

## Antitrust Advisory

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### Second Circuit Applies the Filed Rate Doctrine to Electricity Rates Set by Market-Based Auctions

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The filed rate doctrine precludes antitrust challenges to rates set or approved by federal agencies. The doctrine is broadly applied and covers, for example, wholesale electricity rates that are filed with the Federal Energy Regulatory Commission (FERC or the Commission), even in circumstances where the claimant alleges that the rates were initially set in a fraudulent or improper manner. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 577 (1981). On September 20, 2012, the Second Circuit affirmed the dismissal of a complaint alleging collusion between two rival New York City electricity producers — defendants KeySpan Corp. (KeySpan) and Astoria Generating Company (Astoria) — and facilitation of anticompetitive conduct by an affiliate of the financial firm Morgan Stanley. *Simon v. KeySpan Corp., et al.*, No. 11-2265-cv, 2012 U.S. App. LEXIS 19815 (2nd Cir. Sep. 20, 2012). The Court held that the filed rate doctrine can apply even where the allegedly supracompetitive rate was the product of a market-based auction. *Id.* at 30 (declining to set a per se rule, but applying the doctrine because “the regulator created a process for setting rates, reviewed the resulting rates, and, after investigation, determined that the anticompetitive behavior did not undermine its process and that the resulting rates were reasonable.”). The Court also found that the plaintiff, an indirect purchaser of electricity, lacked standing.

The New York City electricity market is overseen by the New York Independent System Operator (NYISO). In order to determine the price at which wholesalers can sell their electricity to New York City distributor Consolidated Edison, Inc. (Con Ed), NYISO established an auction system that results in a market-based rate. Con Ed then passes on the rate, which is approved by the FERC, to consumers like the plaintiff.

The plaintiff alleged that the Morgan Stanley affiliate acted as an intermediary in what were essentially deals between KeySpan and Astoria to allow KeySpan to keep its prices uncompetitively high in auctions that set the market price. Through these deals, Astoria was assured of always receiving a precise payment for its capacity, while KeySpan received any profits above that rate, and subsidized any losses below it. As a result of these agreements, KeySpan could maintain its maximum bids despite lower demand and still remain profitable, even if it only sold a very small amount of its capacity. The Morgan Stanley affiliate received a fixed rate per unit of electricity in exchange for its assistance.

Following precedent from other circuits, the Court held that the complaint was barred by the filed rate doctrine. Although the rates were set through a regulatory auction scheme and not directly by the FERC, and plaintiff alleged that KeySpan acted to undermine the auction, the Court found that the FERC had in fact authorized the rate and the process was sufficiently safeguarded. Specifically, the FERC investigated the conduct pursuant to its rule barring fraud or deceit in connection with the sale of energy and determined that KeySpan’s conduct did not constitute fraudulent market manipulation. The Commission found that the rate caps were set with the knowledge that some quantity would be required from each wholesaler to meet demand and the expectation that wholesalers would offer capacity for sale at their caps. The Court, however, declined to establish a *per se* rule finding that the filed rate doctrine bars claims in all cases involving market-based auctions, finding that the rationales behind the doctrine may not apply equally well in all such cases.

The Court also found that the plaintiff, as an indirect purchaser of electricity from Con Ed, lacked standing. Specifically, the Court held that indirect purchasers only have standing if they make purchases pursuant to an agreement for a fixed quantity and pay the direct purchaser's costs plus a predetermined additional fee. Such an arrangement removes all doubt as to who bore the antitrust injury.

Although the Court here barred the plaintiff's claim, it expressly noted that its application of the filed rate doctrine was confined only to the facts of this case, leaving the question of whether the filed rate doctrine should apply to all market based rates "for another day." Thus, while this decision reinforces the strength of the filed rate doctrine in the Second Circuit, interested parties should consult experienced practitioners before discounting potential challenges to similar activity.

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