first sales" of natural gas from FERC's jurisdiction, as of January 1, 1993. First sales are "any sale to an interstate, an intrastate pipeline, LDC or retail customer or any sale in the chain of transactions prior to sale to intrastate or interstate pipeline or LDC or retail customer."<sup>38</sup>

In 1992, FERC promulgated two more sets of regulations and lifted its regulation of the sales for resale of natural gas by non-pipeline companies. In its Order No. 636, FERC required all interstate pipelines to "unbundle" their transportation services from their own natural gas sales, and to provide common carriage services to buyers from other sources that wished to transport natural gas.<sup>39</sup> Pursuant to Order No. 547<sup>40</sup>, FERC automatically granted

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30 *United Distribution Co. v. FERC*, 88 F.3d 1105, 1122 (D.D.C. 1996).

31 *Id.*

32 *Panhandle Eastern Pipeline Co. v. Public Servs. Comm'n*, 332 U.S. 507, 516 (1947) ("Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.") See also 15 U.S.C. §717(b).

33 *Id.*

34 15 U.S.C. §§ 3301-3432.

35 Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985).

36 FERC Order No. 636, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 59 FERC ¶ 31,030 at \*6 (Apr. 8, 1992).

37 Pub.L. No. 101-60, 103 Stat. 157, codified as amended at 15 U.S.C. § 3301, *et seq.*

38 Order Denying Rehearing of Blanket Sales Certificates Order, 107 FERC ¶ 61,174 (May 19, 2004); 15 U.S.C. § 3301(21).

39 FERC Order No. 636, 59 FERC ¶ 61,030 at \*6. See also *General Motors Corp. v. Tracy*, 519 U.S. 278, 284 (1997).

40 Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57952, 57953 (December 8, 1992)

blanket sales certificates to non-pipeline wholesalers, including those involved with non-jurisdictional “first sales” and those who traditionally were required to file their rates with FERC. The blanket certificates were to “place all marketers on an equal competitive footing by effectively eliminating the distinctions in treatment that formerly existed between regulated and non-regulated marketers.”<sup>41</sup> This “limited jurisdiction” certificate provides that it does not “subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the commission.”<sup>42</sup> There is no *ex ante* or post-approval reporting requirement for sales made pursuant to the “blanket certificate sales” authority. With these orders, FERC no longer held jurisdiction over a significant portion of natural gas market.

#### IV. NATURAL GAS LITIGATION IN CALIFORNIA STATE COURTS

There have been two main waves of natural gas cases in California state courts. First, in late 2000, class action lawsuits were filed on behalf of purchasers of natural gas and electricity in California. These lawsuits alleged that two subsidiaries of Sempra Energy,<sup>43</sup> and El Paso Corporation and its affiliates conspired to prevent new pipeline capacity from being built in Southern California.<sup>44</sup> The complaints also alleged that these companies agreed not to compete against each other in the Southern California natural gas delivery market.<sup>45</sup> There were also separate allegations against certain Sempra defendants concerning false natural gas reporting and trading activities. These cases are known as the “Pipeline Cases.” The second wave of state court complaints was filed by natural gas consumers, businesses and municipalities after FERC issued its Final Report in 2003. These cases, known as the “Price Indexing Cases,” principally alleged that the defendant natural gas trading companies manipulated the prices reported to trade publications through anti-competitive activities to artificially increase prices in the natural gas market in violation of California state laws.<sup>46</sup>

In the Pipeline Cases, defendants removed a number of the state actions to federal court on the ground that plaintiffs’ claims were preempted by the Natural Gas Act (“NGA”)<sup>47</sup>, the NGPA<sup>48</sup>, and the Federal Power Act (“FPA”).<sup>49</sup> Judge Pro of the United States District Court for the District of Nevada remanded the state actions to the state court, holding that “plaintiffs’ claims did not challenge conduct within FERC’s exclusive domain.”<sup>50</sup> Judge Pro stated that plaintiffs’ complaints focused on “defendants’ allegedly conspiratorial conduct as

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41 Removal of Outdated Regulations Pertaining to the Sales of Natural Gas Production, 69 FERC ¶¶ 61,055, 61,217-18 (Oct. 17, 1994).

42 FERC Order No. 547, 57 Fed. Reg. at 57953. *See also* 18 C.F.R. § 284.402 (a).

43 Southern California Gas Company and San Diego Gas & Electric.

44 *See* Plaintiffs’ Second Amended Master Complaint, filed January 5, 2005, available at <<<http://naturalgasantitrustlitigation.com/documents/SECOND%20AMENDED%20MASTER%20COMPLAINT.pdf>>>.

45 *Id.*

46 *See In re Western States Wholesale Natural Gas Antitrust Litigation*, 346 F.Supp.2d 1123 (D.Nev. 2004) (“*Western States II*”).

47 15 U.S.C. § 717, *et seq.*

48 15 U.S.C. § 3301, *et seq.*

49 16 U.S.C. § 824, *et seq.*

50 *In re California Retail Natural Gas and Electricity Antitrust Litigation*, 170 F. Supp. 2d 1052, 1059 (D.Nev. 2001).

indicative of anti-competitive and unfair behavior that impacted the spot market for the natural gas.”<sup>51</sup> Furthermore, the court held “FERC does not regulate the spot market and FERC’s regulatory powers are not so extensive as to imply preemption in the entire field to exclusion of antitrust claims in particular.”<sup>52</sup> Thereafter, the state cases were coordinated in the San Diego County Superior Court and assigned to the Honorable Richard Haden, and subsequently to the Honorable Ronald Prager in 2005.

In the state court, defendants sought to dismiss the claims in the Pipeline Cases on the grounds of the filed rate and federal preemption doctrines several times without success. Defendants’ demurrers were repeatedly overruled by Judge Haden.<sup>53</sup> The court held that plaintiffs’ causes of action were not completely preempted by any federal law and that application of state antitrust laws and unfair competition law had not been expressly repealed or implicitly preempted.<sup>54</sup> Additionally, the court held that the filed rate doctrine was not applicable because there were no tariffs concerning the spot market for natural gas.<sup>55</sup>

In the fall of 2004, the Sempra defendants filed a motion for summary judgment on preemption and the filed rate doctrines (El Paso had previously settled.). Judge Haden dismissed the motion and reiterated his previous ruling with a detailed analysis. The court ruled that plaintiffs’ state law claims were not preempted directly, impliedly, or as a result of any conflict with the NGA or FPA.<sup>56</sup> The court rejected defendants’ reliance on the recent Ninth Circuit opinions in *California v. Dynegy Inc.*,<sup>57</sup> *Grays Harbor*,<sup>58</sup> and *Public Utility Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*,<sup>59</sup> which all concerned the wholesale electricity market. “The case at bar, involving unregulated spot market prices for natural gas, is distinguishable,” the court stated.<sup>60</sup> Those cases “did not involve the border sale of natural gas on the spot market.”<sup>61</sup> Referring to the fact that FERC refused to provide refunds to compensate costs related to the “scarcity effects” in the natural gas market, the court concluded that there was a “fundamental distinction between the wholesale electricity market that operates pursuant to a FERC filed and approved tariff and this conspiracy case that allegedly impacted the unregulated spot market price for natural gas at the California border.”<sup>62</sup> The court noted that while Congress amended the FPA in 1988 and expressly gave FERC the authority to grant refunds upon finding of unjust or unreasonable electricity rates, Congress did not give similar refund authority to FERC with respect to natural gas

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51 *Id.*

52 *Id.*

53 *See In re Natural Gas Anti-Trust cases I, II, III, & IV*, 2004 WL 2345524, \*3 (Cal. Super. Ct. September 30, 2004).

54 *Id.*

55 *Id.*

56 *Id.* at 4.

57 375 F3d 831 (9th Cir. 2004) (“*Dynegy*”).

58 379 F3d 641.

59 384 F3d 756 (9th Cir. 2004) (“*Snohomish*”).

60 *In re Natural Gas Anti-Trust cases I, II, III, & IV*, 2004 WL 2345524, at \*5.

61 *Id.*

62 *Id.* (citing FERC Order Denying Rehearing, Certifying Fuel Cost Allowance Issues, and Accepting in Part Compliance Filings, 108 FERC ¶ 61,311 (September 24, 2004)).

rates.<sup>63</sup> Moreover, the court held that the filed rate doctrine did not bar plaintiffs' claims because defendants did not identify a FERC tariff, rate filing or rate setting regulation that controlled the spot market price at the California border.<sup>64</sup> Concurrently, FERC denied defendants' request for declaration of FERC's authority over the wholesale natural gas market.<sup>65</sup>

The defendants eventually settled these pipeline cases. The first settlement, finally approved in December 2003, settled claims that the El Paso defendants manipulated capacity on the El Paso Pipeline, and conspired with the Sempra defendants to restrict supplies.<sup>66</sup> The second settlement, reached on the eve of trial and finally approved in June 2006, settled the conspiracy claims against the Sempra defendants.<sup>67</sup>

In the Price Indexing Cases, defendants again removed the actions to federal district courts, but without success. Judge Pro of the district court of Nevada held the NGA did not preempt plaintiffs' state law claims of antitrust violations and unfair competition, and thus did not furnish a basis for removal.<sup>68</sup> The court found that Congress did not intend to preempt all state action by enacting the NGA and that California antitrust law is peripheral to and not in conflict with the central purpose of the NGA.<sup>69</sup> The court also concluded that the NGA did not displace state remedies, because the NGA did not provide remedies to address the anti-competitive behavior alleged, and because the FERC regulations prohibiting such conduct were only adopted after the Energy Crisis.<sup>70</sup> The court dismissed defendants' reliance on the opinions concerning the electricity market, stating, "Congress and FERC have treated the natural gas and electricity markets differently."<sup>71</sup>

The Price Indexing Cases were remanded and assigned by the Judicial Council to Judge Prager of the San Diego Superior Court. In addition to the class action cases, a number of municipalities filed separate actions. In March 2005, the class action plaintiffs filed their Master Class Action Complaint for violations of the California Cartwright Act and Unfair Competition Law, alleging that the defendants reported false prices and/or volumes of trades to private trade publications that compiled and disseminated natural gas price indices,

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63 *Id.* at \*6.

64 *Id.*

65 On September 19, 2005, Sempra Energy, Southern California Gas Company and San Diego Gas Electric Company sought a FERC declaration regarding its jurisdiction on these issues, stating a jury trial was drawing closer in San Diego Superior Court. See *Sempra's Status Report on California Class Action Litigation*, FERC Docket No. EL05-130. FERC denied the request, stating it could not comment on issues involving a matter pending at the FERC.

66 Judgment, Final Order, and Decree Granting Final Approval to the Class Action Settlement with the El Paso Defendants (Dec. 10, 2003), available at El Paso Settlement Informational Website. <<http://www.elpasosettlement.com/Documents.html>>

67 See Amended Ruling After Oral Argument Pipeline Settlement, *Natural Gas Anti-Trust cases I, II, III, & IV*, (Cal. Super. June 27, 2006).

68 *WESTERN STATES II*, 346 F.Supp.3d 1123.

69 *Id.* at 1132-33.

70 *Id.* at 1133.

71 *Id.* at 1136.

executed wash trades, and artificially inflated natural gas prices in California.<sup>72</sup> Defendants demurred. Relying principally on the Ninth Circuit's opinions concerning market manipulation of California wholesale electricity markets, they contended that plaintiffs' claims were preempted by the NGA. Defendants also argued that plaintiffs' claims were barred by the filed-rate doctrine. The court overruled the demurrers, holding, "federal regulation of the natural gas markets was insufficiently comprehensive" to invoke field preemption or exclusive federal jurisdiction.<sup>73</sup> "The state laws implicated by plaintiffs' complaints are complimentary to FERC regulation" and therefore conflict preemption does not exist.<sup>74</sup> Furthermore, the court held that there were critical distinctions between the recent natural gas regulations and the electricity regulations, which made the electricity cases inapposite to the facts alleged in plaintiffs' complaint."<sup>75</sup> Comparing FERC's regulatory oversight of the natural gas market to the comprehensive reporting requirements in the electricity market, the court held, "FERC was not regulating the natural gas marketplace enough to justify federal preemption of state laws."<sup>76</sup>

Nor was the court persuaded by defendants' arguments under the filed rate doctrine. The court noted, "Neither spot market prices nor conspiratorial conduct are regulated by the Tariff."<sup>77</sup> The court stated, "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>78</sup> However, "there was no regulatory oversight to constitute applicability of the filed rate doctrine to market based rates as is done in electricity cases."<sup>79</sup> Finally, the court noted FERC had no explicit prohibitions against the alleged misconduct during the Energy Crisis, and left plaintiffs with no choice but to pursue the state remedies for the wrongful conduct.<sup>80</sup>

The state price indexing class action plaintiffs have settled with all but one defendant as of the preparation of this article. The first wave of settlements, totaling \$92.1 million, with Price Indexing Cases defendants Coral Energy Resources, L.P.; Dynegy Inc. and affiliates; the Williams Companies, Inc. and affiliates; and Encana Corporation and affiliates, was finally approved on December 11, 2006.<sup>81</sup> Thereafter, the plaintiffs settled in a second wave with Reliant Energy, Inc. and affiliates; Duke Energy and affiliates, CMS Energy Resources Management Company, and Aquila Merchant Services, Inc., for a total of \$67.39 million.<sup>82</sup>

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72 See Master Class Action Complaint, filed March 9, 2005, available at <<<http://www.priceindexingsettlements.com/PDFs/MasterComplaint-FINAL.pdf>>>.

73 Ruling on Submitted Matter, JCCP Nos. 4221, *et seq.*, at p. 3 (June 29, 2005).

74 *Id.*

75 *Id.* at 4.

76 *Id.* at 6.

77 *Id.* at 7.

78 *Id.*

79 *Id.* at 9.

80 *Id.* at 10-11.

81 See *Natural Gas Anti-Trust cases I, II, III, & IV*, 0010 WL 3059 (December 11, 2006).

82 See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Final Approval of Class Action Settlements, filed May 9, 2007, <<<http://www.priceindexingsettlements.com/faq.html>>>.

The court granted final approval of these settlements on June 11, 2007. A separate action is still pending against most of the same defendants on behalf of certain municipal, government, and private gas consumers (known as the “Independent Plaintiffs”) alleging the same underlying conduct as in the class actions. No settlements of these cases have been announced to date.

## V. NATURAL GAS LITIGATION IN FEDERAL COURTS

Prior to the Ninth Circuit’s recent *Gallo* decision, the federal district courts in the Ninth Circuit were divided on the applicability of the filed rate doctrine and the federal preemption doctrine to the natural gas market.<sup>83</sup> The last previous decision by the Ninth Circuit concerning the applicability of the filed rate doctrine to the natural gas market predated significant deregulation developments in the natural gas industry.<sup>84</sup> Four appeals were heard on the same day by the same panel of the Ninth Circuit:<sup>85</sup> *Abelman*,<sup>86</sup> *Gallo*,<sup>87</sup> *Texas Ohio*,<sup>88</sup> and *Sierra Pacific*.<sup>89</sup> Although plaintiffs in these cases represent different categories of purchasers,<sup>90</sup> the issues on appeal were essentially the same: whether the filed rate doctrine and the federal preemption doctrine barred plaintiffs’ price indexing claims (pipeline claims also were asserted in *Abelman*).<sup>91</sup>

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83 There is an overlap of class members in these state and federal class action lawsuits. The state class covers all California purchasers, both indirect and direct, except resellers and those who use gas to generate electricity, while the proposed federal class covers all direct purchasers in California. The federal class case also asserts state law claims, but many members of the federal class are also in the state class, and have had their state law claims released as part of the state court settlements.

84 See *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 860 (9th Cir. 1992), cert. denied, 502 U.S. 1094 (1998) (claims arising from sales of natural gas in 1988-93 time frame).

85 A subsequent opinion by Judge Pro dismissing plaintiffs’ complaint based on the federal preemption doctrine, *J.P.Morgan Trust Co., N.A. v. Williams Companies, Inc.*, 471 F Supp. 2d 1076 (D.Nev. 2006), was not joined on appeal at the Ninth Circuit.

86 *In re Western States Wholesale Natural Gas Antitrust Litig. (“Abelman”)*, 408 F Supp. 2d 1055 (D. Nev. 2005).

87 *E&J Gallo Winery v. Encana Energy Servs., Inc.*, 2005 WL 2435900 (E.D. Cal. 2005).

88 *In re Western States Wholesale Natural Gas Antitrust Litigation (“Texas-Ohio”)*, 368 F Supp. 2d 1110 (D. Nev. 2005).

89 *Sierra Pac. Resources, Inc. v. El Paso Corp.*, Case No. CV-S-03-04140JCM (RJJ) (D. Nev. Dec. 8, 2004).

90 The named plaintiffs in *Abelman* and *Gallo* alleged that they purchased natural gas directly from the defendant companies for consumption and not resale. The named plaintiff in *Texas-Ohio*, is a company involved in the business of natural gas marketing, which also purchased natural gas directly from defendants. The named plaintiffs in *Sierra Pac. Res. v. El Paso Corp.* are an electric utility and its parent, the former of which purchases natural gas as fuel to generate electricity for its customers, not for resale to another party. See Plaintiffs’ Opening Brief, 2005 WL 2888169 (July 28, 2005).

91 Defendants did not seem to dispute that FERC has no jurisdiction over first sales which *Fairhaven* and *Gallo* claims allegedly arose from. Rather, they argued that they were blanket sales certificate holders not subject to FERC’s regulation and that the alleged misconduct arose from the wholesale sales which were subject to FERC’s regulations. See, e.g., Appellate Brief of Appellees Duke Energy Trading and Marketing, L.L.C., Duke Energy North America, LLC, Reliant Energy Services, Inc. and Reliant Energy, Inc., 2006 WL 2427696, at \*\*20-28 (May 16, 2006)(“Duke Appellate Brief”).

While the appeals were pending, some settlements were reached in *Abelman* and *Texas Ohio*.<sup>92</sup> These settlements totaled \$11.313 million.<sup>93</sup> Final approval of these settlements was granted on September 5, 2007.

#### **A. District court decisions on the application of the filed rate doctrine to the natural gas market**

The filed rate doctrine was the focus of the district courts' analysis in *Abelman*, *Texas Ohio* and *Gallo*.<sup>94</sup> In *Gallo*, Judge Ishii of the Eastern District of California held that plaintiffs' claims were not precluded by the filed rate doctrine, but certified the issue for appeal before trial.<sup>95</sup> "The central issue is the extent of FERC's jurisdiction with respect to retail sales of natural gas," the court concluded.<sup>96</sup> Judge Ishii applied a "three-step" inquiry: (1) whether the plaintiff directly challenges the fairness of a rate that has been filed; (2) whether the sales at issue are within the FERC's jurisdiction; and (3) if the retail rate paid is pegged specifically to a rate that was filed with and approved by FERC either prospectively or retrospectively.<sup>97</sup> The filed rate doctrine did not bar plaintiffs' antitrust claims because FERC's jurisdiction over end-user retail sales was lacking.<sup>98</sup> Judge Ishii also agreed with plaintiffs that it would not be necessary to determine what reasonable rates would have been in the wholesale gas market to establish damages.<sup>99</sup> The filed rate doctrine was not invoked because damages could be assessed by observing the privately maintained and published price indexes, which were not regulated by FERC.<sup>100</sup>

In contrast, Judge Pro of the District of Nevada dismissed the plaintiffs' federal antitrust and state unfair competition claims on the basis of the filed rate doctrine in *Texas-Ohio*<sup>101</sup> and *Abelman*.<sup>102</sup> The district court concluded that plaintiffs' claims were barred because the calculation of damages would have required the court to examine wholesale natural gas rates, over which FERC retained exclusive authority. Judge Pro did not find it important that FERC did not regulate first sales of natural gas, which include sales to end users such

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92 These settlements were with (1) Williams Companies, Inc. and Williams Power Company, Inc. for \$2.4 million; (2) Encana Corporation and WD Energy Services, Inc. for \$2.4 million; (3) Dynegy Inc., Dynegy Marketing and Trade, Dynegy Power Marketing, Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power I LLC, El Segundo Power II LLC, Long Beach Generation LLC, WCP (Generation) Holdings LLC, West Coast Pwer LLC for \$2.4 million; (4) Coral Energy Resources L.P. for \$2.4 million; (5) CMS Energy Resources Management Company, CMS Enterprises Goup, Inc., CMS Marketing Corporation for \$700,000; and (6) Aquila Merchant Services for \$1.013 million.

93 *Id.*

94 The district court in *Sierra Pacific* dismissed plaintiffs' claims in an unpublished order citing previous Ninth Circuit authority, without specifically addressing these issues.

95 2005 WL 2435900.

96 *Id.* at \*20 (italics in original).

97 *Gallo*, 2005 WL 2435900, at \*14.

98 *Id.* at \*18 (holding "the difference between the legal status of the retail purchaser and wholesale purchaser in their relationship to FERC oversight makes all the difference with respect to the filed rate doctrine").

99 *Id.* at \*21.

100 *Id.*

101 368 F. Supp. 2d 1110.

102 408 F. Supp. 2d 1055.

as plaintiffs. Rather, the court found that “plaintiffs’ amended complaint centers on misconduct in the wholesale natural gas market which is within FERC’s exclusive jurisdiction.”<sup>103</sup> Relying on *Grays Harbor*, the court held that the filed rate doctrine applied to the natural gas market despite its move to market based rates because FERC retained the exclusive authority to determine whether wholesale natural gas rates are just and reasonable.<sup>104</sup> “Although the electricity and natural gas markets were subject to significantly different regulatory structures, at all relevant times FERC retained the statutory authority to ensure that all rates were just and reasonable in both markets,” the court concluded.<sup>105</sup>

This decision was broader than the traditional application of the filed rate doctrine, which was not applied in cases where there were no tariffs, filed rates or the equivalent as a result of prospective or post review by FERC. For example, in *Arkansas-Louisiana Natural Gas Co. v. Hall* (“*Arkla*”),<sup>106</sup> which first applied the filed rate doctrine to the natural gas market, the purchase contract at issue was filed by the defendant and approved by the Natural Gas Commission (“NGC”). Plaintiffs’ claims arose partly from sales based on the purchase contract, the filed rates, and partly from sales made pursuant to a “small producer certificate,” which exempted the defendant from having to file a rate schedule.<sup>107</sup> The Supreme Court held that while the filed rate doctrine barred the producers’ claims during that period in which they actually filed rates and the rates had been reviewed for reasonableness by the NGC, there was no exemption from damages for the period in which the producers possessed small producer certificates.<sup>108</sup>

Similarly, in *Brown v. Ticor Title Ins. Co.*,<sup>109</sup> the Ninth Circuit addressed whether insurance rates filed with Arizona and Wisconsin regulatory agencies were entitled to protection under the filed rate doctrine. In both states, insurance companies were required to file their rates with state regulatory agencies that had the power to disapprove them. However, the “absence of meaningful state review allows the insurers to file any rates they want.”<sup>110</sup> The

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103 *Id.* at 1067.

104 *Id.* at 1069; *Texas-Ohio*, 368 F. Supp. 2d at 1116.

105 *Abelman*, 408 F. Supp. 2d at 1070 (citing the NGA, 15 U.S.C. §717c(a)); *Texas-Ohio*, 368 F. Supp. 2d at 1116.

106 453 U.S. 571, 576-77 (1981).

107 The NGC arguably had more authority over the small producer certificates referenced in *Arkla* than the FERC over the blanket sales certificates because the producer certificates had to be applied for and were at least subject to a “ceiling” that was non-existent in the case of the blanket certificates.

108 See also *AT&T Co. v. Central Office Tel.*, 524 U.S. 214, 229 (1998) (Rehnquist, J., concurring) (“[i]n order for the filed rate doctrine to serve its purpose ... it need preempt only those suits that seek to alter the terms and conditions provided for in the tariff”); *Security Servs., Inc. v. K Mart Corp.*, 511 US 431, 440 (1994) (tariff lacking an essential element not enforceable under the Filed Rate Doctrine); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 932 (1966) (antitrust damages available when challenged rates were not on file with Federal Maritime Commission); *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (the filed rate doctrine “by definition, did not survive detariffing” in the telecommunications industry); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1446 (9th Cir. 1997) (granting partial summary judgment for plaintiff and holding that filed rate doctrine is not applicable to claim relating to anticompetitive agreement by electric utilities); *Town of Norwood Massachusetts v. New England Power Company*, 202 F.3d 408, 419 (1st Cir. 2000) (“It is the filing of tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine).

109 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994).

110 *Id.* at 393.

court refused to apply the filed rate doctrine, holding: “if those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact they were filed does not make them immune from challenge.”<sup>111</sup>

The view that the application of the filed rate doctrine requires the existence of a filed rate is also embraced by FERC itself.<sup>112</sup> In the natural gas market, there is no reporting or extensive oversight by FERC or its delegates which would place “market-based rates” on an equal footing with “tariffs” within the meaning of the filed rate doctrine as was the case in *Snohomish* and *Grays Harbor*. The price indices which defendants allegedly manipulated and which ultimately resulted in injury to plaintiffs are maintained by private companies. They are not monitored or regulated by FERC. The general statutory requirement that the agency require “just and reasonable” rates, in and of itself, is not the level of actual rate regulation that ought to be required to apply the filed rate doctrine. As Judge Haden succinctly concluded, the filed rate doctrine did not bar the claims because there was no FERC tariff, rate filing or rate setting regulation that controlled the spot market price at the California border.<sup>113</sup>

### **B. District court decisions on the application of the federal preemption doctrine to the natural gas market**

The *Abelman* and *Gallo* district courts declined to apply the federal preemption doctrine to California antitrust and consumer protection claims.<sup>114</sup> Judge Pro stated in *Abelman*, “California’s Unfair Competition Act and Cartwright Act are not in direct conflict with NGA regulation. The NGA preempts any state law which directly interferes with the regulatory control of California’s natural gas rates. The purpose of California’s antitrust laws, prohibiting anti-competitive behavior, is peripheral to the central purpose of the NGA, and therefore is not preempted.”<sup>115</sup>

On appeal to the Ninth Circuit, the defendants in *Abelman*, *Texas-Ohio*, *Sierra Pacific* and *Gallo* raised preemption arguments in addition to filed rate arguments. They contended that any misconduct that occurred in the wholesale natural gas market was within the exclusive jurisdiction of FERC.<sup>116</sup> The defendants argued that their natural gas sales under “blanket sales certificate” authority were comparable to the electric sales pursuant to “market-based

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111 *Id.*

112 *Niagara Mohawk Power Corp. v. Hadley*, 111 FERC 61,120, 46 (2005) (“[f]or there to be... a violation of the filed rate doctrine, as Niagara Mohawk claims, there must first be a rate on file.”). *See also AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 110 FERC 61,032 at 61,095 (2005); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (“FERC has affirmed... that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine.”)

113 *In re Natural Gas Anti-Trust Cases I, II, III & IV*, 2004 WL 2345524, at \*6.

114 *See Western States II*, 346 F. Supp. 2d 1123; *Gallo*, 2005 WL 2435900.

115 *Western States II*, 346 F. Supp. 2d at 1133. In a more recent opinion, however, Judge Pro apparently changed his mind, and applied the preemption doctrine to dismiss state antitrust claims based on price indexing. *J.P. Morgan*, 471 F. Supp. 2d 1076.

116 *See, e.g.*, *Duke Appellate Brief*, 2006 WL 2427696, at \*28.

rate” authority.<sup>117</sup> Several defendants, referring to settlement orders they entered into with FERC regarding their conduct in the electricity and natural gas market, argued that FERC did not retreat from its statutory mandate to ensure just and reasonable rates. Defendants relied on Ninth Circuit cases which dismissed complaints concerning similar market manipulation conduct in the deregulated electric wholesale market.<sup>118</sup> They argued that claims arising from their natural gas sales made pursuant to the blanket marketing authority similarly should be barred.

Plaintiffs, on the hand, argued that the sales at issue were subject to FERC’s jurisdiction and distinguished the electric market regulation. Pointing to FERC’s deregulation orders and FERC and defendants’ own representations in FERC proceedings after the California Energy Crisis,<sup>119</sup> plaintiffs argued that FERC had no jurisdiction over sales by non-pipeline wholesalers, and did not actually regulate sales under the blanket marketing certificates.<sup>120</sup>

### C. Application of electricity cases to the natural gas market

Prices for electricity and natural gas are interrelated,<sup>121</sup> and both are subject to some regulation by federal and state authorities. However, the regulatory environments for electricity and natural gas differ significantly, and natural gas is subject to much less regulation than electricity. As a general matter, the greater the degree of regulation, the more likely private actions will be barred. The Ninth Circuit has dismissed several private actions alleging misconduct in the electricity market based on both preemption and the filed rate doctrine.<sup>122</sup>

In *Snohomish*, the Ninth Circuit concluded that FERC had exercised comprehensive and active regulatory oversight in the market-based wholesale electricity market, which justified federal preemption of claims based on state laws.<sup>123</sup> The fundamental question in that case was “whether, under the market-based system of setting wholesale electricity rates, the FERC was doing enough regulation to justify federal preemption of state laws.”<sup>124</sup> The court found the necessary quantum of regulation existed under the FPA because of the following regulatory activities. First, each seller was required to file a market-based umbrella tariff, which preauthorized the seller to engage in market-based sales.<sup>125</sup> FERC approved such market-based umbrella tariffs only upon a showing that the seller lacked market

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117 *Id.*

118 *Id.* at \*27.

119 FERC has admitted that it has no power to regulate defendants’ alleged misconduct. See Reliant Consent Agreement, 105 FERC ¶¶ 61,008, 61016 (2003) (“In approving this Agreement, the Commission has determined there was no regulation prohibiting Reliant’s trading activity at Topock and no violation of Reliant’s blanket certificate.”) See also FERC Final Report, Section II, ES-5.

120 See, e.g., Plaintiffs’ Opening Brief, 2005 WL 2888169, at \*26-27.

121 FERC found that “spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market. . . .” FERC Order No. 644, 105 FERC ¶ 61,217, at para. 12.

122 See, e.g., *Dynergy*, 375 F.3d 831; *Grays Harbor*, 379 F.3d 641; *Snohomish*, 384 F.3d 756.

123 384 F.3d at 760.

124 *Id.*

125 *Id.*

power.<sup>126</sup> Second, FERC required each seller to file quarterly reports of its transactions, including the rates charged and the amount of power delivered.<sup>127</sup> This requirement ensured that rates were on file to allow FERC to evaluate their reasonableness.<sup>128</sup> Third, FERC reviewed and approved detailed tariffs filed by the PX and ISO, which described in detail how the markets operated by each entity would function.<sup>129</sup> Participant sellers in the PX and ISO markets were also required to sign an agreement acknowledging that the tariff filed by the PX or the ISO governed all transactions in that market.<sup>130</sup> Lastly, after the Energy Crisis, FERC ordered wholesalers to disgorge profits that resulted from their misconduct in violation of the protocols that were filed as part of the PX and ISO tariffs.<sup>131</sup>

Likewise in *Grays Harbor*, the Ninth Circuit reiterated its finding of FERC's active and comprehensive oversight in the market-based electricity market. There, a public utility district brought an action against an electricity wholesaler ("IDA"), alleging that it was forced to pay exorbitant prices under the parties' contract. The filed rate doctrine applied because those rates were subject to substantial oversight even though they were market-based.<sup>132</sup> The IDA was required to provide a generation dominance analysis to show a lack of market power before it was allowed to sell at market-based rates.<sup>133</sup> The IDA was also required to file its contracts for all transactions to the FERC.<sup>134</sup> As the court of appeals noted, in the electricity industry, "[e]ven in the context of market-based rates, FERC actively regulates and oversees the setting of rates."<sup>135</sup> Therefore, the claims were also barred on the ground of federal preemption.

The decisions to apply the filed rate and preemption doctrines in these cases were made in consideration of the regulatory structure of the electricity market. As the Ninth Circuit concluded in *Lockyer*, in the electricity market, the transaction-specific reporting requirements were integral to the tariff, with implied enforcement mechanisms sufficient to provide remedies.<sup>136</sup> Although both the natural gas market and the electricity market have moved to market-based systems, their regulatory structures are fundamentally different. The FPA gave FERC complete jurisdiction over all wholesale electricity sales.<sup>137</sup> As noted above, FERC exercised a significant level of regulation under the FPA in the wholesale electricity market even after the deregulation.<sup>138</sup> In contrast, the NGA only gave FERC limited jurisdiction over sales of domestic gas in interstate commerce by pipelines, LDCs or their

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126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 761.

130 *Id.*

131 *Id.*

132 379 F3d at 651.

133 *Id.* at 649.

134 *Id.*

135 *Id.*

136 383 F3d at 1016.

137 FPA, § 205 (16 U.S.C. § 824d (1997)).

138 *Snohomish*, 384 F3d at 760.

affiliates.<sup>139</sup> The comprehensive and active regulatory monitoring and review that is implemented in the electricity wholesale market does not exist in the natural gas wholesale market pursuant to the blanket sales certificate authority.

Additionally, plaintiffs contended that the enforcement actions taken by the CFTC against the conduct complained of in the state and federal natural gas cases provided an additional reason why the filed rate and preemption doctrines should not be applied in that market. It has been held that the filed rate doctrine does not apply where more than one regulatory entity is involved.<sup>140</sup> It is also difficult to conclude that FERC had exclusive jurisdiction over the conduct at issue in the natural gas field when another agency was involved. Transplanting the Ninth Circuit's electricity decisions to the much less regulated natural gas context without careful consideration of the facts of particular cases would be an unwarranted expansion of these doctrines.<sup>141</sup>

The court then analyzed whether Gallo's damage claims could be barred by the filed rate doctrine even though Gallo's purchases were retail, purchases which the court held were outside FERC's jurisdiction. It held that "to the extent Gallo's challenge to the indices is a challenge to those market-based wholesale rates subject to FERC's jurisdiction that are included in the indices, Gallo's claim would be barred by the Filed Rate Doctrine."<sup>142</sup>

However, the Court of Appeals agreed with *Gallo* that it could not be decided on summary judgment "that all the transactions that comprise the indices were FERC-approved transactions or otherwise shielded from challenge...Misreported rates and rates reported for fictitious transactions are not FERC-approved rates, and barring claims that such fictitious transactions damages purchases in the natural gas market would not further the purpose of the Filed Rate Doctrine." The court went on to observe that "...consumer transactions, which are not regulated by FERC, were potentially included in the indices. In addition, first sales transactions, either at the wellhead or via imports from Canada and Mexico, were potentially included in the indices. These first sales are also outside of FERC's jurisdiction."<sup>143</sup>

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139 Order Denying Rehearing, 106 FERC at ¶ 61, 248.

140 See *In re Pacific Gas & Elec. Co.*, 295 B.R. 635, 666-67 (N.D. Cal. 2003) (concurrent regulation of wholesale rates by FERC and retail rates by the California Public Utilities Commission).

141 See, e.g., J. Rossi, *Moving Public Law out of the Deference Trap in Regulated Industries*, 40 Wake Forest L. Rev. 617 (2005); E. Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine*, 11 Fordham J. Corp. & Fin. L. 349 (2006). Courts outside the Ninth Circuit also have not been consistent in their decisions. The District Court for the District of Columbia dismissed an antitrust complaint against defendant Coral Energy Resources, L.P. on the basis of the filed rate doctrine, relying on *Grays Harbor* and the district of Nevada's decision in *Texas-Ohio City of Moundridge v. Exxon Mobil Corp.*, 2007 WL 80832, at \*\*17-18 (D.D.C. Jan. 9, 2007). Coral does not offer natural gas for first sale. 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." *Id.* See also *City of Moundridge v. Exxon Mobil Corp.*, 429 F Supp. 2d 117, 135-38 (D.D.C. 2006) (rejecting motion for preliminary injunction based on alleged antitrust violation by reseller of natural gas on basis of, among other grounds, the filed rate doctrine). Cf. *In re Natural Gas Commodity Litig.*, 337 F Supp. 2d 498, 510 (S.D.N.Y. 2004) (denying defendants' motion to dismiss claims of traders of natural gas future contracts in a case where defendants allegedly manipulated natural gas future prices by falsely reporting data on natural gas spot trades in the western gas market to the industry publications).

142 *Id.* at \*13.

143 *Id.* at \*14.

## VI. THE NINTH CIRCUIT'S GALLO DECISION

The Ninth Circuit ruled in favor of plaintiffs in all four related appeals, issuing a published decision in *Gallo* and unpublished orders citing that opinion in *Sierra Pacific*, *Abelman*, and *Texas-Ohio*.<sup>144</sup> The *Gallo* opinion was authored by Judge Ikuta, joined by Judge Clifton; Judge Betty Fletcher joined the opinion but filed a separate concurring opinion. The same panel issued the orders in the other three appeals.

The court of appeals first held that “to the extent Congress has given FERC authority to set rates under the NGA and FERC has exercised that authority, such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal antitrust law or state law.” These it deemed “FERC-authorized rates.”<sup>145</sup>

The court next addressed the parties’ arguments concerning the applicability of electricity market cases to natural gas, and concluded: “Because FERC has not abdicated its responsibilities but has acted, albeit with a light hand, to authorize just and reasonable rates in the natural gas arena, the Filed Rate Doctrine continues to preempt any rate-setting activities by the courts and bar federal antitrust claims under the Filed Rate Doctrine.”<sup>146</sup> Judge Fletcher’s concurring opinion appears to reflect some uncertainty with this conclusion, however. She stated, “I find no evidence that FERC has set a standard for the determination of what is a just and reasonable rate nor have the courts done so. I fear we talk a better game than we play. Without minimum standards for FERC oversight, the Filed Rate Doctrine threatens to come unmoored from its rationale of respecting the activities of a federal agency to which Congress has delegated authority. Instead, I fear respect is being given to agency passivity, allowing anticompetitive and otherwise illegal actions to escape review.”<sup>147</sup>

The court rejected Encana’s preemption argument, holding that where Congress has withdrawn FERC’s authority to regulate, as is the case with first sales, “normal market forces, including the tug and pull of private lawsuits, will hold sway.”<sup>148</sup> The court also rejected Encana’s argument that if the indices include jurisdictional as well as non-jurisdictional rates, the indices as a whole should be considered to reflect FERC-authorized rates. “We must conclude that to the extent that the indices are comprised of rates that are not FERC-authorized rates, the Filed Rate Doctrine does not bar Gallo’s claim that such rates are unfair and led to unfair retail rates paid by *Gallo*. . . . Our conclusion may raise complexities in resolving claims such as Gallo’s; however, that is dictated by our precedent.”<sup>149</sup>

The orders in *Sierra-Pacific*, *Abelman*, and *Texas-Ohio* were all based on *Gallo*. These appeals all arose from dismissals of complaints, so the Ninth Circuit’s determination that the issue could not be resolved on summary judgment based on the record in *Gallo* required

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144 *Gallo*, 2007 WL 2713126 (Sept. 19, 2007); *Sierra-Pacific*, 2007 WL 2753048 (Sept. 21, 2007); *Abelman*, No. 06-15130 (Sept. 24, 2007); *Texas-Ohio*, No. 05-15919 (Sept. 24, 2007).

145 2007 WL 2713126 at \*5.

146 *Id.* at \*11.

147 *Id.* at \*18.

148 *Id.* at \*15.

149 *Id.* at \*17.

little elaboration. In *Abelman*, the court of appeals also considered and rejected certain defendants' arguments that the filed rate doctrine applied because they were pipeline affiliates, because their settlement agreements with FERC resolved factual matters, and the pipeline conspiracy claims under federal antitrust law against El Paso and Semptra were barred.<sup>150</sup>

## VII. CONCLUSION

Application of the filed rate and preemption doctrines to preclude antitrust litigation involving natural gas manipulation during the Energy Crisis would be incompatible with the regulatory reality in the deregulated natural gas market, and especially with the policy goal that led to deregulation in the first place, i.e., that increased competition would result in lower prices. It also would be inconsistent with the fundamental rationale for these doctrines, which assumes that the regulators will actually regulate. The Ninth Circuit's *Gallo* decision and its related orders in the other three cases permit the plaintiffs in those cases to try to prove their claims on the merits, and to recover for victims of anticompetitive conduct during the Energy Crisis. The threat of such litigation may even deter future anticompetitive conduct. Deregulation without antitrust enforcement, on the other hand would create a vacuum in which the market participants would have free reign to manipulate the market all over again without fear of any liability. Certainly no one in California should desire a repeat of the Energy Crisis.

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150 *Abelman*, No. 06-15130, (Sept. 24, 2007)