UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:                        :
                              :    Chapter 11
   NRG ENERGY, INC., et al.,  :    Case no. 03-13024 (PCB)
                              :
          Reorganized Debtors.:
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MEMORANDUM DECISION SUSTAINING IN PART AND OVERRULING IN PART OBJECTION TO CLAIMS

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STUART M. BERNSTEIN
Chief United States Bankruptcy Judge:

The debtor, NRG Energy, Inc. ("NRG"), supplemented an earlier objection to certain claims, identified below, contending that they are barred by various federal preemption doctrines. The claims relate to excessive electricity rates paid by the creditors. For the reasons that follow, the objection is sustained in part and overruled in part.

BACKGROUND

At all relevant times prior to the bankruptcy, NRG was engaged, inter alia, in the sale of electricity in the wholesale energy market in California. On May 14, 2003, NRG and its debtor affiliates (collectively, "NRG") filed these chapter 11 cases. On November 24, 2003, the Bankruptcy Court entered an order confirming NRG's plan, and the NRG Plan became effective on December 5, 2003.

A. The California Energy Market

The claims at issue arise out of the California energy crisis that occurred earlier this decade. The background is summarized in California v. Dynegy, Inc., 375 F.3d 831, 835-36 (9th Cir. 2003), cert. denied, 544 U.S. 974 (2005) and Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., 384 F.3d 756, 758-59 (9th Cir. 2004)("Snohomish"), cert. denied, 125 S. Ct. 2957 (2005), and following discussion is distilled from those decisions.

Prior to 1996, California electricity rates were based on the cost of producing and transmitting electricity plus an expected rate of return. The Federal Energy Regulatory Commission, or FERC, reviewed and approved the cost-based tariffs. The rate schedules had to be published, and the utility could charge only the filed rate.

In 1996, California switched from a cost-based to a market-based system in which rates were determined by competitive forces. Through appropriate legislation, California formed two non-governmental entities, both subject to FERC regulation, to facilitate the transmission and sale of electricity. The Independent Power Exchange ("PX") operated what amounted to a daily market for the purchase and sale of electricity. Wholesale buyers and sellers of electricity submitted bids, and PX set the market-

clearing price based on its evaluation of the bids. Every exchange took place at that price, regardless of the actual "bid" and "asked" prices.

The Independent System Operator ("ISO") was responsible for the efficient functioning of the high-voltage transmission grid. Essentially, ISO operated a spot market that matched the supply and demand at any given time through two distinct programs. First, producers of electricity would offer to sell ISO "imbalance energy," i.e., energy needed to balance the grid. The sellers' bids had to be made no later than 45 minutes before the operating hour. ISO ranked the bids, and purchased the electricity the market-clearing price. Second, ISO procured "ancillary services." Under this program, producers contracted with ISO to hold capacity in reserve in case it was needed in the future. The producers were compensated for holding the capacity in reserve, and were also compensated if ISO purchased any of the reserved capacity.

The rates in the PX and ISO markets for wholesale electricity rose dramatically during 200 and 2001, and consumer users paid record high rates. This spawned a host of lawsuits.[1] Numerous entities sued various wholesale electricity sellers, including NRG,

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[1] In addition, FERC commenced refund proceedings, and has conducted investigations into the trading, price manipulation and other activities that form the basis of the lawsuits. See In re Enron Corp., 326 B.R. 257, 260 (Bankr. S.D.N.Y. 2005).

alleging that the defendants had manipulated the market in violation of California law, and caused the plaintiffs to pay higher prices for electricity. Several of the pending actions were consolidated in the San Diego Superior Court under a Master Complaint, and denominated the Wholesale Electricity I & II Cases.[2] Oscar's Photo Lab, suing on behalf of itself and all other similarly situated California business and residential ratepayers (the "Ratepayers"), and Borrego Water District, Padre Dam Water District, Ramona Water District, Sweet Water Authority, Valley Center Water District, Vista Irrigation District, Fallbrook Public Utility District and Yuima Water District (collectively, the "Water Districts" and together with the Ratepayers, the "Claimants"), joined as plaintiffs under the Master Complaint. (See Master Complaint, ¶¶ 8-10, 12-15, 19, 22 and 72.) NRG was one of many named defendants. (Id., at ¶ 31.)

The Master Complaint alleged that the defendants' conduct violated California's antitrust law, CAL. BUS. & PROF. CODE §§ 16700, et seq., and California's unfair competition law. Id., §§ 17200, et seq.. By order dated July 22, 2005, the California state court dismissed the claims against NRG without prejudice based on these

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[2] A copy of the Master Complaint is annexed as Exhibit 3 to the Answer of Borrego Springs Water District [etc.], dated Apr. 6, 2004 (ECF Doc. # 1308).

bankruptcy proceedings.[3] The California court subsequently dismissed the entire Master Complaint under the doctrine of federal preemption on October 3, 2005, reasoning that "Congress delegated to FERC [Federal Energy Regulation Commission] the 'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'" (NRG Supplement, Ex. 1, at 2)(quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)). Alternatively, the court concluded that the plaintiffs' claims were barred by the filed rate doctrine. (NRG Supplement, Ex. 1, at 4.)

B. The Claims Objections

In the interim, the Claimants filed the following claims in the NRG bankruptcy cases:

Claimant	**Claim Nos.**
Ratepayers	572, 574, 575, 576
Sweet Water Authority	271, 1730
Ramona Water District	272, 1729
Vista Irrigation District	273, 1728
Yuima Water District	274
Fallbrook Public Utility District	1726
Padre Dam Water District	276, 1725

[3] A copy of the July 22, 2005 order is annexed as Exhibit 2 to NRG's Supplement to Objection of NRG Energy, Inc. to Claims Filed by [the Claimants], dated Jan. 31, 2006 ("NRG Supplement") (ECF Doc. # 1629).

Valley Center Water District	278, 1731
Borrego Water District	1245, 1732

The Ratepayers' claims, which are identical, were filed against four NRG affiliates. Each attached the Master Complaint. The initial claims filed by the Water Districts (other than Fallbrook Public Utility District)[4], (see claim nos. 271-274, 276, 278, 1245), were also identical, except for the amount. Each annexed a declaration executed by Mary E. Coburn, Esq., that referred to and implicitly incorporated the allegations in the Master Complaint. The higher-numbered, later claims filed by Water Districts (except Yuima Water District), (see Claim nos. 1725-26, 1728-32), asserted administrative claims.[5]

On or about March 4, 2004, NRG filed its First Omnibus Motion Objecting to Claims (ECF Doc. # 1216), which included the claims of the Claimants. The objection asserted three grounds: (1) the claims are not enforceable against NRG under any agreement or applicable law, (2) NRG's books and records did not indicate any amount owing, and (3) the claims are were unliquidated. The

[4] The Fallbrook claim (No. 1726) may have been included in this supplemental objection by error. In any event, the text of the supplement does not mention Fallbrook, and for this reason, the objection is overruled without prejudice as to Fallbrook. Unless otherwise noted, further references to the Water Districts or their claims does not include Fallbrook.

[5] The administrative claims referred to the Water Districts' earlier 2001 complaint rather than the Master Complaint that superseded it.

Ratepayers and Water Districts filed opposition, and that motion is still pending before a different judge.

In January 2006, NRG filed this supplement to its earlier objection. In the main, NRG now contends that the claims are barred by federal preemption and the filed rate doctrine. In addition, NRG maintains that the claims of Oscar's Photo Lab ("OPL") are barred by collateral estoppel The Ratepayers' filed a response, in which the Water Districts joined, contending that the state law claims are not preempted, and the filed rate doctrine does not apply because there were no filed rates.

DISCUSSION

A. Preemption

"Federal preemption of state law is rooted in the Supremacy Clause, Article VI, clause 2, or the United States Constitution." Transmission Agency of California v. Sierra Pacific Power Co., 295 F.3d 918, 928 (9th Cir. 2002). Preemption may be express or implied:

> In the absence of express preemption, federal law may pre-empt state claims in two ways. . . . Under field preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Alternatively, there is conflict preemption: "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to

> the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. (internal citations omitted).

California v. Dynegy, Inc., 375 F.3d at 849; accord New York v. FCC, 267 F.3d 91, 101 (2d Cir. 2001)("Federal preemption of state law can occur in several different ways: first, Congress may explicitly provide for preemption; second, Congress's intent to preempt state law may be inferred where the federal regulation in a particular area 'left no room for supplementary state regulation;' third, state law is nullified to the extent that it actually conflicts with federal law.")(Citation omitted).

The filed rate doctrine is related to field and conflict preemption:

> Under the filed rate doctrine, the terms of the filed tariff "are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' " of the contracting parties. Evanns v. AT & T Corp., 229 F.3d 837, 840 (9th Cir.2000) (citing Marcus v. AT & T Co., 138 F.3d 46, 56 (2d Cir.1998)); see also Evanns, 229 F.3d at 840 n. 9. As a result, "the filed rate doctrine bars all claims-- state and federal--that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed." County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 866(9th Cir.1997); Evanns, 229 F.3d at 840. See also AT & T Co. v. Central Office Tel., Inc., 524 U.S. 214, 227-28, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (filed rate doctrine barred state law claims for breach of contract and tortious interference with contractual relations).

California v. Dynegy, Inc., 375 F.3d at 853.

B. The Federal Power Act

The preemption in this matter arises from the Federal Power Act (the "FPA"). Section 201 of the FPA, 16 U.S.C. § 824d, delegates to FERC the "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982); see also Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986). Congress thereby drew "a bright line[,] easily ascertained, between state and federal jurisdiction" such that "FERC clearly has exclusive jurisdiction over the rates to be charged [to] interstate wholesale customers." Nantahala, 476 U.S. at 966 (quoting Fed. Power Comm'n v.S. Cal. Edison Co., 376 U.S. 205, 215 (1964) ("FPC")); New York v. FERC, 535 U.S. 1, 6-7 (2002).

As a result of FERC's exclusive authority in the area, any cause of action or claim that requires a forum other than FERC to compute the reasonable price for wholesale electricity or damages based upon the payment of a price in excess of the reasonable price is barred by the three related doctrines of field preemption, conflict preemption and the filed rate doctrine. These principles apply even where the claims are asserted solely under state law. Two cases that are factually analogous if not identical to the present case illustrate this principle.

In Snohomish, the plaintiff alleged that the defendants had manipulated the price of wholesale electricity, and caused the plaintiffs to pay higher prices, in violation of California's antitrust and unfair competition laws. The plaintiff sought injunctive relief, disgorgement, restitution, damages and attorney's fees. Id. at 759-60. The district court ruled that the claims were barred by the filed rate doctrine and the principles of conflict and field preemption. Id. at 760.

On appeal, the plaintiff argued that the preemption doctrines should not apply to the wholesale electricity market because market-based rates, rather than FERC determined rates, apply. Id. According to the Ninth Circuit Court of Appeals, "[t]he fundamental question in this case is whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws." Id.

Building on its prior decisions in California v. Dynegy, Inc. and Public Util. Dist. No. 1 of Grays Harbor County Washington v. IDACORP, Inc., 379 F.3d 641 (9th Cir. 2004)("Grays Harbor"), the Ninth Circuit answered the question in the affirmative. First, each seller was required to file a market-based umbrella tariff. The tariff preauthorized the seller to engage in market based sales, and place the public on notice that the seller might do so.

384 F.3d at 760. The market-based tariff was subject to approval by FERC "upon a showing that the seller lacked or had mitigated its market power." Id. FERC's determination enforced the belief that the seller will be able to charge only just and reasonable rates. Id. Second, FERC continually monitored the rates by requiring each seller to file quarterly reports detailing the rates charged and the power delivered. Id. Third, FERC reviewed and approved the detailed tariffs filed by PX and ISO. Id. at 761.

Affirming the district court, the Court of Appeals concluded:

> Snohomish's claims in this case allege violations of state antitrust and unfair competition law rather than the state contract law claims involved in Grays Harbor, but Snohomish's claims also ask the district court to determine the rates that "would have been achieved in a competitive market." This is the same determination as the "fair price" determination that we held was barred by preemption principles in Grays Harbor. We therefore hold that Snohomish's claims are barred by the filed rate doctrine, by field preemption, and by conflict preemption.

Id. at 761.

In re Enron Corp., 328 B.R. 75 (Bankr. S.D.N.Y. 2005), aff'd sub nom., Oscar's Photo Lab v. Enron Corp., No. 05 Civ. 9981 (MGC) (S.D.N.Y. 2006)(ECF Doc. # 15), reached the same result on similar facts. There, Oscar's Photo Labs asserted the same claims alleged in this case. Judge Gonzalez ruled that the claims were barred by field preemption, id. at 80-83, conflict preemption, id. at 83, and the filed rate doctrine. Id. at 83-86. District Judge Cedarbaum

affirmed "on the opinion of the Bankruptcy Court with respect to the filed rate doctrine and preemption based on the conflict between the Federal Power Act, 16 U.S.C. § 824, and state antitrust and unfair competition laws."

Indeed, the California court dismissed the Master Complaint asserting the same claims by the same Claimants under these preemption doctrines. At oral argument, NRG's counsel acknowledged that the lower state court determination would not be entitled to collateral estoppel effect under California law. Nevertheless, the state court decision is persuasive, and adds to the well-established law in this area.

Undaunted, the Claimants continue to prosecute the same claims that have been rejected by the California state and federal courts, Judge Gonzalez and Judge Cedarbaum. They simply rehash arguments made and rejected in those cases, and require no additional comment. Here, the Claimants' state law antitrust and unfair competition claims essentially require the Court to compute a hypothetical reasonable rate, and award damages in the form of an allowable claim measured by the difference between the reasonable rate and the market-based rates paid by the purchasers. Congress, however, has granted FERC the exclusive jurisdiction in the field of setting the reasonable rate for the purchase and sale of

wholesale electricity, and the Claimants' efforts to enforce their claims in this Court conflict with that Congressional purpose. Accordingly, the claims are barred by field and conflict preemption. In addition, the filed rate doctrine prevents this Court from setting a different, hypothetical fair rate against which to measure the amount of the allowable claims. In light of this conclusion, it is unnecessary to decide whether the claim of Oscar's Photo Labs is also barred by principles of collateral estoppel based on the Enron decision.

Accordingly, NRG's objection is sustained as to all Claimants other than Fallbrook, and the objection to claim no. 1726 is overruled without prejudice. Settle order on notice.

Dated: New York, New York
May 17, 2006

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
Chief United States Bankruptcy Judge