IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2320

FLORIDA MUNICIPAL POWER AGENCY,

Plaintiff-Appellant,

v.

FLORIDA POWER and LIGHT COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws, which establish a national policy favoring economic competition as a means of promoting the public interest. Therefore, the United States has a substantial interest in ensuring that the filed rate doctrine is interpreted in accordance with the Supreme Court's decisions.

ISSUE PRESENTED

The United States will address the following issue:

Whether the "filed rate doctrine" would preclude recovery of antitrust treble damages if a defendant violated the Sherman Act

by refusing to provide a service, and consequently did not file a rate or tariff for that service.[1]

STATEMENT OF THE CASE[2]

1. The supply chain for electric power is divided vertically into three segments: generation, transmission and distribution. Defendant Florida Power and Light (FPL) performs all three functions. Plaintiff Florida Municipal Power Agency (FMPA) and some of its 27 members (municipally owned electric utilities) engage in generation, and all FMPA members engage in retail distribution. FMPA and its members, however, depend on FPL for transmission. For many years, FPL has provided FMPA with "point-to-point" transmission. FPL assesses a charge for transmission between pairs of FMPA receipt and delivery points (e.g., a generation point and a particular city). To supply a delivery point from another source, FMPA must pay an additional transmission charge. These charges are set forth in contracts between FMPA and FPL filed with the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act.

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[1]This brief does not represent the views of the Federal Energy Regulatory Commission. The United States takes no position on the merits of appellant's contract and antitrust claims or on any other issues presented in this case.

[2]The procedural history and the facts relevant to the issue the United States will address are set forth in the district court's opinion. 839 F. Supp. 1563, 1565-68; R12-238-2 to 6.

Beginning in 1989, FMPA sought a transmission service that would allow its members to use FPL's transmission network to integrate their resources in the same way FPL integrates its own resources, and to implement an "Integrated Dispatch and Operations" (IDO) project for joint planning and operation of FMPA's power supply sources. Negotiations between FMPA and FPL concerning the requested service were unsuccessful, and FMPA filed suit in state court. It alleged that FPL had refused to provide the service FMPA sought, thereby breaching certain settlement agreements (Count I) and violating state antitrust laws (Count II). FPL removed the case to federal court, and FMPA amended its complaint also to allege that FPL violated federal antitrust law (Count III). FMPA sought damages and injunctive relief on all counts.

2. Both parties moved for summary judgment, and the district court entered judgment for FPL. It held that "the 'filed rate' doctrine, as it has evolved through a line of Supreme Court cases," barred FMPA's damage claim. 839 F. Supp. at 1565, 1571; R12-238-2 and 14. The court reasoned that "[u]nder Keogh [v. Chicago & Northwestern Railway, 260 U.S. 156 (1922)], FMPA can claim no right to a rate other than the legal rate that was approved by FERC." 839 F. Supp. at 1571; R12-238-13 to 14. The court acknowledged that "FMPA has asserted that the damages it claims are consequential damages for the business effects of FPL's refusal to offer a transmission network service," and thus that FMPA might be "attempting to assert a

claim for damages in terms that do not implicate the rates on file with FERC." 839 F. Supp. at 1571; R12-238-14. Nonetheless, the court held that the filed rate doctrine barred FMPA's claim because:

> in Arkla [Arkansas Lousiana Gas Co. v. Hall, 453 U.S. 571 (1981)], the Court stated that any award of damages would require an assumption that the higher rate that might have been filed was reasonable, but only FERC could make that determination. In the case at bar, any award of damages would require an assumption regarding what type of rate/service terms would have been approved by FERC. The Court cannot engage in this type of speculation.

Id.

The court recognized that the filed rate doctrine "does not eliminate the possibility of injunctive relief." 839 F. Supp. at 1571; R12-238-15. But it concluded that a proposed FERC order granting FMPA's request that FPL be required to provide network transmission service to FMPA mooted FMPA's claims for injunctive relief. 839 F. Supp. at 1572; R12-238-15 to 16. Accordingly, the court granted summary judgment for FPL without addressing the merits of either the contract claims or the antitrust claims. 839 F. Supp. at 1572; R12-238-16.

FMPA moved for reconsideration. It contended that the filed rate doctrine should not bar its claims because it was challenging a refusal to serve rather than any filed rate. R13-242-4 to 14. Network and point-to-point services are fundamentally different, FMPA argued, and FPL had never filed a rate for network service. If the court found antitrust or

contract violations, FMPA contended, it could "apply the network rate that results from the pending FERC proceeding in Docket No. TX93-4-000." R13-242-15. FMPA argued that "the Court is free to determine what transmission rate would have been in effect throughout the damage period." Id. It also suggested that the court could make a primary jurisdiction referral to FERC. R13-242-14 and 16 to 17.

The district court denied reconsideration. R13-248. It did not decide whether network service and point-to-point service are different services; nor did it decide whether FPL had refused to provide network service and, if so, whether that refusal violated the Sherman Act as FMPA alleged. Rather, it held that "[e]ven if [as FMPA contends] network and point-to-point transmission are entirely different services or products," and even if FPL had violated the Sherman Act and damaged FMPA, FMPA could not recover antitrust damages because it "'would not be able to establish that the rate on which it based its damage calculations would have been reasonable in the eyes of FERC.'" R13-248-2 (quoting 839 F. Supp. at 1571; R12-238-14). The court expressly rejected FMPA's argument that the court could base an award of damages on a rate established in the pending FERC proceeding:

> [N]o primary jurisdiction argument was made by FMPA prior to dismissal of this case. However, even if the primary jurisdiction issue had been raised, it would not have altered the opinion of the Court. The Court understands that the determination of a rate to be applied prospectively can be referred to FERC. Such a referral would not address the concerns of the court. The filed rate doctrine would still bar retroactive

> application of a FERC-approved rate. An award for damages based on a retroactive rate is prohibited as too speculative, not just because the proper rate has not yet been determined by FERC, but also because retroactive application would require speculation regarding whether FERC would actually have approved such a rate given the circumstances in existence at a prior point in time.

R13-248 at 3.

After FMPA had filed this appeal, FERC, pursuant to Sections 211 and 212 of the Federal Power Act,[3] "directed FPL to provide network transmission service to FMPA," specified a pricing formula, and directed FPL to make a rate filing implementing that formula.[4]

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[3]The Energy Policy Act of 1992, P.L. 102-486, broadened FERC's authority under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. §§824j, 824k, to order electric utilities to provide transmission service. See H.R. Rep. No. 102-474(I), 102d Cong., 2d Sess. 139 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962 (many believed that FERC's practical ability to order wheeling under the Federal Power Act [had been] ambiguous").

[4]Florida Municipal Power Agency v. Florida Power & Light Co., 67 Fed. Energy Reg. Comm'n Rep. (CCH) ¶61,167 (May 11, 1994). Both FMPA and FPL have sought clarification and rehearing on certain aspects of the order; thus FPL has not yet filed its rates. FERC did not address FMPA's contention that FPL's refusal to include network service in its previously existing service agreements was unjust, unreasonable and unduly discriminatory

STANDARD OF REVIEW

The question the United States addresses is one of law, subject to de novo review by this Court. See, e.g., In re Empire for Him, Inc., 1 F.3d 1156, 1159 (11th Cir. 1993); Simon v. Kroger Co., 743 F.2d 1544 (11th Cir. 1984).

SUMMARY OF ARGUMENT

In Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), the Supreme Court held that if a carrier's rate has been submitted to and approved by the responsible regulatory agency, treble damages under the federal antitrust laws are not available to a customer claiming that the rate is the product of an antitrust violation. Implied immunity from the antitrust laws is disfavored, however, and the "filed rate doctrine," bars antitrust damages only in cases challenging filed rates. It would not confer immunity from antitrust damages if a carrier were found to have violated the antitrust laws by refusing to provide a service -- and thus filing no rate. In such a case, a court, for the limited purpose of calculating damages, could estimate the rate that would have been in effect but for the violation without infringing on the regulatory agency's jurisdiction.

The district court, in concluding that the filed rate doctrine would bar FMPA's damage claim even if FPL had refused to provide an entirely new service as FMPA alleged, thus misconstrued the Supreme Court's decisions. Because this error

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under Section 206 of the FPA. See id. at 61,473 n.3.

may have affected its decision to grant summary judgment for FPL, the judgment should be vacated.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE FILED RATE DOCTRINE WOULD BAR AN ANTITRUST DAMAGE CLAIM FOR AN ALLEGED VIOLATION BASED ON A REFUSAL TO PROVIDE SERVICE.

A. The Filed Rate Doctrine Bars Recovery of Antitrust Damages Based on a Claim that Rates Validly Filed with, and Not Disapproved by, a Regulatory Agency Are Unlawful. It Does Not Preclude Recovery of Damages for a Refusal To Provide a Service.

1. In Keogh, a shipper alleged that railroads had violated the Sherman Act by agreeing on uniform rates. Those rates had been filed with, and approved by, the Interstate Commerce Commission. The Court held that, although the railroads might be subject to other remedies under the antitrust laws for such price fixing,[5] a shipper could not recover damages for the difference between the filed rate and the rate that would have prevailed but for the antitrust violation.

The Court explained that, "[t]he legal rights of a 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." 260 U.S. at 163. The Interstate Commerce

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[5]The Court expressly recognized the United States' right to bring criminal, injunctive and forfeiture actions against carrier cartels regardless of whether their rates were filed with the ICC. 260 U.S. at 161-62.

Act provided shippers an opportunity to challenge the rates before the ICC as "unreasonably high or discriminatory," and Congress did not intend "to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act." Id. at 162. The Court also expressed concern that an additional antitrust remedy "might, like a rebate, operate to give [a shipper] a preference over his trade competitors," and thereby lead to the unjust discrimination that the Interstate Commerce Act was designed to prevent. Id. at 163. Further, "by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." Id. at 164. Finally, the Court viewed the shipper's damages as "purely speculative" because the benefits of any lower rates "might have gone to [the shipper's] customers, or conceivably, to the ultimate consumer." Id. at 164-65.[6]

In subsequent cases, the Supreme Court has reaffirmed the Keogh holding, applying the filed rate doctrine to rates filed with the Federal Power Commission and its successor, FERC, under the Federal Power Act and the Natural Gas Act, as well as to rates filed with the ICC. E.g., Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) (fraud

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[6]Later, in Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Supreme Court sharply limited any "pass-on" defense.

damage claim barred, rates filed with FPC); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) (Arkla) (breach of contract damage claim barred, rates filed with FPC); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) (antitrust damage claim barred, rates filed with ICC); Maislin Industries v. Primary Steel, Inc., 497 U.S. 116 (1990) (ICC policy relieving shipper of obligation to pay the filed rate when the shipper and carrier have privately negotiated a lower rate is inconsistent with Interstate Commerce Act); Security Services, Inc. v. K Mart Corp., 114 S. Ct. 1702 (1994) (tariffs that are void under ICC regulations are not binding as filed rates). See also Georgia v. Pennsylvania Railroad, 324 U.S. 439, 453 (1945)(Keogh held "that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade," but Keogh does not bar injunctive relief); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (FERC decision pre-empts inconsistent state regulatory order); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) (same); Taffet v. Southern Co., 967 F.2d 1483 (11th Cir. 1992) (en banc) (RICO claim barred, rates filed with state public service commissions), cert denied, 113 S. Ct. 657 (1992).

In the 1986 Square D case,[7] the Supreme Court considered

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[7]Square D was an antitrust damage action brought by a shipper against carriers that had fixed prices in violation of

whether, in light of subsequent developments, it should reexamine and overrule Keogh. The Court did not dispute the view of the Second Circuit (Judge Friendly) and the Solicitor General that the factors the Court had relied on in Keogh did not compel continued adherence to the filed rate doctrine. But it concluded that even if "the Keogh decision was unwise as a matter of policy," the Court should not overrule it because "Congress did not see fit to change it when Congress carefully reexamined this area of the law [collective motor carrier ratemaking] in 1980." 476 U.S. at 420. Given that implicit congressional acquiescence, developments in the law were "insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute." Id. at 424. Accordingly, Keogh remains the law.

2. Keogh, Square D and the other filed rate decisions, however, must be read in light of the well-established rule that

> Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973)

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the Sherman Act. The carriers were parties to an agreement that had been approved by the ICC and thus was immune from the antitrust laws, but the complaint alleged that the carriers had failed to comply with the terms of the approved agreement.

(internal quotations and citations omitted).

Moreover, as the Supreme Court has emphasized, the "treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985). This important implement of federal antitrust policy must not be limited unless it directly interferes with rights and obligations imposed by regulatory statutes. Thus, in Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966), for example, the Court reversed the dismissal of an antitrust treble damage action alleging collective ratemaking not approved by the Federal Maritime Commission (FMC). The Shipping Act authorized the FMC to approve certain ratemaking agreements and thereby exempt them from the antitrust laws. The Court held, however, that the Act did not preclude application of the antitrust laws to unapproved agreements, explaining that "[t]he award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the [FMC]." 383 U.S. at 222.

Accordingly, in declining to abandon the filed rate doctrine, the Court in Square D emphasized its limited scope. Recognizing that "'the antitrust laws represent a fundamental national economic policy,'" and that "exemptions from the antitrust laws are strictly construed and strongly disfavored," the Court explained 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 was the product of an antitrust violation." 476 U.S. at 421-22 (quoting Carnation, 383 U.S. at 217).[8]

3. The Supreme Court's concern in Keogh with the potential for conflict between the regulatory scheme and an antitrust damage remedy is inapplicable when damages are based on the failure to provide and file a rate for a particular service. Thus, the Court has never held that the filed rate doctrine bars an antitrust damage claim where there is no filed rate, and its decisions make clear that the filed rate doctrine is limited to validly filed rates. In Square D, for example, it expressly distinguished Carnation (in which it had rejected defendants' implied immunity argument) on the basis of the absence of any challenge to a filed rate: "The specific Keogh holding . . . was not even implicated in [Carnation], because the ratemaking agreements challenged in that case had not been approved by, or filed with, the Federal Maritime Commission." 476 U.S. at 422

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[8]The Supreme Court also reiterated that the filed rate doctrine does not bar criminal or injunctive antitrust actions. 476 U.S. at 422. In granting injunctive relief, an antitrust court may require the defendant to provide services and to file rates with the appropriate regulatory agency. See, e.g., Otter Tail, 410 U.S. at 376; Essential Communications Systems, Inc. v. American Tel. & Tel. Co., 610 F.2d 1114, 1122 (3d Cir. 1979).

n.29 (emphasis added). And, in its most recent decision involving the filed rate doctrine, the Court held that a carrier could not rely on that doctrine when, having filed a tariff lacking an essential element, "in effect it had no rates on file." Security Services, 114 S. Ct. at 1708.

The courts of appeals, too, have consistently held that the filed rate doctrine does not bar antitrust damage claims that do not directly challenge filed rates. E.g., In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1158-61 (3d Cir. 1993), cert. denied, 114 S. Ct. 921 (1994) (alleged anticompetitive activity included blocking competitors' entry; if the harm alleged results from non-rate activity Keogh does not bar damage claims); Pinney Dock and Transport Co. v. Penn Central Corp., 838 F.2d 1445, 1457 (6th Cir.) (alleged anticompetitive conduct included refusing to allow competitors to use certain facilities; "[t]o the extent that . . . alleged acts are unrelated to defendants' rates, any damages suffered therefrom would not be barred by Keogh"), cert. denied, 109 S. Ct. 196 (1988); see also City of Mishawaka, Indiana v. American Elec. Power Co., 616 F.2d 976, 984-85 (7th Cir. 1980) (no regulatory bar to damage claims for monopolizing conduct, an important element of which was a "continuing wholesale and retail rate disparity"; no discussion of Keogh), cert. denied, 449 U.S. 1096 (1981); Square D Co. v. Niagara Frontier Tariff Bureau, 760 F.2d 1347, 1349 (2d Cir. 1985) (plaintiffs should be afforded opportunity to amend complaint to claim damages for conduct other

than the fixing of rates), aff'd on other grounds, 476 U.S. 409 (1986).

The filed rate doctrine, properly construed and applied, gives a regulated carrier a choice. If the carrier provides a requested service and files its rates, challenges to the price of that service may be limited to the regulatory forum.[9] In that situation, however, customers enjoy the protection of regulatory scrutiny of those rates, making serious uncompensated antitrust injury less likely. See Town of Concord v. Boston Edison Co., 915 F.2d 17, 28 (1st Cir. 1990) (Breyer, J.), cert. denied, 499 U.S. 931 (1991). FERC has the authority to grant prospective rate relief and to order refunds if it permits rates to take effect after suspension and later finds them unlawful. Id.; 16 U.S.C. §824d. If the carrier denies a request for service, on

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[9]The Second, Third and Eighth Circuits have held that even if filed rates are at issue, Keogh does not bar a competitor's antitrust damage claim. City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981); Lower Lake Erie, 998 F.2d at 1161; Essential, 610 F.2d at 1121 (3d Cir. 1979); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1178-79 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983). The Sixth Circuit has concluded that Keogh does bar competitors' antitrust damage claims insofar as they are based on defendant's rates. Pinney Dock, 838 F.2d at 1456-57. This Court need not reach that issue to reverse the grant of summary judgment in this case.

the other hand, and does not file any rate to be scrutinized by the regulatory agency, there is no comparable basis for immunity from damages if its conduct constitutes an antitrust violation.

Moreover, when Congress has broadened FERC's powers to order interconnections and transmission it has made clear that this authority is not intended to displace or limit antitrust remedies. See 16 U.S.C. §824k(e)(2) ("Sections 821i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws"); see also 16 U.S.C. §2603(1) ("Nothing in this Act or in any amendments made by this Act affects . . . the applicability of the antitrust laws to any electric utility"); H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 7797, 7802 ("Specifically with regard to certain authorities to order interconnections and wheeling under title II, it is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the Federal Energy Regulatory Commission. The conferees specifically intended to preserve jurisdiction of Federal and State courts to resolve, independent of the Commission, such actions, including for example, cases where a refusal to wheel electric energy is alleged to be in violation of such laws.").

B. The District Court Erred in Granting Summary Judgment.

1. The parties to this case vigorously dispute the issue that is critical in determining whether the Keogh doctrine bars FMPA's antitrust damage claims: whether FPL refused to provide a

new "network" service or whether FMPA is merely complaining that FPL's filed contractual rates for point-to-point service were too high. FMPA contended that network service is fundamentally different from point-to-point service and that FPL had refused to provide network service in violation of the Sherman Act. Such a claim for economic benefits lost as a result of an alleged refusal to provide service that is claimed to violate federal antitrust law would differ significantly from the claims at issue in Keogh, Arkla, Square D and similar filed rate cases. In those cases, the plaintiffs had paid a valid, filed rate and then brought antitrust or fraud actions in which they asked the courts to award damages based on claims that they were entitled to a rate other than the filed rate. But if, as FMPA alleges, there was no filed rate for the service it sought, the filed rate doctrine is not implicated because FMPA is not claiming a right to avoid any filed rate, and the court would not have to invalidate any filed rate or otherwise infringe on FERC's jurisdiction in order to award damages resulting from the denial of service.

FPL, on the other hand, contended that FMPA could have obtained the transmission it sought -- but at a higher price than it wanted to pay -- under the filed contractual point-to-point rates.[10] If, as FPL argues, FMPA was simply challenging the

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[10]It is undisputed that no rates for network service, as distinct from point-to-point service, had been filed with or

reasonableness of those rates, which were properly filed with and not disapproved by FERC, its damage claim would be barred by the filed rate cases.

The district court's disposition of this key issue is unclear and ultimately troubling. Its initial opinion on summary judgment suggested that it agreed with FPL that there had been no refusal to serve. See 839 F. Supp. at 1570; R12-238-12 ("Counsel for FMPA responded that the transmission service was available, but that the charges that would be assessed pursuant to the existing TSAs [filed contracts] would make the network alternative impracticable. . . . [This statement] is fairly construed as an assertion that the rates on file are unreasonable"). In denying rehearing, however, the court stated that comparison of network and point-to-point service "was not essential to the [c]ourt's decision" because "[e]ven if network and point-to-point transmission are entirely different services or products, the conclusions reached by the [c]ourt" -- that the damage claim is barred by the filed rate doctrine -- "are fully applicable." R13-248-2. As we read the reconsideration order, the court was stating that it had not decided whether a refusal to serve was at issue, or whether the dispute involved only the reasonableness of filed rates, and that it did not view this distinction as material to the question whether the Keogh doctrine barred FMPA's damage claim. But the distinction is material. Antitrust damage claims based on a refusal to provide

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approved by FERC.

a service and file a tariff, by definition, do not require the court to hold any filed rate unlawful, and the filed rate doctrine does not bar such claims as a matter of law. Accordingly, the district court erred in granting summary judgment based on the filed rate doctrine without ruling on the appropriate characterization of FMPA's claim.[11]

2. The district court appears to have concluded that it was unnecessary to determine whether FMPA was challenging a refusal to serve -- rather than a filed rate -- because, in its view, the filed rate doctrine would bar antitrust damages even for an illegal denial of a service. This unduly broad construction and application of the filed rate doctrine was legal error.

FMPA claimed that FPL's alleged illegal refusal to provide network service made it impossible to implement FMPA's IDO project. To calculate FMPA's antitrust damages if this alleged

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[11]The United States takes no position as to whether the "network" service FMPA sought was or was not "an entirely different service" from the point-to-point service available at filed rates. Depending on the circumstances, the court also could have considered a primary jurisdiction referral to FERC in connection with this issue. See generally United States v. Western Pacific R.R., 352 U.S. 59 (1956); Ricci v. Chicago Mercantile Exchange 409 U.S. 289 (1973); Reiter v. Cooper, 113 S. Ct. 1213, 1220 (1993); Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199 (5th Cir. 1988).

refusal were found to violate the Sherman Act, it would be necessary to compare FMPA's costs and revenues without network service (and without the IDO project) to estimates of its costs and revenues with that service (and the IDO project), i.e., its costs and revenues but for the antitrust violation. The rate that FMPA would have paid for network service would have been one element of FMPA's costs absent the alleged violation. Therefore, a hypothetical rate for network service would be one of many factors in calculating damages.

The court, it appears, viewed the filed rate doctrine as an insurmontable barrier to that aspect of damage computation:

> "[W]hen FERC approves or fixes a given rate, that rate is established as reasonable for the service rendered. If the service is altered, a new determination regarding rate must be made. Whether the same rate is reasonable for an altered service or whether a higher rate is required is a determination within the exclusive jurisdiction of FERC. According to Montana-Dakota, a court cannot determine what a reasonable rate during the past would have been. As the Supreme Court in Keogh observed, there is no mechanism available for review by a regulatory commission of a hypothetical rate. At trial, FMPA would not be able to establish that the rate on which it based its damage calculations would have been reasonable in the eyes of FERC."

R13-248-2 (quoting 839 F. Supp. at 1571; R12-238-14).

The district court erred in thus concluding that the filed rate doctrine would prohibit it from estimating a network service rate for the limited purpose of calculating antitrust damages. Estimates are permissible and unavoidable in antitrust damage computations. Indeed, the Supreme Court repeatedly has

recognized that damages in market exclusion and similar types of antitrust cases "are rarely susceptible of . . . concrete, detailed proof of injury." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565 (1981) (quoting Zenith); Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1579 (11th Cir. 1983) (quoting Zenith). Evidence of lost profits is necessarily imprecise in many respects because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." J. Truett Payne, 451 U.S. at 566. Thus, an antitrust plaintiff's evidence need only be sufficient to support a "just and reasonable inference" of damages; "'any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.'" Id. (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946)); see also Lower Lake Erie, 998 F.2d at 1176.

It follows from this well-established principle that an estimate of antitrust damages in a denial of service case would not require a definitive answer to the question whether "'the rate on which [FMPA] based its damage calculations would have been reasonable in the eyes of FERC.'" R13-248-2 (quoting 839 F. Supp. at 1571; R12-238-14). Nor would it require impermissible "speculation regarding whether FERC would actually have approved such a rate given the circumstances in existence at a prior point

in time." Id. at 3.[12]

The essence of the filed rate doctrine is that a court may not substitute a different rate for a validly filed rate, as the plaintiffs sought to do in cases such as Montana-Dakota, Arkla, Keogh, and Square D. But if there is no filed rate, the prohibitions on judicial "ratemaking" that displaces a valid filed rate should not be construed to preclude antitrust recovery. As the Third Circuit explained in Lower Lake Erie, 998 F.2d at 1159-60, assessing damages from non-rate activity could "coincidentally implicate rates promulgated under the jurisdiction of [a regulatory agency]," but "the question of hypothetical . . . rates is ancillary"; thus rate regulation does

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[12]In FMPA's initial proffered damage computation, its expert apparently "assumed that 'with IDO' [i.e., if FMPA had provided network service] the rate currently on file with FERC [for point-to-point service] would remain the same, even though the transmission service available at that rate would be altered and, arguably, expanded." 839 F. Supp. at 1571; R12-238-13. The district court was justified in questioning this assumption; the filed rate for point-to-point service might not be a reasonable estimate of the rate for the network service FMPA sought, which FMPA claimed was a different service. Id. As we read the reconsideration order, however, the district court did not base its grant of summary judgment on an assessment of the particular computations FMPA had proffered.

not supplant the antitrust damage remedy for the non-rate anticompetitive conduct.

Moreover, there was no reason in this case to conclude that the district court could not arrive at a reasonable estimate of antitrust damages consistent with FERC's orders and regulatory policies. As the district court noted in its initial summary judgment order, FERC had granted FMPA's request for network service and would "set the rates, terms and conditions of such service" in the event the parties could not reach agreement. 839 F. Supp. at 1572; R12-238-15. FERC subsequently established the formula to be used in pricing network services and directed FPL to file a tariff implementing that formula. See supra p. 6 and note 4. Thus, it appears that there soon will be a filed and FERC-approved rate for essentially the same service FMPA claims FPL illegally denied. If FMPA proved an antitrust violation, one reasonable option for the court would be to use this rate in calculating FMPA's damages.[13] Costs and reasonable rates based on those costs may change over time, but absent special circumstances, a rate approved in 1994 could provide a reasonable estimate of the rate that would have been applied had FPL provided the same service in 1989-93. Use of a FERC-approved

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[13]FMPA apparently did not make this suggestion before the court's initial decision, but it did so in its reconsideration motion, and the court expressly considered and rejected it in denying that motion. See R13-248-3.

rate would neither infringe on FERC's jurisdiction nor impose any additional burden on FERC or the court. The court also could consider a primary jurisdiction referral to FERC in connection with the damage issue. Thus, while it would be premature to consider any damage formula in detail before a determination of liability, we submit that the district court's blanket conclusion that even if FMPA proved an antitrust violation it could not present adequate proof of damages without running afoul of the filed rate doctrine (R13-248-3) was incorrect.[14]

CONCLUSION

The United States' concern in this case is that the district court's judgment, as explained in the reconsideration order, was based on a misreading of the Supreme Court's filed rate decisions as they apply in the context of antitrust treble damage actions. Those decisions bar damage claims challenging filed rates (or other terms and conditions of service) that are valid under applicable regulatory law and thus binding on carriers and customers alike. But the district court appears to have based its grant of summary judgment on the incorrect view that the filed rate doctrine also prohibits a court from awarding

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[14]At this stage of the case, there is no need to address questions that might arise in reconciling any antitrust damage award with FERC's orders specifying rates and services. See supra p. 6 and note 4; see also Otter Tail, 410 U.S. at 375-77, 381-82.

antitrust damages if calculation of those damages would require hypothesizing a rate that, due to an illegal refusal to provide service, was never filed. This erroneous expansion of the filed rate doctrine could undermine the private damage remedy provided by Congress to further the public interest in competition and antitrust enforcement. Because the district court's error of law may have affected its decision to grant summary judgment for defendant-appellee FPL, this Court should vacate the judgment and remand for further proceedings.

Respectfully submitted.

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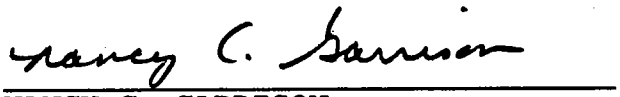

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 1994, the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE was served by hand delivery upon:

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