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BEYOND *GOLDWASSER*: EX POST JUDICIAL ENFORCEMENT IN DEREGULATED MARKETS*

*Jim Rossi***

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INTRODUCTION

Increasingly, regulatory agencies are adopting ex ante rules to set market access terms and conditions for network industries. Ex ante rules provide forward-looking, predictable and clear standards to guide conduct in markets. At the same time, in industries such as telecommunications and electric power transmission and distribution, antitrust laws play an important role in defining the terms and conditions of market access. Liability in this context is often backward-looking, and the rules are often not as predictable or clear in their enforcement. Antitrust liability is a good example of how courts play an important ex post enforcement role in defining market conduct. A major

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challenge for regulatory law is striking an effective balance between ex ante and ex post regulatory mechanisms.

In this essay, I address the filed rate doctrine, a legal principle that determines when courts, rather than regulatory agencies, may serve as a standard-setter for or arbiter of market terms, independent of their widely-accepted role as the reviewer of decisions by an agency, such as the Federal Communications Commission (FCC). I begin by discussing the issue in the context of electric power deregulation. Then, I turn to the telecommunications context, in which the points of departure for this issue after the Telecommunications Act of 1996,[1] are the Seventh Circuit's *Goldwasser v. Ameritech Corp.*[2] decision and the Second Circuit's *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*[3] case, which is currently pending before the United States Supreme Court. I argue that ex post enforcement has an important role to play in deregulated markets and should not be ignored where a regulatory agency is not actively applying ex ante rule to guide market conduct.

I. NETWORK ACCESS AND FILED RATES IN ELECTRIC POWER

The electric power industry faces remarkably similar institutional governance issues to those facing telecommunications. As in the telecommunications context, some of these issues are federalism based. For example, the Supreme Court's opinion last year in *New York v. Federal Energy Regulatory Commission*[4] has implications for electric power regulation similar to decisions that limit the scope of state authority in telecommunications. Outside of this federalism issue another institutional governance issue relates to the respective spheres of agency and judicial regulation. Here, the filed rate doctrine does a lot of heavy lifting in determining when courts will intervene in the enforcement of market norms for electric power as well as telecommunications.

A. Network Access and *Otter Tail*

Before exploring the implications of the filed rate doctrine, it is useful to examine the promise of the antitrust principles for an industry like electric

1. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18 and 47 U.S.C.).

2. 222 F.3d 390 (7th Cir. 2000).

3. 294 F.3d 307 (2d Cir. 2002), *cert. granted sub nom.*, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P., __U.S.__, 123 S. Ct. 1480 (2003).

4. __U.S.__, 122 S. Ct. 1012 (2002).

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power. The network features of electric power infrastructure allow a monopolist the ability to control a bottleneck facility (power transmission) to effectively foreclose competition in either upstream, such as power generation or downstream (power distribution) markets.

As the Supreme Court recognized in the classic *Otter Tail Power Co. v. United States*,[5] in order for competition to thrive in downstream markets (power distribution markets were at issue in that case) physical access to network transmission facilities is necessary.[6] In *Otter Tail*, the Supreme Court upheld a district court's order requiring interconnection with such transmission facilities, drawing on earlier cases, such as *United States v. Terminal Railroad Ass'n of St. Louis*.[7] The principle that *Otter Tail* applied–known today as the "essential facilities" doctrine–is fundamental to market access in electric power. This principle also has significant impact in the telecommunications industry, as is evidenced by Judge Greene's decision in *United States v. AT&T Co.*[8] and the Seventh Circuit's *MCI Communications Corp. v. AT&T Co.*[9]

Federal courts have at their disposal fairly broad powers to implement these sorts of principles through the issuance of treble damages (an ex post remedy) or by issuing an injunction that requires interconnection, which might take on the role of an ex ante remedy. In exercising these powers, however, courts recognize the importance of respecting the agency's jurisdictional turf. For instance, in *Otter Tail* the Supreme Court emphasized how, after it upheld the district court's injunction requiring interconnection, the district court would retain jurisdiction necessary and proper to ensure that the antitrust laws were enforced. The Court stated:

> The decree of the District Court has an open end by which the court retains jurisdiction 'necessary or appropriate' to carry out the decree or 'for the modification of any of the provisions.' It also contemplates that future disputes over interconnections and the terms and conditions governing those interconnections will be subject to Federal Power Commission perusal. It will be time enough to consider whether the antitrust remedy may override the power of the Commission . . . if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it.[10]

5. 410 U.S. 366 (1973).
6. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
7. 224 U.S. 383 (1912).
8. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).
9. 708 F.2d 1081, 1105 (7th Cir. 1983).
10. *Otter Tail*, 410 U.S. at 376-77.

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Implicitly, the Supreme Court was recognizing that the agency had primary jurisdiction for purposes of determining the rates for access, but antitrust law principles enforced by courts also had an important role to play.

B. The Strands of the Filed Rate Doctrine

The filed rate doctrine can keep courts from even considering the merits of such issues. Historically, the filed rate doctrine concerned itself with protecting consumers against nondiscrimination in utility service rates. A utility with a filed tariff is prohibited from offering customers rebates and discounts that are at odds with the filed (and often approved) tariff. In addition to inherent fairness, a non-economic goal, the non-discrimination principle behind this doctrine also has an economic purpose. The general idea behind prohibiting price discrimination is to preclude the monopolist from using its market power to extend its monopoly into secondary markets.[11]

The filed rate doctrine's origins may be in protecting against price discrimination, but there are two other strands to the doctrine that play an important role for industries, such as electric power.

First, there is a federal preemption strand to the filed rate doctrine. For example, in the electric power context, the Ninth Circuit invoked the filed rate doctrine to bar California's governor from commandeering expensive wholesale power contracts during the state's recent deregulation crisis.[12] The court's rationale for invoking the doctrine in that case was that the state's action would present a conflict with a tariff filed with the Federal Energy Regulatory Commission (FERC). While the court relied on the filed rate doctrine, it was really making a determination that federal preemption precluded a state regulatory action. It is unclear what, if anything, giving a filed rate an independent, legally significant status in such cases accomplishes.[13]

Second, and most relevant in the consideration of federal antitrust claims, there is an agency deference strand to the doctrine. The leading case on this is *Keogh v. Chicago & Northwestern Railway Co.*,[14] decided by the Supreme Court in 1922.[15] *Keogh* held that a private antitrust plaintiff is precluded from recovering treble damages against a carrier based on the claim

11. For discussion, see Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement in the Deregulatory Era*, 56 VAND. L. REV. (forthcoming 2003).

12. *See* Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001).

13. In fact, I have argued that reference to filed rates can lead courts to overreaching preemption conclusions. *See* Rossi, *supra* note 11.

14. 260 U.S. 156 (1922).

15. *See* Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922).

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that a tariff filed with the interstate commerce commission was allegedly monopolistic. Noting that section eight of the Interstate Commerce Act gave shippers injured by illegal rates actual damages plus attorney's fees, Justice Brandeis reasoned that the issue of rates is best determined by the agency, not by a court.[16] Thus, applying a deference-type principle, *Keogh* invoked another strand of the filed rate doctrine.[17]

This agency deference strand has also been used to bar antitrust claims in the deregulated electric power industry. For example, in *Town of Norwood v. New England Power Co.*,[18] the First Circuit invoked the *Keogh* strand of the filed rate doctrine to bar a price squeeze claim against a utility–even where the tariff filed with FERC was a market-based tariff relying on competitively set prices.[19] The *Norwood* court reasoned, "[i]t is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine"[20]

The approach of courts in applying the filed rate doctrine to the electric power industry can lead to problematic–even harmful–results. The conventional understanding is that the file rate doctrine, by respecting regulatory over market determinations, can stand in the way of deregulation. By contrast, cases such as *Town of Norwood* may allow the filed rate doctrine to lead to even more radical deregulation–that is, markets absent even common law and antitrust remedies–than either Congress or the regulatory agencies accepting tariffs would prefer. Specifically, to the extent the filed rate doctrine is used by courts as a basis to decline jurisdiction, private firms might look to ex ante tariffing as a strategy to foreclose antitrust or common law litigation, thus reducing the possibility of ex post judicial meddling. Allowing private conduct to determine the institutional forum for market enforcement leads to a serious bias against judicial enforcement. The problem with this bias, as I see it, is that it privileges private choice over public assessment of the effectiveness of dual enforcement.

Reliance on private forum selection for a regulatory enforcement mechanism poses a particularly costly problem as we move from cost-of-service based regulation to a different approach to regulating markets, focusing on inputs or the structure of access to important facilities for competition. In industries like electric power, the judiciary has a comparative institutional competence that has a lot to offer markets and market enforcement regimes. Courts, unlike regulatory agencies, do not depend on

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16. *See Keogh*, 260 U.S. at 162-64.
17. *See id.*
18. 202 F.3d 408 (1st Cir. 2000).
19. *See* Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).
20. *Town of Norwood*, 202 F.3d at 419.

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budget allocations or limited statutory jurisdiction for their enforcement authority. Courts have greater political independence. Courts have wider remedial authority and discovery powers than do agencies.

Thus, at least in electric power, I believe the fundamental issues relating to the application of doctrines, like the essential facilities doctrine, are properly considered by courts, as well as by agencies. I do not think that the filed rate doctrine, in particular, should no longer be used as the defense to claims brought in court, particularly given the extent to which it privileges private choice over assessment of the public interest. At times courts must respect the agencies' turf, but existing doctrines, such as regulatory preemption, primary jurisdiction and antitrust immunity, provide a more complete assessment of the public interest in the judicial enforcement decision.[21]

II. THE FILED RATE DOCTRINE IN DEREGULATED TELECOMMUNICATIONS MARKETS: BEYOND *GOLDWASSER*

Against the backdrop of this critique of the filed rate doctrine in the electric power context, I want to compare the doctrine's effects in the telecommunications industry.

As in electric power, in telecommunications there is a well-established federal preemption strand to the doctrine. *AT&T Co. v. Central Office Telephone Co.*[22] invoked the filed rate doctrine to preclude state law tort and breach of contract suits against a carrier with filed tariffs.[23] That case involved the federal preemption doctrine, but with federal detariffing of telecommunications (something electric power has yet to experience) it seems that the federal preemption strand of the doctrine, while still marginally relevant, will fade away.

While the preemption strand seems to be fading, in the last few years the agency deference strand of the doctrine has begun to take on a life of its own for telecommunications. The leading case on this, *Goldwasser v. Ameritech Corp.*,[24] decided by the Seventh Circuit in 2000, barred a court's consideration of an essential facilities antitrust complaint by direct consumers of Ameritech's local telephone services. The Seventh Circuit reasoned that the antitrust complaint was "inextricably linked" to the plaintiff's allegations that section 251 of the Telecommunications Act of 1996 had been violated.[25]

21. The argument is developed more completely in Rossi, *supra* note 11.
22. 524 U.S. 214 (1998).
23. *See AT&T Co. v. Cent. Office Tel. Co.*, 524 U.S. 214 (1998).
24. 222 F.3d 390 (7th Cir. 2000).
25. *See* Goldwasser v. Ameritech, 222 F.3d 390, 401 (7th Cir. 2002).

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Goldwasser reached this result despite the antitrust savings clause of the 1996 Act, which states "nothing in this act or the amendments made by this act shall be construed to modify, impair or supersede the applicability of any of the antitrust laws."[26]

To be kind, the reasoning in *Goldwasser* is unclear and confused. The court specifically stated that it was not conferring antitrust immunity, instead basing its decision on the court's conclusion that that the plaintiffs had failed to allege anything under the auspices of an antitrust complaint that could be divorced from a claim under the Telecommunications Act of 1996.[27] Notwithstanding the court's characterization, to me this looks a lot like implied antitrust immunity–especially to the extent that the court drew on general principles of statutory construction. For example, the court's primary argument was that the 1996 Act is more specific legislation that must take precedence over the general antitrust laws where the two cover precisely the same field. Traditionally formulated antitrust immunity analysis, however, could not possibly have led the court to this conclusion. Generally, to imply antitrust immunity, a court must find a "plain repugnancy"–an inconsistency–between the regulatory statute and antitrust laws,[28] not complimentary standards, as the *Goldwasser* court seemed to assume.

Perhaps after recognizing how strained this reasoning really is, the Seventh Circuit concluded its opinion in *Goldwasser* by stating that the filed rate doctrine also precludes consideration of the antitrust claim under *Keogh* and its progeny–the old line of cases involving the Interstate Commerce Commission. The court concluded that, "the plaintiffs cannot pursue their damages claim under the 1996 Act because the monopoly claim these plaintiffs are trying to assert necessarily implicates the rates Ameritech is charging."[29] Thus, like *Keogh*, *Goldwasser* is a classic agency deference filed rate case. The opinion, though, contains little discussion of how Ameritech's rates were determined and by whom–federal or state regulators–inviting private choices (or at least the opportunity for private choices) to determine the regulatory forum. As I have argued, this can be a problem for electric power regulation and it may also be a problem for telecommunications.

Thus, I believe it fortunate that other circuits have not bindly followed the approach of *Goldwasser*. Last year, in *Law Offices of Curtis V. Trinko*,

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26. 47 U.S.C. § 152 (historical and statutory notes); Telecommunications Act of 1996 § 601(b)(1), 110 Stat. 143.

27. *See Goldwasser*, 222 F.3d at 401.

28. *See, e.g.*, Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796 (2d Cir. 2002) (emphasizing whether antitrust claim presents a "plain repugnancy" to Congress' intended regulatory program).

29. *Goldwasser*, 222 F.3d at 402.

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L.L.P. v. Bell Atlantic Corp.,[30] the Second Circuit refused to endorse *Goldwasser's* use of the filed rate doctrine and antitrust immunity.[31] In that case, the claim was better pled to isolate the antitrust claims from claims brought under section 251. The court refused to endorse *Goldwasser's* analysis under the filed rate doctrine, thus considering the merits of the alleged antitrust misconduct.

The apparent "split" between the Seventh and Second Circuits is heading to the Supreme Court, so regulatory lawyers are keeping a careful eye on how the Court will resolve this issue. But it is not at all clear that there is a direct conflict between the circuits. Scholars writing on *Goldwasser* have observed that the case is readily distinguishable from others if courts read *Goldwasser* narrowly to focus on what is pled.[32] This would limit *Goldwasser*'s endorsement of the filed rate doctrine to poorly-pled pleadings, where plaintiffs have not separately pled antitrust violations.

This reading of *Goldwasser* is consistent with other circuit and district court cases that do not allow the filed rate doctrine, or the bizarre antitrust immunity of *Goldwasser,* to serve as a basis for rejecting antitrust claims. For example, in *Covad Communications Co. v. BellSouth Corp.*,[33] decided last year, the Eleventh Circuit also rejected the approach of *Goldwasser*, allowing a competitor monopoly leveraging claim to survive summary judgment.[34] That case is not as quite as explicit as *Law Offices of Curtis V. Trinko, L.L.P.* in its rejection of *Goldwasser* – to the extent that it is a competitor suit – but its spirit is inconsistent with *Goldwasser*. District courts in Ohio[35] and California[36] also have rejected the *Goldwasser* approach to antitrust immunity.

In granting certiorari to consider *Curtis V. Trinko*, at least four members of the Supreme Court appear to agree with the United States Solicitor General that the case presents a "matter of substantial importance" if not a Circuit

30. 294 F.3d 307 (2d Cir. 2002).

31. *See* Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 294 F.3d 307 (2d Cir. 2002), *cert. granted sub nom.*, Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, L.L.P., __U.S.__, 123 S. Ct. 1480 (2003).

32. *See, e.g.*, Randal C. Picker, *Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?* (Jan. 2003) (Working Paper, University of Chicago Law School, *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_176-200/177.rcp.bundles.pdf), at 3; Philip J. Weiser, Goldwasser, *The Telcom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1, 5 (2003).

33. 299 F.3d 1272 (11th Cir. 2002).

34. *See* Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002).

35. *See* Ohio Bell Tel. Co. v. CoreComm Newco, Inc., 214 F. Supp. 2d 810 (N.D. Ohio 2002).

36. *See* Stein v. Pac. Bell Tel. Co., 173 F. Supp. 2d 975 (N.D. Cal. 2001); Davis v. Pac. Bell, 204 F. Supp. 2d 1236 (N.D. Cal. 2002).

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conflict.[37] It seems, however, that aside from poorly pled complaints, as in *Goldwasser*, the line of cases outside of the Seventh Circuit makes some sense. The filed rate doctrine should not play a role in barring antitrust claims in the telecommunications context. In telecommunications, as in electric power, the filed rate doctrine is unnecessary–and it may prove harmful to the extent it allows antitrust enforcement decisions to hinge on the private choices of regulated firms in tariffing.

In telecommunications, as in electric power, the doctrine should be reassessed. Instead of using filed tariffs to decline judicial consideration of antitrust matters, courts should focus their attention on doctrines that better protect the public interest as they assess the issue of institutional governance. There are important principles of antitrust law that apply here–the essential facilities doctrine the most important among them–and the judiciary has a role to play in enforcing these. Lifting the shield of the filed tariff doctrine will allow courts the flexibility that they need to ensure adequate remedies against monopolistic conduct in deregulated markets.

CONCLUSION

Let me conclude by clarifying that I am not advocating that regulatory agencies are *never* relevant to the application of the network access principles of antitrust law or their enforcement. Agencies are relevant to the enforcement of antitrust principles and have an important role to play alongside courts.

At the same time, other doctrines–antitrust immunity (properly applied), primary jurisdiction, or federal preemption doctrine–are more than adequate for dealing with the duel enforcement issues courts face. Moreover, these doctrines are not as harmful as the filed rate doctrine. The filed rate doctrine allows private tariffing to foreclose ex post judicial enforcement of antitrust principles. As I have argued, this risks more radical deregulation than Congress or agencies would intend. By contrast, these other doctrines pay attention to the public interest in enforcement, evaluating more carefully legislative and agency schemes.

For example, I think that the *Goldwasser* court could have avoided the filed rate issue altogether, considering the issue under the doctrine of primary jurisdiction, to the extent the court was concerned with the implications of judicial enforcement for the FCC's regulatory scheme. For the Seventh Circuit's concerns to have materialized in *Goldwasser*, a federal or state

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37. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P. (No. 02-682) at 20 (May 23, 2003).

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agency would need to actively regulate and enforce the conduct of concern. Staying the antitrust claim pending resolution of the section 251[38] claim before the agency might have better respected the antitrust principles that are important to network industries. Indeed, this is consistent with the approach taken in *Otter Tail*. The *Otter Tail* decision emphasized that the district court, even when it issued its injunction, retained jurisdiction necessary and proper for purposes of ensuring compliance with the antitrust laws, notwithstanding the agency's role in mandating access and setting access prices.[39]

Given the importance of these antitrust principles to network access in competitive markets, the filed rate doctrine does little more than allow firm-specific private behavior to determine–or play an important role in determining–the regulatory forum for enforcement. For this reason, I think that courts ought to abandon the filed tariff doctrine, taking up increased adjudication of antitrust claims where the public interest warrants. Other safeguards can adequately determine when the public interest is balanced against judicial enforcement ex post and in favor of ex ante agency regulation of market inputs.

38. 47 U.S.C. § 251 (2000).

39. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 376 (1973); *see also supra* note 10 and accompanying text.

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