The Filed-Rate Doctrine and Market-Based Rates: Who’s Minding the Store?

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In *Marbury v. Madison*, Chief Justice Marshall wrote, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.”\(^1\)

The California energy crisis of 2000-2001 has tested the ability of our government to live up to that charge. Consider these events:

- Five years after it ordered an investigation, the Federal Energy Regulatory Commission has yet to take final action on refunds for excessive charges in the California Power Exchange and California Independent System Operator spot markets. The Energy Policy Act of 2005 directed FERC to conclude this case as soon as possible and report to Congress by the end of the year.\(^2\)

- Enron Corporation, after declaring bankruptcy, sued to recover contract-termination charges from Western wholesale power purchasers to whom it never delivered any power. The bankruptcy court asserted sole authority over Enron’s claim, even while FERC was investigating whether Enron was manipulating Western wholesale power markets when these contracts were signed. A provision tucked in the Energy Policy Act provides that FERC has sole authority to decide whether Enron may enforce these contracts.\(^3\)

- The State of California and Western utilities filed complaints with FERC alleging that the prices in long-term power-purchase contracts they had signed during the energy crisis were unjust and unreasonable. After commencing hearings to determine “whether the dysfunctional California spot markets adversely affected the long-term bilateral markets” so as to warrant

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\(^1\) Marbury v. Madison, 5 U.S. 137, 163 (1803).


\(^3\) *Id.*, sec. 1290, 119 Stat. 983.
modifying these contracts, FERC ultimately denied relief on the ground that it could not modify these contracts unless they were contrary to the public interest—a standard that FERC indicated was nearly insurmountable. The Energy Policy Act omitted proposed language that would have codified FERC's rationale in these cases.

One of the disputes about available remedies for the California energy crisis involves the “filed-rate doctrine.” This doctrine, which arose in early 20th-century railroad regulation and was later applied to energy regulation, “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.” The doctrine binds not only the regulated entity, however, but also the regulatory agency and the courts, and as such the doctrine has come into play in the California energy crisis in two distinct but ultimately related ways.

One strand of the filed-rate doctrine is that FERC “has no power to alter a rate retroactively.” This principle reflects the fact that both of the principal statutes that FERC administers—the Federal Power Act and the Natural Gas Act—generally permit FERC to change a filed rate only prospectively. Concluding that the filed-rate doctrine applied to market-based rates just as it does to cost-based rates, FERC ruled

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7 Id. at 578.
that it was powerless to grant refunds for excessive market-based charges in the California PX and ISO spot markets before October 2, 2000—thus barring any refunds for excessive charges in the summer of 2000.\(^8\) Appeals of that ruling are pending before the Ninth Circuit.

A second strand of the filed-rate doctrine is that “courts lack authority to impose a different rate than the one approved by the Commission.”\(^9\) Thus, in a series of cases from 2004 that I will discuss here, the Ninth Circuit held the filed-rate doctrine and related principles of federal preemption required the dismissal of civil lawsuits brought under state law seeking injunctive and monetary remedies for excessive charges made for wholesale power during the California energy crisis.\(^10\)

In the Ninth Circuit’s view, the public’s only remedy was available at FERC, not in the courts.

Almost simultaneously, however, the Ninth Circuit ruled in another case arising from the California energy crisis that FERC had abused its discretion by not holding sellers to the terms of their filed market-based wholesale electric tariffs—indeed, there was no “filed rate,” and FERC had unlawfully deregulated wholesale electric rates without providing remedies for purchasers.\(^11\)

A year later, that case remains on rehearing at the court of appeals, and it has yet to be remanded to FERC, which has yet to provide its definitive response.

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\(^9\) Arkansas Louisiana Gas Co. v. Hall, 453 U.S. at 578.


\(^11\) California ex rel. Lockyer v. FERC, 383 F.3d 1006 (9th Cir. 2004).
If wholesale purchasers have no recourse to the courts in the first instance, and the regulatory agency is unable or fails to provide adequate remedies, one may ask where is “the right of every individual to claim the protection of the laws whenever he receives an injury”?

Is the filed-rate doctrine an exception to “the very essence of civil liberty”?

This second strand of the filed-rate doctrine, involving the intersection of judicial and regulatory authority, was formulated long ago as the rule that a court cannot entertain a private antitrust action seeking treble damages for injury arising from a rate tariff filed with a regulatory body.

That was the holding of the Supreme Court’s 1922 decision in *Keogh v. Chicago and Northwestern Railway Company*. In that case, a railroad shipper sued eight railroads for price-fixing under the Sherman Act. The railroads had in fact agreed on uniform freight rates. The shipper claimed that this conspiracy resulted in higher freight rates than would otherwise have been maintained, and he sought damages representing the difference in rates. The railroads’ defense was that they had filed their rates with the Interstate Commerce Commission, which had suspended and investigated the rates and, after a hearing in which the shipper had participated, had approved the rates and made them effective.

The shipper’s arguments have a modern sound: his rights were “not limited to the protection against unreasonably high or discriminatory rates afforded him” by the Interstate Commerce Act; rather, “he was entitled to the benefit of competitive rates,” and the elimination of competition resulted in higher rates, causing him injury on which he was entitled to recover under the Sherman Act.

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12 260 U.S. 156 (1922). For this reason, this meaning of the filed-rate doctrine is often called the *Keogh* doctrine, usually in contexts other than energy regulation.

13 260 U.S. at 161.
The Supreme Court acknowledged that the rates might have been lower if there had been competition, and that a conspiracy to fix even “reasonable and nondiscriminatory” rates still could violate the Sherman Act. Thus, the ICC’s approval of the rates would not bar criminal, injunctive, or forfeiture proceedings by the government under the Sherman Act. But the Court, in a unanimous opinion by Justice Brandeis, held that the shipper had no cause of action to recover treble damages under the Sherman Act. The opinion offered several reasons.

First, the railroads would be liable to the shipper for damages if the ICC found the rates unlawful under the Interstate Commerce Act. In Congress did not intend in that event to provide the duplicative remedy of antitrust damages. *A fortiori*, the shipper could not recover antitrust damages if the ICC had approved the rates as lawful.

Second, antitrust damages would operate like a rate rebate, defeating Congress’ “paramount purpose” of “preventing unjust discrimination.” The Court stated the “stringent rule” that epitomize the filed-rate doctrine:

The legal rights of shipper as against carrier in respect of a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all practical purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier.

Third, the shipper would have to prove not only that a lower rate would have been maintained absent the conspiracy, but also that the ICC would have approved the lower rate as non-discriminatory. Only the ICC may make such a determination, at least in the first instance;

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14 *Id.* at 161-62.

15 *Id.* at 162.

16 *Id.* at 163.

17 *Id.* at 163.
but there was “no conceivable proceeding” in which the ICC could determine the legality of a hypothetical lower rate.  

Finally, the shipper’s damages were “purely speculative” and “impossible” to prove, because his competitors would also have been entitled to the lower rate, and the benefit of the lower rate might have been passed on to the shipper’s customers or final consumers.  

*Keogh* has had remarkable staying power. In 1986 the Court declined a request—supported by the Solicitor General—to overrule it.  

The Court adhered to *Keogh* because it represented a long-standing statutory construction that Congress had not seen fit to disturb when reexamining this area of law.  

At the same time, however, the Court clarified that *Keogh* did not provide “immunity” from all antitrust liability, but only held that treble damages were not an available remedy for a private shipper claiming that a filed rate was the result of an antitrust violation.  

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18 *Id.* at 163-64.  
19 *Id.* at 165.  


21 *Id.* at 420, 421-22, 423. The Court noted that principles of *stare decisis* apply with particular force to questions of statutory construction, where Congress can correct even a serious error by legislation. *Id.* at 424. See also California v. FERC, 495 U.S. 490, 499-500 (1990) (same).  

22 *Id.* at 422. See *id.* at 419 (noting that under *Keogh* “tariff-related claims” remain subject to governmental and injunctive antitrust actions absent an express statutory immunity). See also Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973) (upholding injunction in government civil antitrust action against electric utility for refusal to sell or wheel wholesale power); California v. FPC, 369 U.S. 482 (1962) (FPC should stay proceedings on natural gas company’s application for certificate of public convenience and necessity allowing it to acquire a pipeline corporation while antitrust suit challenging the acquisition was pending in the courts). *But cf.* Verizon
The Supreme Court first applied the filed-rate doctrine to the electric-utility industry in *Montana-Dakota Utilities Company v. Northwestern Public Service Company*.

Although the Court did not cite *Keogh* or any other early cases espousing the filed-rate doctrine, this opinion is the foundation for the filed-rate doctrine in energy law.

The plaintiff was an electric utility that alleged that its predecessor and the defendant, another utility, previously had been under common control through an interlocking directorate and joint officers. During this period the two companies interchanged electric energy under contracts filed with and accepted by the Federal Power Commission pursuant to the Power Act. Plaintiff alleged, however, that it paid excessive rates and received unreasonably low rates under these contracts. This result was fraudulent and unlawful, but the interlocking directorate had prevented it from protesting to the FPC to have just and reasonable rates established under the Power Act.

The plaintiff sued in federal district court, asserting jurisdiction on the existence of a federal question arising under the Power Act. In a 5-4 decision, the Court held that the plaintiff had no federal cause of action. The plaintiff's problem was “whether it is open to the courts to determine what the reasonable rates during the past should have been.” Writing for the Court's majority, Justice Jackson said no, because “the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.” Justice Jackson then penned

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Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (complaint alleging breach of duty under Telecommunications Act of 1996 of incumbent telephone local exchange carrier to share its network with competitors does not state claim under section 2 of Sherman Act—notwithstanding savings clause in 1996 Act stating that Act does not modify, impair, or supersede antitrust laws—where regulatory structure under the 1996 Act is designed to deter and remedy anticompetitive harm and such claims of violation of 1996 Act would be technical and difficult for antitrust courts to evaluate).


24 *Id.* at 251.

25 *Id.*
what is—at least to the energy bar—perhaps the most-quoted description of the filed-rate doctrine:

[The plaintiff] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission’s orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.\(^{26}\)

The Court then held that the allegations of fraud did not require a different result. A common-law action for “active fraud and deceit” could have been maintained even in the absence of the Power Act, since the plaintiff had a “common-law right not to be defrauded into paying an excessive or unreasonable” rate. But such a claim would have been dismissed for lack of diversity of citizenship.\(^{27}\)

A claim alleging a “constructive fraud” arising from the interlocking directorate could not be maintained, because the FPC had approved the interlocking directorate under the Power Act. “It would be a strange contradiction between judicial and administrative policies if a relationship which the Commission has declared will not adversely affect public or private interests were regarded by the courts as enough to create a presumption of fraud.”\(^{28}\)

The Court majority also concluded that the trial court could not stay the case while it referred the rate issues to the FPC. Relying on what I have termed the first strand of the filed-rate doctrine, the Court noted that the Power Act gave the FPC no authority to grant

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\(^{26}\) *Id.* at 251-52.

\(^{27}\) *Id.* at 252.

\(^{28}\) *Id.* at 253.
reparations, and there was no indication Congress intended to allow courts indirectly to obtain FPC action that granted reparations.29

The Supreme Court’s 1981 decision in Arkansas Louisiana Gas Company v. Hall30 also involved both strands of the filed-rate doctrine. Although arising under the Gas Act, it relied on Montana-Dakota Utilities and held that the two statutes are identical for these purposes.31

In Hall, a group of natural-gas producers filed a breach-of-contract action in state court against the buyer of their gas. They claimed as damages the difference between the contract rates they had received for their gas and had filed with the FPC and the higher rates they would have received and would have filed with the FPC had the buyer informed them it had taken action triggering the “favored-nations clause” in their contracts, which entitled them to higher rates. The state supreme court held that the producers were entitled to damages on this theory.

The Supreme Court reversed, holding that such damages were barred by the filed-rate doctrine:

    It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.32

29 Id. at 254. The dissenting opinion claims that the FPC urged such adoption of such a procedure. Id. at 265 n.2. FERC now appears to have a different position, as shown by its brief in opposition to the petition for certiorari in the recent Ninth Circuit litigation. See infra nn. 70 & 85.


31 Id. 577 n.7.

32 Id. at 579.
Because the case involved state-law claims, *Hall* also relied on federal preemption to support reversal of the state court’s judgment. Although *Montana-Dakota Utilities* indicated that a common-law fraud action could be maintained consistent with the Power Act, the Court held in *Hall* that a common-law breach-of-contract suit could not be maintained, “for when Congress has established an exclusive form of regulation there can be no divided authority over interstate commerce.”33 The state court’s award of damages “was necessarily supported by an assumption that the higher rate respondents might have filed with the Commission was reasonable. ... But under the filed rate doctrine, the Commission alone is empowered to make that judgment, and until it has done so, no rate other than one on file may be charged.”34 The state court thus had “usurped a function that Congress has assigned to a federal regulatory body,” which “the Supremacy Clause will not permit.”35

The gas producers argued that the filed-rate doctrine and the Supremacy Clause should not bar their state-law action when they had been prevented from filing higher rates with the FPC by the purchaser’s misconduct in failing to disclose the facts that the producers claimed had triggered the favored-nations clause in their contracts. The Court found no “affirmative misconduct” by the purchaser to defraud the producers, however, and “save[d] for another

33 *Id.* at 580 (internal quotation omitted). “Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.” *Id.*

34 *Id.* at 580-81.

day the question whether the filed rate doctrine applies in the face of fraudulent conduct.”36

In three opinions filed in short succession in the summer of 2004, the Ninth Circuit relied on federal preemption and the filed-rate doctrine to dismiss civil actions seeking remedies under state law for alleged injuries arising out of the California energy crisis.

Contemporaneously with the last of those three opinions, another Ninth Circuit panel granted a petition for review of FERC orders in an opinion that may be read to undercut the factual and legal premise underlying the other three decisions. The full implications of this decision are still unclear but bear watching.

The first of these decisions, California ex rel. Lockyer v. Dynegy, Inc.,37 involved a suit by the California attorney general against several electricity generators alleging that they had fraudulently sold energy on the spot market from generating capacity they had also contracted to hold in reserve for the California ISO. As a result, they could not respond to dispatch orders by the ISO, which was forced to find alternative sources of energy during periods of shortage. The complaint sought injunctions, restitution, disgorgement, and civil penalties for violations of the California Unfair Competition Act.38

The generators removed the case to a federal district court, which then granted a motion to dismiss, holding that California’s claims were barred by preemption principles and the filed-rate doctrine. The Ninth Circuit affirmed on both grounds.

The court of appeals held that by giving FERC exclusive jurisdiction over transmission and wholesale electricity sales in

36 Id. at 583 & n.13.
37 375 F.3d 831, modified, 387 F.3d 966.
interstate commerce under the Power Act, Congress had preempted the field and barred any state regulation of those matters.\textsuperscript{39} California argued that the Power Act allowed the state to police fraudulent business practices in wholesale markets, and that the state could enforce its laws even if that had an indirect effect on wholesale rates. The court rejected that theory, however, because the state’s lawsuit sought directly to enforce federal tariff obligations and would give the state “regulatory authority over the specific tariff-governed conduct alleged in this case.”\textsuperscript{40} The court noted that FERC’s exclusive jurisdiction was not limited to rates but also extended to the transmission and wholesale sale of energy itself.\textsuperscript{41} In this case, “California’s unfair-competition claims [were] based on the [generators’] agreement to provide ancillary services, the terms of which are embodied in, and governed by, the ISO tariff, including its remedial provisions.”\textsuperscript{42} As such, the claims were “preempted because they encroach upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy.”\textsuperscript{43}

The Ninth Circuit also affirmed the district court’s alternative grounds for dismissal, based on the “closely related issue” of the filed-rate doctrine.\textsuperscript{44} The court emphasized that the tariff specified the remedies and penalties to which companies were subject for violating their reserve-capacity commitments. To the extent that California sought either to enforce or enlarge the penalty provisions of the filed

\textsuperscript{39} 375 F.3d at 849-50.

\textsuperscript{40} Id. at 851.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 852.

\textsuperscript{43} Id. The court, \textit{see id.} at 851-52, relied on two of its earlier preemption decisions involving electric utilities, Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001), and Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918 (9th Cir. 2002). The court noted that in the latter case, it had concluded that procuring a filed rate by fraud did not preclude filed rate preemption. \textit{See} Lockyer v. Dynegy, 375 F.3d at 852 n. 21 (citing Transmission Agency of N. Cal., 295 F.3d at 933.).

\textsuperscript{44} 375 F.3d at 852.
tariffs, the state’s claim “conflict[ed] with the filed rate doctrine and the exclusive authority conferred to FERC to enforce its tariff.”

The opinion in *California v. Dynegy* was filed on July 6, 2004. On August 10, 2004, a different panel of the court filed the opinion in *Public Utility District No. 1 of Grays Harbor County v. Idacorp Inc.*, which relied on principles of federal preemption and the filed-rate doctrine to affirm the dismissal of state contract-law claims by a public-power utility related to the Western energy crisis.

In March 2001, during the height of the crisis, the utility in *Grays Harbor*, located in the state of Washington, entered into a contract to purchase 20 megawatts of power from October 2001 through March 2002 at the “market rate” of $249 per megawatt-hour.

In October 2002, the utility brought suit in state court seeking rescission or reformation of the contract based on four state-law theories—mutual mistake, unilateral mistake, duress, and unconscionability—or, alternatively, restitution based on a state-law claim for unjust enrichment. The utility alleged that it had agreed to pay the contract rate believing it was the product of a functioning market, when later events showed that it was the product of a dysfunctional market. The utility sought rescission or reformation of the contract to a fair price absent the market dysfunction or, alternatively, restitution measured by the difference between the contract rate and the fair value of the energy.

After the case was removed to federal court, it was dismissed on preemption grounds in an opinion that cited the district court dismissal in *California v. Dynegy*. The Ninth Circuit affirmed, holding

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45 *Id.* at 853.

46 The court issued a correction of one footnote on October 29, 2004.

47 379 F.3d 641.

48 *Id.* at 645-46.
that “three preemption-related theories” required dismissal—field
preemption, conflict preemption, and the filed-rate doctrine.\footnote{Id. at 647.}

Field pre-emption is the theory noted by the Supreme Court in

\textit{Hall}. It occurs when comprehensive federal regulation occupies a field
U.S. 190, 212-13 (1983); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).}

In \textit{Grays Harbor} the utility argued that the Power Act did not give FERC exclusive
jurisdiction over all power-related contract disputes, emphasizing that
its complaint was about contract formation and not rates \textit{per se}. The

\textit{Ninth Circuit} conceded that state courts can assert jurisdiction over
some disputes over power contracts but held that the complaint in

\textit{Grays Harbor} was not of that character, because it required the court
to determine the fair price of electricity, a determination that was
within FERC’s exclusive jurisdiction to make.\footnote{379 F.3d at 648.} A court could find that
duress or mutual mistake made rescission or reformation appropriate,
but the court “could do no more without intruding into an area of
exclusive FERC authority.”\footnote{The court cited \textit{Hall} as well as the district court decision in \textit{California v. Dynegy}. \textit{Id.} at 648-49.}

The court rejected the utility’s argument that this case was
different because it had been charged a market-based rate made this
case different. The court concluded, “[e]ven in the context of market-based rates, FERC actively regulated and oversees the setting of
rates.”\footnote{Id. at 649.} Although noting that prospective refunds may be an
inadequate remedy,\footnote{Note that the complaint in \textit{Grays Harbor} was filed after the contract had expired.} the Ninth Circuit held that “this fact, by itself,
does not change the scope of preemption regarding FERC’s exclusive jurisdiction over wholesale rates.”

The court of appeals held that the utility’s claims should also be dismissed on conflict-preemption principles, because the utility was “invoking a state rule (specifically, contract law) that would interfere with the method by which the federal statute was designed to reach its goals (specifically, FERC regulation of wholesale electricity rates).” To permit the utility “to receive in its court action what is essentially a refund would create a conflict with FERC’s authority over wholesale rates” and “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the [Power Act.]”

The court also held that the case should be dismissed under the filed-rate doctrine, because the relief sought by the utility “would require the court to set damages by assuming a hypothetical rate, the ‘fair value’ ...” Although the utility argued that filed-rate doctrine should not apply in the context of market-based rates, the court rejected that argument, again noting that FERC’s oversight of the rates charged was effective and ongoing. “[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine,” the court concluded “they do not fall outside the purview of the doctrine.”

55 Id. at 649 (citing Hall). The court noted that the district court had implied that “FERC’s scheme” may be “broken.” Id. at 649 n.9.

56 Id. at 650.

57 Id.

58 Id. at 651.

59 Id. The court cited FERC’s characterizations of its market-based rate scheme in orders in California ex rel. Lockyer v. British Columbia Power Exch. Corp., 99 FERC ¶ 61,247, order on reh’g, 100 FERC ¶ 61,295 (2002), which the Ninth Circuit subsequently reversed on that very point in California ex rel. Lockyer v. FERC, discussed below.

60 379 F.3d at 651.
In an interesting twist, however, the court concluded its opinion by holding that the utility should be given the opportunity to amend its complaint to seek declaratory relief limited to issues of contract formation, such as unilateral or mutual mistake. The complaint could not require the trial court to determine what the fair rate would have been, and the utility could not obtain any monetary relief; such relief would be available, it at all, from FERC.61

A month later, on September 10, 2004, a third panel of the Ninth Circuit filed the decision in *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, which held that dismissal of the state-law claims in that case was required by the court’s decisions in *California v. Dynegy* and *Grays Harbor.*62

Like *Grays Harbor*, the *Snohomish* suit was brought under state law by a public-power utility located in the state of Washington. But unlike *Grays Harbor*, the suit was brought in federal court under diversity jurisdiction, and the suit was not based on contract law, but rather under California antitrust and unfair-competition law—the Cartwright Act63 and California’s Unfair Competition Law. The defendants were major power generators and traders selling in the California wholesale electricity markets. The utility claimed that it had to pay higher-than-competitive prices for wholesale electricity because of the defendants’ manipulation and gaming of the markets. The complaint sought injunctive relief, disgorgement, restitution, and treble damages under the California statutes.

The district court dismissed the case for lack of jurisdiction on grounds of field preemption, conflict preemption, and violation of the filed-rate doctrine, and the Ninth Circuit affirmed on all those grounds.

61 Id. at 652.

62 384 F.3d 756.

The court noted that the “fundamental question” in the case was whether FERC, in its scheme of market-based rates, was “doing enough regulation to justify federal preemption of state laws.” It concluded that an affirmative answer was dictated by the court’s earlier decisions in *California v. Dynegy* and *Grays Harbor*.65

The court noted that FERC’s scheme for market-based rates waived many of the filing requirements that apply to cost-based rates, but “FERC continued to oversee wholesale electricity rates,” and *Grays Harbor* had rejected the claim that FERC’s scheme was inadequate to support a finding of preemption.66 Although the utility alleged violations of California antitrust and unfair-competition law rather than state contract law as in *Grays Harbor*, the complaint still required the court to find the “fair price”; thus, the claims were barred by field preemption, conflict preemption, and the filed-rate doctrine.67

The same result held for the utility’s request for injunctive relief—the court had already held in *California v. Dynegy* that such claims are barred by preemption and the filed-rate doctrine.68

The court concluded that the utility’s “only option is to seek a remedy before FERC.”69

Opposing the utility’s petition for a writ certiorari in an amicus brief, the Justice Department and FERC argued that complaints about the adequacy of FERC’s market-based rate scheme were not properly part of the case and that the courts had held that market-based rates were lawful under the Power Act. The government argued that the

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64 384 F.3d at 760.
65 Id.
66 Id. at 760-61. As in *Grays Harbor*, the court relied on FERC’s characterizations of its market-based rate scheme in the orders in *California ex rel. Lockyer v. British Columbia Power Exch. Corp.*, which the Ninth Circuit later reversed.
67 384 F.3d at 761.
68 Id. at 761-62.
69 Id. at 762.
principle of field preemption provided the best reason for dismissing the utility’s state-law claims, although the filed-rate doctrine and conflict-preemption principles also supported that conclusion.70 The Supreme Court denied certiorari.

On September 9, 2004—one day before the Ninth Circuit’s *Snohomish* decision was filed—a different panel of the court filed its decision in *California ex rel. Lockyer v. FERC*.71 The court held that FERC’s scheme for allowing market-based rates, while not inherently contrary to the Power Act, had been administered so as to effectively gut the Act’s protections of consumers from unlawful wholesale prices.

Unlike the other three Ninth Circuit cases discussed here, this case involved a direct review of FERC orders. These orders denied a complaint by the California attorney general alleging that (1) FERC’s market-based rate scheme violated the rate-filing and rate-review requirements of the Power Act, and (2) even if FERC’s scheme were permissible under the Power Act, FERC was not enforcing its requirement that the regulated public utilities filed after-the-fact, quarterly reports of specific sales made at market-based rates.

Besides requesting prospective changes in FERC’s market-based rate regime, the complaint also sought refunds of excessive wholesale charges in the California ISO and PX markets in 2000-2001, including charges before October 2, 2000, for which FERC had concluded that the filed-rate doctrine barred relief, and a declaratory order that such short-term wholesale energy sales at market-based rates in the California markets were not subject to the filed-rate doctrine.72

FERC denied the complaint for the most part but concluded that sellers had not filed the required transaction-specific sales information in their quarterly reports. FERC did not order any refunds, however.

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71 383 F.3d 1006.

72 *Id.* at 1010.
concluding that this reporting failure was “essentially a compliance issue,” and ordering the filing of the required transaction-specific information was “an appropriate and sufficient remedy.”\textsuperscript{73}

The Ninth Circuit panels in \textit{Grays Harbor} and \textit{Snohomish} had cited and quoted from FERC’s orders explaining its market-based rate scheme and holding that it was consistent with the rate-filing and rate-review provisions of the Power Act.

Now reviewing those FERC orders, the Ninth Circuit noted that the case had its roots in the filed-rate doctrine and how it applied to FERC’s scheme for market-based rates. The court focused on the fact that FERC’s scheme relied both on an \textit{ex ante} determination that a seller lacks market power that would enable it to charge more than competitive rates—which entitled the seller to a market-based rate tariff—and an \textit{ex post} monitoring of quarterly reports of transactions under that tariff—which provided a means for FERC to ensure that the actual charges were just and reasonable. In addition, the seller had to periodically file an updated market analysis showing that it still lacked market power.\textsuperscript{74} The Ninth Circuit held that because of FERC’s \textit{ex post} “strict reporting requirements,” this scheme did not rely on market forces alone to ensure that wholesale rates remain at lawful levels, and thus did not, \textit{per se}, violate the Power Act.\textsuperscript{75}

But the court of appeals agreed with California’s second argument, that “FERC failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations.”\textsuperscript{76} The court reiterated that FERC’s scheme would be unlawful absent the \textit{ex post} reporting feature:


\textsuperscript{74} See California v. FERC, 383 F.3d at 1012-13. The court incorrectly stated that the updated market analyses are filed every four months, when in fact they are required to be filed every three years.

\textsuperscript{75} \textit{Id.} at 1013. On this basis the court distinguished \textit{MCI Telecommunications Corp. v. AT&T}, 512 U.S. 218 (1994), and \textit{Maislin Indus. USA v. Primary Steel Inc.}, 497 U.S. 116 (1990).

\textsuperscript{76} 383 F.3d at 1014.
[A] market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight. The structure of the tariff complied with the [Power Act], so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were ‘just and reasonable’ and whether market forces were truly determining the price.77

The court noted, however, that FERC had found that the many of the regulated public utilities were filing aggregated data on their market-based sales that did not comply with FERC’s requirements for transaction-specific sales data. Thus, the reporting mechanism necessary for the lawfulness of FERC’s scheme “was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brownouts threatened California’s businesses and citizens,” and “the California energy market was subjected to artificial manipulation on a massive scale” while FERC was “abdicating its regulatory responsibility.”78

The court then turned to the question of remedies. FERC had concluded that it was “without authority to order refunds retroactively based on reporting failures.”79 The court of appeals disagreed: “FERC misapprehends its legal authority in this context.”80 Because the reporting requirements were essential to the lawfulness of FERC’s market-based rate scheme, FERC could not “dismiss [them] as mere punctilio,”81 and had broad authority to enforce compliance:

If the ability to monitor the market, or gauge the “just and reasonable” nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed

77 Id.
78 Id. at 1014-15.
79 Id. at 1015.
80 Id.
81 Id.
tariff in place at all. 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. FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so. 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. That result does not comport with the underlying theory or the regulatory structure established by the FPA.\textsuperscript{82}

The court noted, “the purpose of the filed-rate doctrine is undermined when it is impossible to review the reasonableness of privately negotiated, unfiled rates.”\textsuperscript{83} Therefore, if FERC’s market-based rate tariffs worked that way, they would be contrary to the filed-rate doctrine and the Power Act. “If, on the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market based rate is permitted.”\textsuperscript{84}

Requests for rehearing and rehearing en banc were filed in this case and are still pending before the court of appeals. Thus, petitions for a writ of certiorari are still premature, and the court has not issued the formal mandate remanding the case to FERC. Lacking any jurisdiction over the case at this point, FERC has not yet had to issue any orders on remand.

Therefore, the full implications of the court of appeals’ decision in \textit{California v. FERC} cannot be gauged yet. If nothing else, the opinion was a shot across the bow signaling that the appellate courts will

\textsuperscript{82} \textit{Id.} at 1015-16.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}
require FERC to keep its word and provide more than lip service to notions of market monitoring and enforcement.

Indeed, read together with the court’s preemption opinions, the Ninth Circuit has sent the clear message that FERC is in charge of the wholesale electricity markets. While that holding may limit the work of state law and the courts, it shows that the courts can take seriously the task of reviewing FERC’s orders in this area to ensure that the public is afforded legal protection and remedies.

If FERC is in charge, then California v. FERC says that FERC must act that way. This holding is in keeping with the “very essence of civil liberty.”

Has FERC gotten the message? It is still too early to say. FERC can be expected to claim at least a partial victory in that the Ninth Circuit held that FERC’s market-based rate scheme was allowed under the Power Act.85 And FERC can be expected to interpret the second part of the court’s opinion as narrowly as possible and to claim that it has already taken actions that meet the court’s concerns.

When it comes time for FERC to provide its formal response to the remand of its orders in that case, FERC may point to several intervening events to argue that it has already done what the court of appeals demanded.

First, FERC has tightened the standards for initially granting market-based rates and for reviewing the triennial market analyses required of sellers with market-based rate tariffs.86 While it is true that tightening the standards for ex ante review of applications for

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85 In the amicus brief in opposition to the certiorari petition in the Snohomish case, see supra n. 70, the Justice Department and FERC cited that holding in California v. FERC but did not discuss or even allude to the Ninth’s Circuit’s second holding, that FERC was not enforcing its market-based rate scheme so as to ensure the actual charges were lawful under the Act.

market-based rate authority in the first instance cannot substitute for effective \textit{ex post} reporting, FERC can rightly point to the fact that part of the \textit{ex post} reporting is its review of the triennial market analysis required to continue the effectiveness of a market-based rate tariff. And FERC can claim that has beefed up its enforcement of this triennial reporting requirement by initiating investigations and setting for hearing doubtful cases.\footnote{See, \textit{e.g.} Southern Co. Energy Mktg., L.P., 109 FERC \& 61,275 (2004).}

Moreover, in the Energy Policy Act of 2005, Congress gave FERC several new authorities and responsibilities over the power industry. By meeting these new statutory requirements, FERC may claim that it has adequately implemented Congress’ intent concerning market-based rates in the amended Power Act, and that reviewing courts should defer to FERC’s interpretation and not insist on additional procedures not required by the Power Act.

Others may note that Congress did not overrule \textit{California v. FERC} and thus implicitly agreed with the court of appeals’ conclusions.

In any event, in the Energy Policy Act of 2005, Congress directed FERC “to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce” and to issue such rules as it deems necessary and appropriate for that purpose.\footnote{Energy Policy Act of 2005, sec. 1281, 119 Stat. 978 (adding new section 220 to the Power Act).} FERC may argue that such rules facilitate FERC’s monitoring of prices charged under market-based rate tariffs and public utility compliance with the terms of their market-based rate tariffs. Nonetheless, FERC has yet to promulgate any implementing rules.

Second, Congress has added a new section 221 to the Power Act, prohibiting the knowing and willful reporting of false information on electricity prices with the intent to fraudulently affect the data being complied by a federal agency,\footnote{Id., sec.1282, 119 Stat. 979.} and a new section 222, prohibiting
energy market manipulation.\textsuperscript{90} In addition, Congress increased FERC’s civil-penalty authority from $10,000 to $1,000,000 for each day a violation continues.\textsuperscript{91} These new provisions in provide additional enforcement powers that FERC may, in its discretion, employ in addition to or in lieu of ordering refunds.

At the same time, however, Congress enhanced FERC’s refund authority by allowing FERC to set a “refund effective date” as early as the day a complaint is filed rather than 60 days after filing,\textsuperscript{92} and by giving FERC authority to order refunds by some public-power entities for certain voluntary short-term sales of electric energy though organized markets in which rates are set by tariff or FERC rule rather than by contract.\textsuperscript{93}

In the end, however, none of the new authority conferred on FERC disturbs the filed-rate doctrine, grants FERC the authority to order reparations, or obviates the need for FERC to pay heed to the concerns of the Ninth Circuit in \textit{California v. FERC}.


\textsuperscript{92} \textit{Id.}, sec. 1285, 119 Stat. 980-81 (amending section 206(b) of the Power Act, 16 U.S.C. § 824e(b)).

\textsuperscript{93} \textit{Id.}, sec. 1286, 119 Stat. 981 (adding new subsection 206(e) to the Power Act, 16 U.S.C. § 824e).