NO. 19-1678

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PNE ENERGY SUPPLY LLC, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED

PLAINTIFF-APPELLANT,

V.

EVERSOURCE ENERGY, a Massachusetts Voluntary Association; AVANGRID, INC., a New York Corporation,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OFMASSACHUSETTS
CASE NO. 18-CV-11690 (THE HON. DENISE J. CASPER)

MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(b), the Open Markets Institute respectfully moves for leave to participate as amicus curiae in the above-captioned case in support of the plaintiff-appellant.

I

BACKGROUND

On June 7, 2019, the district court granted the defendants-appellees' motion to dismiss the plaintiff-appellant's complaint. Plaintiff-appellant accuses Eversource Energy and Avangrid (two vertically-integrated utilities that distribute gas and electricity to end-use customers and own power generation assets) of misusing their market power at the natural gas resale level and engineering a chain of events that inflicted substantial harm on New England residents. The defendants-appellees abused their gas pipeline use rights to create an artificial shortage of resale gas, a key input for generating electricity in New England. By limiting the supply of gas in New England and raising the price of natural gas, the defendants-appellees raised the costs of generating electricity. And by raising the costs of generating electricity, they increased wholesale electricity prices and ultimately retail electricity costs for New Englanders by more than $3 billion. Plaintiff-appellant alleged that the defendants-appellees' conduct violates Section 2

of the Sherman Act, 15 U.S.C. § 2, and state antitrust and consumer protection laws.

II

INTEREST OF PROPOSED AMICUS CURIAE AND RELEVANCE

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The vigorous enforcement of the antitrust laws is essential to protecting the U.S. economy and democracy from monopoly and oligopoly. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, courts, journalists, and other members of the public.

Legislative and regulatory action have transformed the governance of gas and electricity industries since the 1970s. For much of the twentieth century, comprehensive public utility regulation governed the production and sale of gas and electricity. Federal and state regulators treated both industries as generally monopolistic and subjected firms to price regulation. Under this cost-of-service regulation, federal and state regulators established rates that allowed sellers of gas and electricity to recover their costs and earn a reasonable rate of return on their

capital investments. Over the past 40 years, Congress and the Federal Energy Regulatory Commission (FERC) have curtailed the public regulation of prices in natural gas and electricity and introduced market competition in both industries. These legislative and regulatory actions have replaced regulator-approved rates with market-based prices in one or more levels of the gas and electric supply chains. Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. Econ. Persps. 119 (1997).

Under a system of market-based pricing, full and robust antitrust enforcement is vital to protect the public from the collusive, exclusionary, and unfair practices of producers and traders of electricity and natural gas. *See* Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 Calif. L. Rev. 1059, 1059 (1987) ("While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."). In this case, however, the Court expanded the filed rate doctrine, which was created to protect the integrity of *regulator-approved rates*, to immunize Eversource Energy and Avangrid's manipulation of *market prices* for electricity and gas from a private antitrust lawsuit. In broadening the filed rate doctrine to dismiss the plaintiff-appellant's lawsuit, the district court granted a *de facto* license for sellers of gas and electricity to use their market

power to transfer millions or even billions of dollars from the public into their own coffers.

Traditionally, the filed doctrine protected the integrity of rates that federal regulators had approved. Under the filed rate doctrine, the Supreme Court and this Court have declined to retrospectively alter rates that a regulator had approved in advance of taking effect. *Square D Co. v. Niagara Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000). With market-based pricing, however, regulators do not require the prospective filing of rates and approve any rates in advance of their effectiveness.

The district court's expansion of the filed rate doctrine to insulate market-based prices from private antitrust lawsuits is both bad law and bad policy. First, the decision, in addressing the relationship between the Natural Gas and Federal Power Acts and the antitrust laws, repealed the Clayton Act's private right of action. The Supreme Court has established a strong presumption against such implied repeals of federal statutes, including the antitrust laws. *United States v. Borden Co.*, 308 U.S. 188 (1939). The Supreme Court has held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51 (1963). Second, the decision undermines effective antitrust enforcement

and the public benefits of market-based pricing regimes. With market-based pricing in gas and electricity, private antitrust lawsuits complement federal regulatory oversight and public antitrust enforcement, provide essential deterrence against collusive, exclusionary, and other unfair practices, and compensate the victims of antitrust violations in gas and electricity markets.

III

DESIRABILITY OF PARTICIPATION

The district court's opinion improperly expanded the scope of the filed rate doctrine. The district court disregarded both the strong presumption against implied repeals of the antitrust laws and the importance of antitrust enforcement for competitive market-based pricing in gas and electricity. Amicus curiae will explain the legal authorities and policy considerations that support denying filed rate protection to the market-based prices at issue in this case.

Amicus curiae's brief will not duplicate arguments made by the parties. It will instead provide the amicus curiae's distinct perspectives on the issues facing the Court.

CONCLUSION

For these reasons, the motion for leave to file an amicus curiae brief in support of the plaintiff-appellant should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Mark A. Gottlieb
Mark A. Gottlieb (BBO #627008)

Counsel for Open Markets Institute

Dated: October 25, 2019

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BRIEF OF OPEN MARKETS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1, I certify that amicus curiae Open Markets Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public. The Open Markets Institute has moved for leave to file this amicus curiae brief in support of plaintiff-appellant.

Legislative and regulatory action have transformed the governance of the gas and electricity industries since the 1970s. For much of the twentieth century, comprehensive public utility regulation governed the production and sale of gas and electricity. Federal and state regulators treated both industries as generally monopolistic and subjected firms to price regulation. Under this cost-of-service regulation, federal and state regulators established rates that allowed sellers of gas and electricity to recover their costs and earn a reasonable rate of return on their capital investments. Over the past 40 years, Congress and the Federal Energy

[1] No parties oppose the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

Regulatory Commission (FERC) have curtailed the public regulation of prices in natural gas and electricity and introduced market competition in both industries. These legislative and regulatory actions have replaced regulator-approved rates with market-based prices in one or more levels of the gas and electric supply chains. Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. Econ. Persps. 119 (1997).

Under a system of market-based pricing, full and robust antitrust enforcement is vital to protect the public from the collusive, exclusionary, and other unfair practices of producers and traders of electricity and natural gas. *See* Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 Calif. L. Rev. 1059, 1059 (1987) ("While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."). In this case, however, the court expanded the filed rate doctrine, which was created to protect the integrity of *regulator-approved rates*, to immunize Eversource Energy and Avangrid's manipulation of *market prices* for electricity and gas from a private antitrust lawsuit. In broadening the filed rate doctrine to dismiss the plaintiff-appellant's lawsuit, the district court granted a *de facto* license for sellers of gas and electricity to use their market

power to transfer millions or even billions of dollars from the public into their own coffers.

Plaintiff-appellant accuses Eversource Energy and Avangrid (two vertically integrated utilities that distribute gas and electricity to end-use customers and own power generation assets) of misusing their market power at the natural gas resale level and engineering a chain of events that inflicted substantial harm on New England residents. The defendants-appellees abused their gas pipeline use rights to create an artificial shortage of resale gas, a key input for generating electricity in New England. By limiting the supply of gas in New England and raising the price of natural gas, the defendants-appellees increased the costs of generating electricity. And by raising the costs of generating electricity, they increased wholesale electricity prices and ultimately retail electricity costs for New Englanders by more than $3 billion.

Over the past four decades, legislators and regulators have limited and even withdrawn public utility regulation over the production and sale of natural gas and the generation of electricity and introduced market-based pricing in these areas. In lieu of cost-of-service regulation, market-based pricing now governs the sale of gas at the wellhead where gas is produced, the resale of surplus gas to purchasers like electricity generators, and the sale of electricity at the wholesale level. In contrast to the previous regulated environment, the conduct of sellers in these markets is

today "governed in the first instance by business judgment, and not regulatory coercion." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

As these legislative and regulatory decisions have lifted traditional price controls, participants in the wellhead gas, gas resale, and wholesale electricity markets exercise discretion that they previously did not have. Competition in well-structured markets constrains this private discretion and can ensure the availability of plentiful and affordable gas and electricity. When markets are concentrated or when market participants engage in collusive, exclusionary, or other unfair practices, however, this private discretion becomes private power. Under these circumstances, sellers can use their unilateral or collective market power to profit at the expense of purchasers of gas and electricity.

As the plaintiff-appellant alleges, the risk of misconduct in these markets is real. And the alleged misconduct is not an aberration. In electricity markets, generators have engaged in market power abuse on a recurring basis. This abuse was most powerfully illustrated in the California electricity crisis in 2000. In-state generators with market power created artificial shortages of electricity and caused price spikes and rolling blackouts in the state, extracting billions of dollars in private taxes from the public. Severin Borenstein, James B. Bushnell & Frank A. Wolak, *Measuring Market Inefficiencies in California's Restructured Wholesale Electricity Market*, 92 Am. Econ. Rev. 1376 (2002).

In industries governed by price regulation, the courts have established the filed rate doctrine to ensure that regulator-approved rates are not challenged through parallel judicial proceedings or disregarded by sellers. Under this doctrine, individual rates that have been filed with a federal regulator in advance of their effectiveness must be honored. *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). The Supreme Court has held that customers cannot seek judicial modification of these pre-filed rates, and sellers cannot deviate from them. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). In short, in an industry subject to traditional public utility regulation, the filed rate doctrine protects the integrity of regulator-approved rates and ensures that purchasers and sellers abide by them.

The Supreme Court and this Court historically have confined the filed rate doctrine to individual rates that are filed with a federal regulator *in advance* of their effectiveness. In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the Supreme Court held that the trucking firms' rates had been pre-filed with the Interstate Commerce Commission and therefore could not be challenged or modified through a private antitrust lawsuit. *Id.* at 413, 417. Like the Supreme Court in *Square D*, this Court traditionally held that rates that have been submitted to, and approved by, FERC in advance of taking effect are protected under the filed rate doctrine. *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 414, 419 (1st Cir. 2000).

The market prices here are outside the protection of the filed rate doctrine, as interpreted by the Supreme Court in *Square D* and this Court in *Town of Norwood*. In the resale market for gas in which generators procure fuel, sellers do not make any regulatory filings to FERC. And in wholesale electricity markets, generators do not file, in advance, the prices that they will charge purchasers, but only periodic, after-the-fact informational reports to FERC concerning market sales. As such, the market-determined prices for natural gas and electricity at issue in this case are *not* entitled to filed rate protection and insulation from private antitrust lawsuits.

The district court's expansion of the filed rate doctrine is erroneous on both legal and policy grounds. First, the Supreme Court has established a strong presumption against implied repeals of the antitrust laws. The Supreme Court has held that "[i]t is a cardinal principle of construction that repeals by implication are not favored" and that "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As such, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51 (1963). Parties seeking an implied repeal through an expansion of the filed rate doctrine "march into the teeth

of a strong judicial policy disfavoring" such limitation of federal antitrust law. *United States v. Brien*, 617 F.2d 299, 310 (1st Cir. 1980). Despite failing to find—or even consider whether—a plain repugnancy exists between the antitrust laws and the Federal Power and Natural Gas Acts, the district court expanded the filed rate doctrine and judicially repealed the Clayton Act's private right of action in electricity and gas markets.

Second, the full application of the antitrust laws, including through private enforcement, complements FERC market oversight and is necessary to ensure competitive market-based prices in gas and electricity. FERC's oversight of these markets has important limitations and cannot be counted on to root out all collusive, exclusionary, and other unfair conduct or compensate purchasers harmed by such practices. The enforcement of the antitrust laws, including through lawsuits brought by injured consumers and businesses, is critical to ensuring that the market-based pricing of gas and electricity serves the public.

Instead of recognizing this reality and ensuring the full effectiveness of the antitrust laws in these markets, the district court's decision establishes a system of "radical deregulation—markets absent common law and antitrust protections." Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1596 (2003). The district court freed sellers of gas and electricity to engage in anticompetitive and other unfair practices and transfer

billions of dollars from the public to their own coffers through overcharges on gas and electricity.

ARGUMENT

I. Due to a Series of Legislative and Regulatory Actions, Private Discretion Has Displaced Public Control in Natural Gas Resale and Wholesale Electricity Markets

Private decision-making, not public control, governs large swaths of activity in the natural gas and electricity sectors. Historically, public utility regulation applied to these industries. Through legislation and regulatory actions over the past 40 years, however, Congress and the Federal Energy Regulatory Commission (FERC) have eliminated much of the price regulation and other forms of public control that once governed these two industries. In lieu of cost-of-service regulation, market-determined prices today govern the sale of natural gas at the wellhead, the resale of surplus natural gas, and the sale of wholesale electricity.

As a result, participants in these markets exercise discretion that they previously did not possess. When markets are both structurally competitive and free from collusive, exclusionary, and other unfair practices, this private discretion is constrained and can ensure the availability of plentiful and affordable gas and electricity. When markets are concentrated or market participants engage in

collusive or exclusionary conduct though, sellers can use their market power to raise prices and profit at the expense of electricity and gas purchasers.

A. Congress and the Federal Energy Regulatory Commission Have Replaced Public Utility Regulation with Market-Based Pricing in Wide Swaths of the Natural Gas and Electricity Industries

Policymakers at the federal and state levels historically treated natural gas and electricity as natural monopolies. Legislators and regulators believed that these industries had monopolistic tendencies and that it was more cost-effective to have a single provider of these services than to have multiple competing entities. Given this assumption of monopoly, legislators and regulators limited entry and established cost-of-service price regulation in both industries. Under this regime, regulators set rates that allowed sellers of gas and electricity to recover their costs as well as a reasonable rate of return on their capital investments. Over the past forty years, the federal government has reconsidered these assumptions at a fundamental level and restructured both industries with an aim of relying more on market-set prices and limiting public utility regulation to monopolistic transmission functions. Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. Econ. Persps. 119 (1997).

Since the late 1970s, Congress and FERC have curtailed the public regulation of prices in the natural gas industry. Congress in 1978 enacted the Natural Gas Policy Act, which raised price ceilings on certain classes of wellhead natural gas and established a timeline for eliminating many price ceilings. 15 U.S.C. §§ 3301–3432. In 1989, Congress accelerated the termination of price ceilings in the Natural Gas Wellhead Decontrol Act. Pub. L. No. 101-60. FERC eliminated filing requirements for natural gas resales to local distribution companies and power generators in 1992. 57 Fed. Reg. 13,267-02 (April 16, 1992).

To create competitive markets in natural gas, FERC transformed pipelines from purchasers and sellers of gas into common carriers of gas for other parties. Due to monopolistic characteristics, pipeline owners can manipulate the sale and purchase of gas by producers and customers and favor their own affiliates. To guard against this threat, FERC issued Orders 436 and 636 to encourage and mandate, respectively, that pipelines be operated on a non-discriminatory, open access basis. 50 Fed. Reg. 42,408 (Oct. 18, 1985); 57 Fed. Reg. 13,267-02 (April 16, 1992).

In electricity, Congress and FERC have similarly scaled back price regulation and sought to create competitive wholesale electricity markets. In the 1978 Public Utilities Regulatory Policies Act, Congress encouraged the entry of independent power generators that are not owned by vertically integrated utilities.

Pub. L. No. 95-617. Over the course of the subsequent two decades, FERC granted market-based rate authority to an increasing number of generators, allowing them to sell wholesale electricity at market prices and not cost-based rates. *E.g.*, *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 (1993); *Market–Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (June 21, 2007).

Much as it did with natural gas pipelines, FERC established an open access regime for the electric transmission grid. In 1996, FERC issued Order 888 that granted all power generators the right to use the transmission grid on non-discriminatory terms. *Promoting Wholesale Competition Through Open Access Non–Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996).

These legislative and regulatory decisions have transformed the natural gas and electric power industries. Market-derived pricing is now the norm in both sectors. In natural gas, wellhead producers and resellers are no longer subject to any filing requirements. In electricity, generators can sell their electricity at wholesale market-determined prices. FERC today does not exercise price-setting powers over a wide swath of activity – including the prices on gas resales and wholesale electricity.

B. Sellers of Natural Gas and Wholesale Electricity Can Exercise Market Power

In this new environment in which prices are set in markets, market participants exercise fundamental discretion that they previously did not have. Under systems of market pricing, the conduct of sellers of wellhead and resale gas and wholesale electricity is "governed in the first instance by business judgment and not regulatory coercion." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). A market participant's principal discipline comes from rival sellers, which underscores the importance of structurally competitive markets that are free of collusive and exclusionary practices. As the plaintiff-appellant's allegations and history show, the threat of anticompetitive and other unfair practices is real and can inflict enormous harm on the public.

While market-based rates can serve the public provided competition exists, concentrated market structures and anticompetitive practices can lead to significant public harm. When markets are highly concentrated, sellers face little or no competitive discipline and can unilaterally raise prices. Furthermore, sellers can engage in collusive and exclusionary activity that establishes or enhances market power. Under these circumstances, private discretion becomes private market power.

As the plaintiff-appellant alleges, the risk of market misconduct is real. Plaintiff-appellant accuses the defendants-appellees of abusing their market power in the following fashion: (1) misusing their gas pipeline usage rights to create an artificial shortage of gas (a key input for generating electricity in New England), (2) raising the costs of generating electricity, and (3) elevating wholesale electricity prices and ultimately retail electricity costs to New Englanders by more than $3 billion. Such misconduct is not an aberration and indeed is a constant threat. This abuse was most powerfully illustrated in the California electricity crisis in 2000. In-state generators with market power created artificial shortages of electricity and caused price spikes and rolling blackouts in the state, transferring billions of dollars from Californians to generators. Severin Borenstein, James B. Bushnell & Frank A. Wolak, *Measuring Market Inefficiencies in California's Restructured Wholesale Electricity Market*, 92 Am. Econ. Rev. 1376 (2002). *See also United States v. Keyspan Corp.*, 763 F.Supp.2d 633, 636 (S.D.N.Y. 2011) (describing alleged effects of anticompetitive swap involving rival generators in New York City, and imposing antitrust penalties for this conduct); ISO New England Inc. Internal Market Monitor, 2017 Annual Markets Report 16-17 (2018) (Multiple analyses for 2017 "indicate that there have been supply portfolios with market power in about 58% of hours. . . . In the absence of effective mitigation

measures, participants may have the ability to unilaterally take action that would increase prices above competitive levels.”).

II. Market-Based Natural Gas and Wholesale Electricity Prices Are Outside the Scope of the Filed Rate Doctrine

Market-based prices for resale gas and wholesale electricity are outside the legal protection of the filed rate doctrine. This doctrine holds that individual rates that have been filed with a federal regulator before they take effect must be honored and cannot be challenged or retroactively altered in court. Per the decisions of the Supreme Court, the *prospective filing* of individual rates remains the touchstone of filed rate analysis. Accordingly, the filed rate doctrine does not apply to the market prices in this case. In the market for resale natural gas in which generators procure fuel, sellers do not submit any prices to FERC. And in wholesale electricity markets, generators are not required to file, and do not file, in advance the individual rates that they will charge purchasers, and only submit periodic, after-the-fact reports to FERC concerning their market sales. As such, prices for resale natural gas and wholesale electricity are not entitled to filed rate protection and insulation from private antitrust lawsuits.

Under the filed rate doctrine, sellers and buyers must comply with the rates that have been filed in advance with federal regulators. Customers cannot seek judicial modification of these rates after the fact. *Keogh v. Chicago &*

Northwestern Railway Co., 260 U.S. 156 (1922). And sellers cannot charge rates in excess of the filed rates or offer discriminatory rebates. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) ("[N]o regulated seller of natural gas may collect a rate other than the one filed with the Commission."). In an industry subject to traditional public utility regulation, the filed rate doctrine protects the integrity of regulator-approved rates and ensures that purchasers and sellers abide by them.

In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc*. 476 U.S. 409 (1986), the Supreme Court's holding confined the filed rate doctrine to rates that were filed with a federal regulator in advance of their taking effect. The trucking firms' filing of individual rates with the Interstate Commerce Commission was the critical fact for the Court. Drawing from the petitioners' complaint, the Court noted that "the ICC requires motor carriers to file tariffs containing all their rates, to make the tariffs available for public inspection, and to give advance notice of any changes in the filed rates." *Id.* at 413. The Court stated that the rates were "duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful." *Id.* at 417.

This Court traditionally applied the filed rate doctrine in line with *Square D*. *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000). The Court held that "[i]t is the filing of the tariffs" that triggers the filed rate doctrine. *Id.* at 419. In applying the filed rate doctrine to bar the plaintiff's antitrust

claims in *Town of Norwood*, this Court observed that "the relevant rates and termination charge were individually filed with FERC." *Id.* The challenged rates in *Town of Norwood* had been filed with, and approved by, FERC in *advance* of taking effect. *See id.* at 414 (internal citations omitted) ("[I]n the FERC proceedings, the Commission ultimately approved a settlement agreement permitting (on payment of contract termination charges) early termination of requirements contracts by the affiliates of New England Power [and] approved the offering of the new backup wholesale standard offer service[.]"); *Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir. 2000) (describing FERC proceedings that gave rise to Town of Norwood's antitrust claims).

The Court's recent decision in *Breiding v. Eversource Energy, Inc.*, 2019 WL 4463281 (1st Cir. 2019), represents a mistaken departure from the circumscribed filed rate doctrine. The Court relied on dicta from *Town of Norwood* in stating that the filed rate doctrine "prohibits antitrust challenges to agency-approved tariffs even in energy markets in which FERC has eschewed traditional ratemaking." *Id.* at 4. As discussed earlier, the Court in *Town of Norwood* did not establish this proposition because it only decided the propriety of an antitrust challenge to prospectively approved rates. As such, the panel in *Breiding* made a sweeping pronouncement that lacked precedential support in this Court.

Since the defendants-appellees do not file resale natural gas or wholesale electricity prices before they take effect, these prices are not entitled to filed rate protection. Natural gas resellers do not have to make any filing to FERC, let alone file individual rates. Since there is no regulatory filing of prices, the defendants-appellees cannot invoke the filed rate doctrine to insulate their conduct in the natural gas market from the plaintiff-appellant's antitrust challenge. Given the suspension of FERC filing requirements, the filed rate doctrine does not operate in the natural gas resale market. Similarly, generators do not file the wholesale prices they charge *prospectively*, but only *retrospectively* submit reports of their market activities. Because they are submitted to FERC after the fact, these submissions do not trigger the filed rate doctrine as articulated by the Supreme Court in *Square D* and this Court in *Town of Norwood*.

III. The District Court Improperly Expanded the Filed Rate Doctrine

The district court improperly broadened the filed rate doctrine to cover market-determined prices. As discussed *supra* in Part II, the Court in *Town of Norwood* applied the filed rate doctrine to protect pre-filed rates but it did not expand the doctrine to apply to market-based prices.[2] To be sure, some other courts

[2] This Court in *Town of Norwood* described the filed rate doctrine as "creaky." 202 F.3d at 420. In light of this language and the Court's holding, it would be incorrect and odd to interpret *Town of Norwood* as somehow broadening the reach of the filed rate doctrine.

of appeals have expanded the filed rate doctrine in this fashion. *E.g.*, *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303 (3d Cir. 2004); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Inc.*, 379 F.3d 641 (9th Cir. 2004); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004). These decisions have applied the filed rate doctrine "to cases where there is no filed rate, only a market-based rate set in a competitive market with passive regulation." Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 Utah L. Rev. 613, 653. They are inconsistent with Supreme Court precedents on implied repeals of the antitrust laws and undermine the public benefits of market-based pricing in industries that were historically subject to comprehensive price regulation.

The district court's decision is erroneous on both legal and policy grounds. First, the Supreme Court has established a strong presumption against implied repeals of the antitrust laws. This presumption cuts against expanding the filed rate doctrine and judicially repealing the Clayton Act's private right of action against participants in the gas resale and wholesale electricity markets, such as the defendants-appellees. Second, the full application of the antitrust laws, including through lawsuits brought by injured consumers and businesses, is necessary to ensure competitive market-based rates in gas and electricity.

A. In Expanding the Filed Rate Doctrine, the District Court Ignored the Strong Presumption against Implied Statutory Repeals and Judicially Repealed the Clayton Act's Private Right of Action

The Supreme Court strongly disfavors implied repeals of federal statutes in general. It has stated "[i]t is a cardinal principle of construction that repeals by implication are not favored" and that "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). On this basis, the Court has held that it finds an implied repeal of a statute only in the event of "a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy." *Id.* at 199. By broadening the filed rate doctrine to block the plaintiff-appellant's antitrust claims, the district court disregarded the presumption against implied repeals of the antitrust laws and repealed the Clayton Act in part.

The Supreme Court has repeatedly applied a presumption against implied repeals of the antitrust laws in particular. It has written that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51 (1963). *See also N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct.

1101, 1110 (2015) (noting implied repeals of the antitrust laws are disfavored); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 275 (2007) ("This Court's prior decisions also make clear that, when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint—or as we shall subsequently describe the matter, whether the two are 'clearly incompatible.'").

The Supreme Court has applied the strong presumption against implied repeals of the antitrust laws in suits involving gas and electricity markets. In analyzing the intersection between the antitrust laws and the Federal Power and Natural Gas Acts, the Court has held that "[antitrust] exemptions are not lightly to be implied." *Otter Tail Power*, 410 U.S. at 390. *See also California v. Federal Power Commission*, 369 U.S. 482, 485 (1962) (same with respect to Natural Gas Act).[3] Emphasizing the full application of the antitrust laws in a private lawsuit heard after *Otter Tail*, the Court stated that "there can be no doubt about the proposition that the federal antitrust laws are applicable to electrical utilities." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976).

[3] In a similar spirit, the Supreme Court in 2015 declined to find that the Natural Gas Act field-preempts state antitrust claims against natural gas traders. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

In line with Supreme Court precedent, this Court has applied a strong presumption against implied repeals of statutes, including such repeals of the antitrust laws. It has stated that those seeking an implied repeal "march into the teeth of a strong judicial policy disfavoring" of such limitation of a federal statute. *United States v. Brien*, 617 F.2d 299, 310 (1st Cir. 1980). The finding of an implied repeal requires "a positive repugnancy between the two statutes." *Id.* Applying this presumption in the antitrust context, this Court has found "no irreconcilable conflict of federal antitrust policy as embodied in Section 5 of the Federal Trade Commission Act with . . . the Interstate Commerce Act." *Massachusetts Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985).

Although it did not even consider whether a clear repugnancy exists between the implicated statutes, the district court nonetheless repealed the Clayton Act's private right of action. 15 U.S.C. § 15. The court ignored the strong presumption against implied repeals and improperly broadened the filed rate doctrine. In natural gas resale and wholesale electricity markets, market-determined pricing is the norm. *See supra* Part I. The plaintiff-appellant's complaint "challenge[s] the background marketplace conditions" and *not* "the reasonableness of any rates expressly approved by FERC." *Oneok*, 135 S. Ct. at 1602. *See also Otter Tail*, 410 U.S. at 374 ("When [commercial] relationships are governed in the first instance

by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.").

No "clear repugnancy" exists between the Clayton Act and the Federal Power and Natural Gas Acts. The plaintiff-appellant's complaint does not ask or threaten to unsettle *any* prices individually filed with FERC before they took effect. In contrast to the individual rates that were prospectively filed in *Town of Norwood* and *Square D*, the defendants-appellees here did not file rates with FERC in advance of their effectiveness. Instead of charging regulator-approved or -validated rates, the defendants-appellees' discretionary conduct[4] helped set prices in the market. Indeed, as discussed *infra* in Part III.B, private antitrust enforcement

[4] While FERC did grant the defendants the right to charge market-based rates for wholesale electricity and transport natural gas over pipelines, including through no-notice contracts, the exercise of these rights was "governed in the first instance by business judgment, and not regulatory coercion." *Otter Tail*, 410 U.S. at 374. FERC's grant of *discretionary* authority to defendants does not and should not shield them from antitrust liability. The D.C. Circuit offered a pointed illustration of the absurdity of the claim that the grant of certain rights by the government somehow displaces other laws:

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes[.] . . . That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (en banc).

and federal regulatory oversight *complement* each other in industries with market-based prices – and together constrain the discretion of market actors and ensure that they cannot profit through collusive, exclusionary, and other unfair practices.

B. The Full Application of the Antitrust Laws Is Essential for Competitive Market-Based Prices

Since Congress and FERC have committed to market-based pricing in wellhead gas, resales of gas, and wholesale electricity, the full application of the antitrust laws is critical for ensuring the success of this legislative and regulatory market creation. Even as FERC maintains oversight of the electricity and natural gas markets, this regulatory supervision has important limitations and cannot be expected to root out all anticompetitive conduct. Antitrust enforcement complements FERC oversight and provides vital deterrence against anticompetitive practices in gas and electricity markets. Specifically, antitrust suits brought by injured consumers and businesses provide strong deterrence of anticompetitive conduct as well as compensation. In dismissing the plaintiff-appellant's suit, the district court severely weakened the effectiveness of the antitrust laws and empowered sellers of gas and electricity to profit through anticompetitive market conduct.

FERC oversight is not adequate to prevent anticompetitive conduct and ensure that markets in natural gas and electricity are free from collusive,

exclusionary, and other unfair market conduct. Although FERC has an obligation to maintain "just and reasonable rates" under the Natural Gas and Federal Power Acts, 15 U.S.C. § 717c, it has only very limited tools to police specific anticompetitive conduct in the gas and electricity markets and to provide any remedy for anticompetitive market conduct it discovers after the fact.

Even assuming FERC acts against anticompetitive and other unfair conduct,[5] its remedies provide inadequate deterrence and cannot be counted on to compensate injured parties. FERC can impose monetary penalties of up to a fixed maximum amount per day on parties over whom it has jurisdiction and who have violated FERC rules in gas or electricity markets. 15 U.S.C. 717t-1; 16 U.S.C. 825o-1(b). All such penalties, however, go to the United States Treasury, not to the injured customers, absent agreement by the defendant. FERC can also order disgorgement of ill-gotten profits as a result of market manipulation. *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008). Both remedies are, at best, an imperfect approximation of market-wide injury to purchasers and, at

[5] FERC has not been a consistently vigilant market monitor. For instance, the Department of Justice concluded that Keyspan and Morgan Stanley engaged in anticompetitive conduct in the New York City generation capacity market, *Keyspan*, 763 F.Supp.2d at 636, whereas FERC cleared the two parties of any wrongdoing. Fed. Energy Reg. Comm'n, Enforcement Staff Report, Findings of a Non-Public Investigation of Potential Market Manipulation by Suppliers in the New York City Capacity Market, Dkt. Nos. IN08-2-000 & EL07-39-000 (Feb. 28, 2008).

worst, a small fraction of market harm and woefully inadequate to deter market misconduct. And they offer no guarantee of full compensation for injured parties.

Given FERC's limited market oversight powers, antitrust enforcement plays an important role in gas and electricity markets. Antitrust lawsuits help identify and stop anticompetitive practices and ensure that market-based pricing serves the public. When sellers engage in collusion, exclusion and mergers, they can enhance and maintain their market power and profit at the expense of purchasers and rivals. *See, e.g.*, *Keyspan*, 763 F.Supp. at 636 (describing alleged effects of anticompetitive swap agreement involving rival generators in New York City). As federal regulators have renounced or been deprived by Congress of direct price-setting authorities, the full effectiveness of the antitrust laws is essential. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1648 (2003). *See also* Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 Calif. L. Rev. 1059, 1059 (1987) ("While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.").

The filed rate doctrine's limitation on private antitrust enforcement subverts the effectiveness of the antitrust laws. The ability of injured consumers and businesses to bring antitrust suits is a pillar of the American antitrust enforcement

regime. Under the Clayton Act, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) ("Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. . . . As we have recognized, '[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'").

Empirical research shows the public importance of "private attorneys general" and the value of having more enforcers on the beat against corporate collusion, consolidation, and monopolization. A study of 60 private antitrust lawsuits between 1990 and 2011 found that these actions generated more deterrence than the federal government's *entire* criminal antitrust enforcement activity over the same period. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev.

1, 26 (2013). And these lawsuits compensated injured parties, whereas public enforcement generally did not.

Under the district court's neutering of private antitrust enforcement, market participants have expansive power to control markets through collusive and exclusionary conduct and extract billions in overcharges from the public. Their discretion and power are subject only to the limited oversight of FERC, *supra*, and resource-constrained public antitrust enforcement agencies. Kadhim Shubber, *Staffing at Antitrust Regulator Declines under Donald Trump*, Fin. Times, Feb. 7, 2019. Federal antitrust enforcers themselves have recognized the central role of suits brought by consumers and businesses injured by antitrust violations. *See, e.g.,* Study of Monopoly Power: Hearing Before the H. Comm. on the Judiciary, 82 Cong. Rec. 15 (1951) (Statement of H. Graham Morison, Assistant Attorney General in charge of Antitrust Div., Dep't of Justice) ("[I]f you did away with the triple damages suit entirely and still wanted substantial enforcement in order to have economic freedom you would have to quadruple the size of the Antitrust Division.").

The district court's expansion of the filed rate doctrine establishes for gas and electricity a regime of "radical deregulation—markets absent common law and antitrust protections." Rossi, *supra*, at 1596. By barring purchasers of power and potentially other market participants from bringing antitrust suits for damages, the

court's ruling blocks arguably the most effective antitrust enforcers—individuals and businesses—from vindicating their rights and protecting the public.

CONCLUSION

For the foregoing reasons, this Court should limit the filed rate doctrine to its scope as articulated by the Supreme Court in *Square D* and this Court in *Town of Norwood*. The district court improperly expanded the filed rate doctrine to cover market-based prices that are not filed with a federal regulator before they take effect. Accordingly, this Court should reverse the district court's granting of the defendants-appellees' motion to dismiss and remand the case for discovery.

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g), Open Markets Institute certifies that this brief is in 14-point Times New Roman proportional font and contains 6,346 words. The brief therefore complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

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