

Client Alert

Antitrust & Litigation Practice Group

June 27, 2012

Sixth Circuit Holds that Electricity is a Commodity Under Robinson-Patman Act and Limits Applicability of the Filed Rate Doctrine

On June 4, 2012, in *Williams v. Duke Energy International, Inc.*, No. 10-3604, 2012 WL 1970096, the Sixth Circuit reversed the dismissal of Robinson-Patman Act claims against Duke Energy International, Inc. and Duke Energy Corp. (“Duke”). In *Williams*, a class of retail electricity purchaser plaintiffs alleges that Duke gave an unfair competitive advantage to some of its largest customers by paying them undisclosed and substantial electricity rebates in exchange for withdrawing objections to the rate-stabilization plan Duke submitted to Ohio regulators. Plaintiffs allege that the rebates caused favored customers to pay effective rates below those approved by the regulatory agency, while plaintiffs still had to pay the higher approved rates in violation of the Robinson-Patman Act, which prohibits discrimination among different purchasers of commodities “of like grade and quality.” 15 U.S.C. § 13 *et seq.* *Williams* is noteworthy for at least two reasons: First, the Sixth Circuit held that the filed rate doctrine did not bar the district court from hearing the case. Second, the Sixth Circuit found that electricity is a commodity under the Robinson-Patman Act.

In *Williams*, the Sixth Circuit reversed and remanded the district court’s decision to grant Duke’s motion to dismiss under the filed-rate doctrine. The district court held that the “filed rate doctrine” deprived it of jurisdiction to hear the matter. The filed rate doctrine precludes a court from considering a challenge to the “reasonableness” of the rates of common carriers if the rates have been approved by an appropriate regulatory agency. Duke argued, and the district court agreed, that the court was barred from hearing the plaintiffs’ claims because they required an “analysis of [a] filed rate.” *Williams*, 2012 WL 1970096 at *5. But the Sixth Circuit reversed, finding that the filed-rate doctrine applies only to challenges to the “underlying reasonableness or setting of filed rates.” *Id.* The court concluded that plaintiffs’ allegations do not concern the rate set by the governing agency, but rather rebate payments made outside the approved rate scheme.

The Sixth Circuit also found that electricity is a “commodity” under the Robinson-Patman Act. While the statute does not extend to services and intangible items, the court held that electricity is a commodity because it can be produced, felt, stored, and distributed in discrete quantities. Other courts have been divided on the status of electricity, with some holding that it is more akin to services such as cellular telephone service and cable television programming.

For more information, contact:

Jeffrey S. Spigel
+1 202 626 2626
jspigel@kslaw.com

Kevin R. Sullivan
+1 202 626 2624
ksullivan@kslaw.com

Brian R. Meiners
+1 202 626 2910
bmeiners@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, DC 20006-4706
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

Client Alert

Antitrust & Litigation Practice Group

It is unclear whether other circuits will follow *Williams* reasoning, particularly those in which courts have viewed the filed rate as encompassing not only what is actually filed but what would be subject to filing. *See, e.g., Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (filed rate doctrine bars not only challenges to the filed rate but to claims that regulated “companies owe ‘obligations ... beyond those set out in the filed tariffs’” (quoting *Evanns v. AT&T Corp.*, 229 F.3d 837, 841 (9th Cir. 2000))). Nevertheless, *Williams* is a reminder that companies dealing in commodities, including electricity, must exercise caution when giving certain customers rebates or discounts below rates approved by regulatory agencies.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.