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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term 2011

(Argued: February 28, 2012      Decided: September 20, 2012)

Docket No. 11-2265-cv

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CHARLES SIMON, on behalf of himself and all others  
similarly situated,

Plaintiff-Appellant,

-- v. --

KEYSPAN CORPORATION, MORGAN STANLEY CAPITAL GROUP INC.,

Defendants-Appellees.

-----x

B e f o r e : WALKER, LYNCH, and DRONEY, Circuit Judges.

Plaintiff-appellant Charles Simon appeals from an order of  
the United States District Court for the Southern District of New  
York (Shira A. Scheindlin, Judge), dismissing his federal and  
state antitrust claims against defendants-appellees KeySpan  
Corporation and Morgan Stanley Capital Group Inc. We agree with  
the district court that plaintiff-appellant lacks standing to  
pursue his federal claims because he was an indirect purchaser

1 and that his claims are otherwise barred by the filed rate  
2 doctrine. AFFIRMED.

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29 NY; Richard M. Brunell, American  
30 Antitrust Institute, Washington,  
31 DC; Christopher L. Sagers,  
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35 American Antitrust Institute.  
36

37 JOHN M. WALKER, JR., Circuit Judge:

38 This appeal requires us to consider whether plaintiff-  
39 appellant Charles Simon ("Simon"), a retail consumer of  
40 electricity in New York City, can maintain an antitrust action  
41 against defendant-appellee KeySpan Corporation ("KeySpan"), a

1 producer of electricity in New York that allegedly colluded with  
2 one of its rivals to increase installed capacity prices, and  
3 defendant-appellee Morgan Stanley Capital Group Inc. ("Morgan  
4 Stanley"), a financial firm that allegedly facilitated KeySpan's  
5 anticompetitive conduct. The United States District Court for  
6 the Southern District of New York (Shira A. Scheindlin, Judge)  
7 dismissed plaintiff-appellant's claims principally on the grounds  
8 that he lacked antitrust standing and that his claims were barred  
9 by the filed rate doctrine.<sup>1</sup> We agree and conclude that  
10 plaintiff-appellant, as an indirect purchaser, lacks standing to  
11 bring his federal antitrust claims. We further hold that the  
12 filed rate doctrine bars plaintiff-appellant's state and federal  
13 claims even though the allegedly supracompetitive rate was the  
14 product of a market-based auction.

#### 15 **BACKGROUND**

16 In reviewing a motion to dismiss, we accept all factual  
17 claims in the complaint as true and draw all reasonable  
18 inferences in the plaintiff's favor. Famous Horse Inc. v. 5th  
19 Ave. Photo Inc., 624 F.3d 106, 108 (2d Cir. 2010). Where  
20 necessary, we take judicial notice of the regulatory structure  
21 governing the New York City electricity market.

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<sup>1</sup> The district court also concluded that Simon's state law claims were preempted and insufficiently pled. Because we hold that the state law claims are barred by the filed rate doctrine, we need not consider whether the district court was correct on these points.

1 I. The New York City Electricity Market

2 The market for electricity in New York City is overseen by  
3 the New York Independent System Operator ("NYISO").<sup>2</sup> On the  
4 wholesale side, the market is based on the producers' "installed  
5 capacity," i.e. the amount of electricity that the producer can  
6 supply at a given time. Retail sellers of electricity must  
7 purchase enough installed capacity from producers to meet their  
8 expected peak demand plus a share of reserve capacity. The  
9 system is designed to ensure that the amount of electricity  
10 eventually sold to consumers is consistent with the total  
11 production capacity of the producers.

12 In order to determine the price at which producers can sell  
13 their capacity, NYISO has established an auction system that  
14 results in a market-based rate ("MBR"). Producers submit bids  
15 indicating the amount of capacity they can produce and the lowest  
16 per unit price at which they are willing to sell. The bids are  
17 then "stacked" from lowest to highest price until the total  
18 demand for capacity has been met. The point at which demand is  
19 met determines the market price for installed capacity and every

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<sup>2</sup> NYISO is an Independent System Operator ("ISO") created to administer the retail electricity market in New York. See generally Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (Apr. 24, 1996) (codified at 18 C.F.R. pts. 35 & 385); see also Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 397 (D.C. Cir. 2004) (describing FERC's efforts to encourage public utilities to create ISOs).

1 producer stacked below that price point can sell its full  
2 capacity for the market price. The producer whose bid set the  
3 price can sell as much of its capacity as is necessary to meet  
4 demand. The rest remains unsold. Any producer that bid higher  
5 than the market price cannot sell its capacity.

6 The New York City capacity market is highly concentrated.  
7 Three firms - defendant-appellee KeySpan, NRG Energy, Inc.  
8 ("NRG"), and Astoria Generating Company ("Astoria") - control a  
9 substantial portion of the total generating capacity.<sup>3</sup> The total  
10 demand for installed capacity cannot be met without at least some  
11 of the capacity from each of these three firms. Accordingly,  
12 NYISO has imposed a price cap on these firms' bids and barred  
13 them from selling electricity outside of the auction process.  
14 KeySpan's bid cap is the highest of the three.

15

16 II. The Anticompetitive Agreement

17 As a result of the prevailing market conditions from June  
18 2003 to December 2005, most of KeySpan's capacity was necessary  
19 to satisfy total demand. KeySpan therefore routinely bid at its  
20 price cap and set the market price at that level. However,

---

<sup>3</sup> These firms were created in 1998 when Consolidated Edison Company of New York, Inc. ("Con Ed") divested most of its generating capacity. The three firms are known collectively as Divested Generation Owners ("DGOs"). See Order Conditionally Approving Proposal, 122 FERC ¶ 61,211, ¶ 3 (2008) ("2008 Market Power Modification Order").

1 because other producers would be bringing new plants online,  
2 KeySpan anticipated that in 2006, supply would increase, leaving  
3 KeySpan to either bid below its cap or risk selling only a small  
4 amount of its capacity. To avoid these unappealing options,  
5 KeySpan indirectly entered into an agreement with Astoria ("the  
6 agreement"). Using Morgan Stanley as an intermediary, KeySpan de  
7 facto agreed to pay Astoria a fixed income in exchange for any  
8 potential profits (after a certain point) from Astoria's  
9 generating capacity.<sup>4</sup>

10 The agreement consisted of two separate deals: the "KeySpan  
11 Swap" and the "Astoria Hedge." The KeySpan Swap, executed on  
12 January 18, 2006, provided that if the market price after auction  
13 were set above \$7.57 per KW-month ("the fixed price"), Morgan  
14 Stanley would pay KeySpan the difference between the market price  
15 and the fixed price multiplied by 1800 megawatts ("MW"). If the  
16 market price were lower than the fixed price, KeySpan would pay  
17 the difference (times 1800 MW) to Morgan Stanley. The "Astoria  
18 Hedge," executed on January 11, 2006, provided that if the market  
19 price were higher than \$7.07 per KW-month, Astoria would pay  
20 Morgan Stanley the difference times 1800 MW. If the price were  
21 below \$7.07, Morgan Stanley would pay the difference (times 1800  
22 MW) to Astoria. The net effect of the agreement was that Astoria

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<sup>4</sup> KeySpan had considered acquiring Astoria's physical generating assets, but did not pursue this approach due to antitrust concerns.

1 was assured of always receiving exactly \$7.07 per KW-month for  
2 its capacity while KeySpan received any profits (if the market  
3 price were above \$7.57) and subsidized any losses (if the market  
4 price were below \$7.07) from the sale of Astoria's capacity. The  
5 combination of the KeySpan Swap and the Astoria Hedge enabled  
6 Morgan Stanley to receive a fixed rate of fifty cents per KW-  
7 month in exchange for facilitating the deal.

8 As a result of the agreement, it remained lucrative for  
9 KeySpan to continue to bid as high as its cap permitted and set  
10 the market price at that level. If it then sold only a small  
11 amount of its own capacity, it would still receive substantial  
12 profits from Astoria's capacity. Since either all of KeySpan's  
13 or all of Astoria's capacity would be required by the market,  
14 KeySpan stood to make a substantial profit by setting the price  
15 as high as possible, i.e., at its cap. In the absence of the  
16 agreement, KeySpan would likely have had to bid competitively,  
17 which might have lowered the market price of capacity. This was  
18 borne out by experience: KeySpan continued to bid at its cap,  
19 setting the market price and leaving a significant portion of its  
20 capacity unsold. Thus the market price of capacity did not drop  
21 despite an industry-wide increase in generating capacity.

22

1 III. Investigations of the Agreement

2 In May 2007, the United States Department of Justice ("DOJ")  
3 began an investigation into the KeySpan agreement based on its  
4 anticompetitive effect. In February 2010, it filed a civil  
5 complaint alleging that KeySpan had unlawfully restrained trade.  
6 KeySpan entered into a stipulation with the DOJ to settle the  
7 case. Pursuant to a consent decree, KeySpan paid the United  
8 States \$12 million and the case was resolved "without trial or  
9 adjudication of any issue of fact or law."<sup>5</sup>

10 FERC also conducted an investigation of the agreement. Its  
11 enforcement office issued a detailed report concluding that  
12 KeySpan had not violated FERC's regulations prohibiting market  
13 manipulation. The report noted that

14 Market participants in the in-city ICAP [installed  
15 capacity] market have always known that KeySpan,  
16 pursuant to the applicable market mitigation rules, was  
17 permitted to offer at its cap and set the market-  
18 clearing price. In addition, as noted, KeySpan's  
19 offering behavior was consistent with market rules and  
20 the Commission's announced expectations that DGOs, such  
21 as KeySpan, would (in the absence of sufficient  
22 capacity additions) offer their capacity at their caps.

23  
24 FERC Enforcement Staff Report, Feb. 28, 2008, at 17; Joint  
25 Appendix ("J.A.") 89. FERC agreed with the enforcement staff's

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<sup>5</sup> The United States also recently settled a civil suit with Morgan Stanley arising from these same facts. See United States v. Morgan Stanley, --- F. Supp. 2d ---, 2012 WL 3194969 (S.D.N.Y. Aug. 7, 2012). There, the consent decree required Morgan Stanley to disgorge to the United States Treasury \$4.8 million of the net revenues that it had earned from the agreement. Id. at \*2-\*3.



1 report and noted that it had expected KeySpan's cap to set the  
2 market price.

3  
4 IV. The Complaint

5 Plaintiff-appellant Simon purchased electricity as a retail  
6 customer from Con Ed between 2006 and 2009. Con Ed in turn  
7 purchased electricity in the form of installed capacity through  
8 the previously described New York City auction process. On July  
9 16, 2010, Simon filed this complaint in the district court  
10 alleging that the defendant-appellees' conduct had caused him to  
11 be unlawfully overcharged for electricity. He sought to  
12 represent a class of customers who had purchased electricity from  
13 Con Ed between 2006 and 2009. The complaint claimed violations  
14 of federal antitrust law as well as New York law.

15 On March 22, 2011, the district court dismissed all of  
16 Simon's federal and state claims with prejudice. Simon v.  
17 KeySpan Corp., 785 F. Supp. 2d 120 (S.D.N.Y. 2011). The district  
18 court concluded that Simon lacked standing to bring his federal  
19 claims because he was an indirect purchaser. Id. at 134-37. It  
20 further found that all of his claims were barred by the filed  
21 rate doctrine, which precludes legal challenges to rates set or  
22 approved by federal agencies, because the rate he sought to  
23 challenge was authorized by FERC. Id. at 138-39. The district  
24 court also held that Simon's state law claims were preempted and

1 denied leave to amend on the basis of futility. Id. at 139-41.  
2 On May 27, 2011, it denied Simon's motion for reconsideration.  
3 Simon v. KeySpan Corp., No. 10 Civ. 5437 (SAS), 2011 WL 2135075  
4 (S.D.N.Y. May 27, 2011). It reiterated its holding that Simon's  
5 claims were barred by the filed rate doctrine even though it  
6 acknowledged that those rates were set at a market-based auction  
7 rather than filed directly with FERC. See generally id. Simon  
8 appeals.

#### 10 DISCUSSION

11 We review a district court's decision to grant a motion to  
12 dismiss under Rule 12(b)(6) de novo, accepting all factual claims  
13 in the complaint as true and drawing all reasonable inferences in  
14 the plaintiff's favor. Famous Horse Inc., 624 F.3d at 108. "To  
15 survive a motion to dismiss, a complaint must contain sufficient  
16 factual matter, accepted as true, to 'state a claim for relief  
17 that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.  
18 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S.  
19 544, 570 (2007)). "A claim has facial plausibility when the  
20 plaintiff pleads factual content that allows the court to draw  
21 the reasonable inference that the defendant is liable for the  
22 misconduct alleged." Id. We hold that Simon's complaint fails  
23 to state a plausible antitrust claim both because he lacks

1 federal antitrust standing and because all of his claims are  
2 barred by the filed rate doctrine.

3  
4 I. Antitrust Standing

5 Simon's federal claims are barred because he was an indirect  
6 purchaser and therefore lacks standing to sue under section 4 of  
7 the Clayton Act, 15 U.S.C. §§ 12, et seq.<sup>6</sup> Generally, only  
8 direct purchasers have standing to bring civil antitrust claims.  
9 See Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover  
10 Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). This  
11 rule has two rationales. First, defendants may otherwise face  
12 multiple liability. Ill. Brick, 431 U.S. at 730. Second, there  
13 are too many "uncertainties and difficulties in analyzing price  
14 and out-put decisions in the real economic world rather than an  
15 economist's hypothetical model." Id. at 731-32 (internal  
16 quotation marks omitted); see also id. at 741-44. In other  
17 words, it is nearly impossible for a court to determine which  
18 portion of an overcharge is actually borne by the direct  
19 purchaser and which portion is borne by a subsequent indirect  
20 purchaser. The Supreme Court has therefore established a general

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<sup>6</sup> We need not determine whether Simon qualified for antitrust standing under New York law, see generally Ho v. Visa U.S.A. Inc., 787 N.Y.S.2d 677 (Table) (N.Y. Sup. Ct. 2004), because we conclude that his state claims are barred by the filed rate doctrine.

1 rule that the direct purchaser is the only appropriate antitrust  
2 plaintiff.

3 An indirect purchaser may have standing, however, if it had  
4 a pre-existing cost-plus contract with the direct purchaser,  
5 meaning that the indirect purchaser has agreed in advance to  
6 purchase a fixed quantity, paying the direct purchaser's costs  
7 plus a predetermined additional fee. Id. at 736.

8 In such a situation, the purchaser is insulated from  
9 any decrease in its sales as a result of attempting to  
10 pass on the overcharge, because its customer is  
11 committed to buying a fixed quantity regardless of  
12 price. The effect of the overcharge is essentially  
13 determined in advance, without reference to the  
14 interaction of supply and demand that complicates the  
15 determination in the general case.

16  
17 Id. In this type of situation, there is no difficulty  
18 apportioning the overcharge because the indirect purchaser paid  
19 the direct purchaser's entire cost. There is no chance that the  
20 indirect purchaser decreased its demand because it had previously  
21 agreed to purchase a fixed quantity. Finally, there is no risk  
22 of duplicative liability; the defendant would have a valid pass-  
23 on defense against the direct purchaser because the latter  
24 suffered no injury. See id. at 735-36.

25 The cost-plus contract exception to the indirect purchaser  
26 bar is a narrow one that is only appropriate when the contract  
27 has removed all doubts about who bore the antitrust injury. For  
28 the exception to apply, the contract quantity must be determined

1 prior to the overcharge to avoid uncertainty about "what effect a  
2 change in a company's price will have on its total sales."

3 Hanover Shoe, 392 U.S. at 493. A direct purchaser that passes on  
4 all of its costs may still suffer an antitrust injury if passing  
5 on increased costs decreased its sales and therefore its profits.  
6 Additionally, there must be no possibility that the direct  
7 purchaser would have "raised his prices absent the overcharge."

8 Id.

9 Simon contends that he qualifies for the cost-plus contract  
10 exception because Con Ed passed on 100% of its installed capacity  
11 costs to its consumers. The complaint alleges:

12 Each month from at least May 2006 through February  
13 2008, Con Ed passed through 100% of Con Ed's costs for  
14 the purchase of installed capacity in the NYC Capacity  
15 Market to its customers. Its customers, including  
16 Plaintiff, were contractually required to pay and did  
17 pay 100% of such costs as "supply charges" on their  
18 monthly billing statements. The quantity of installed  
19 capacity for which Plaintiff was required to pay Con Ed  
20 was contractually fixed prior to the time the price for  
21 such capacity was known and charged to Plaintiff.

22  
23 J.A. 10. Further, he argues that "[r]etail distribution  
24 utilities like Con Ed typically are not permitted to make a  
25 profit on the sale of electricity or capacity." Appellant's Br.  
26 33-34.

27 The Supreme Court has previously addressed the applicability  
28 of the cost-plus contract exception to regulated utilities and  
29 their retail customers. In Kansas v. UtiliCorp United, Inc., 497

1 U.S. 199 (1990), natural gas wholesalers were sued by several  
2 public utilities as well as Kansas and Missouri, acting as parens  
3 patriae for their citizens. The Court held that only the  
4 utilities, as direct purchasers, were proper plaintiffs. It  
5 declined to create an exception to the indirect purchaser rule  
6 for situations where regulated public utilities pass on 100% of  
7 their costs to consumers. Id. at 208-17. The Court noted that a  
8 utility might still suffer an antitrust injury because it might  
9 be unable to effect a rate increase that would have otherwise  
10 been possible. Id. at 209. Moreover, the Court viewed the  
11 presence of government regulation as a complicating, rather than  
12 simplifying, factor. This was so because a reviewing court would  
13 have to examine whether the regulator would have allowed a rate  
14 increase in the absence of the overcharge in addition to  
15 determining whether the utility would have sought an increase.  
16 Id. at 209-10.

17 The Kansas Court also rejected the states' argument, even  
18 without a general exception, they qualified for the cost-plus  
19 exception because the utilities had passed on 100% of their costs  
20 to their retail customers. The Court noted that

21 [t]he utility customers made no commitment to purchase  
22 any particular quantity of gas, and the utility itself  
23 had no guarantee of any particular profit. Even though  
24 the respondent raised its prices to cover its costs, we  
25 cannot ascertain its precise injury because . . . we do  
26 not know what might have happened in the absence of an  
27 overcharge.

28  
29 Id. at 218.

1           Simon's attempts to differentiate this case from Kansas are  
2 unavailing. We credit the complaint's claim that Con Ed passed  
3 on 100% of its installed capacity costs to consumers each month  
4 as "supply charges," a portion of the overall bill.<sup>7</sup> The Kansas  
5 Court's central concern, however, remains applicable: We cannot  
6 say with any certainty what would have occurred in the absence of  
7 an overcharge. If the price for capacity had been lower, Con Ed  
8 might have requested and received permission to increase its  
9 rates. Additionally, increased supply charges might have driven  
10 down Con Ed's customers' electricity usage, diminishing its  
11 profits. Even though Con Ed does not make a profit on its retail  
12 sale of electrical capacity, it does make a profit on its  
13 distribution of electricity. Like any business, Con Ed has  
14 overhead costs, and the rates it charges reflect a variety of  
15 factors in addition to its supply costs. Even if Con Ed  
16 increased its rates by exactly the amount it was overcharged for  
17 installed capacity, it does not follow that Con Ed's sales and  
18 profits were unaffected. In short, Con Ed may have suffered an

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<sup>7</sup> We share the district court's skepticism that the markets for installed capacity and retail electricity are similar enough to allow a seamless pass-through in this way, but we nevertheless assume for the present that Simon could prove this to be the case at trial. See Simon, 785 F. Supp. 2d at 137 ("[T]he proposition that Con Ed is able to pass through one hundred percent of any overcharge to its consumers in the form of retail price increases is suspect given the differing nature of the two markets.").

1 antitrust injury as a result of the agreement, and therefore  
2 under Hanover Shoe and Illinois Brick, it is the only proper  
3 plaintiff.

4         Simon points to the allegation in his complaint that “[t]he  
5 quantity of installed capacity for which Plaintiff was required  
6 to pay Con Ed was contractually fixed prior to the time the price  
7 for such capacity was known and charged to Plaintiff.” J.A. 10.  
8 Although Simon is further attempting to analogize his situation  
9 to that of a cost-plus contract, this argument fails. Simon  
10 neglects to account for the fact that he was not contractually  
11 obligated in advance to purchase a fixed quantity of electricity  
12 each month, we reject this contention as implausible. Con Ed,  
13 like all electrical utilities of which we are aware, charges its  
14 customers a metered fee based on their actual electricity usage.  
15 See Simon, 785 F. Supp. 2d at 137 n.123 (taking judicial notice  
16 of Judge Scheindlin’s Con Ed bill, which bases the monthly charge  
17 on electricity used). Therefore, Simon was free to decrease his  
18 electricity usage, and thereby his payments, if supply costs  
19 became too high. Further, even if Simon had contracted to buy a  
20 fixed quantity of electricity in advance, a contention that is  
21 implausible, see Iqbal, 556 U.S. at 678, it would not alter our  
22 conclusion because we would still be unable to determine whether



1 Con Ed could have sought and received a rate increase in the  
2 absence of the overcharge.

3 Simon's other attempts to distinguish this case from Kansas  
4 are similarly unavailing. He notes that, in Kansas, the  
5 utilities were actually present in the lawsuit, making allocation  
6 issues unavoidable. This may be true, but the Supreme Court  
7 rested its holding on the possibility of allocation difficulties,  
8 not their imminence or likelihood. The fact that Con Ed would be  
9 a proper plaintiff to sue KeySpan for the same conduct implicates  
10 Illinois Brick's concerns about duplicative recovery and  
11 apportionment. Simon also points to the fact that the certified  
12 question in Kansas stated that the utility "passed on most or all  
13 of the price increase" to its customers. 497 U.S. at 205-06  
14 (internal quotation marks omitted). His complaint, in contrast,  
15 expressly alleges that all of the cost was passed on. However,  
16 the Kansas Court did not leave open the possibility that the  
17 plaintiffs could maintain a suit by proving as a matter of fact  
18 that the utilities passed on 100% of the overcharge.  
19 Additionally, for the reasons discussed earlier, the allegation  
20 here that 100% of the costs were passed on is not sufficient to  
21 establish standing because it does not negate the possibility  
22 that Con Ed might have sought and received a rate increase in the  
23 absence of the overcharge.

1           For all of these reasons, we hold that Simon cannot qualify  
2 for federal antitrust standing as an indirect purchaser. He did  
3 not contract to buy a fixed monthly quantity of electricity from  
4 Con Ed in advance, and we cannot determine whether Con Ed would  
5 have been able to seek and obtain a rate increase in the absence  
6 of the overcharge. The cost-plus contract exception to the bar  
7 on indirect purchaser standing is therefore not applicable in  
8 this case.

9  
10 II. Filed Rate Doctrine

11           Simon's state and federal claims are also foreclosed by the  
12 filed rate doctrine. "Simply stated, the doctrine holds that any  
13 'filed rate' - that is, one approved by the governing regulatory  
14 agency - is per se reasonable and unassailable in judicial  
15 proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX  
16 Corp., 27 F.3d 17, 18 (2d Cir. 1994). This Circuit has not  
17 previously addressed whether the filed rate doctrine applies to  
18 rates set at market-based auctions as opposed to those set or  
19 approved directly by the regulatory agency. There is no need for  
20 us to decide whether the filed rate doctrine always applies to  
21 market-based auction rates. But we do hold that it applies in  
22 the circumstances of this case, where the auction process was  
23 circumscribed, and the MBR process was reviewed by the regulatory

1 body which determined the resulting rate to be reasonable. In  
2 these circumstances, the filed rate doctrine forecloses Simon's  
3 claims.

4 The filed rate doctrine originated in the context of the  
5 Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 1, et seq. In  
6 Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 160-65 (1922), the  
7 Supreme Court addressed an antitrust claim against an association  
8 of railroad companies that had colluded to set rates rather than  
9 competing with one another. These rates, although the product of  
10 collusion, were filed with and approved by the Interstate  
11 Commerce Commission ("ICC"). In an opinion by Justice Brandeis,  
12 the Court held that because the ICC had determined the rates to  
13 be lawful, they could not be challenged in court. The Court  
14 posited three rationales for the filed rate doctrine: the lack of  
15 need for antitrust remedies in regulated industries (that  
16 inherently involve some level of government oversight); the per  
17 se legality of rates approved by a regulator; and the difficulty  
18 of proving that an alternative lower rate would have been  
19 approved by the regulator. Central to the Court's reasoning was  
20 the ICA's requirement that rates be nondiscriminatory; if  
21 customers were allowed to challenge the rate in court, varying  
22 litigation outcomes might result in non-uniform rates.

1           Since Keogh, the filed rate doctrine has "been extended  
2 across the spectrum of regulated utilities." Ark. La. Gas Co. v.  
3 Hall, 453 U.S. 571, 577 (1981) ("Arkla"). It applies even when a  
4 claim is based on fraud or impropriety in the method by which the  
5 rate is determined. See Square D Co. v. Niagara Frontier Tariff  
6 Bureau, Inc., 476 U.S. 409, 415 (1986) (filed rate doctrine bars  
7 claim that shippers colluded to fix rate subsequently approved by  
8 ICC). The Supreme Court discussed the filed rate doctrine in the  
9 context of wholesale electricity rates when it held that rates  
10 filed with FERC are binding on state utilities. Entergy La.,  
11 Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47-51 (2003).

12           When the filed rate doctrine applies, it is rigid and  
13 unforgiving. Indeed, some have argued that it is unjust. See,  
14 e.g., Fax Telecomunicaciones Inc. v. AT&T, 138 F.3d 479, 491 (2d  
15 Cir. 1998); Ting v. AT&T, 319 F.3d 1126, 1131 (9th Cir. 2003).  
16 It does not depend on "the culpability of the defendant's conduct  
17 or the possibility of inequitable results," nor is it affected by  
18 "the nature of the cause of action the plaintiff seeks to bring."  
19 Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998). It applies  
20 whenever a claim would implicate its underlying twin principles  
21 of "preventing carriers from engaging in price discrimination as  
22 between ratepayers" and "preserving the exclusive role of federal  
23 agencies in approving rates." Id. And when the doctrine

1 applies, it bars both state and federal claims. Arkla, 453 U.S.  
2 at 584-85 (1981).

3 FERC has exclusive authority over wholesale electricity  
4 rates. See 16 U.S.C. § 824e (establishing FERC's power to fix  
5 rates); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953,  
6 966 (1986) ("FERC clearly has exclusive jurisdiction over the  
7 rates to be charged . . . [to] wholesale customers."). The  
8 parties do not dispute that Simon's claims are based on the  
9 premise that he paid a supracompetitive price for electricity.  
10 The only issue we must decide is whether the filed rate doctrine  
11 can apply beyond rates set directly by an agency to MBRs set by a  
12 regulatory auction scheme.<sup>8</sup>

13 Although we have not previously addressed whether the filed  
14 rate doctrine applies to MBRs, other circuits that have addressed  
15 the issue have concluded that the doctrine applies with equal  
16 force to MBRs. See Town of Norwood, Mass. v. New Eng. Power Co.,  
17 202 F.3d 408, 419 (1st Cir. 2000) (applying filed rate doctrine  
18 to prices that FERC "left to the free market" because FERC is  
19 "still responsible for ensuring 'just and reasonable' rates");  
20 Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303 (3d Cir.

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<sup>8</sup> Simon also argues in his brief that the filed rate doctrine is limited to certain statutes and does not apply to rates set under the Federal Power Act, 16 U.S.C. §§ 796, et seq. This argument is unavailing, as Supreme Court precedent makes clear that the doctrine applies in all instances where rates are set by federal agencies. See Arkla, 453 U.S. at 577-78.

1 2004) (applying filed rate doctrine when market based rates were  
2 "in conformity with the requirements of the FERC and [local  
3 authority]-approved market model"); Tex. Commercial Energy v. TXU  
4 Energy, Inc. 413 F.3d 503, 509-10 (5th Cir. 2005) (applying filed  
5 rate doctrine to MBR tariff in context of state agency that  
6 regulated electric utilities); Pub. Util. Dist. No. 1 of Grays  
7 Harbor Cnty. Wash. v. IDACORP Inc., 379 F.3d 641, 650-52 (9th  
8 Cir. 2004) (rejecting argument that filed rate doctrine does not  
9 apply to FERC MBR tariff on the basis that FERC takes steps to  
10 ensure that the MBR complies with the statutory mandate that  
11 rates be just and reasonable); see also Simon, 2011 WL 2135075,  
12 at \*2 n.21 (collecting other similar cases from these circuits as  
13 well as district courts). We are not aware of any court holding  
14 that the doctrine does not apply to MBRs.<sup>9</sup>

15 In affirming the application of the filed rate doctrine in  
16 this case, we need not announce a per se rule and, in a case that  
17 does not require it, are reluctant to do so. It is not clear to  
18 us that the filed rate doctrine, and the rationales underlying

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<sup>9</sup> Simon's reliance on Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 546 (2008), is misplaced. Morgan Stanley dealt with the Mobile-Sierra doctrine, which applies to "market based tariffs," i.e., bilateral contracts between wholesalers and purchasers that are not directly submitted for rate approval. Id. at 537-38. It does not implicate the filed rate doctrine. See Simon, 2011 WL 2135075, at \*2-3 (describing and distinguishing Morgan Stanley opinion).

1 it, should preclude all court scrutiny of alleged anti-  
2 competitive behavior affecting the setting of MBRs. The Supreme  
3 Court's three rationales from Keogh do not apply with equal force  
4 to rates set by MBRs when the only involvement by a regulator is  
5 creating the process ultimately corrupted by parties in the  
6 market. This is so because antitrust remedies become more  
7 necessary as markets become increasingly deregulated by the MBR  
8 system. Indeed, some of our sister circuits who have held that  
9 the filed rate doctrine applies have taken into account factors  
10 such as the level of FERC review. See, e.g., Town of Norwood,  
11 202 F.3d at 418 (noting that the tariffs at issue were "actively  
12 at issue in the FERC proceedings"); Pub. Util. Dist. No. 1 of  
13 Snohomish Cnty. v. Dynegy Power Mktg., Inc., 384 F.3d 756, 760-61  
14 (9th Cir. 2004) (discussing three specific steps taken by the  
15 FERC to exercise oversight over the MBR process).

16 Simon urges us to limit the filed rate doctrine to cases  
17 where the regulatory agency itself chose or approved the rate.  
18 We acknowledge that Simon's approach has some appeal. Because  
19 FERC did not directly set the rate at issue here, it did not  
20 specifically determine that the rate was reasonable. Moreover,  
21 KeySpan's alleged conduct undermined the competitive market  
22 scheme FERC and NYISO had created. One could therefore conclude  
23 that the rate arrived at was not the one envisioned by FERC.

1           However, we find that the MBR process established by the  
2           FERC in this case was sufficiently safeguarded such that the  
3           filed rate doctrine should apply. A central underpinning of the  
4           filed rate doctrine is the desire to "preserv[e] the exclusive  
5           role of federal agencies in approving rates . . . by keeping  
6           courts out of the rate-making process." Marcus, 138 F.3d at 58.  
7           FERC has chosen to exercise its rate-setting authority in this  
8           market by establishing an MBR auction process. Despite leaving  
9           the final price to auction, FERC exercised tight control over the  
10          rate by imposing price caps on the major producers. Tellingly,  
11          when FERC capped these producers' bids, it was aware that the  
12          producers were "pivotal" (i.e., at least some of their capacity  
13          would be required to meet demand), and therefore the market would  
14          clear at their cap. 2008 Market Modification Order at ¶ 4.  
15          KeySpan's bid cap, specifically approved by FERC, in fact set the  
16          market price from 1998 until 2006. See id. As the Ninth Circuit  
17          has observed,

18                 the market-based rate regime established by FERC  
19                 continues FERC's oversight of the rates charged. FERC  
20                 only permits power sales at market-based rates after  
21                 scrutinizing whether the seller and its affiliates do  
22                 not have, or have adequately mitigated, market power in  
23                 generation and transmission and cannot erect other  
24                 barriers to entry.

25  
26          Grays Harbor, 379 F.3d at 651 (internal quotation marks omitted).



1           Importantly, FERC tightly controls the auction process and  
2 has mechanisms in place to remedy the kind of misconduct that  
3 allegedly occurred here. FERC has promulgated a rule barring  
4 fraud or deceit in connection with the sale of energy. 18 C.F.R.  
5 § 1c.2(a). It has the authority to investigate market  
6 manipulation in the energy market, and exercised that authority  
7 in this case when it investigated the KeySpan agreement for  
8 unlawful manipulation. FERC's enforcement division's  
9 investigation determined that KeySpan's conduct did not  
10 constitute fraudulent market manipulation. FERC Enforcement  
11 Staff Report, Docket Nos. IN08-2-000 & EL07-39-000, at 24 (Feb.  
12 28, 2008). FERC adopted this report and concluded that KeySpan's  
13 continued bids at its cap were "not only permissible under the  
14 NYISO's [tariff] but consistent with the Commission's  
15 expectations when the Commission approved [the 1998 divestiture  
16 plan]." 2008 Market Power Modification Order at ¶ 145; see Order  
17 Establishing Paper Hearing and Referring Certain Matters for  
18 Investigation, 120 FERC ¶ 61,024, at ¶ 17 (July 6, 2007).

19           The rationale behind the filed rate doctrine applies with  
20 equal force to an MBR auction system such as NYISO's in which the  
21 regulating agency tightly controls the auction process and has  
22 exercised its ability to undertake individual review of the MBR  
23 to ensure that anti-competitive practices did not undermine the

1 process it created. FERC employed a bid cap to curb the market  
2 power of large firms and created a mechanism to investigate and  
3 rectify fraudulent market manipulation. For a federal court to  
4 intrude into FERC's carefully constructed system would directly  
5 undermine the rationale of the filed rate doctrine. It would  
6 permit courts "to grant . . . greater relief than [plaintiffs]  
7 could obtain from the Commission itself." Arkla, 453 U.S. at  
8 579. FERC's auction process was plainly designed to result in a  
9 reasonable rate, and we are not willing to say that KeySpan's bid  
10 cap, specifically approved by FERC, was not reasonable. We  
11 conclude that the filed rate doctrine applies on these facts -  
12 where the regulator created a process for setting rates, reviewed  
13 the resulting rates, and, after investigation, determined that  
14 the anti-competitive behavior did not undermine its process and  
15 that the resulting rates were reasonable. There is no need for  
16 us to reach the question of whether the filed rate doctrine would  
17 apply to all MBRs irrespective of the oversight of the regulator,  
18 and we leave that question for another day.

#### 19 **CONCLUSION**

20 Because we conclude that Simon lacks standing to bring his  
21 federal antitrust claims and his state and federal claims are  
22 barred by the filed rate doctrine, we need not consider his  
23 challenges to the district court's other holdings. Accordingly,

1 for the reasons described above, the judgment of the district  
2 court is AFFIRMED.

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