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Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction

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This Article argues that the judicial review of private party antitrust claims predicated upon market-based tariffs and filed with a regulatory agency should not be precluded by the filed rate doctrine (an antitrust doctrine that prevents challenge of electricity rates once they have been filed with, and approved by, the regulatory agency). This Article analogizes the filed rate doctrine with agency inaction in administrative law. Applying the reasoning of the United States Supreme Court in Heckler v. Chaney *to the specifics of a case study leads to the general conclusion that there is a strong case for making all agency market-based tariff-approval decisions presumptively reviewable in spite of the filed rate doctrine. The case study utilized is California's electricity crisis of 2000-2001 and FERC's mismanagement thereof, its aftermath, and the subsequent private antitrust claims.*

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I. INTRODUCTION

This Article argues that judicial review of private party antitrust claims, predicated upon market-based tariffs and filed with a regulatory agency, is not precluded by the filed rate doctrine. The scope of this study is limited to the electricity market. In order to argue in favor of judicial reviewability of private conduct under antitrust laws, this Article analogizes the filed rate doctrine with agency inaction in administrative law, which is governed by the doctrine of nonreviewability. In *Heckler v. Cheney*, the United States Supreme Court gave policy reasons for its conclusion that agency inaction was unreviewable.[1] I will apply the reasoning offered by the Court in *Heckler* to the specifics of a case study and conclude that agency market-based tariff-approval decisions should be reviewable. The case study is California's electricity crisis of 2000-2001. In particular, the examination will concentrate on the Federal Energy Regulatory Commission's (FERC) poor handling of the crisis, its aftermath, and the antitrust claims that followed.

The presumption of reviewability shifts the burden to the agency to show that its approval of a marked-based rate was not arbitrary. Courts should subject an agency's decision to the arbitrary and capricious standard of review. This standard would require agencies to give explanations and standards. If the agency fails to show that the tariff-related decision was not arbitrary, courts should refuse to apply the filed rate doctrine and should subject the claim to the operation of antitrust laws. Courts should not, however, determine which tariff would best serve the interests of the properly functioning deregulated electricity markets.

1. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

Such determinations are best left to the legislature or the agency because antitrust law and agency regulation are complementary to each other.

Part II describes the advantages of private antitrust claims enforcement and the unique characteristics of the electricity market, due to its particular susceptibility to market power abuse and price manipulation by individual utilities. I argue that if the filed rate doctrine is abolished, the electricity market should be subject to the joint operation of antitrust laws and agency regulation.

Part III explores the concept of the filed rate doctrine, its origins and current applications in regulated and competitive markets. Historically, the filed rate doctrine evolved to prevent price discrimination stemming from monopoly power, by entrusting the regulatory agency with exclusive authority to monitor and approve the rates charged by public utilities.[2] The approved rates became immune from modification by the utilities and the courts alike.[3]

Although the doctrine's original purpose was consumer protection, this was gradually perverted into protection of privately owned utilities from antitrust claims if such utilities had previously submitted their rates for regulatory agency approval. The shielding of utilities from antitrust prosecution became particularly problematic in a context of market deregulation, following the shift from cost-of-services to market-based rates. The filed rate doctrine is harmful to the newly competitive markets because it exposes consumers to potential market abuse by privately owned utilities.

Part IV argues against the continuing application of the filed rate doctrine in the context of deregulated electricity markets and argues for judicial review of agency decision-making process related to the approval of filed market-based rates. Currently, such judicial review is effectively blocked by the filed rate doctrine. Under the filed rate doctrine, courts may not scrutinize whether an agency has actually reviewed the data submitted to it or has merely rubber-stamped the rate approval. This Part analogizes the filed rated doctrine to the administrative law notion of agency inaction by concentrating on *Heckler v. Chaney* and its discussion of judicial reviewability of agency inaction.[4]

Part V develops the argument in favor of presumptive judicial review of antitrust claims predicated upon filed market-based tariffs by applying the discussion in *Heckler* to California's electricity crisis of 2000-2001. I will examine aspects of the discussion in *Heckler*, such as

2. Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1032 (N.D. Cal. 2002).
3. *Id.* at 1033-34.
4. *Heckler*, 479 U.S. at 823-24.

the lack of institutional expertise, and apply them to specific instances of harm suffered by California energy consumers due to FERC's decision not to provide a remedy within its powers and jurisdiction. After exploring California's electricity market deregulation scheme and the reasons for its subsequent failure (which was due, in part, to market power abuse by the partially deregulated entities), I will examine FERC's poor regulatory response to the California electricity crisis and its aftermath. I will show that, by successfully applying the *Heckler* discussion to California's crisis, there is a strong case for presumptive judicial review of FERC's market-based tariff-approval decisions despite the filed rate doctrine.

Part VI argues that the filed rate doctrine should be abolished, as its revision is an unworkable solution, and deference to the President of the United States is not a sufficient check upon the agency's decisions not to act. If the doctrine is overruled, the courts have several paths available in order to ensure that the agency's tariff-setting decisions are not arbitrary.[5] Arbitrariness encompasses the instances when an agency's "conclusions . . . do not follow logically from the evidence," when an agency's "rules . . . give no notice of their application," or when an agency makes "distinctions that violate basic principles of equal treatment."[6] In other words, a lack of arbitrariness means that the agency's decisions are politically independent and procedurally consistent. To achieve that end, courts should subject an agency's market-based tariff-approval decisions to the arbitrary and capricious standard of judicial review. Under this standard, the court would force the agency to give explanations and set standards.

If the court concludes that a claim should be subjected to the operation of antitrust laws, it should steer clear of the determination as to which prices are fair and how to correct the perceived market failures, because such determinations should be left to the legislature.

II. THE ROLE OF ANTITRUST LAWS IN DEREGULATED ELECTRICITY MARKETS

Because the filed rate doctrine precludes judicial review of an agency's discretionary and often inadequate market-based rate-approval decisions, the doctrine hinders the effective operation of competitive deregulated markets. However, if the filed rate doctrine is abolished and

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5. Lisa S. Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1687 (2004).

6. *Id.* (quoting Lisa S. Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2002)).

the court can scrutinize antitrust claims predicated upon market-based tariffs, the role of agency regulation will not become obsolete.

This Part describes the advantages of private antitrust claims enforcement and the unique characteristics of the electricity market. The unique nature of the electricity market structure, as well as poor suitability of antitrust laws to resolve policy concerns, calls for the continuing parallel roles for agency regulation and antitrust laws in monitoring deregulated electricity markets.

A. Antitrust Laws and Agency Regulation

Antitrust laws are codified in the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act.[7] Antitrust actions can be brought by either private parties, the Department of Justice (DOJ), or the Federal Trade Commission (FTC).[8] The Antitrust Division of DOJ may enforce the Sherman, Clayton, and Robinson-Patman Acts "through either civil or criminal prosecution."[9] The FTC is the "sole enforcer" of the Federal Trade Commission Act (unfair trade practices), and it also shares jurisdiction with DOJ over the civil provisions of the Clayton Act.[10]

For the purposes of this Article, I will only address the potential enforcement of federal antitrust laws by private parties. Under the court-developed doctrine of "primary jurisdiction," antitrust laws are preempted by the specific provision of a federal regulatory statute "when it is clear that enforcement of the antitrust laws would frustrate the specific regulatory scheme."[11] As discussed below, the electricity market, which is the main subject of this study, is regulated by the Federal Power Act (FPA), which delegates to FERC the exclusive authority in reviewing and approving filed rates.[12] Thus enforcement by either the DOJ or FTC would be contrary to the congressional scheme. However, private enforcement suits of antitrust laws are not preempted if the agency entrusted with evaluating the anticompetitive conduct is not engaged in "a full consideration of the consequences for competition," but rather

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7. Sherman Act, 15 U.S.C. §§ 1-7 (2006); Clayton Act, 15 U.S.C. §§ 12, 14-27 (2006); Robinson-Patman Act, 15 U.S.C. § 13 (2006); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2006).

8. 15 U.S.C. § 15.

9. HERBERT HOVENKAMP & E. THOMAS SULLIVAN, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 65 (5th ed. 2003).

10. *Id.*

11. *Id.* at 985.

12. Federal Power Act, 16 U.S.C. § 824e (2006).

engages in a "pro-forma" evaluation.[13] It is the argument of this Article that FERC's inadequate review of filed market-based tariffs justifies judicial review of FERC's decision in the context of the private party antitrust claims.

The private enforcement suit is traditionally embraced by courts and is authorized by section 4 of the Clayton Act, which states that "any person . . . who has been injured in its 'business or property' by reason of an antitrust violation may sue to recover treble damages, costs of the suit, and attorney fees."[14] Section 4 of the Clayton Act authorizes private antitrust enforcement under "(1) sections 1, 2 and 3 of the Sherman Act, (2) section 2(a)–(f) of the Clayton Act (price discrimination), (3) section 3 of the Clayton Act (exclusive dealing and tying arrangements), (4) section 7 of the Clayton Act (merger), and (5) section 8 of the Clayton Act (interlocking directorates)."[15] The scope of this Article is limited to antitrust laws that deal directly with prices, namely the Sherman Act sections 1 and 2, because the filed rate doctrine blocks antitrust suits predicated upon filed rates (i.e., the prices consumers pay).

Congress created modern antitrust law by passing the Sherman Act in 1890.[16] The Act's purpose was to preserve "free trade and competition as fundamental components of American economic policy."[17] Section 1 of the Act prohibits combinations of restraints on trade, and section 2 prohibits monopolization.[18] Courts have attempted to interpret the Sherman Act's broad statutory language.[19] The Supreme Court held section 1 to apply to "unreasonable" restraints only.[20] The Court defined the term "restraints" as "cartelization—agreements among competitors that possess market power, formed with the intent or that have the necessary tendency to restrict the output of the cartel members."[21]

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13. HOVENKAMP & SULLIVAN, *supra* note 9, at 985 (citing Hughes Tools Co. v. Trans World Airlines, 409 U.S. 363 (1973); PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 226-240 (2d ed. 2001)).

14. HOVENKAMP & SULLIVAN, *supra* note 9, at 70 (quoting § 4 of the Clayton Act, 15 U.S.C. § 15 (1982)).

15. *Id.* at 71.

16. Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1125 (1985).

17. Liam D. Scully, Comment, *Antitrust Law—Section One of the Sherman Act Extends Criminal Liability to Conduct Committed Wholly Outside of the United States*—United States v. Nippon Paper Industries Co., *109 F.3d 1 (1st Cir. 1997),* cert. denied*, 118 S. Ct. 685 (1998)*, 31 SUFFOLK U. L. REV. 977, 978 (1998).

18. Sherman Act, 15 U.S.C. §§ 1-2.

19. *See* Clark, *supra* note 16, at 1126-28.

20. *Id.*

21. *Id.* at 1130.

Compared to the regulatory response to anticompetitive behavior, the possibility of private enforcement of antitrust laws confers the advantages of both deterrence and considerable financial incentives for the successful plaintiff.[22] Further, antitrust laws have the power to provide prospective and retroactive remedy to the injured parties, unlike a regulatory agency, which is limited by its legislative authority.[23]

Although there is a valid argument that antitrust law is capable of policing the competitive market on its own, antitrust laws and agency regulation should not be "viewed as competing methods for correcting market failures."[24] Those two reinforce each other, because neither alone is a panacea for market power abuse in the deregulated public utility markets.[25] Actually, deregulated markets are often highly regulated.[26] Deregulated markets in general, and the electricity market in particular, require both proper regulatory systems and application of antitrust laws in order to reach anticompetitive behavior, which neither one is capable of reaching on its own.[27]

Thus, antitrust law and regulation complement each other.[28] Their relationship is inverse: when the government controls price and output by means of regulation, antitrust laws become less relevant.[29] Likewise, when the government moves towards deregulation, antitrust laws start to become more relevant as they perform the function of overseeing now-unleashed market forces.[30] Thus, the increased role of antitrust is a "natural result of deregulation."[31]

Further, antitrust laws are effective only after the fully functioning regulatory scheme of the new and properly functional competitive market has been established.[32] When the utilities market is at the beginning of deregulation, the uncertainty as to its function hinders the efficient application of antitrust law.[33] Once deregulation has taken place and the

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22. Clayton Act § 4, 15 U.S.C. § 15 (2006) (treble damages).

23. Robert B. Martin, III, *Sherman Shorts Out: The Dimming of Antitrust Enforcement in the California Electricity Crisis*, 55 HASTINGS L.J. 271, 300 (2003).

24. Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is To Blame for California's Power Woes*, 83 OR. L. REV. 207, 208 (2004).

25. *See id.* (discussing antitrust law as an alternative to regulation in deregulated markets).

26. *Id.* at 209.

27. *Id.* at 284.

28. Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 336.

29. *Id.* at 341.

30. *Id.*

31. *Id.*

32. Bush & Mayne, *supra* note 24, at 209.

33. *Id.* at 209-10.

market becomes subject to competitive market forces, antitrust law assumes an increased role in policing the market.[34]

There are several valid justifications for the continued role of agency regulation in parallel with the operation of antitrust law in the deregulated markets.

First, the unique nature of the electricity market, described below, requires active regulation in order to prevent market power abuses and to allow the market to function properly.[35]

Second, regulation is needed to correct several "market failures," the most notable of which is the so-called "natural monopoly," which denotes an "industry in which the cost of service declines as volume increases, all the way up to the market's saturation point."[36] Under this definition, electricity market is a natural monopoly. The effect of natural monopoly is such that a single firm "can realize economies of scale throughout a range of production, thus continually lowering cost."[37] Because natural monopoly only allows for the operation of a fixed number of firms, regardless of whether the market is deregulated, regulation assumes the role of preventing anticompetitive monopolistic behavior (producing too little and charging too much).[38]

Last, it is critical to understand that antitrust law is poorly suited to resolve the policy issues which deregulation necessarily entails.[39] The role of antitrust law is confined to remedies and deterrence, not to repairing anticompetitive harms.[40] Antitrust law is best suited to "preserv[e] competitive incentives that are consistent with the regulatory regime . . . whatever the regime's internal merits."[41] The role of curing market defects should be assumed by the legislature, not the courts. The courts are poorly suited to determine proper rates and prices.[42] Antitrust law takes the market as it is, "warts and all, and tries to prevent injuries to competition that the regulatory process leaves untended."[43] Antitrust law's role is most efficient where regulation stops short due to various

34. Hovenkamp, *supra* note 28, at 341.
35. Bush & Mayne, *supra* note 24, at 209.
36. Hovenkamp, *supra* note 28, at 338.
37. Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 445 (2002).
38. Hovenkamp, *supra* note 28, at 338-39.
39. *Id.* at 342.
40. *Id.* at 376; *see also* Martin, *supra* note 23, at 300.
41. Hovenkamp, *supra* note 28, at 377.
42. *Id.* at 342.
43. *Id.*

impediments, such as limited legislative authority to grant retroactive compensation.[44]

B. The Unique Nature of the Electricity Market and the Greater Potential for Market Abuse

The electricity market is different from any other competitive market in a way that makes it hard to control. This makes the electricity industry particularly prone to market power abuse by individual utilities.[45] The wholesale electricity market is currently under FERC's jurisdiction.[46] That means that private utilities are required to file their tariffs with FERC for its review and approval.[47] During the approval process, FERC reviews the market share of the utility in order to determine whether the utility possesses the market power necessary to manipulate the market.[48] Market power means the power of a single firm to drive prices upwards without losing its consumers.[49] In its extreme form, market power leads to monopoly.[50] Monopolies hurt consumers because they produce too little and charge too much.[51]

Currently, FERC employs the Federal Guidelines developed by the DOJ and the FTC for nonelectricity markets as a benchmark for the critical market share under which the utility is incapable of exercising market power.[52] This market set by DOJ and FTC stood at twenty percent.[53] What FERC does not account for is that the unique characteristics of the electricity market "directly translate into enhanced market power for generators and traders holding much smaller market shares than 20%."[54] The nature of the electricity market is such that when the right conditions are met, even a utility with as little as one percent of the market share can exercise significant market power by withholding capacity and driving the prices upwards.[55]

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44. *Id.* at 341.
45. Martin, *supra* note 23, at 278.
46. Charles H. Koch Jr., *Control and Governance of Transmission Organizations in the Restructured Electricity Industry*, 27 FLA. ST. U. L. REV. 569, 577 (2000).
47. Federal Power Act, 16 U.S.C. § 824d(c) (2006).
48. Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE J. ON REG. 471, 512 (2002).
49. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).
50. *Id.*
51. *Id.* at 954.
52. Duane, *supra* note 48, at 514.
53. *Id.*
54. *Id.* at 515.
55. *Id.*

The electricity market is unique in several ways. First, the demand for electricity is highly inconsistent over time.[56] Second, electricity cannot be stored.[57] That means that "[e]ach unit consumed must be produced at exactly the nanosecond it is consumed."[58] Thus, unless consumers are responsive in their demand for electricity, the only way to stabilize prices is to add more generators because the future capacity cannot balance out the present capacity.[59] The demand for electricity is fairly inelastic due to the lack of price information among consumers.[60] Price elasticity of demand describes "the extent to which quantity demanded decreases in response to an increase in the price of a good or service."[61] Therefore, consumer demand does not act as a constraint upon market power because consumption will continue at the same rate regardless of the price charged.[62] Further, the number of generating facilities is relatively fixed due to the substantial entry barriers for production of electricity.[63]

Thus, varying demand for electricity and the inability to store electricity may result in tremendous price volatility in the electricity market.[64] Further, these characteristics open the door to potential market power abuse by making it possible for one firm to artificially inflate prices by withholding its electricity generation capacity or raising its prices with impunity.[65] The fact that the exercise of market power in the electricity market does not demand collusion makes the electricity market particularly vulnerable to abuse.[66] In case of collusion, however, the price of electricity can soar even higher.[67]

Third, electricity is transmitted through an integrated transmission grid which may include several regions in the United States and Canada.[68] Consequently, individual states can impact the market significantly yet have very little power to control it.[69] Further, because

56. Richard J. Pierce, Jr., *How Will the California Debacle Affect Energy Deregulation?*, 54 ADMIN. L. REV. 389, 395 (2002).
57. *Id.*
58. *Id.*
59. Bush & Mayne, *supra* note 24, at 235.
60. *Id.* at 236-37.
61. Pierce, *supra* note 56, at 397.
62. *Id.*
63. Martin, *supra* note 23, at 278.
64. Pierce, *supra* note 56, at 395.
65. *See* Bush & Mayne, *supra* note 24, at 255-58.
66. Duane, *supra* note 48, at 535.
67. Martin, *supra* note 23, at 278.
68. Pierce, *supra* note 56, at 396.
69. *See id.* (explaining California's significant market impact despite a lack of market control).

electricity cannot be stored, the only way to operate the grid without causing blackouts is to balance generation and demand carefully in order to avoid surplus in the wires.[70]

III. THE ORIGINS OF THE FILED RATE DOCTRINE AND ITS APPLICATION TO THE ELECTRICITY MARKET

Deregulation dictates abandoning the cost-of-service rates in certain markets (such as wholesale generation markets) in favor of market-based rates in order to achieve "improved efficiencies, lower costs, and ultimately lower prices for consumers."[71] Both full and partial industry deregulation unleash market forces, which are usually regulated by antitrust law.[72] The electricity market is particularly vulnerable to market manipulation and market power abuse.[73] However, the courts' application of the filed rate doctrine, which shields the utilities from such claims, effectively thwarts the regulatory power of antitrust laws.[74]

The filed rate doctrine first appeared as a judge-made defense in 1906, based on a statutory interpretation of the Interstate Commerce Act (ICA) of 1887 and the common law concept of contract.[75] However, the Supreme Court treats the doctrine as a "type of statutory precedent," which is now binding on courts and agencies alike.[76]

Congress enacted the ICA as a countermeasure to price discrimination and accusations of abusive monopoly power in the interstate railroad system.[77] The dominance of the interstate railroad system over interstate commerce gave the railroads unprecedented market power, which allowed for varied and discriminatory rate setting.[78] The subsequent popular discontent led to the adoption of the ICA.[79] The overarching principle underlying the adoption of the Act "was the notion that prices should reflect the cost of producing the services subject to such

70. Bush & Mayne, *supra* note 24, at 235 (quoting U.S. GEN. ACCOUNTING OFFICE, ENERGY MARKETS: CONCERTED ACTIONS NEEDED BY FERC TO CONFRONT CHALLENGES THAT IMPEDE EFFECTIVE OVERSIGHT 2, 19 (2002) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d02686.pdf).

71. Martin, *supra* note 23, at 274 (quoting GAO REPORT).

72. Hovenkamp, *supra* note 28, at 341.

73. Duane, *supra* note 48, at 477.

74. *In re* Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1077 (S.D. Cal. 2003).

75. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1599, 1602 (2003) (citing N.Y., New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361 (1906)).

76. *Id.* at 1601-02.

77. Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1031 (N.D. Cal. 2002).

78. *Id.* at 1030.

79. *Id.*

regulation."[80] The Act gave rise to the filed rate doctrine by prohibiting providers from charging the end-users any other rate than the one filed with the regulatory agency.[81]

The Federal Power Act (FPA) borrows the concept of the filed rate doctrine from the ICA.[82] The FPA entrusts FERC with jurisdiction over the wholesale electricity markets, and requires the regulated private utilities to file their rates with FERC for approval.[83] Faithful to the original goal of the filed rate doctrine (preventing price discrimination stemming from monopoly power), FERC must ensure that the rates filed are "just and reasonable."[84]

FERC's approval means that filing utilities may not charge any other rate than the one FERC approved;[85] utilities purchasing in the wholesale market for later resale on a retail market may not negotiate a different rate; and the courts may not question the approved rate as inappropriate or offer an alternative rate.[86] Further, the filed rate doctrine, coupled with the rule against retroactive ratemaking, prevents FERC from granting retroactive refunds.[87]

The filed rate doctrine first appeared in an antitrust claim in *Keogh v. Chicago & Northwestern Railway Co.*[88] In *Keogh*, the petitioner alleged that the respondent, a group of interstate carriers, had formed a conspiracy to set uniform prices higher than reasonable and in a discriminatory fashion.[89] The Court, however, was precluded from determining whether the rates were in fact "unreasonable" or discriminatory because these rates were filed and approved by the Interstate Commerce Commission (ICC).[90] Thus the filed rate doctrine acts as a type of firm-specific immunity when the antitrust claim is predicated upon an agency-approved rate.[91]

Judicial application of the filed rate doctrine evolved further after the deregulation of electric utilities began. Although originally the filed rate doctrine only applied to cost-of-service rates prevalent in the

80. *Id.*
81. *Id.* at 1031.
82. *Id.* at 1031-33.
83. Federal Power Act, 16 U.S.C. § 824d(c) (2006).
84. *Id.* § 824d(a).
85. *Id.*
86. *Pacific Gas*, 216 F. Supp. 2d at 1032.
87. *Id.*
88. Keogh v. Chi. & N.W. Ry., 260 U.S. 156 (1922); *see also* Martin, *supra* note 23, at 293.
89. *Keogh*, 260 U.S. at 161.
90. *Id.* at 161-62.
91. Martin, *supra* note 23, at 293.

regulated industries, courts have extended the filed rate doctrine to market-based rates in the newly deregulated public utilities.[92] However, the doctrine's application to market-based rates is harmful to consumers and competitive markets for two reasons. First, the doctrine prevents judicial review of the agency's rate-approval process. As shown below, the process is often inadequate and entails nothing more than a mere rubber stamping. Second, because of inadequate supervision of the competitive markets by the agency, the application of the doctrine to such markets invites anticompetitive behavior and market abuse.

IV. THE THEORY OF NONREVIEWABILITY AND *HECKLER*

Application of the filed rate doctrine is ill-suited for consumer protection in deregulated electricity markets. FERC alone is not properly equipped to monitor the newly competitive markets. Unfortunately, the filed rate doctrine effectively blocks judicial review of the agency decision-making process related to rate monitoring and approval. This Article contends that such review is necessary and highly desirable in order to protect consumers and maintain properly functioning competetive markets.

The argument in favor of judicial review of agencies' market-based rates-approval decisions analogizes the filed rate doctrine to the notion of agency inaction in administrative law. The two concepts share many functional similarities.

Administrative law analyzes agency inaction under the theory of nonreviewability, which bars the court from hearing an issue inappropriate for judicial review even when the parties have established standing as to a particular claim.[93] The theory of nonreviewability is codified under section 701 of the Administrative Procedure Act (APA).[94] In general, agency *action* is presumed reviewable while agency *inaction* is presumed unreviewable.[95]

Although the Supreme Court has analyzed the nonreviewability doctrine in several landmark cases—most notably *Abbott Laboratories v. Gardner*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, and *Heckler v. Chaney*—this Article will concentrate only on the *Heckler* case.[96] In *Heckler*, the Food and Drug Administration (FDA) refused to initiate

92. *Id.* at 296.
93. Bressman, *supra* note 5, at 1665.
94. Administrative Procedure Act, 5 U.S.C. § 701(a)(1)-(2) (1946).
95. Heckler v. Chaney, 470 U.S. 821, 830-31 (1985).
96. Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); *Heckler*, 470 U.S. at 823-24.

proceedings designed to stop the use of certain drugs in human executions.[97] The challenge was brought by a group of the death row prisoners who claimed that the drugs were not approved by the FDA for human executions and thus their continuing use violated the Food, Drug, and Cosmetic Act.[98]

The *Heckler* case is particularly interesting because the Court interpreted APA § 701(a)(2) as insulating "an entire class of administrative decisions—namely, agency inaction" from judicial review.[99] Thus, *Heckler* extended the nonreviewability doctrine beyond the individual facts of the case and articulated generally applicable standards for the determination of whether or not agency inaction is reviewable.

The Court in *Heckler* considered whether agency expertise and the separation of powers create an obstacle to the judicial reviewability of agency inaction.[100] Courts defer to agency expertise if the issue concerns allocation of the agency's resources because such matters involve "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise."[101] Further, a court will look at whether the result of the agency inaction is coercive: whether certain rights—such as the right to liberty or property—were infringed.[102] Judicial review will be precluded if a court has no harm to remedy or record to review.[103]

I argue that the filed rate doctrine often involves agency inaction, and thus *Heckler* provides a valid tool for assessing the judicial reviewability of antitrust claims that the doctrine currently blocks. The concept of agency inaction "might encompass any instance in which an agency fails to take desired or desirable action."[104] The filed rate doctrine also involves agency inaction because "it is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the [federal] agency, that triggers the filed rate doctrine."[105]

I contend that judicial review of agency oversight and scrutiny of filed market-based rates is a highly desirable public policy outcome. Without judicial review, there is a perverse incentive for private utilities to file their rates with the regulatory agency solely in order to foreclose

97. *Heckler*, 470 U.S. at 823-24.
98. *Id.*
99. Bressman, *supra* note 5, at 1667.
100. *Heckler*, 470 U.S. at 831-32.
101. *Id.* at 831.
102. *Id.* at 832.
103. Bressman, *supra* note 5, at 1681-83.
104. *Id.* at 1664.
105. Town of Norwood v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000).

any future possibility of antitrust litigation.[106] Although the filed rate doctrine was initially promulgated to protect consumers from discriminatory prices through regulatory oversight of the utilities' rates, the continuing application of the doctrine tends to privilege private choice over public interest by preventing judicial remedies for its anticompetitive behavior.[107]

Effectively, the filed rate doctrine freezes market-based tariffs and prevents their modification or challenge by anyone other than the regulatory agency.[108] The court is precluded from reviewing the agency's decision making in the rate-approval process.[109] That means, for example, that the court may not examine whether or not the agency has reviewed all the data necessary to the approval of the tariff submitted (for example, the firm's market power).[110] However, the federal agency may or may not have reviewed the accuracy and relevance of all of the information submitted in order to ensure that the public interest is served and that market abuse is prevented.[111] In many instances, the agency merely rubber stamps the submitted market-based tariffs.[112] Because the filed rate doctrine prevents the courts from reexamining the agency's decisions, the doctrine, in effect, provides an opportunity for filing process manipulation by private firms bent on escaping agency oversight in order to exercise unlawful market power.[113]

Thus, the filed rate doctrine can function as a "firm-specific defense" due to the virtual immunity from antitrust claims the doctrine currently provides to utilities.[114] A private utility is given an incentive to file its rates with the regulatory agency in order to foreclose any future possibility of litigation.[115] It is quite lamentable that the main application of the filed rate doctrine is its use as a "shield" against antitrust claims brought against the private utilities for abuse of monopoly power, considering the fact that the doctrine was historically formulated to prevent the unwanted effects of monopoly power.[116]

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106. Jim Rossi, *Debilitating Doctrine*, PUB. UTIL. FORT., Nov. 2004, at 16.
107. Rossi, *supra* note 75, at 1592, 1598.
108. *Id.* at 1593.
109. *In re* Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003).
110. *See Town of Norwood*, 202 F.3d at 419 (noting that the filed rate doctrine is triggered when the rate is filed).
111. Rossi, *supra* note 75, at 1618.
112. *Id.* at 1626.
113. *Id.* at 1618.
114. Rossi, *supra* note 106, at 16.
115. *Id.*
116. Rossi, *supra* note 75, at 1598-99.

V. APPLYING *HECKLER* TO THE FILED RATE DOCTRINE

This Part applies the *Heckler* decision to the filed rate doctrine's devastating effect upon deregulated markets by examining California's electricity crisis of 2000-2001. The application of *Heckler* to the specifics of this case leads to the general conclusion that FERC's failed attempt to control and regulate the newly competitive market is indicative of a larger problem, which extends far beyond the particulars of the situation in California. The bigger problem, I suggest, is that of entrusting the oversight, review, and approval of the filed market-based tariffs to FERC's sole and unreviewable discretion. There is a strong case for making *all* the agency's tariff-approval decisions presumptively reviewable despite the filed rate doctrine.

The following Subparts describe California's electricity market crisis and focus on FERC's attempts to mitigate the crisis, the antitrust claims that followed, and the demand for compensation from the injured parties.

A. *Introduction to the California Electricity Crisis*

California moved towards deregulation of its electric industry in 1996 and started to deregulate in April 1998.[117] The state's deregulation efforts were limited by the nationwide jurisdictional split between the states and FERC.[118] While FERC has "authority over the wholesale, bulk segment of the industry," the states have "authority over the industry's non-interstate and retail segments."[119]

California encouraged its investor-owned utilities (IOUs) to unbundle their generation capacity.[120] In order to purchase electricity, IOUs were required to turn to a state-created spot market.[121] Simultaneously, the state capped retail prices, effectively freezing them below the market levels.[122] The deregulation proceeded without any major issues until May 2000, when wholesale prices soared, retail prices remained capped, and the IOUs became heavily indebted, unable to recover their expenses in the retail market.[123] At that point, in order to prevent interruptions in power service, the state started purchasing electricity on

117. Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse:" Jurisdiction over Electric Utilities*, 22 ENERGY L.J. 1, 1 (2001).
118. *Id.* at 2.
119. Koch, *supra* note 46, at 577.
120. Fels & Lindh, *supra* note 117, at 1.
121. *Id.*
122. *Id.*
123. *Id.*

behalf of the IOUs.[124] Despite that effort, massive blackouts still rolled through California.[125] FERC, the only federal agency with the jurisdictional authority to discipline the soaring wholesale prices, did not respond to the crisis until several months after its peak, and the response did little to remedy the situation in California.[126]

The following are the particulars of California's deregulation plan. Retail customers were now able to choose their own electricity provider.[127] The three largest state utilities—Pacific Gas and Electric Company (PG & E), Southern California Edison Company (Edison), and San Diego Gas and Electric Company (SDG & E)—were compelled to unbundle and transfer their transmission facilities to the state-owned independent system operator (ISO), which was to assure indiscriminatory access to the transmission facilities.[128] Further, the utilities were required to sell their generation facilities and purchase the needed electricity at wholesale prices through the state-created spot market conducted by the FERC-approved Power Exchange.[129] In order to allow the utilities to recover the costs of the transition, retail prices included a "competition transition charge" (CTC).[130]

Independent companies subject to FERC's jurisdiction controlled the generation of electricity.[131] Those companies could continue selling electricity wholesale and at the market-based rates if they could demonstrate to FERC that they lacked market power and that their prices were reasonable in relation to the "interplay of supply and demand in well-functioning markets."[132] Despite these requirements, however, the rates filed with FERC were not subjected to the proper analysis needed to maintain well-functioning markets. Prior to approval of the filed rates, FERC failed to evaluate the actual market power of the filing utility or the actual conditions of supply and demand in the newly competitive market.[133] To make things worse, those rates were not subject to judicial review, effectively shielded by the filed rate doctrine.[134]

The mechanics of FERC's supervision of wholesale prices opened the door to the possibility of market abuse by wholesale vendors who,

124. *Id.* at 1-2.
125. *Id.* at 12.
126. *Id.* at 13.
127. *Id.* at 8.
128. *Id.*
129. *Id.*
130. *Id.*
131. Martin, *supra* note 23, at 274-75.
132. *Id.* at 274.
133. *Id.* at 277.
134. *Id.*

being in sole possession of the generation capacity and shielded from antitrust prosecution by the filed rate doctrine, could easily inflate prices by limiting their electrical output.[135] Although it is still not entirely clear whether the private firms unlawfully colluded, there was nothing that could have prevented such collusion from occurring.[136] In fact, memos Enron released after the crisis strongly suggested that market abuse did occur by means of "strategic withholding of bids and supplies."[137] Further, because most of the generation companies diversify their assets, such as baseload generation and peaking facilities, each company could exercise market power during peak-demand periods.[138] As discussed in detail below, FERC proved to be incapable of protecting the market from abuse by either collusion or monopoly.[139] Further, the filed rate doctrine neutralized antitrust laws because potential market abusers filed their tariffs with FERC.[140]

The state's deregulation proceeded down this path until April 2000 when, within a span of eight months, wholesale electricity prices increased one thousand percent and exceeded California's fixed retail prices exponentially.[141] Utilities were forced to absorb the price increases because they were unable to recover in the capped retail market.[142] The state found itself in a severe electricity shortage, the utilities became heavily indebted, and PG & E declared bankruptcy.[143] The resulting blackouts rolled through California for eighteen months, from November 1999 through May 2001.[144]

There were several factors that contributed to California's crisis: "[p]oorly structured markets, ineffectual regulatory responses to correct market flaws, limited generation supply, higher-than-anticipated increases in demand, an economic slow-down, [and] dryer-than-normal weather."[145] Also, there was a severe imbalance between the supply and the inelastic demand for electricity.[146] Because California's retail prices

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135. *Id.* at 278, 293.
136. *Id.* at 284.
137. Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 51 (2004).
138. Bush & Mayne, *supra* note 24, at 257.
139. Weaver, *supra* note 137, at 51-52.
140. *In re* Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1077 (S.D. Cal. 2003).
141. Pierce, *supra* note 56, at 395.
142. Martin, *supra* note 23, at 272.
143. *Id.*
144. *Id.* at 271.
145. Michael A. Yuffee, *California's Electricity Crisis: How Best To Respond to the "Perfect Storm,"* 22 ENERGY L.J. 65 (2001).
146. Pierce, *supra* note 56, at 397.

were capped, consumers did not feel the yoke of the rapidly increasing wholesale prices.[147] Thus, the demand for electricity did not diminish but, in fact, steadily increased due to the unusually hot seasonal weather.[148] The demand for electricity rose by thirty-eight percent between the years 1990 and 2000, eventually causing serious electricity shortages.[149]

During the time of the crisis, FERC did little to remedy the situation.[150] On December 15th, FERC issued an order that largely blamed the situation in California on the flawed retail electricity market and the imbalance of supply and demand in the state.[151] Thus, FERC blamed the entire crisis on California's allegedly flawed deregulation plan, which was, ironically, preapproved by FERC.[152] Further, although FERC had the jurisdictional authority over wholesale vendors, it refused to discipline wholesale prices by imposing cost-of-service pricing.[153]

B. Lack of Agency Expertise

Perhaps the most convincing justification that the Court in *Heckler* offered for the insulation of agency inaction from judicial review was the "administrative concerns," which refer to an agency's balancing of factors falling squarely within an agency's expertise.[154] The reason for deference to agency expertise is twofold. First, under the political accountability theory, the best check upon an agency's expertise is the President's supervision, not the courts'.[155] Second, the courts do not have the necessary institutional expertise, experience, or guidelines to micro-manage agency decisions.[156]

Thus, when courts invoke the filed rate doctrine in order to shield the utility from antitrust prosecution, they are, in effect, deferring to the agency's expertise both in evaluating the tariffs filed by regulated utilities and in assuring that these tariffs are "just and reasonable" and nondiscriminatory, as required by the FPA.[157] However, because the courts focus on the mere fact of the tariff being filed, such deference risks

147. *Id.* at 395.
148. *Id.* at 396-97.
149. *Id.* at 396.
150. Fels & Lindh, *supra* note 117, at 13.
151. *Id.*
152. Duane, *supra* note 48, at 516.
153. Fels & Lindh, *supra* note 117, at 13.
154. Bressman, *supra* note 5, at 1678.
155. *Id.* at 1659.
156. *Id.* at 1678.
157. 16 U.S.C. § 824d(a) (2006).

"privileg[ing] private behavior rather than the actual or anticipated actions by regulators."[158]

Unfortunately, the actions by the regulators are very troubling. FERC's failure to detect market manipulation in California stems from the agency's general lack of familiarity with deregulation and market-based tariffs monitoring.[159] FERC has extensive expertise with cost-of-services rates, but market-based tariffs are very different.[160] Thus, while FERC has the expertise to determine just and reasonable *cost-of-service* rates, it lacks similar expertise in determining which *market-based* rates are just and reasonable.[161] Further, FERC has failed to make the requisite findings to address this problem. Until recently, FERC had never taken upon itself to devise rules and parameters for efficient markets.[162]

Thus, judicial deference to FERC's expertise in the context of market-based tariffs is unwarranted because the agency lacks both experience and expertise in the subject matter. Further, FERC is not equipped with the proper jurisdictional authority to retroactively remedy the claims resulting from tariffs FERC itself has found to be unfair and unreasonable.[163] Given the situation, judicially enforced antitrust laws would be more efficient in addressing potential market power manipulation. Unlike FERC, courts possess a solid and constantly evolving expertise in dealing with competitive markets.[164] Further, courts are more responsive than agencies to legislative actions aimed at remedying potential market power abuse. Also, courts can issue retroactive remedies.[165]

During California's crisis, FERC was confronted by a market which operated extremely fast and which was not structurally competitive.[166] Further, FERC was faced with "aggressive traders and generators primed to find and use loopholes in the protocols to increase their companies' profits and their personal bonuses."[167]

FERC, however, did not take these competitive market realities into account. It analyzed the filed market-based rates by looking at the market share of the regulated utility under the faulty assumption that

158. Rossi, *supra* note 75, at 1648.
159. Martin, *supra* note 23, at 298.
160. *Id.*
161. *Id.*
162. Bush & Mayne, *supra* note 24, at 223.
163. Martin, *supra* note 23, at 306.
164. *Id.* at 305.
165. *Id.*
166. Weaver, *supra* note 137, at 80-81.
167. *Id.* at 81.

insufficient market share effectively denies the potential for market manipulation.[168] FERC assumed that generators with market shares of less than twenty percent were incapable of exercising market power.[169] However, the numbers employed by FERC were erroneously borrowed from the measures used by DOJ and FTC in analyzing a firm's market power in *nonelectricity* markets.[170] The unique characteristics of the electricity market confer market power on a utility with market share as small as one percent during peak hours of demand.[171]

The lack of synchronization between retail and wholesale rates, which contributed greatly to the California crisis, further highlights FERC's inexperience with market-based rates. It also shows the income-patibility between the filed rate doctrine and maintenance of a properly functioning competitive market.

When California froze its retail prices, it assumed that FERC would impose much lower wholesale prices during the period of transition to the newly deregulated market.[172] If such calculations were correct, the "headroom" between retail and wholesale prices would have allowed utilities to recover costs following the state-ordered unbundling.[173] This assumption proved to be a serious miscalculation on the part of the state.[174] When the wholesale prices soared, Pacific Gas and Electric Company started to accumulate massive debts and eventually filed for bankruptcy, unable to recover costs in the retail market.[175]

While the state retail market based its rate calculation on a mistaken assumption in regards to wholesale rates, FERC's wholesale rates were approved based on retail tariffs.[176] FERC required that wholesale sellers either show that they lacked market power or that they took measures to mitigate such power in order to have their rates approved.[177] One of the "measures" taken by the wholesale sellers was to successfully claim that the retail market rate freeze would prevent them from passing higher costs to the consumers.[178] However, FERC's decision to approve these wholesale rates, no matter how faulty, was immune from judicial review

168. Martin, *supra* note 23, at 298.
169. Duane, *supra* note 48, at 514-15.
170. *Id.* at 514.
171. *Id.* at 515.
172. Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1021 (N.D. Cal. 2002).
173. *Id.*
174. *Id.*
175. *Id.* at 1022.
176. *Id.* at 1036.
177. *Id.*
178. *Id.*

pursuant to the filed rate doctrine.[179] In *Pacific Gas & Electric Co. v. Lynch*, the California district court held that FERC was not "obligated to adjust wholesale rates to harmonize with retail rates," even if FERC did rely on the state retail price freeze in its initial calculation of market-based rates.[180]

Further, FERC's authority to impose penalties only extends to ordering prospective refunds for rates not found to be "just and reasonable."[181] FERC cannot administer any other monetary penalties against violators.[182] Thus, FERC is not effective in policing deregulated markets and deterring future violations.[183] Further, the "just and reasonable" rate standard does not account for the fact that the market-based rate may seem "reasonable" to FERC yet be a result of a price-fixing conspiracy, and thus higher than the rate dictated by free market competition.[184] Thus, antitrust violations could pass FERC's review unnoticed.

FERC's Order, issued on December 15, 2000, in response to California's electricity crisis, revealed the extent of FERC's inability to discipline the wholesale market.[185] The Order announced that FERC would not intervene and stated two major conclusions.[186] One acknowledged that FERC was under the obligation to ensure that wholesale prices were just and reasonable and that the state's current wholesale rates, all previously filed and approved by the FERC, were neither just nor reasonable.[187] That conclusion notwithstanding, FERC refused to cap the current wholesale prices.[188] The second conclusion referred to the demand for retroactive relief, which FERC denied.[189] It cited the filed rate doctrine as justification for the assertion that all rates previously found by FERC to be just and reasonable were not eligible for a refund.[190]

FERC's Order made it clear that the filed rate doctrine applied to cost-of-service and market-based rates alike, thus revealing FERC to be a

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179. *Id.* at 1032-34, 1038.
180. *Id.* at 1040 (emphasis omitted).
181. Martin, *supra* note 23, at 305.
182. *Id.*
183. *Id.* at 306.
184. *Id.* at 299.
185. Duane, *supra* note 48, at 516-17.
186. *Id.*
187. Weaver, *supra* note 137, at 81-82.
188. *Id.* at 85.
189. *Id.* at 83.
190. *Id.* at 83-84.

"paper tiger" incapable of disciplining competitive markets.[191] The filed rate doctrine became a legal loophole for rampant abuse in the already dysfunctional California market.[192] The Order, coupled with the knowledge that FERC was probably incapable of deterring price and market power manipulation invited utilities to "game the system at will" by manipulating electrical supply and demand and driving prices upwards.[193] Predictably, prices increased substantially, and the general result of the FERC Order was that "[t]he equivalent of outright looting occurred in plain sight."[194]

The extent of FERC's lack of expertise in dealing with deregulated market prices was further confirmed by the findings of the Senate Committee on Governmental Affairs staff report in regards to FERC's investigation of the Enron scandal.[195] The report cited a "shocking absence of regulatory vigilance on FERC's part and a failure to structure the agency to meet the demands of the new, market-based system that the agency itself has championed."[196]

C. Coercive Inaction (Harm Done)

The lack of coercion or harm is the last justification *Heckler* offers for the insulation of agency inaction from judicial review.[197] This inquiry invites an examination of the harm that FERC had opportunity, power, and proper jurisdiction to remedy, yet did not do.

The court's analysis in *Heckler* distinguishes agency inaction from agency action because it is noncoercive, and similar to prosecutorial discretion.[198] However, this distinction does not apply to the filed rate doctrine, which is coercive. Consequently, it should be reviewed under the same principles as agency action. Further, the distinction on the grounds of coercion is not persuasive, as argued by Justice Marshall in his concurrence in *Heckler*.[199] Agency inaction can have "just as

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191. *Id.* at 84.
192. *Id.*
193. *Id.*
194. Duane, *supra* note 48, at 517.
195. Majority Staff Report, Senate Comm. on Governmental Affairs, Staff Investigation of FERC's Oversight of Enron Corp. 2 (Nov. 12, 2002), *available at* http://hsgac.senate.gov/111202fercmemo.pdf.
196. *Id.*
197. Heckler v. Chaney, 470 U.S. 821, 832 (1985).
198. *Id.* at 831-82.
199. Bressman, *supra* note 5, at 1694 (citing *Heckler*, 470 U.S. at 850-52 (Marshall, J., concurring)).

devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."[200]

In the case of California's crisis, the continued application of the filed rate doctrine "cause[s] affirmative harm for energy-market development and policy" by precluding potential antitrust claims against generators' market abuse, and by denying a remedy to those injured by it.[201] As such, the doctrine prevented the development of properly structured competitive markets.[202]

FERC's decision not to act wreaked chaos upon the participants in California's electricity crisis. As discussed above, because the filed rate doctrine was applied to market-based rates, the generators of electricity could have abused the vulnerable market by means of strategic withholding of electricity supplies. California's wholesale prices skyrocketed in May of 2000.[203] Simultaneously, FERC refused to cap wholesale electricity prices on the California Power Exchange.[204] According to Robert McCullough's study, price caps would have prevented the entire crisis from occurring.[205] However, as the Enron memos later showed, FERC was either not ready or unable to contain the crisis.[206]

As prices soared, utilities such as PG & E and Edison were unable to recover their losses in the retail market and became heavily indebted, forcing the Power Exchange to bail them out by purchasing electricity on their behalf.[207] Eventually, trapped between FERC's lack of an effective response and constantly defaulting utilities, the Power Exchange significantly reduced its operations and declared bankruptcy on March 9, 2002.[208]

Following the collapse of the Power Exchange, a barrage of antitrust claims followed.[209] The buyers of wholesale electricity sued sellers for alleged market manipulation and unfair business practices.[210] California

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200. *Id.* (citing *Heckler*, 470 U.S. at 851).
201. Rossi, *supra* note 106, at 16.
202. *Id.*
203. Weaver, *supra* note 137, at 47-48.
204. *Id.* at 85.
205. Robert McCullough, *Revisiting California: Market Power After Two Years*, PUB. UTIL. FORT., Apr. 1, 2002, at 34-35, 38.
206. Weaver, *supra* note 137, at 51-52.
207. Martin, *supra* note 23, at 272.
208. Fels & Lindh, *supra* note 117, at 12.
209. *See, e.g.*, *In re* Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072 (S.D. Cal. 2003); *In re* Wholesale Elec. Anti-Trust Cases I & II, 55 Cal. Rptr. 3d 253 (Cal. App. 4th Dist. 2007).
210. *Id.*

courts held that such suits were barred under the filed rate doctrine and denied recovery to the plaintiffs.[211]

In one such case, the plaintiff—Public Utility District No. 1 of Snohomish County—asserted that the wholesale rates it was forced to pay for electricity "far exceed[ed] the price [for] which energy would be sold in a truly competitive market."[212] The plaintiff alleged a strategic withholding of electricity supply in order to cause price inflation.[213] The California district court dismissed the suit and denied recovery under the filed rate doctrine, because in order to resolve the claim the court would have to review the rates filed with FERC.[214] However, the court was prohibited from setting a rate different from the FERC-approved rate.[215] Thus, the court barred the claim because in order to resolve it, "the Court would presumably have to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable' wholesale price."[216]

The court further refused to review FERC's decision-making process in setting the tariff and flatly denied the plaintiff's claim that the filed rate doctrine should not apply because FERC did not consider all the variables needed for filing the cost-of-service tariffs in calculating the market-based tariff.[217] The court interpreted the FPA as granting the agency-wide discretion and authority in reviewing filed rates.[218] The filed rate doctrine applied to cost-based as well as market-based rates, and FERC could employ any elements it wished in the calculation and approval of either rate.[219] The filed rate doctrine was satisfied when the mere act of filing with the agency took place.[220]

In one of the most recent cases, the court reaffirmed that the filed rate doctrine bars damages stemming from antitrust claims against filing utilities.[221] A group of public entities sued a group of wholesale electricity generators for alleged antitrust violations "arising from defendants' manipulation, distortion, and corruption of California's

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211. *Id.*
212. *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d at 1075 (internal quotations omitted).
213. *Id.*
214. *Id.* at 1077-78, 1080.
215. *Id.* at 1077.
216. *Id.* at 1078.
217. *Id.* at 1080.
218. *Id.* at 1079.
219. *Id.* at 1079-80.
220. *Id.* at 1080.
221. *In re* Wholesale Elec. Anti-Trust Cases I & II, 55 Cal. Rptr. 3d 253, 268 (Cal. App. 4th Dist. 2007).

deregulated wholesale electricity market."[222] Such violations included "combining to withhold supply from electricity markets and colluding to fix electricity prices" during California's electricity crisis.[223] Allegedly, the defendants conspired to "gam[e] the market" by creating "false shortages and prevent[ing] the sale of electricity at competitive rates."[224] The alleged manipulations forced the plaintiffs to pay highly inflated market prices, leading to their inability to pay and to subsequent electricity shortages.[225] The harms alleged were blackouts and economical instability.[226]

Nonetheless, the court refused to entertain these claims because, under the FPA, FERC had exclusive authority to determine the reasonableness of the wholesale rates charged.[227] If the court were to grant the plaintiff's remedy, it would be required "to second-guess FERC rate determinations in fixing antitrust damages to punish the defendants for the alleged anticompetitive conduct."[228] Such review would necessitate the determination as to the reasonableness of the charged rates.[229] The court has reaffirmed that the mere act of filing the tariffs with a regulatory agency elevates them to the level of a federal regulation, and places them beyond the reach of the court by the combined means of the preemption principle and the filed rate doctrine.[230] These principles continue to apply when the market-based rates of a deregulated wholesale market are involved.[231] The court further elaborated that "[n]otwithstanding those past institutional failures on the part of FERC," the agency "possessed 'broad remedial authority to address anti-competitive behavior' . . . such as ordering refunds."[232]

In some cases, however, FERC determined that the rates were not just and reasonable. Such was the case with the rates charged in California during the summer and the fall of 2000.[233] Despite this determination, FERC refused to provide retroactive refunds.[234] The

222. *Id.* at 258.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 264.
228. *Id.* at 268.
229. *Id.*
230. *Id.* at 264.
231. *Id.* at 265.
232. *Id.* at 270 (quoting Cal. *ex rel.* Lockyer v. FERC, 383 F.3d 1006, 1015 (9th Cir. 2004)).
233. Yuffee, *supra* note 145, at 78-79.
234. *Id.* at 79.

agency based its decision on a combined effect of the filed rate doctrine, "the prohibition against retroactive ratemaking," and, ironically, the absence of a "precise legal standard for determining when a market-based rate is unjust and unreasonable."[235] As indicated in its December 15, 2000, Order, FERC was willing to administer *prospective* refunds only for the rates charged during January 2001.[236]

VI. JUDICIAL REVIEW AND THE FILED RATE DOCTRINE

There is little reason to continue to disallow judicial review of antitrust claims against utilities on account of the filed rate doctrine. As argued in the preceding section, such claims are likely to be found reviewable if subjected to the *Heckler* standard in lieu of FERC's limited expertise with the competitive markets, and its subsequent lack of capacity to monitor and effectively deter market abuse by private utilities.[237] Such claims should be subjected to the same principles courts utilize in reviewing claims arising from agency *action* under the arbitrary and capricious standard of review, namely, the requirement for explanation-giving and standard-setting.

Judicial scrutiny should be limited to the determination of whether the agency's decision was arbitrary, and if it was, courts should then subject the claim to antitrust laws. The determination as to whether the rates approved by the agency were indeed sufficient for the proper functioning of a competitive market should be left to the legislature. The courts are poorly suited for the determination of proper rates and prices.[238]

There are several other alternatives to judicial review of agency decision-making process for tariff approval, such as the expansion of the filed rate doctrine or judicial deference to the most politically accountable figure.[239] However, judicial review seems to be the most workable solution in light of "the founding principles of the administrative state [which] are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness."[240]

The danger of arbitrariness undermines the legitimacy of an agency's decisions by generating "conclusions that do not follow

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235. *Id.*
236. *Id.*
237. *See supra* Part V.B.
238. Hovenkamp, *supra* note 28, at 342.
239. Bressman, *supra* note 5, at 1659; Frank P. Darr, *Mitigating Costs and the Preemptive Effect of Federal Rate Orders*, 13 ENERGY L.J. 61, 73-74 (1992)).
240. Bressman, *supra* note 5, at 1657.

logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment."[241] Such arbitrary results are evident in the continuing application of the filed rate doctrine, which shields private utilities from antitrust claims and prevents remedy even when such rates were approved as a result of an inadequate agency review process and lack of agency expertise.[242]

Further, the filed rate doctrine, as it exists in its current form and application, poses a serious problem as an impediment to the effective operation of properly functioning deregulated electricity markets.[243] The doctrine has to be either abolished or revised. The latter solution would result in keeping the doctrine while expanding an agency's enforcement authority. This solution is simply not workable, because expanding agency authority will not be an effective substitute for agency expertise and experience with competitive markets. Abolishing the doctrine entirely is a more viable answer to the problem at hand. Abolition, however, must be accompanied by judicial review of agency decision-making processes related to tariff approval.

Keeping the filed rate doctrine in its current state is an unwise policy decision. As elaborated earlier, the filed rate doctrine was developed by the courts as a rule of statutory construction out of "deference to a 'congressional scheme of uniform . . . regulation'" delegated to the agency.[244] The construed congressional intent behind the filed rate doctrine was to protect consumers from price discrimination by public utilities.[245] This intent, however, was later perverted when courts started employing the doctrine to shield regulated utilities from antitrust claims. The mere act of filing with an agency, such as FERC, effectively insulates the utility from antitrust claims, even when the agency's market-based rate-approval process is nothing more than rubber stamping the submitted rates.[246] Thus, the doctrine opens the door to market power abuse which poses a serious danger to the proper functioning of deregulated electricity markets.

Despite current judicial deference, FERC's limited authority to impose penalties in deregulated markets, as well as its lack of expertise in competitive markets, makes FERC a poor institution to deter market

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241. *Id.* at 1687 (quoting Bressman, *supra* note 6, at 496).

242. *See, e.g.*, *In re* Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003).

243. Rossi, *supra* note 106, at 16.

244. County of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997) (quoting Ark. La. Gas Co. v. Hall, 453 U.S. 571, 579 (1981)).

245. Pac. Gas & Elec. Co. v. Lynch, 216 F. Supp. 2d 1016, 1031-32 (2002)

246. Town of Norwood v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000).

power abuse and manipulation.[247] Thus, unless Congress acts to expand FERC's legislative authority to impose meaningful penalties, the filed rate doctrine will continue to shield violators of the Sherman Act and conceal poorly made administrative decisions from judicial oversight.[248] This legislative expansion of punitive authority, however, is unwise, because FERC does not have the much-needed expertise to police the newly deregulated and competitive markets, so the ability to punish effectively will only resolve part of the problem.[249]

Abolishing the filed rate doctrine is likely to be a congressional task. Because the Supreme Court is unlikely to overrule the filed rate doctrine, Congress should take the lead.[250] *Keogh* could be overruled by statute, opening the door to judicial oversight of the market by means of antitrust laws.[251]

If the filed rate doctrine is abolished, courts must step in to make sure that the agency's rate-approval process is a proper one. In order to preserve the congressional intent of delegation expressed in the FPA, judicial scrutiny should not touch upon the substantive component of the agency's decision, such as whether the rate in question is indeed "just and reasonable" according to the standards set by the agency.[252] Such questions can be referred to the agency itself, as courts have done several times before in other contexts, or simply left to the legislature.[253]

An increased role for courts is justified by the fact that the filed rate doctrine itself is a judicial construct. Congress has not spoken directly to the filed rate doctrine.[254] Absent clear congressional policy making as to the current application of the doctrine, courts have two paths to follow in future interpretation and application of the doctrine in order to prevent arbitrary agency decisions. Courts could defer to the executive branch's supervision of the agency's decisions under the theory of political accountability.[255] Alternatively, courts could step in and scrutinize an agency's decisions by acting as a restraint upon agency discretion and

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247. Martin, *supra* note 23, at 305-07.

248. Rossi, *supra* note 75, at 1629.

249. Martin, *supra* note 23, at 308.

250. *Id.* (citing Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409, 424 (1986)).

251. *Id.*

252. *Id.* at 301.

253. *Id.* (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1354 (2d Cir. 1985) (citing three United States Supreme Court cases that referred the question of tariff's reasonableness to ICC)).

254. *See* Bressman, *supra* note 5, at 1688-91 (discussing the need to interpret Congress's broad statutory language).

255. *Id.* at 1675-77.

ensuring that the agency has made a politically independent and procedurally consistent decision.

A. *Political Accountability Doctrine*

Judicial reluctance to scrutinize agency inaction reflects the political accountability doctrine.[256] An agency's legitimacy, which gives clout to its decision not to act, resides, according to the doctrine, in the close scrutiny to which politically accountable officials submit the agency's decisions.[257] This doctrine, however, is no more than a popular view and does disservice to the "founding principles of the administrative state," which "are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness—and reserve[s] a role for judicial review toward that end."[258]

The political accountability doctrine achieves its purpose by entrusting the most politically accountable official with the task of scrutinizing agency inaction decisions.[259] The President is considered to be more appropriate for that role than Congress, because the President is capable of exerting personal pressure on the agency and because he represents the majority of the electorate.[260] Congress has more room to escape accountability by writing the statutes too broadly, thus opening the door to private interests' abuse, while blaming the result on the agency's inadequate implementation of the statute.[261]

However, presidential political accountability alone is not a sufficient check upon the agency's decision not to act.[262] First, the agency itself is not accountable to the electorate and thus is not subjected to direct pressure.[263] Second, presidential control is not entirely free from corruption and improper influence, making the president an unsuitable candidate for the efficient supervision of agency decisions.[264] As an elected and fully accountable official who must raise campaign funds, the President faces both private and public pressure.[265] Third, the practical reality is such that the President is constrained in his review to

256. *Id.* at 1659.
257. *Id.* at 1659, 1675.
258. *Id.* at 1657, 1678.
259. *Id.* at 1659.
260. *Id.*
261. *Id.* at 1689.
262. *Id.* at 1690.
263. *Id.*
264. *Id.*
265. *Id.*

major administrative decisions, so that more minor agency decisions slip though the net of his supervision unnoticed.[266]

B. Judicial Scrutiny

Judicial scrutiny is necessary to ensure that agencies make politically independent and procedurally consistent decisions. The judiciary is shielded from the political influences and budget allocations that the other two branches are exposed to.[267] Further, courts benefit from long experience and acquired competence in enforcing competitive markets.[268] Because of the harm to competitive markets inherent in the process of the tariffs approval, the courts should be able to scrutinize these agency's decisions by "focus[ing] on the extent to which the agency itself considered the matter."[269] There are two firmly established administrative checks the court may employ to police agency inaction: the requirements for reason-giving and standard-setting.[270] The reason-giving check would require the agency to explain why it has elected not to act in a particular way.[271] The explanation requirement effectively shuts the door to improper and arbitrary private influences by making the administrative decision-making process more transparent.[272]

The reason-giving requirement was articulated in the landmark case of *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*[273] In *State Farm*, the Court held that the rescission of the passive restraint standard by the National Highway Traffic Safety Administration was arbitrary and capricious because the agency did not present an adequate explanation of the basis for its decision.[274] Further, the standard burdened the very influential automobile industry, but was highly beneficial for public safety.[275] Thus, the potential for an arbitrary and politically dependent agency decision was fairly high. *State Farm* reiterated that agency expertise alone is not effective in preventing arbitrary administrative decisions.[276] Expertise

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266. *Id.*
267. Rossi, *supra* note 106, at 18.
268. *Id.*
269. Rossi, *supra* note 75, at 1645.
270. Bressman, *supra* note 5, at 1690.
271. *Id.*
272. *Id.*
273. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48-49 (1983).
274. *Id.* at 46, 57.
275. *See id.* at 49 (discussing the automobile industry's regulatory "war" against safety standards).
276. *Id.* at 48 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)).

"can become a monster which rules with no practical limits on its discretion."[277] An agency needs to justify its decisions and "cogently explain why it has exercised its discretion in a given manner."[278]

The standard-setting check requires the agency to supply the reviewing court with guiding standards necessary for both consistent agency action and its judicial review.[279] The standard-setting also minimizes the possibility that narrow private interests of privately owned utilities will be treated differently than the public interest.[280] Further, "it must be possible for the regulated class to perceive the principles which are guiding agency action."[281]

The explanation-giving and standard-setting requirements would allow the court to independently verify that the agency's decision was not arbitrary and thus that the filing utility qualifies for shielding from the application of antitrust laws. If the agency provides the court with the appropriate explanations and standards for the decision it made, but the court determines that the agency's decision was in fact arbitrary, the antitrust claim against the utility would be allowed to proceed.

VII. CONCLUSION

The filed rate doctrine should be abandoned and private antitrust claims predicated upon market-based tariffs filed with the regulatory agency should be presumptively subject to judicial review. Such review should focus on policing the agency decision-making process related to the tariff approval, and should steer clear of trying to correct the market defects which, allegedly, have given rise to the antitrust claim under consideration. Such determinations should be left to the legislature. Thus, antitrust laws, as enforced by courts, and regulation, as enforced by the regulatory agency, should work together in monitoring the deregulation of electricity markets and in deterring future anticompetitive behavior.

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277. *Id.*
278. *Id.*
279. Bressman, *supra* note 5, at 1690-91.
280. *Id.* at 1691.
281. Pearson v. Shalala, 164 F.3d 650, 661 (D.C. Cir. 1999).