

Comments on
The Filed Rate Doctrine

Submitted on Behalf of
United States Telecom Association

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These comments are submitted on behalf of the United States Telecom Association (USTelecom)¹ in response to the Antitrust Modernization Commission's May 19, 2005, Request for Public Comment. *See* 70 Fed. Reg. 28,902. These comments address topic V.A.2.o, the filed rate/*Keogh* doctrine.

SUMMARY

The filed rate doctrine, which has a long history of common-law development, should be preserved. The doctrine does not immunize conduct from antitrust scrutiny, but instead imposes a limitation on private claims for damages based on challenges to filed rates. As long as the FCC and the states continue to require the filing of tariffs, that relationship between regulated entities and their customers be governed by those tariffs, and that service be offered in accordance with the tariff terms, the filed rate doctrine properly balances the need to preserve regulatory authority over regulated rates, the interest in ensuring nondiscriminatory treatment of rate-payers, and the legitimate enforcement concerns underlying the antitrust laws.

DISCUSSION

I. The Contours of the Filed Rate Doctrine

The filed rate doctrine – sometimes called the filed tariff doctrine – provides that any entity that is required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms. This general principle is codified in the Communications Act, which requires interstate communications common carriers to file tariffs and not to deviate from them. *See* 47 U.S.C. § 203(a), (c). State laws generally impose comparable requirements for

¹ USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

intrastate communications services. *See, e.g.*, Kan. Stat. Ann. § 66-117 (2004); Miss. Code Ann. § 77-3-35 (2004); N.Y. Pub. Serv. Law § 92 (McKinney 2005).

As applied in the antitrust context, the filed rate doctrine bars any antitrust claim for damages that would constitute a collateral attack on the terms of a lawful tariff. For example, a ratepayer might claim that a communications service provider has violated Section 2 of the Sherman Act by unlawfully excluding potential competitors from a certain market and that, as a result, it has been able to maintain filed rates that are excessive. Such a claim would provide no basis for a recovery of damages by the plaintiff, because the defendant is obligated to charge (and the plaintiff is obligated to pay) the tariffed rate.

The filed rate doctrine does not, however, create an antitrust immunity – *i.e.*, it does not remove any *conduct* from the scope of the antitrust laws – rather, it bars private actions for damages. Thus, the filed rate doctrine does not bar the government from bringing an action to enforce the antitrust laws, nor does it bar claims for injunctive relief in most circumstances.² *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986) (rejecting the proposition that the filed rate doctrine “is properly characterized as an ‘immunity’”). This is in contrast to state-action immunity, *see generally Parker v. Brown*, 317 U.S. 341 (1943) – which provides that certain state-approved conduct is not subject to the antitrust laws at all – or *Noerr* immunity, *see Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) – which provides that good-faith government petitioning cannot be the basis for antitrust liability. The filed rate doctrine thus affects remedies and standing, but not the reach of the antitrust laws. *See Square D*, 476 U.S. at 422 n.28 (“a critical distinction remains between an

² As the First Circuit noted in an opinion written by Judge Michael Boudin, certain types of injunctive relief – that is, relief requiring the alteration of tariffs themselves, as opposed to relief addressing non-tariff conduct – are also covered by the filed rate doctrine. *See Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000).

absolute immunity from *all* antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy”).

The precise scope of the filed rate doctrine is a matter of some controversy. For example, there is some disagreement about whether and when the filed rate doctrine may bar damages claims by competitors.³ Likewise, there may be controversies over whether certain regulatory instruments or filings “count” as filed tariffs. Like other judge-made doctrines under the antitrust laws, these matters have been and continue to be litigated and the law elaborated through the adjudicatory, common-law process.

II. The Doctrine’s Original Rationale and the Critique

The application of the filed rate doctrine to bar claims for damages under the antitrust laws stems from the Supreme Court’s decision in *Keogh v. Chicago and Northwestern Railway*, 260 U.S. 156 (1922). Justice Brandeis’s opinion for the Court reflects two basic policy rationales underlying the Court’s decision that have been elaborated by modern courts as well.

First, the Court reasoned that the filed rate doctrine preserves the authority of the designated regulator to oversee tariffed rates pursuant to the governing regulatory statute. “The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but

³ When a competitor is also a purchaser under the tariff, there is little doubt that the filed rate doctrine operates to bar any collateral challenge. *See, e.g., Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 307-08 (3d Cir. 2004); *Town of Norwood*, 202 F.3d at 420. Courts are divided over whether a non-purchasing competitor may seek damages resulting from the application of tariff terms. *Compare, e.g., Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (Posner, J.) (doctrine may bar claims by non-purchasing competitors) (dicta) and *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988) (applying *Keogh* to bar competitors’ claims) with *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1161 (3d Cir. 1993) (applying non-purchasing competitor exception). The primary rationale underlying the filed rate doctrine – preservation of regulatory authority over filed tariffs – applies to claims by non-purchasing competitors as well as claims by purchasers when they challenge the binding terms of filed tariffs. Competitors’ concerns about the terms of those tariffs should be addressed to responsible regulators, not to antitrust courts.

for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would have conformed to the requirements of” the governing statute. *Id.* at 163-64. “But it is the Commission which must determine whether a rate” conforms to the statute, “at least, in the first instance.” *Id.* at 164. The doctrine thus “preserv[es] the exclusive role of . . . agencies in approving rates for telecommunications services that are ‘reasonable’ by keeping courts out of the rate-making process . . . , a function that the . . . regulatory agencies are more competent to perform.” *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998). “[C]ourts are not institutionally well suited to engage in retroactive rate setting,” and allowing antitrust attacks on the reasonableness of filed rates would “unnecessarily enmesh the court in the rate-making process.” *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994) (internal quotation marks omitted). The filed rate doctrine thus “recognizes that (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack competence to set . . . rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime.” *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir. 1998) (internal quotation marks omitted; alteration in original).

Second, the core purpose of a filed tariff is to avoid discrimination – that is, to ensure that all customers are subject to the same rates, terms, and conditions of service. “It is that antidiscriminatory policy which lies at the heart of the common-carrier section of the Communications Act.” *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (internal quotation marks omitted). If particular customers could recover damages based on amounts paid under a filed tariff, “the amount recovered might, like a rebate, operate to give . . . a preference” over other customers. *Keogh*, 260 U.S. at 163. For that reason, the “rights as defined by the

tariff cannot be varied or enlarged by either contract or tort” – or through an antitrust claim for damages. *Id.* “This stringent rule prevails, because otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated.” *Id.*

Judge Friendly criticized *Keogh* (but nevertheless applied it) in his opinion for the Second Circuit in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), *aff’d*, 476 U.S. 409. First, he questioned whether the filed rate requirement was intended to prevent the type of discrimination that would result from an award of damages; he also suggested that the availability of class actions could prevent such discrimination. *See id.* at 1352. Second, the opinion questions the degree to which such a claim would necessarily interfere with the proper authority of the agency. Judge Friendly suggested that the question whether a different rate would have been consistent with the statute could be referred to the agency pursuant to the doctrine of primary jurisdiction. *See id.* at 1353. And he noted that it would not necessarily interfere with agency authority for a plaintiff to recover the difference between the effective rate and a lower, but still legal, rate that would have been in effect absent the unlawful conduct. *See id.* at 1354.

The Supreme Court affirmed the judgment and thus the vitality of the filed rate doctrine. *See Square D*, 476 U.S. 409. The Court relied primarily on the rule of *stare decisis* – that is, the presumption of adherence to prior decisions in cases involving statutory interpretation. In so ruling, the Court emphasized that it was wrong to treat the filed rate doctrine as “antitrust immunity” rather than a limitation on available remedies for conduct that “has consistently been within the reach of the generally applicable antitrust laws.” *Id.* at 422 & n.28. And the Court noted that “the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some [six-and-a-half] decades. The emergence of

subsequent procedural and judicial developments does not minimize *Keogh*'s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area." *Id.* at 423.

III. The Filed Rate Doctrine Should Be Preserved

The filed rate doctrine is a venerable common law defense to antitrust damages claims, one that strikes an appropriate balance between preservation of regulatory authority over tariffed rates and antitrust intervention to address anticompetitive conduct.

As an initial matter, we do not suggest that regulation of rates and imposition of tariff obligations is always desirable or efficient. Rather, so long as a carrier remains subject to a regime of filed tariffs, the filed rate doctrine should preserve the rates that are properly filed with the responsible regulator from improper collateral attack through an antitrust action for damages. The existence of a tariff regime indicates that a regulatory authority is exercising – or, at a minimum, could exercise – supervision over the rates, terms, and conditions of service. To the extent that ratepayers object to existing rates as unreasonable, those complaints should be addressed to the responsible regulator. Allowing collateral attack on the terms of filed tariffs through an antitrust suit undermines (1) regulatory control over those rates and (2) the transparency and non-discrimination that tariffs are intended to insure. Indeed, despite Judge Friendly's critique, courts have correctly reaffirmed the validity of these concerns in applying the filed rate doctrine to a variety of antitrust claims. *See, e.g., Texas Commercial Energy v. TXU Energy, Inc.*, --- F.3d ---, No. 04-40962, 2005 WL 1413365 (5th Cir. June 17, 2005); *Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), *cert. denied*, --- S. Ct. ---, No. 04-621, 2005 WL 1500322 (June 27, 2005); *Utilimax.com*, 378 F.3d 303.

Under the state and federal regulatory regimes governing USTelecom’s members, state commissions and the FCC generally have the authority both to review tariff rates when they are filed and to entertain complaints that such rates are unjust and unreasonable. The governing rate regulations reflect a complicated accretion of different regulatory approaches, including rate-of-return regulation, price caps, and different degrees of pricing flexibility. *See, e.g.,* Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994, ¶¶ 9-18 (2005) (describing history of special access pricing regulation). In many cases, the particular rates or rate ceilings have been dictated by regulators, either after elaborate rate cases or pursuant to formulas established pursuant to similarly elaborate rule-making proceedings. Furthermore, the rate structures in place do not necessarily reflect considerations of economic efficiency alone: regulators may establish rates to promote other interests, including universal service. *See United States Telecom Ass’n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000). Thus, determinations about rates involve complicated determinations of policy that legislatures have delegated to expert agencies. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 146 n.12 (1990) (“[A] recurring theme in [the filed rate] cases is that the Commission, rather than the courts, should have primary responsibility for administration of the statute. The filed rate doctrine was regarded in significant part as a means for ensuring that this allocation of responsibility was respected.”) (Stevens, J., dissenting). In all events, the establishment of rates is a task that is peculiarly within the institutional competence of regulatory agencies, and outside that of antitrust courts. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (“antitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies . . .) that are easier to administer”).

Tariff regimes are meant to promote transparency by requiring the public filing of binding rates. Elimination or weakening of the filed rate doctrine would encourage litigants to side-step the regulatory process – which offers no treble-damages incentive – and thus would undermine agency control over the rate-setting process. As a result, the openness and transparency – and uniformity of treatment – that tariff regimes are designed to promote would be sacrificed. *Cf., e.g., Cavalier Tel., LLC v. Verizon Virginia, Inc.*, 330 F.3d 176 (4th Cir. 2003), *cert. denied*, 540 U.S. 1148 (2004) (specific procedures for implementation of statutory duties could be over-ridden by collateral antitrust litigation); *Covad Communications Co. v. BellSouth Corp.*, 314 F.3d 1282, 1292 (11th Cir. 2002) (Tjoflat, J., dissenting from denial of rehearing en banc of *Covad Communications Co. v. BellSouth Co.*, 299 F.3d 1272 (11th Cir. 2002), *vacated*, 540 U.S. 1147 (2004), *on remand*, 374 F.3d 1044 (11th Cir. 2004)) (noting incentives to evade regulatory control and “run to federal court, seeking treble damages”).

Furthermore, there is no reason to believe that the filed rate doctrine leads to underenforcement of the antitrust laws. Judge Friendly noted that increased reliance on “competition rather than regulation to insure the reasonableness of rail and motor carrier rates” might undermine the application of the doctrine. *Square D*, 760 F.2d at 1354. But where markets are competitive, there is likely no reason to require tariffs – competition protects consumers against both unjust and unreasonable rates and unreasonable discrimination. *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004). Even in hybrid regimes that give substantial pricing flexibility while maintaining a tariff requirement, there will usually be a plaintiff that is better suited to enforce any antitrust obligation than a consumer complaining that rates are too high. In cases involving supposedly exclusionary unilateral conduct by an incumbent, for example, the victim of the exclusionary practice would

generally suffer a more direct injury and be the appropriate enforcer of any antitrust duty. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 416-17 (2004) (Stevens, J., concurring). And cases involving unlawful horizontal conspiracies, if discovered, are likely to attract the attention of public enforcement authorities – as was the case in *Square D* itself. *See* 760 F.2d at 1349 n.1.

The requirement that carriers maintain filed tariffs is designed to ensure that regulators have the ability to scrutinize filed rates and to enforce carriers’ obligation to provide service on just, reasonable, and nondiscriminatory terms. Such regimes are “designed to deter and remedy” the harm that would result from charging excessive rates; thus, “the additional benefit to competition” from allowing consumer antitrust actions for damages resulting from such rates “will tend to be small.” *Trinko*, 540 U.S. at 411. The filed rate doctrine is well calibrated to ensure that antitrust enforcement continues with regard to private, discretionary conduct that is not subject to regulatory scrutiny and control, while blocking claims that would tend to undermine the authority and transparency of existing regulatory controls.