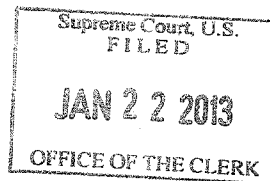


12 919
No.



In The Supreme Court of The United States

CHARLES SIMON, ON BEHALF OF HIMSELF AND ALL
OTHERS SIMILARLY SITUATED,
Petitioner,

v.

KEYSPAN CORPORATION, and MORGAN
STANLEY CAPITAL GROUP INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the “filed rate doctrine” bars *federal antitrust damage claims* against defendants who violate the federal antitrust laws to inflate market prices that are subject to the Federal Power Act, and are not required by law to be pre-filed with any agency before being charged and were not pre-filed with any agency before being charged.
2. Whether the “filed rate doctrine” bars *state antitrust and consumer fraud claims* against defendants who violate state antitrust and fraud laws to inflate market prices that are subject to the Federal Power Act, and are not required by law to be pre-filed with any agency before being charged and were not pre-filed with any agency before being charged.
3. Whether the “indirect purchaser” holding in *Kansas v. Utilicorp*, 497 U.S. 199 (1990), requires dismissal as a matter of law of all federal antitrust damage claims by indirect purchasers who bore 100% of an illegal overcharge under a pre-existing tariff which (i) guaranteed that the direct purchaser could pass through 100% of the cost of the product at issue, (ii) prohibited the direct purchaser from making any profit on the sale of the product at issue, regardless of variations in prices or quantities sold, and (iii) guaranteed that the direct purchaser’s profits/losses on the sale of the product at issue would always be zero, regardless of variations in prices or quantities sold.

PARTIES TO THE PROCEEDING

The Petitioner is Charles Simon, on behalf of himself and all other similarly situated retail consumers of electricity in New York City.

Respondents are Keyspan Corporation and Morgan Stanley Capital Group Inc.

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Petitioner Charles Simon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the court of appeals affirming the district court (App. 1a-24a) is reported at 694 F.3d 196. The Order of the court of appeals denying Petitioner's petition for panel rehearing (App. 97a-98a) is not reported. The Opinion of the district court granting Respondents' motions to dismiss (App. 25a-68a) is reported at 785 F.Supp.2d 120. The Opinion of the district court denying Petitioner's motion for reconsideration (App. 69a-96a) is reported at 2011 WL 2135075.

JURISDICTION

The decision of the court of appeals was issued on September 12, 2012. A timely petition for penal rehearing was denied on October 23, 2012. The judgment of the court of appeals was entered on September 20, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTES, REGULATIONS AND RULES INVOLVED

Pertinent portions of the following statutory, regulatory, and rule provisions are reproduced in the appendix to this petition: Section 4 of the Clayton Act, 15

U.S.C. § 15 (2006); and the Federal Power Act, 16 U.S.C. § 824d(c) and (d).

STATEMENT

1. This case raises an important and recurring issue which a number of lower courts have decided incorrectly, and requires direction from the Court: whether the so called filed rate doctrine as a matter of law bars federal antitrust remedies and state fraud claims regarding collusion and other illegal conduct to inflate market-determined electricity prices that are subject to the Federal Power Act,¹ but are not required by law to be pre-filed with a federal agency before being charged and were not pre-filed before being charged. (Questions 1 and 2).

The Second Circuit and other Circuits have provided erroneous and confusing bases for holding that the filed rate doctrine bars such claims. In this case the Second Circuit held that the filed rate doctrine barred all of Petitioner's claims because, in its view, the Federal Energy Regulatory Commission ("FERC") "sufficiently safeguarded" market conditions "such that the filed rate doctrine should apply." App. 22a. No holding of the Supreme Court has endorsed such standard for triggering the fatal filed rate doctrine.

Most significantly, the Second Circuit ignored that the minimum threshold requirement necessary to invoke the filed rate doctrine is not present here. The

¹ Federal Power Act of 1935, 16 U.S.C. § 791 *et seq.* ("Federal Power Act" or "FPA").

fundamental threshold requirement for the barring of claims under the filed rate doctrine is that (1) the claims at issue involve prices which by applicable law were required to be pre-filed before being charged and (2) only those pre-filed prices could thereafter legally be charged under the applicable statutes involved. (See discussion of *Keogh v. Chicago and Northwestern Railway Company* (“Keogh”), 260 U.S. 156 (1922) and *Arkansas Louisiana Gas Co. v. Hall* (“Arkla”), 453 U.S. 571 (1981), *infra*).

The Second Circuit and other lower courts have expanded the “harsh” filed rate doctrine well beyond this essential threshold requirement to myriad other contexts never authorized by the Court’s carefully-defined holdings. The circuit courts have ignored this essential threshold requirement established by the Court, and have instead adopted their own vague and erroneous standards for applying the filed rate doctrine to market based prices.

This case provides the Court with the opportunity to correct this widespread error and confusion in the lower courts and provide specific direction on this issue by clarifying, based on existing precedent, the following:

(1) that market-determined electricity prices that are subject to the Federal Power Act, and are not required by that Act to be pre-filed before being charged and were not pre-filed before being charged, do not meet a minimum necessary threshold requirement for the invocation of the filed rate doctrine, *i.e.*, that the pre-filing of the prices be required by law and

that the prices actually be pre-filed before they are charged;

(2) that any asserted conflicts between two federal statutes (here the Federal Power Act and the federal antitrust laws) involving such prices can and should be resolved under the Court's established doctrine of "implied repeal" applicable to reconciling claimed conflicts between two federal statutes;² and

(3) any asserted conflicts between a federal statute and a state claim involving such market-based prices can and should be resolved under this Court's established preemption doctrine, requiring a clear finding of express, field or conflict preemption before a state claim is barred.³

Such clarification by the Court would (1) correct widespread error and inconsistency in the lower courts regarding the filed rate doctrine as applied to market-determined rates subject to the Federal Power Act, (2) provide clear direction and (3) preserve well-established

² See, e.g., *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, at 271 (2007) ("courts should reconcile . . . both...statutory schemes...rather than holding one completely [preempted]."); *Gordon v. NYSE, Inc.*, 422 U.S. 659, 682 (1975). "Courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973).

³ See, e.g., *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).

precedent for resolving conflicts between allegedly competing federal statutes and conflicts between federal and state law involving claims of corruption in competitive energy markets. The Court should grant the Petition to correct this widespread error and confusion, and provide clear direction to the circuit courts.

2. The salient facts pertinent to this Petition can be succinctly stated. In 2010, the United States Department of Justice concluded that Respondents KeySpan Corporation and Morgan Stanley colluded in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to inflate market auction prices for electricity in New York City, and obtained disgorgement of a portion of Respondents' profits as a penalty in settlement of civil suits. App. 7a-8a. Over the objection of injured consumers, the penalty was paid solely to the U.S. Treasury. Petitioner subsequently filed this action seeking recovery for the customers who suffered all of the overcharges from Respondents' illegal conduct under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and under state antitrust and antifraud laws.

The Second Circuit held that the filed rate doctrine barred all of Petitioner's claims, based primarily on its "sufficiently safeguarded" test. App 22a. The Second Circuit ignored or overlooked the fact that the illegally inflated prices were not required by the Federal Power Act to be pre-filed before being charged and were not pre-filed before being charged.

3. The Second Circuit's decision is not supported by prior holdings of the Court. The Court has

never held that the filed rate doctrine bars private federal antitrust or state fraud claims against defendants who violate the law to inflate market prices that are subject to the Federal Power Act, and are not required by law to be pre-filed with any agency before being charged and were not filed with any agency before being charged. The Second Circuit's decision is wrong, contrary to the Court's existing precedents, and constitutes an unwarranted and unmoored expansion of the Court's prior precedents under the filed rate doctrine.

4. This case also presents the separate issue of whether indirect purchasers who bear 100% of an illegal overcharge through a direct purchaser which had a pre-existing guarantee that it could pass through all of the cost of the product at issue and that its profit and losses relating to the resale of the product would always be zero, have standing to recover for their injury under the federal antitrust laws. (Question 3). This issue is addressed in Section III below.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION ENTRENCHES ERROR IN THE COURTS OF APPEALS REGARDING THE APPLICATION OF THE FILED RATE DOCTRINE TO MARKET-BASED RATES

A. The Second Circuit's Decision is Wrong

1. A Minimum Threshold Requirement for Applying the Filed Rate Doctrine is That The Prices Be Required by Law to Be Pre-filed Before Being Charged, And Are So Filed

The Second Circuit's ruling that the filed rate doctrine barred Petitioner's claims overlooked the dispositive fact that FERC has waived the statutory requirement of the Federal Power Act requiring that sellers pre-file a specific price before that price can legally be charged, and waived the corollary requirement that only that pre-filed price can thereafter be legally charged to customers.⁴ The waiver of this

⁴ See Federal Power Act § 205 (c) and (d), 16 U.S.C. § 824d (c) and (d), which sets forth the Federal Power Act's pre-filing requirements (App. 100a-101a). Where (as here) 99a-100a electricity sellers successfully opt out of the price pre-filing requirement and are permitted to sell at market-based prices, FERC does not require the pre-filing of prices or that sellers may thereafter sell only at that pre-filed price under these provisions. Rather, under the Federal Power Act, unlike the Interstate Commerce Act, market-based sales may occur at any prices driven by the market

price pre-filing requirement and corollary limitation on price to only that pre-filed price by the regulatory agency makes the filed rate doctrine, as embodied in the holdings of the two primary Supreme Court cases relied on by the Second Circuit, *Keogh v. Chicago and Northwestern Railway Company* (“*Keogh*”), 260 U.S. 156 (1922) and *Arkansas Louisiana Gas Co. v. Hall* (“*Arkla*”), 453 U.S. 571 (1981), inapplicable as a matter of law.

A review of both *Keogh*, 260 U.S. 156, and *Arkla*, 453 U.S. 571, shows that the essential minimum requirement for the Court’s application of the “filed rate” bar was the overarching competing regulatory mandate that the prices involved be pre-filed before they are charged and that only those pre-filed prices (and no others) can thereafter be charged. In this case, as in most cases involving market-determined prices, such mandate has been expressly waived by FERC as to the sales at issue. For that reason alone, the harsh filed rate doctrine as specifically envisioned and articulated in both *Keogh* and *Arkla* simply does not apply. The Second Circuit overlooked or misapprehended this essential aspect of *Keogh* and *Arkla* in this regard.

As discussed below, the actual language and reasoning of both *Keogh* and *Arkla* make clear that the essential necessary element for the application of the filed rate doctrine in both cases was the existence of a competing mandatory statutory requirement that all

and the offerors’ discretionary and strategic offering conduct, subject only to such particular specific legal limitations which may be imposed on a particular seller by FERC or other applicable laws.

prices be pre-filed and that *only the pre-filed price could thereafter be legally charged*, a requirement that has been expressly waived by FERC in this case. Moreover, *Arkla* itself makes clear that the filed rate bar does not apply where there has been a waiver of this competing mandatory requirement.

Keogh

In *Keogh*, the Court's ruling barring antitrust claims turned fundamentally on the fact that the applicable competing statute in that case (the Act to Regulate Commerce, the predecessor to the Interstate Commerce Act ("ARC")) required as a matter of law that all prices be pre-filed before they were charged and that only those pre-filed prices (and no others) could thereafter be charged. In *Keogh*, the specific prices which were allegedly illegally fixed had been set out in a pre-filed tariff, and the statute required that those pre-filed prices "had to be charged." *Keogh* first notes that "every *rate* complained of had been *duly filed* by the several carriers *with the Interstate Commerce Commission*" before being charged, *Keogh*, 260 U.S. at 160 (emphasis added). *Keogh* then notes that under the ARC these pre-filed rates "while in force *had to be collected by the carrier*." *Id.* at 162 (emphasis added).

Keogh then explains the critical relationship between (x) the ARC's statutory requirements that all prices must be pre-filed before they can be charged and that only those pre-filed prices could thereafter be charged and (y) the Court's ultimate conclusion that the antitrust claims in that case must therefore be barred:

Section 7 of the Anti-Trust Act gives a right of action to one who has been “injured in his business or property.” Injury implies violation of a legal right. The legal rights *of shipper as against carrier in respect to a rate* are measured *by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.*

Id. at 163 (emphasis added).

In the present case, by contrast, because the price pre-filing requirements and subsequent limitations on prices to only the pre-filed price have been waived by FERC, there was no requirement for a pre-filed published tariff price, and no specific pre-filed price was “made, for all purposes [indeed for any purpose], the legal rate as between” sellers and buyers in the market-based electricity market. *Id.* Because of FERC’s waiver, prices have been left to vary and there is no pre-filed published fixed price that “had to be collected while in force” which was the minimum essential requirement for the so-called filed rate bar. This point is made even more clearly in *Arkla*.

Arkla

Arkla similarly, and even more forcefully, makes clear that the filed rate doctrine does not apply where FERC has *waived* the statutory pre-filing requirement and corollary requirement that only that pre-filed price be thereafter be charged.

The Court in *Arkla* described the filed rate doctrine (as applied in that case) as follows: “The ‘filed rate doctrine’ prohibits a federally regulated seller of natural gas from charging *rates higher than those filed* with FERC pursuant to the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717, *et seq.* (1976 ed. and Supp. III).” *Arkla*, 453 U.S. at 573 (emphasis added). *Arkla* similarly states that “Under the [filed rate] doctrine, no regulated seller is legally entitled to collect a rate *in excess of the one filed with the Commission for a particular period*”. *Id.* at 576 (emphasis added).

But *Arkla* expressly makes clear that this principle does not apply where there has been a waiver of the price pre-filing requirement by the Commission, noting that:

Except when the Commission permits a waiver, no regulated seller of natural gas may collect a rate other than the one filed with the Commission. § 4 (d), 52 Stat. 823, 15 U.S.C. § 717c (d). These straightforward principles underlie the “filed rate doctrine,” which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.

Id. at 577 (emphasis added and internal citations omitted).

The Federal Power Act § 205(d), 16 U.S.C. 824d (d), contains the substantially identical provision as the

NGA § 4 (d), 52 Stat. 823, 15 U. S. C. § 717c (d), which is the provision cited above by *Arkla*, for the statement that “*[e]xcept when the Commission permits a waiver*, no regulated seller of natural gas may collect a rate other than the one filed with the Commission.” *Arkla*, 453 U.S. at 577.

Moreover, *Arkla* indicates in two additional places that the filed rate doctrine does not bar claims where the statutory requirements of price pre-filing and adhering to a specific pre-filed price have been waived: First, *Arkla* held that state law claims against a subgroup of regulated sellers who opted for “small producer” status, and therefore were exempted by FERC’s regulations from the price pre-filing requirements and related limitations on prices collectible, were not barred by filed rate doctrine from pursuing those claims. *See Arkla*, 453 U.S. at 576 n.5, 584 n.14.

Second, the Court’s discussion in *Arkla* makes clear that it was precisely because there had *not* been a waiver of the pre-filing requirement by FERC in that case -- indeed FERC had expressly refused to grant a waiver of that requirement -- that the Court determined that the main claims for the different price sought by the plaintiffs were barred by the filed rate doctrine. The Court noted that the plaintiffs were expressly told that in order to recover a price other than the pre-filed price, “they would have to ask the Commission *to waive* the filing requirements of the Natural Gas Act”, which the Court noted “was denied” by the Commission. *Id.* at 576 n.5 and n.6 (emphasis added). In this case, FERC granted broad advance waivers of requirements to pre-

file any particular price or adhere only to any such pre-filed price.

The Second Circuit cites no Supreme Court case that has applied the filed rate doctrine to bar a claim where the essential minimum feature compelling the application of the doctrine in *Keogh* and *Arkla*, the statutory mandate that the prices be pre-filed and that only those pre-filed prices could thereafter be legally charged, had been waived. The Second Circuit's mandating for the first time that the bar apply where there has been a waiver of this critical element, which was indispensable to the holdings in both *Keogh* and *Arkla*, is unprecedented in Supreme Court jurisprudence.

The Second Circuit conflated the issue of the filed rate doctrine, which does not apply for the above fundamental reason (as well as others), with the separate but related doctrines of (1) implied repeal as to federal claims and (2) federal preemption as to state claims, which the Second Circuit did not address. Those doctrines, Petitioner submits, are the appropriate doctrines to be considered in this case, not the filed rate doctrine as set out in *Keogh* and *Arkla*.

2. The Second Circuit's Decision Conflicts With Other Rulings of the Court

The test adopted by the Second Circuit also conflicts with the Court's direction that "When there are two acts upon the same subject, the rule is to give effect to both if possible." *California v. Fed. Power Comm'n*,

369 U.S. 482, 485 (1962) (internal citation omitted) (involving the Natural Gas Act). This Court has also held that Federal Power Commission “approval” of conduct under the Natural Gas Act does not insulate parties from federal antitrust liability. *Id.* at 488-89.

The Second Circuit’s decision is also contrary to the Court’s statement, specifically in the context of the FPA, that when a regulated entity’s conduct is “governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.” *Otter Tail Power v. United States*, 410 U.S. 366, 374 (1973). Here, Respondents’ subsequent independent conduct in illegally fixing prices by manipulating market prices an exercise of their business judgment and discretion. Moreover, all of the foregoing cases involved conduct that FERC was “authorized to regulate.”

3. The Second Circuit’s Decision Irreconcilably Conflicts with Judge Friendly’s Analysis in *Square D*

The Second Circuit’s decision is also irreconcilable with Judge Friendly’s detailed analysis in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), explaining how virtually none of the original assertions which drove the decision in *Keogh* in the 1920s holds true today, an analysis the Court described as “characteristically thoughtful and incisive” and with which the Court did not disagree. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476

U.S. 409, 423-24 (1986).⁵ Judge Friendly's careful analysis is irreconcilable with the attempt by the Second Circuit and other circuits to expand the filed rate bar to the new and different context of market based prices under the Federal Power Act, where it has never before been applied to bar claims for wrongful conduct.

B. Decisions of Other Circuits Applying The Filed Rate Doctrine to Market-Based Prices Are Wrong and Confusing

The Second Circuit cited, without analysis, decisions from four other Circuit Courts of Appeals purporting to apply the filed rate doctrine to market-based rates. App. 20a-23a. The bulk of the decisions are cited by reference to a footnote in the District Court's opinion. App. 20a (referencing *Simon v. KeySpan Corporation*, 2011 WL 2135075, at *2 n.21). The Second Circuit does not attempt to explain or defend the reasoning of any of these decisions, but merely points to their results.

Petitioner will address the error in the Ninth Circuit's decisions in *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.* ("Grays Harbor"), 379 F.3d 641 (9th Cir. 2004) and *Public Utility District No. 1 of Snohomish County v.*

⁵ Both *Keogh* and *Square D* involved solely pre-filed prices required to be pre-filed under the Interstate Commerce Act (or its successor statute), a statute which had as its "paramount" concern in the 1920s the prohibition of any discrimination whatsoever in prices to shippers. This concern is not present in today's market based market system under the Federal Power Act.

Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004), the two cases on which most of the other cases cited by the Second Circuit rely; and the Third Circuit's decision in *Utilimax.com, Inc. v. PPL Energy Plus, LLC* ("*Utilimax*"), 378 F.3d 303 (3d Cir. 2004), a case which involved a federal antitrust damages claim in the context of the Federal Power Act.

In *Grays Harbor's*, the Ninth Circuit did not examine or discuss binding Supreme Court holdings or federal statutory law, and instead relied solely on conclusory quotations from FERC regulatory opinions to summarily conclude that "the filed rate doctrine" applies to prices charged by market-based sellers. See *Grays Harbor*, 379 F.3d at 651 (citing FERC opinions). *Grays Harbor* neither discussed nor analyzed judicial authorities in support of its summary conclusion that the filed rate doctrine applied, and simply relied on a few spliced statements of opinion from FERC.⁶ Nowhere did the court in *Grays Harbor* persuasively explain how under applicable federal statutory law or binding precedent of the Supreme Court the applicability of *the filed rate doctrine* was compelled or justified. Moreover, the case involved no federal antitrust claims or other federal claims.

⁶ As one commentator has noted, "Courts applying the filed-rate doctrine have done so with little or no examination of whether the doctrine is actually appropriately applied to market based-rates. Rather, they simply assume its relevance with slight discussion." See Rachel Warnick Petty, *A Light in the Darkness: The Case for Judicial Antitrust Enforcement in the Electric Wholesale Industry*, 5 Texas J. Oil, Gas, & Energy L. 55, 65 (2010).

Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004) simply relied on *Grays Harbor* in turn, with no additional analysis. Like *Grays Harbor*, *Snohomish* involved solely state law claims and was primarily concerned with federal preemption of state claims under the Supremacy Clause. (“The *fundamental question in this case* is whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to *justify federal preemption of state laws.*” *Snohomish*, 384 F.3d at 760 (emphasis added)).

The Third Circuit’s decision in *Utilimax*, 378 F.3d 303, simply *presumed*, without discussing in detail the provisions of the Federal Power Act or Congress’ intent under that Act as applied to the federal antitrust laws, that the filed rate doctrine applied to all electricity market prices, once a utility was permitted to charge market-based rates under the Federal Power Act. In making this presumption, *Utilimax*’s brief discussion of the filed rate doctrine critically misstates the case law which it cites. The *Utilimax* court:

- 1) incorrectly cites *Keogh*, 260 U.S. at 162-63, as broadly holding that the filed rate doctrine “bars antitrust suits based on rates that have been filed and approved by federal agencies” (*Utilimax*, 378 F.3d at 306), when in fact that case held only that the Court’s interpretation of the *Interstate Commerce Act* precluded antitrust recovery in that case only for rates filed

*with the Interstate Commerce Commission;*⁷

- 2) incorrectly cites *Arkla*, 453 U.S. at 580, a Natural Gas Act case, for the proposition that “the [filed rate] doctrine operates to bar both *federal antitrust actions* and state law claims,” (*Utilimax*, 378 F.3d at 306), when in fact *Arkla* did not involve, or even address, any federal antitrust claims; and
- 3) incorrectly cites *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), as holding that “[u]nder the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, *although alleged to be the result of anticompetitive conduct*, were filed with the federal agency responsible for overseeing such rates” (*Utilimax*, 378 F.3d at 306), when *Montana-Dakota* did not involve any “anticompetitive conduct,” and certainly

⁷ The Supreme Court has described the holding in *Keogh* narrowly, stating that *Keogh* “simply held that an award of treble damages is not an available remedy for a private *shipper* claiming that the rate submitted to, and approved by *the ICC* [*i.e.*, under the Interstate Commerce Act] was the product of an antitrust violation.” See *Square D*, 476 U.S. at 422 (emphasis added). That holding was reached only after a detailed consideration of, and because of, the precise nature and requirements of the Interstate Commerce Act. *Keogh*, 260 U.S. at 160-65.

did not involve collusive conduct violative of the federal antitrust laws.

Thus, in addition to not containing any clear and persuasive explanation of why under specific applicable federal statutory law and Supreme Court holdings its summary conclusion was warranted, *Utilimax* hinged on the Circuit's misinterpretation of the primary cases to which it cited.

II. THE COURT SHOULD GRANT THE PETITION TO CORRECT ERROR AND CONFUSION IN THE CIRCUIT COURTS AND PROVIDE CLEAR DIRECTION ON THE ISSUE OF THE APPLICATION OF THE FILED RATE DOCTRINE TO MARKET BASED RATES

The Second Circuit decision and the decisions of other circuits are erroneous and conflate the issue of the filed rate doctrine, which this Court has applied only rarely to narrow circumstances and has never applied to claims of illegal conduct resulting in inflated market-determined prices subject to the Federal Power Act, with the separate but related doctrines of (1) implied repeal as to federal claims and (2) federal preemption as to state claims. The result has been error and confusion and a panoply of varying standards by various courts.

The Court should grant the Petition to remedy this error and confusion and provide clear direction to the Courts of Appeals based on the Court's existing precedent.

As stated above, the Court can do this by simply clarifying that:

(1) market-determined electricity prices that are subject to the Federal Power Act, and are not required by law to be pre-filed before being charged and were not pre-filed before being charged, do not meet a minimum necessary threshold requirement for the invocation of the filed rate doctrine, *i.e.*, that the pre-filing of the prices before they are charged be required by law and that the prices actually be pre-filed before they are charged;⁸

(2) any asserted conflicts between federal statutes (here conceivably the Federal Power Act and the federal antitrust laws) can and should be resolved under this Court's established doctrine concerning implied repeal of federal law; and

(3) any asserted conflicts between a federal statute and state claims can and should be

⁸ Alternatively, the Court should clarify that prices that are intended to be set by non-collusive market forces in competitive markets under the Federal Power Act simply are not subject to the "filed rate" bar with respect to federal antitrust or state antitrust claims, as (a) the Court has never held that they are barred under the filed rate doctrine and it declines to hold for the first time that they are, and (b) markets depend fundamentally on the absence of collusion and market corruption to achieve their intended purpose under the Federal Power Act, and enforcement of the antitrust laws to impose financial responsibility against wrongdoers who collude to undermine those markets is fully consistent with that objective. Moreover, the doctrines of implied repeal and preemption can adequately resolve any conflicts that arise.

resolved under this Court's established preemption doctrine, requiring a clear finding of express, field or conflict preemption before a claim is barred.

III. THE COURT SHOULD GRANT THE PETITION TO CONSIDER AN IMPORTANT QUESTION LEFT OPEN BY *KANSAS V. UTILICORP* REGARDING INDIRECT PURCHASER STANDING

The Second Circuit left unanswered an important question of federal law that has not been settled by this Court with respect to standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), to sue for antitrust violations under Section 4 of the Clayton Act, 15 U.S.C. § 15. (Question 3). In *Kansas v. Utilicorp United, Inc.*, ("Kansas") 497 U.S. 199 (1990), this Court expressly held "[w]e might allow indirect purchasers to sue[under the federal antitrust laws] only *when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury.*" *Kansas*, 497 U.S. at 218 (emphasis added). This Petition seeks to resolve a question that was posed by the *Kansas* Court, but not yet decided because the appropriate facts had not been presented.

There can be no question that the maintenance of competition in the market for electric capacity is an issue of nationwide importance. Federal and state antitrust laws must be able to be utilized as a method of combating anticompetitive conduct in the electric industry. The decision below conflicts with the goals of enforcement by eliminating any form of redress for

acknowledged antitrust violations in circumstances where a utility that purchases capacity at inflated market-based rates passes on overcharges fully and completely and is immunized by tariff from any form of antitrust injury.

The facts of this case present the ideal scenario in which to clarify the standing of an indirect purchaser to pursue antitrust claims where a direct purchaser utility is precluded by tariff from making a profit in the relevant market. The Second Circuit was faced with a scenario, unlike *Kansas*, where there was a preexisting guarantee that the direct purchaser would suffer no losses and make no profits on the sale of the capacity at issue here, regardless of changes in price or quantity sold, and the direct purchaser would otherwise suffer no compensable antitrust injury from the wrongful conduct in the capacity market at issue in this case. While the key in the *Kansas* case was the inability of the Court to know what would have happened in the absence of a price increase, here, the Court knows.

The Second Circuit did not explore the applicability of *Kansas* under this distinct factual scenario because it found that, even though Con Ed may have been insulated from losses in sales in the illegally restrained market for *electricity capacity*, which is the subject of this suit, it still might conceivably have suffered antitrust injury from a decrease in its profits on sales of retail *electricity distribution services*. (App. 15a). But the Second Circuit ignored that (1) the product market for electric generation capacity (which turns on ownership of independently owned generation plants, and is at issue here) and (2) the product market

for electricity distribution services (which turns on separate ownership of “wires” systems), are two separate product markets for antitrust purposes. *See, e.g., Cajun Power Electric Coop., Inc. v. Fed. Agency Regulatory Comm’n*, 28 F.3d 173, 176 (D.C. Cir. 1994).

Under well-established antitrust principles, persons injured in a product market -- other than the one illegally restrained -- can not bring an antitrust action for their injuries. *See, e.g., Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (“Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant’s conduct unlawful, are experienced in another market do not suffer antitrust injury.”). The Second Circuit’s assumption that Con Ed could bring an antitrust claim for such hypothetical damages in a different market, which led its ruling that Con Ed “is the only proper Plaintiff” (App. at 15a) overlooked these applicable legal principles and was incorrect.

The Second Circuit also did not explore the issue teed up by the *Kansas* Court finding *Kansas* distinguishable because “[t]he utility customers made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit.” *Kansas*, 497 U.S. at 218. Here, however, Con Ed *did* have a *preexisting guarantee* of exactly what its particular profit would be on sales of capacity – it was guaranteed that that profit would be exactly zero, regardless of the changes in quantity or prices. Under this scenario, the Second Circuit’s decision leaves

antitrust violators immune from liability – direct purchasers can not establish injury-in-fact and indirect purchasers lack standing. As a result of its failure to explore the fact that Con Ed did in fact have a guarantee of no profit regardless of changes in quantity or price, the Second Circuit was able to avoid analysis of the dispositive distinction between this case and *Kansas* under the specific language of *Kansas* noted above, and to evade the important question left open by the *Kansas* Court.

Similarly, the Court’s denial of federal antitrust standing on the ground that the Court “would be unable to determine whether Con Ed could have sought and received a rate increase” to enhance its profits “in the absence of the overcharge” was also designed to avoid review of the hypothesis of the *Kansas* Court (App. 16a). Unlike in *Kansas*, Petitioner alleged that the pre-existing tariff guaranteed the recovery of only the costs of capacity and prohibited the making of any profit regardless of the presence or absence of overcharges. Con Ed was prohibited from profiting at all on the sale of capacity, much less seeking to increase such prohibited profits either in the presence or absence of the overcharge in this case. Con Ed under its tariff was prohibited from making any profit on capacity under its tariff and it is implausible that Con Ed could or would seek or obtain an increase in profits where no profits on these sales transactions were permitted, even in the absence of the alleged overcharge.

Here, there was a pre-existing guarantee and requirement that there would be zero gain or loss to the direct purchaser on the sales of capacity at issue --

regardless of changes in the price or quantity of the product sold -- and therefore the direct purchaser has no standing to assert any antitrust injury from the illegal restraint of the capacity market here. Customers as a group will, by hypothesis, bear 100% of the overcharge.

Recognizing federal antitrust standing in this case where consumers who bore 100% of the overcharge, rather than Con Ed which had a pre-existing guarantee that it would bear none of the overcharge, nor otherwise make profits on the sale of capacity in any event, and which would have no standing to pursue an antitrust claim, is fully consistent with the exceptions recognized in *Illinois Brick* and *Kansas*. Those cases contemplate an exception where (1) "by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury," (*Kansas*, 497 U.S. at 218); (2) the utility itself "had" a "guarantee" of a fixed "particular profit" regardless of price and sales changes -- in this case that the profit on capacity would in all cases be zero (*Id.*); and (3) the direct "purchaser is insulated from any decrease in its sales [i.e., profits] as a result of attempting to pass on the overcharge...." (*Id.* at 217).

This claim is one of the perhaps rare -- but immensely important -- categories of indirect purchaser claims that is not barred by *Illinois Brick* and *Kansas*. In the now extensively restructured electricity industry, tens of millions of customers fall into this narrow and precise category of purchasers. A per se denial of the customers' right to enforce the federal antitrust laws for injuries they and no one else bear effectively guts the federal antitrust laws in the vast majority of the

hundred billion dollar per year modern competitive electricity markets.

Petitioner respectfully submits that the Court should grant the Petition to directly settle the issue of whether *Kansas* precludes indirect purchaser standing to pursue federal antitrust claims in the circumstances squarely before the Court, which in fact apply to millions of other consumers in today's competitive restructured electricity markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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