

No. 05-15127

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA PACIFIC RESOURCES
AND NEVADA POWER COMPANY,

Appellants,

v.

EL PASO CORPORATION; ET AL,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA CV-S-03-0414-JCM-RJJ

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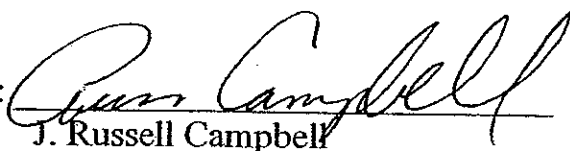
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Fed. R. App. P., Sierra Pacific Resources and Nevada Power Company make the following disclosures:

1. Sierra Pacific Resources is a publicly held corporation.
2. Nevada Power Company has 100% of its stock owned by Sierra Pacific Resources.

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STATEMENT OF JURISDICTION

The United States District Court for the District of Nevada had subject matter jurisdiction over this case under 28 U.S.C. § 1331. The complaint filed by Sierra Pacific Resources and Nevada Power Company (collectively, “Nevada Power”) sets forth claims arising under federal antitrust law, 15 U.S.C. § 1, and the Racketeer Influenced Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c) and (d), and other state law claims arising from the same common nucleus of operative fact. (ER-128:69-72,85-92).¹ See 28 U.S.C. § 1367(a) (1993) (Supp. 2004); *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

The United States Court of Appeals for the Ninth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291. The district court entered a final judgment, granting defendants’ motions to dismiss and disposing of all of Nevada Power’s claims, on December 13, 2004. (ER-162.) Pursuant to Rule 4(a), Fed. R. App. P., Sierra Pacific Resources and Nevada Power timely filed their notice of appeal on January 7, 2005. (ER-165.)

¹ “ER-128:33-43” refers to Excerpts of Record, tab 128 (the district court clerk’s docket sheet number), and pages 33-43 of the document at tab 128. Similarly, references to “C” are to documents contained in the clerk’s record.

STATEMENT OF ISSUES

- I. Whether the district court erred in granting the motion to dismiss Nevada Power's natural gas claims based on the filed rate doctrine when, in contrast to wholesale electricity sales:
 - A. The Federal Energy Regulatory Commission (the "Commission") has no jurisdiction over and required no filing of rates or transaction data for the natural gas sales, the hedge contracts, or the pipeline termination alleged in the Complaint;
 - B. Nevada Power's damages calculations will not require the district court to assume or change any Commission-approved rate; and
 - C. Congress provides no system of administrative review of rates in exempt natural gas transactions.

- II. Whether Nevada Power alleges a RICO association-in-fact "enterprise" distinct from the racketeering activity, when the Complaint expressly alleges that the enterprise "existed separate and apart from the pattern of racketeering activity."²

² Nevada Power waives for appeal the issue of whether Sierra Pacific Resources, Nevada Power's parent corporation, had standing to sue.

STATEMENT OF THE CASE

This case is about the application of the filed rate doctrine to natural gas transactions that fall outside the Commission's rate-setting jurisdiction and for which no tariff rate or transaction data was filed.

Nevada Power filed its original complaint on April 21, 2003, alleging that El Paso Corporation and El Paso Natural Gas Company (collectively, "El Paso"), Sempra Energy Trading Corporation ("Sempra"), and the other defendants (collectively, the "Gas Companies"): (i) made false reports to private natural gas price indices resulting in dysfunctionally high natural gas prices that Nevada Power paid generally to third party merchant energy traders; and (ii) collusively terminated a pipeline project that would have increased the supply and reduced the price of natural gas in the Las Vegas area. (C-1, Orig. Compl.:7-10.) Nevada Power filed its first amended complaint on July 7, 2003. (C-17, First Amd. Compl.) Relying principally on the filed rate doctrine, the Honorable James C. Mahan dismissed the first amended complaint by an order entered on February 17, 2004, but on reconsideration gave Nevada Power leave to amend. (C-118, Order of Dism. & C-124, Order Granting Leave to Amd.)

On June 4, 2004, Nevada Power filed its second amended complaint (the "Complaint"), alleging violation of the Nevada Unfair Trade Practices Act,

violation of the Sherman Antitrust Act, fraud, conspiracy to defraud, fraudulent suppression, violation of Nevada's Racketeer Influenced Corrupt Organizations Act ("Nevada RICO"), conspiracy to violate Nevada RICO, violation of federal RICO, unjust enrichment, breach of contract, and rescission. (ER-128:67-91.)

On December 13, 2004, Judge Mahan dismissed the Complaint based on the filed rate doctrine. (ER-162:1-2.) The district court also held that Sierra Pacific Resources lacked standing, that Nevada Power did not allege a RICO enterprise that was separate and distinct from the RICO predicate acts, and that the rest of the issues were therefore moot. (*Id.* at 2.)

On January 7, 2005, Nevada Power Company and Sierra Pacific Resources filed this appeal. (ER-165.)

STATEMENT OF THE FACTS

Nevada Power is an electric utility serving customers in southern Nevada. (ER-128:6.) Nevada Power purchases natural gas at retail as fuel to generate electricity for its customers, not for the purpose of reselling gas to another party. (*Id.* at 25-27.) Nevada Power purchased natural gas from merchant energy traders who typically purchased the gas from producers in transactions that were the “first sales” by the producers. (*Id.* at 17.) Specifically, Nevada Power alleges that the gas producers sold natural gas to Barrett – a merchant energy trader that is unaffiliated with a pipeline – an unregulated “first sale.” (ER-128:15-16.) The Complaint alleges that Barrett then resold the gas to Nevada Power for use in powering electric generators – an unregulated retail sale. (*Id.*)

The prices Nevada Power paid for natural gas were the product of three categories of wrongdoing. (*Id.* at 51.) First, during 2000-2001, the Gas Companies “systematically supplied [natural gas index] publications with false information about natural gas trades.” (ER-128:25.) Through this false reporting, the Gas Companies fraudulently inflated natural gas index prices and, consequently, the retail prices paid by Nevada Power to the merchant energy traders who are not parties to this action, as well as prices paid to certain of the Gas Companies. (*Id.* at 16-17,25,46-54,73-77.) The Gas Companies knew the false

trading information and the resulting dysfunctional pricing would affect purchase decisions by Nevada Power because it is common practice for transactions to be made in direct reliance upon the indices. (*Id.* at 25.) Nevada Power had numerous natural gas purchase contracts that expressly incorporated the prevailing index price as the contract price. (*Id.* at 47-48.)

Second, Nevada Power heard and relied on the Gas Companies' lulling misrepresentations, *i.e.*, false assurances that the natural gas market was functioning properly. (ER-128:47-48,51-53,73-75.) These misrepresentations were crafted to mask the Gas Companies' false reporting activities and other market manipulations, and they induced Nevada Power to purchase financial instruments – hedges – to guard against what Nevada Power believed to be persistent market volatility. (*Id.* at 51-53,55-66,80.) These hedge contracts provided that Nevada Power would receive money if the price of gas exceeded a certain point and would pay money if the price dropped below a certain point. (*Id.* at 27-28.)

The Gas Companies' manipulation caused Nevada Power to enter into hedge contracts with artificially high front-end prices. (*Id.* 66,80.) After the Gas Companies' price-index-manipulation scheme fell apart, the price of natural gas fell back to normal levels, leaving Nevada Power to pay the artificially high back-end price. (*Id.*) In essence, the Gas Companies used hedging activity as a safety

net for the day their fraud was discovered and the market returned to normal price levels. (*Id.* at 45-46,65-66.) That day came at great expense to Nevada Power and other retail gas consumers. (*Id.*)

Third, the Gas Companies entered into a conspiracy in Phoenix, Arizona (the “Phoenix Conspiracy”) to terminate the planned new Altamont pipeline project that would have caused more inexpensive gas to be brought to the Las Vegas area. (ER-128:29,31,35,33-46.) By terminating the project, the Phoenix Conspiracy was able to keep gas prices artificially high. (*Id.* at 35,36,45.)

With respect to the Nevada and federal RICO charges, the Complaint alleged an association-in-fact enterprise involving the Gas Companies that committed the predicate acts of mail fraud and wire fraud. (ER-128:81-91.) The racketeering activities involved false reporting to natural gas price indices, extortion, and obtaining money by false pretenses. (*Id.*) The enterprise, however, had a broader purpose than the racketeering activity and, therefore, a separate existence. (*Id.* at 81-82,85-86.) Moreover, some of the Gas Companies engaged in the separate non-racketeering acts of conspiring to terminate the pipeline project – the Phoenix Conspiracy. (*Id.* at 86.)

SUMMARY OF THE ARGUMENT

This appeal turns on a simple premise: With no filed rate (or tariff) to protect and no Commission jurisdiction to heed, the district court erroneously applied the filed rate doctrine to dismiss Nevada Power's natural gas claims. As is evident from its very name, the "filed rate doctrine" protects filed rates, tariffs, and administrative jurisdiction. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) [*Arkla*]. Unlike market-based electricity claims, Nevada Power's natural gas claims implicate none of these interests. The Complaint alleges sales of natural gas by producers to merchant energy traders and then to Nevada Power for consumption, the purchase of purely financial gas hedge contracts, and the termination of a proposed gas pipeline project. These transactions, taken as true at the motion-to-dismiss stage, fall outside the Commission's jurisdiction under express statutory language as recognized by the Commission and the courts.

Specifically, there are three reasons that the filed rate doctrine does not apply to the natural gas transactions in this case. First, the Commission has no jurisdiction over the retail sales of natural gas to Nevada Power or the upstream wholesale sales to its suppliers, no jurisdiction over financial hedging transactions, and no jurisdiction over a decision to terminate a proposed pipeline project.

Accordingly, no rate or transaction data, of any kind, was ever required to be filed with the Commission.

Second, a court would not have to compute a Commission-approved “hypothetical rate” to compute damages. Awarding damages would neither require the district court to assume the Commission would approve any hypothetical rate nor undermine a Commission-approved rate, because no such thing exists. No Commission-approved rate would be changed or modified as a result of any damages award in this case.

Third, Congress has not provided a statutory system of administrative review of rates for exempt natural gas transactions. Accordingly, the courts are the proper forum for the review of natural gas transactions over which the Commission has no jurisdiction.

At the motion-to-dismiss stage, the Gas Companies cannot bear their burden of showing that all three requirements of the filed rate doctrine affirmative defense apply to every transaction that Nevada Power alleges. For example, Nevada Power alleges that as producers sold natural gas to Barrett, a merchant energy trader that is unaffiliated with a pipeline. (ER-128:15-16.) The Commission has recognized that it has no jurisdiction over this “first sale” transaction – *e.g.*, the first sale of gas by the producer. *Nat’l Ass’n of Gas Consumers Proceeding*, 106 FERC ¶ 61, 072, ¶ 61,248, 2004 WL 179284, at *2 (2004) [“NAGC Proceeding”] (“The Wellhead

Decontrol Act removed 'first sales' as defined in the NGPA, from the Commission's 'sale for resale' jurisdiction."). The Complaint alleges that Barrett then resold the gas to Nevada Power for use in powering electric generators. (ER-128:15-16.) The Supreme Court has recognized that such sales for consumption are exempt retail sales. *See Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 516-17 (1947).

Nevada Power's Gas Transactions are Fundamentally Different from the Electricity Transactions this Court Recently Addressed.

This case is fundamentally different from this Court's recent market-based **electricity** cases where the filed rate doctrine did apply because: (1) the Federal Power Act grants the Commission jurisdiction over all interstate wholesale sales of **electricity**, and the Commission requires filing and approval of tariffs and transaction data; (2) computing damages on **electricity** claims would require the courts to assume the Commission would have approved hypothetical new **electricity** rates; and (3) the Commission provides a forum for the review of **electricity** rates. *See, e.g., Public Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 761 (9th Cir. 2004) [*Snohomish*] (holding filed rate doctrine barred claims on electricity sales within the Commission's "jurisdiction" and for which sellers "file[d] quarterly reports . . . to ensure the rates will be on file as required by

FPA § 205(c)”), *cert. denied*, 125 S. Ct. 2957 (2005); *California v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (remanding administrative proceeding back to the Commission to reconsider refund remedy on electricity claims).

**The Commission Lacks Rate-Setting Jurisdiction
and Requires No Filing or Approval of Rates.**

1. The Natural Gas Transactions were Unregulated.

Unlike the transactions in this Court’s recent electricity cases, both the retail sales of gas to Nevada Power to burn in its generators and the upstream wholesale sales to Nevada Power’s suppliers are exempt from Commission rate-setting jurisdiction. Retail sales are exempt from the Commission’s rate-setting jurisdiction under Section 1(b) of the NGA. *See Panhandle E. Pipe Line*, 332 U.S. at 516-17. The upstream wholesale sales typically fall within the category of “first sales” (e.g., the first sale of the gas from the wellhead to a middleman). Such “first sales” are now statutorily exempt from the Commission’s rate-setting jurisdiction. *See Wellhead Decontrol Act* § 3 (b)(7); 15 U.S.C. § 3431(a)(1)(A) [“WDA”] (providing that as of January 1, 1993, “the **jurisdiction** of the Commission under such Act **shall not apply** to any natural gas solely by reason of any **first sale** of such natural gas”) (emphases added).

Moreover, unlike jurisdictional electricity sales, the Commission does not require the filing of transaction data for non-jurisdictional natural gas transactions. See Order 2001, *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107, ¶¶ 103-105, 2002 WL 977239, *18-*19 (2002) (stating that “many of the gas sales . . . are no longer jurisdictional” and thus, “[t]he Commission terminated the data collection” and “no longer require[s] additional reports”).

Without statutory rate-setting jurisdiction or any transaction data filing requirement, the filed rate doctrine does not apply. See *Arkla*, 453 U.S. at 575 n.4, 584 n.14 (stating that where the Commission “no longer required . . . rate increase filings,” “[t]here is no bar to damages . . .”).

2. This Case Differs from *Stanislaus*.

The trial court held that the filed rate doctrine barred Nevada Power’s claims based on *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998). In *Stanislaus*, 114 F.3d at 860-62, retail purchasers challenged wholesale transactions, including the importations of gas from Canada and resales to California that increased the retail price the purchasers had paid for the gas. The filed rate doctrine barred the claims because the wholesale rates and transactions were within the jurisdiction of the federal regulatory agencies and had been approved by them. *Id.* at 865. Nevada Power

does not challenge a wholesale natural gas rate or transaction that is within the Commission's jurisdiction or that has been approved by the Commission: this fact critically distinguishes Nevada Power's claims from the claims dismissed in *Stanislaus*.

**Nevada Power's Damages Will Not Require Assumption of
a Commission-Approved Hypothetical Rate.**

Again, unlike the claims in the electricity cases, Nevada Power's natural gas claims will not require a computation of damages based on a hypothetical rate that the district court would have to assume the Commission would have approved. Because the Commission has no jurisdiction over Nevada Power's exempt gas transactions and could not require tariff or transaction data filing, the Commission did not approve and would not have authority to approve any different price for those exempt transactions. *Cf. Stanislaus*, 114 F.3d at 865 (barring damages claims where federal agencies did have authority to approve a different price for jurisdictional transactions). Absent Commission jurisdiction and a filing requirement, the filed rate doctrine does not bar Nevada Power's damages claims. *See, e.g., Arkla*, 453 U.S. at 584 n.14 ("There is no bar to damages for the period [for which tariff filing was not required]").

**Congress Has Not Authorized Administrative Review
of Natural Gas Rates by the Commission.**

Unlike the electricity cases, where this Court held that proceeding to litigation would conflict with the Commission's California refund cases, here no conflict exists. Congress has not provided a system of administrative review for rates charged in exempt natural gas transactions. When injured parties recently petitioned the Commission for relief from gas rates, the Commission stated: "The Wellhead Decontrol Act removed 'first sales' as defined in the NGPA, from the Commission's 'sale for resale' jurisdiction. . . . Consequently, the Commission cannot impose a cap on gas sales" *NAGC Proceeding*, 106 FERC ¶ 61,072, ¶ 61,248, 2004 WL 179284, at *2 (emphases added). Litigation regarding natural gas sales is now routinely conducted in state and federal courts, by gas companies, including a defendant/appellee in this case. *See, e.g., Sempra Energy Trading Corp. v. PG&E Texas VGM, L.P.*, 728 N.Y.S.2d 16 (N.Y. App. Div. 2001).

**The Filed Rate Doctrine Does Not Bar Nevada Power's
Hedge Contract and Pipeline Termination Claims.**

Similarly, Nevada Power's purchase of financial hedge contracts falls outside Commission jurisdiction. (ER-128:51-53,55-66,80.) The Commission has long recognized that it has no jurisdiction over purely financial instruments where no electricity or natural gas is actually delivered. *See Katy Interchange Serv.*, 48

FERC ¶ 61,332, ¶¶ 62,109, 1989 WL 262421 (1989). The damages for the hedge contracts would equal the amount Nevada Power actually paid upon their termination, which would not involve any hypothetical rate or any assumption about Commission approval. Suits involving natural gas financial contracts are also brought in federal and state courts, as opposed to administrative proceedings before the Commission. *See, e.g., Hess Energy, Inc. v. Lightning Oil Co., Ltd.*, 338 F.3d 357 (4th Cir. 2003).

Likewise, Nevada Power's antitrust claims are not barred by the filed rate doctrine because the decision not to build or to terminate a proposed pipeline project is not within the Commission's jurisdiction and no filing of any tariff or Commission approval is required. (ER-128:29,31,35,33-46); *see Panhandle Eastern Pipeline Co. v. FPC*, 204 F.2d 675, 680 (3rd Cir. 1953). Further, the computation of damages would not assume a Commission-approved rate because sales of gas from the new pipeline to Nevada Power would have also been exempt. No system of administrative review exists for the termination of proposed pipeline projects. *Id.*

Nevada Power's RICO Claims Allege a Separate "Enterprise."

With respect to its RICO claims, Nevada Power did allege an "enterprise" separate and apart from the conspiracy to commit the predicate racketeering acts.

The Complaint alleges that the Gas Companies committed the predicate acts, including mail fraud and wire fraud, by falsely reporting to the gas indices. (ER-128:81-91.) Further, the Complaint alleges that some of the Gas Companies engaged in separate, non-predicate acts of conspiring to terminate a proposed pipeline project. (*Id.* at 86.) The racketeering activity alleged is more narrow than the Gas Companies' overall conduct. As such, the racketeering activity is separate and distinct from the RICO enterprise.

The district court erred in granting the Gas Companies' motions to dismiss.

STANDARD OF REVIEW

This Court “review[s] the district court’s grant of a motion to dismiss *de novo*.” *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). “A motion to dismiss should not be granted unless it appears beyond doubt [that] the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *See Kaiser v. Blue Cross*, 347 F.3d 1107, 1111 (9th Cir. 2003) (internal quotations omitted.)

The filed rate doctrine is an affirmative defense. *See, e.g., Smith v. Sprint Comm’s Co.*, No. C 96-2067 FMS, 1996 WL 1058204 (N.D. Cal. Sept. 13, 1996) (“[D]efendant raises four affirmative defenses to plaintiff’s claims: 1) the filed rate doctrine. . . .”); *In re Jones Truck Lines*, 860 F. Supp. 1360, 1363 (E.D. Wis. 1994) (“Phoenix answered . . . bringing . . . affirmative defenses including . . . the filed rate doctrine.”). “In every civil case, the defendant bears the burden of proof as to each element of an affirmative defense.” *Tovar v. United States Postal Service*, 3 F.3d 1271, 1284 (9th Cir. 1993).

To bear this burden, the Gas Companies must show from the face of the Complaint that the filed rate doctrine applies to each and every transaction that Nevada Power alleges. To establish this, the Gas Companies must show from the face of the Complaint: (1) that each and every transaction was subject to the

Commission's jurisdiction and tariff or transaction data filing and approval were required; (2) that the computation of damages requires the assumption that the Commission would have approved a hypothetical rate; and (3) that there is a system for administrative review of rates by the Commission. They did not and cannot.

ARGUMENT AND CITATIONS OF AUTHORITY

Nevada Power's natural gas claims are not barred by the filed rate doctrine because the current natural gas statutes, unlike the electricity statutes, exempt Nevada Power's natural gas transactions from the jurisdiction/filing, damages, and administrative review requirements.

The Difference Between Electricity and Natural Gas Statutes Drives the Difference in the Application of the Filed Rate Doctrine.

1. The Old Cost-Based Regime: The Filed Rate Doctrine Applied Equally to Electricity and Natural Gas Transactions Because the Statutes Were the Same.

As originally enacted in the 1930s, the Federal Power Act ("FPA") and the Natural Gas Act ("NGA") provided for the same Commission jurisdiction over wholesale sales of electricity and natural gas, the same requirement for the filing of tariffs (*i.e.*, schedules) setting forth rates for the Commission's approval, and the same administrative review by the Commission of challenges to rates. *See* FPA §§ 201(b) (jurisdiction); 205(c) (tariff filing); 206(a) (administrative review) (codified at 16 U.S.C. §§ 824(b); 824d(c); 824e(a) (1997)); NGA §§ 1(b) (jurisdiction); 4(c) (tariff filing); 5(a) (administrative review) (codified at 15 U.S.C. §§ 717(b); 717c(c); 717d(a) (1997)).³ (C-140, Opp. to Mot. to Dism.:8-10.)

³ Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717-717w (1997)); Federal Power Act, Title II of the

a. **The Filed Rate Doctrine Followed the Regulating Statute at Issue.**

Consistent with the original statutes, the filed rate doctrine protected Congress' commitment of electricity and natural gas rate regulation to the Commission. The doctrine barred court challenges to rates where: (1) the Commission had jurisdiction over the sale and required a tariff filing for approval of rates; (2) the computation of damages would require a court to assume that the Commission would approve a new hypothetical rate; and (3) there was a system of administrative review by the Commission.

For example, in *Arkla*, 453 U.S. at 574, the Supreme Court addressed breach of contract claims brought by natural gas producers for Arkla's failure to apply an escalator clause to increase the rate that had been filed with the Commission. First, the Supreme Court determined the gas producers' sales to Arkla "were subject to Commission jurisdiction" and that the gas producers had "filed with the Federal Power Commission (now the Federal Energy Regulatory Commission) the contract and their rates and obtained from the Commission [approval for] the sale of gas at the rates specified in the contract." *Id.* at 574, 584 (emphases added). Second, the Court determined that an "award of damages... [would] necessarily [be]

Public Utility Act of 1935, Pub. L. 74-333, 49 Stat. 838-863 (1935) (codified as amended in 16 U.S.C. §§ 824 – 825u (1997)).

supported by an **assumption** that the higher rate [the gas producers] might have filed with the Commission was reasonable.” *Id.* at 580 (emphasis added). Third, the Court also noted that there was a statutory system of administrative review of rates before the Commission. *Id.* at 576 n.6. Though an aggrieved party could not challenge the Commission-approved rate in court, he could challenge the rate before the Commission. FPA § 206(a); 16 U.S.C. § 824e(a). The Supreme Court concluded: “We hold that the filed rate doctrine prohibits the award of damages for *Arkla’s* breach during the period that respondents were subject to Commission jurisdiction.” *Id.* at 584.

Similarly, in *Stanislaus*, 114 F.3d at 866, retail natural gas purchasers challenged wrongful conduct in the allocation and pricing of gas in wholesale transactions from which their retail prices were derived. While the retail sales were exempt from the Commission’s price-setting jurisdiction under the NGA, the prices paid in the retail transactions were based on the upstream wholesale transactions that were not exempt at that time and were approved by the Commission. During the cost-based rate era, retail prices were set by state utility commissions based on the upstream Commission-approved wholesale price plus a reasonable rate of return. *See Nantahala*, 476 U.S. at 970. The filed rate doctrine operated to ensure that a reseller that had paid a Commission-approved price in an upstream wholesale transaction could recover that price when it resold that gas in a

downstream retail transaction. *Id.* (noting “a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate; . . . such a ‘trapping’ of costs is prohibited”).

In *Stanislaus*, 114 F.3d at 864, this Court applied the *Arkla* analysis and concluded that the Commission had “**jurisdiction**” over and granted “**price approval**” for the wholesale transactions from which the cost-based retail prices were derived. (Emphases added.) Second, this Court concluded that the computation of damages “would require a showing that a hypothetical lower rate should and **would have been adopted** by [the Commission].” *Stanislaus*, 114 F.3d at 863 (emphasis added). Third, this Court noted that the claimants brought complaints before the “state and federal agencies” pursuant to a statutory system of administrative review. *Id.* at 865. Though the aggrieved parties could not challenge the rates in a court, they could challenge the rates, at least prospectively, before the Commission. NGA § 5(a); 15 U.S.C. § 717d(a). This Court concluded: “[T]he filed rate doctrine bars such . . . challenges to federally reviewed and filed rates.” *Stanislaus*, 114 F.3d at 867.

b. The Supreme Court has Held that the Filed Rate Doctrine Does Not Apply where the Jurisdiction, Damages, and Administrative Review Prerequisites were Not Met.

The Supreme Court held that where the jurisdiction-approval, damages, and administrative review prerequisites were not present, the filed rate doctrine did not bar natural gas claims. *Arkla*, 453 U.S. 584 n.14. In *Arkla*, 453 U.S. at 575 n.4, the Supreme Court recognized that the gas producers were “small producers” for the period of 1972 to 1975 and were thus “no longer required to make rate increase filings” for that period under the Commission’s regulations. Because the gas producers were not required to file rate increases with the Commission, the producers could have charged rates below the regulatory ceiling then in effect. The rates the producers sought fell within that range, so to compute damages, a court would make no assumption about whether the Commission would approve such rate increases.

Second, because the small producers were not required to file rate increases with the Commission, no assumption that the Commission would approve such a rate increase was required to compute damages. *See Arkla*, 453 U.S. at 575 n.4. Third, the Commission did not administratively review the small producers’ rates. *Id.* at 575. *See Hall v. Arkansas-Louisiana Gas Co.*, 368 So. 2d 984, 991 (La. 1979) (providing judicial review and damages for post-1972 claims for which the

Commission required no filing and provided no review). Where the aggrieved party could not obtain review by the Commission, it did obtain review from the court. Thus, the Supreme Court of the United States concluded “[t]here is **no bar to damages for the period** after respondents gained ‘small producer’ status.” *Arkla*, 453 U.S. at 584 n.14. (emphasis added).

In *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005), the D.C. Circuit recently addressed a Commission order that required installation and payment for meters on natural gas wells by using a filed tariff to extend the Commission’s jurisdiction to cover gas gathering activities. The court of appeals held that the filed rate doctrine could not confer jurisdiction over otherwise exempt gathering activities. First, the D.C. Circuit observed that the NGA expressly provided that the Commission’s rate-setting jurisdiction “**shall not apply to . . . the production or gathering of natural gas.**” NGA § 1(b) (emphasis added); 15 U.S.C. § 717(b). Concluding that gas wells were involved in the production and gathering of natural gas, the D.C. Circuit explained:

The filed rate doctrine derives from *sections 4* [filing of tariffs] and *5* [setting of rates] of the NGA. . . . Yet NGA section 1(b) states that “the provisions of this chapter” – of which *sections 4 and 5* are two “**shall not apply to . . . the production or gathering of natural gas.** . . . A doctrine that rests on these sections likewise cannot apply to the gathering of natural gas. . . .

This conclusion is consistent with the Supreme Court’s holding that the petitioner in the *Arkla* case was bound by the filed rate

doctrine *only* during the period in which it was otherwise subject to FERC's jurisdiction.

Columbia Gas, 404 F.3d at 462 (bold emphases added).

Second, the D.C. Circuit held that the Commission could not bootstrap its jurisdiction to enforce the tariff because the Commission had no jurisdiction to accept or approve the tariff on exempt activities. *See Columbia Gas*, 404 F.3d at 462. Consequently, any computation of damages would not have been based on any rate the Commission had jurisdiction to approve. Third, although the Commission reviewed the transaction, it had done so outside of any congressionally provided system of administrative review. *See id.* Indeed, the D.C. Circuit rejected the Commission's attempt to review an activity over which it had no jurisdiction. *Id.*

2. The Current Market-Based Regime: The Filed Rate Doctrine Applies Differently Because the Electricity and Natural Gas Statutes Are Now Different.

While Congress has left the broad electricity regulatory statutes in place, it has substantially narrowed the Commission's jurisdiction over natural gas transactions and thus, the filed rate doctrine's application to them:

CURRENT LAW

Electricity Statutes	Natural Gas Statutes
<p><u>Jurisdiction of the Commission:</u> “[T]his subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce” 16 U.S.C. § 824(b)(1).</p>	<p><u>Jurisdiction of the Commission:</u> “[T]his chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, . . . use, and to natural-gas companies engaged in such transportation or sale” 15 U.S.C. § 717(b).</p>
<p><u>First Sale Exemption:</u></p> <p style="text-align: center;"><i>NONE</i></p>	<p><u>First Sale Exemption:</u> “For purposes of section 1(b) of the Natural Gas Act [15 U.S.C.A. § 717(b)], the provisions of the Natural Gas Act [15 U.S.C. § 717 <i>et seq.</i>] and the jurisdiction of the Commission under such Act <u>shall not apply to any natural gas solely by reason of any first sale of such natural gas.</u>” 15 U.S.C. § 3431.</p>
<p><u>Imported Electricity Exemption:</u></p> <p style="text-align: center;"><i>NONE</i></p>	<p><u>Imported Gas Exemption:</u> “With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, . . . (1) the importation of such natural gas shall be treated as a “first sale” within the meaning of section 3301(21) of this title” 15 U.S.C. § 717b(b).</p>

a. **Under *Arkla*, the Filed Rate Doctrine Applies to Market-Based Sales of Electricity.**

Unlike the natural gas statutes, the electricity statutes have not changed. Thus, sales of electricity at “market-based” rates continue to be subject to the filed rate doctrine because all three of the filed rate doctrine prerequisites apply. First, under the market-based-rate system for electricity, the Commission still has “exclusive jurisdiction to set wholesale rates” and “reviewed and approved detailed tariffs filed . . . which described in detail how the markets . . . would function.”⁴ *Snohomish*, 384 F.3d at 761. The Commission also “require[s] each seller to file quarterly reports, which contain . . . the . . . rate charged . . . to ensure the [electricity] rates will be on file as required by FPA § 205(c), 16 U.S.C. § 824d(c).” *Id.*

Second, the sought-after electricity remedy would “require the court to set damages by assuming [that the Commission would approve] a hypothetical rate, the ‘fair value,’ in violation of the filed rate doctrine. . . .” *Public Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 651 (9th Cir. 2004) [*Grays Harbor*]. Third, Congress provided a statutory system of administrative review of the electricity

⁴ The Commission itself changed the method of setting prices for wholesale electricity sales to allow market-based rates to set prices within the FPA’s statutory construct. See, e.g., *Heartland Energy Serv., Inc.*, 68 FERC ¶ 61,223, 1994 WL 415138 (1994) (granting approval to public utility to sell electricity at market-based rates).

rates for the challenged transactions. *See, e.g., California*, 383 F.3d 1006 (remanding administrative proceeding back to Commission for reassessment of refund remedy on electricity transactions); *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, 2003 WL 21480252 (2003) (Commission ordering wholesalers to disgorge profits that resulted from improper conduct in market-based sales of electricity).

Accordingly, each time a claimant has filed a challenge in court to market-based electricity rates, this Court has held that such claims were barred under the filed rate doctrine. *See, e.g., Snohomish*, 384 F.3d at 761; *Grays Harbor*, 379 F.3d at 652; *California v. Dynegy, Inc.*, 375 F.3d 831, 853, *amended*, 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1836 (2005).

b. Under *Arkla*, the Filed Rate Doctrine Does Not Apply to Nevada Power's Exempt Natural Gas Transactions.

In contrast to electricity sales, Congress, in a series of enactments, has statutorily withdrawn virtually all types of wholesale natural gas sales from the Commission's jurisdiction, including the transactions involved in this case. *See* Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. 95-621, 92 Stat. 3351, 15 U.S.C. § 3301 *et seq.* (replacing the Commission's authority to fix producer's rates for natural gas sales with statutory price ceilings and with standby presidential

regulatory authority);⁵ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2866 (1992) (codified at 15 U.S.C. § 717b(b)) (removing importations of natural gas pursuant to a free trade agreement (with Canada and Mexico) from the Commission's jurisdiction). See *Dynegy LNG Production Terminal, L.P.*, 97 FERC ¶ 61,231, 2001 WL 1476137 (2001). (ER-128:13-16) (C-140, Opp. to Mot. to Dism.:11-15.)

The key piece of natural gas deregulation legislation was the **Wellhead Decontrol Act** of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) ["WDA"]. The WDA expressly removed all "first sales" of natural gas from the Commission's jurisdiction effective January 1, 1993:

For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the **jurisdiction of the Commission** under such Act **shall not apply** to any natural gas solely by reason of any **first sale of such natural gas**

WDA § 3 (b)(7); 15 U.S.C. § 3431(a)(1)(A) (emphases added) (internal citations omitted).⁶

⁵ The NGPA also contained a schedule for the deregulation of certain types of gas. NGPA § 121; 15 U.S.C. § 3331.

⁶ The Gas Companies argued below that the 1978 NGPA language deeming the price paid in certain jurisdictional sales as "just and reasonable" eliminated the 1993 first sale exemption. (C-135, Mot. to Dism:16-17) (citing 15 U.S.C. § 3431(b)(1)(A); 15 U.S.C. § 3431(c)(2)). However, this language merely allowed pipelines and other "natural gas companies" that remained subject to the Commission's jurisdiction over resale transactions to recover the amount they paid

“First sales” are defined as the actual first sale of the natural gas from the well and all subsequent sales up to and including a sale to a pipeline company, local distribution company (“LDC”), or an affiliate of either where the selling entity did not produce the gas.⁷

for deregulated natural gas when they resold it. See HOUSE CONF. REP. 95-1752, at 124 (1978), reprinted in 1978 U.S.C.C.A.N. 8983, 9041. The sales at issue in Nevada Power’s Complaint do not involve any such resales by “natural gas companies.” In any event, the 1978 NGPA deeming language for pipelines no longer applies. See *Reporting Requirements*, 95 FERC ¶ 61,262, 2001 WL 34077142 (2001) (“For the most part, **interstate pipelines no longer sell natural gas.**”) (Emphasis added); see also NGPA § 601(a)(1)(D); 15 U.S.C. § 3431(a)(1)(C). (C-140, Opp. to Mot. to Dismiss:18-20.)

⁷ Section 2(21) of the NGPA (15 U.S.C. § 3301(21)) provides:

- (A) General Rule. – The term “first sale” means any sale of any volume of natural gas –
 - (i) to any interstate pipeline or intrastate pipeline;
 - (ii) to any local distribution company;
 - (iii) to any person for use by such person;
 - (iv) which precedes any sale described in clauses (i), (ii), or (iii); and
 - (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.
- (B) Certain sales not included. –

Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas

The Commission's remaining jurisdiction is limited to a pipeline company's, LDC's, or affiliate's, interstate wholesale sale of natural gas, which is produced by another party, and any subsequent wholesale sale of that gas. Even for that narrow class of transactions, the Commission, acting pursuant to congressionally granted authority, requires compliance with the conditions of a blanket certificate in lieu of the filing and approval of tariff rates.⁸

Consistent with Congress' withdrawal of its jurisdiction, the Commission does not require the filing of tariffs or transaction data for exempt natural gas transactions and provides no administrative review of challenges to gas rates. *See* Order 2001, *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107, ¶ 103 - ¶ 105, 2002 WL 977239, *18-*19; *NAGC Proceeding*, at 106 FERC at ¶¶ 61,247-248, 2004 WL 179284, at *2. After deregulation, the filed rate doctrine prerequisites do not apply to Nevada Power's exempt retail natural gas transactions or the exempt wholesale gas transactions of its suppliers.

produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

⁸ Order 547, *Regulations Governing Blanket Marketer Sales Certificates*, FERC Stats. & Regs. 30,957 (1992), *order on reh'g and clarification*, 62 FERC ¶ 61,239, 1993 WL 68660 (1993). *See* Order No. 644, *Amendments to Blanket Sales Certificates*, 105 FERC ¶ 61,217, 2003 WL 22758080 (2003). Such authority was not required for gas produced by the pipeline, LDC, or affiliate. *Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

I. The Filed Rate Doctrine Does Not Bar Nevada Power's Claims Because the Jurisdiction/Filing, Damages, and Administrative Review Prerequisites Do Not Apply.

The filed rate doctrine does not bar Nevada Power's claims because: (1) they arise from natural gas transactions for which the Commission has no rate-setting jurisdiction and requires no rate or transaction data to be filed and approved; (2) the computation of damages does not require the assumption that the Commission would have approved a hypothetical rate; and (3) Congress has provided no administrative review by the Commission for rates of exempt gas transactions at issue. The absence of the filed rate doctrine's bar is demonstrated by applying the three requirements to Nevada Power's claims that the Gas Companies inflated the price of natural gas that Nevada Power purchased by falsely reporting to private market indices, induced Nevada Power to purchase hedging contracts, and terminated a previously approved pipeline project.

A. The Filed Rate Doctrine Does Not Bar Nevada Power's Gas Purchase Claims.

1. The Commission Has No Jurisdiction over Nevada Power's Natural Gas Purchase Transactions and Requires No Filing or Approval of Tariffs.

The first filed rate doctrine requirement – jurisdiction and filing – does not apply because both the retail sales of natural gas to Nevada Power and the upstream wholesale sales to its suppliers are statutorily exempt and the

Commission does not require any filing of a tariff or transaction data. (C-140, Opp. to Mot. to Dism.:8-18.) Nevada Power alleges that it purchased at retail natural gas from merchant energy traders, mostly third parties, such as Barrett, in 2000–2001 for the purpose of running gas-powered generators that produced electricity for sale to its customers. (ER-128:15-17,25-27.) The Gas Companies made false reports to private gas indices that artificially inflated the market price that Nevada Power paid. (*Id.* at 16-17, 25, 46-54, 73-77.)

a. The Commission Has No Jurisdiction over Nevada Power's Retail Sales of Natural Gas and Requires No Filing or Approval.

Section 1(b) of the NGA has always exempted the direct sale of gas for consumption – retail sales – from the Commission's rate-setting jurisdiction. In *Panhandle Eastern Pipe Line*, 332 U.S. at 516-17, the Supreme Court stated: "Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply to any other . . . sale . . . ' . . . Direct sales for consumptive use of whatever sort were excluded." *See General Motors Corp. v. Tracy*, 519 U.S. 278, 290 (1997) (recognizing that the States, not the Commission, have the "power to regulate, as a matter of local concern, all direct

sales of gas to consumers”),⁹ *Columbia Gas*, 404 F.3d at 462 (the filed rate doctrine does not apply where Congress says the Commission’s natural gas jurisdiction “shall not apply”).

The filed rate doctrine could apply to a claim arising from an exempt retail natural gas sale only if the claim involved the Commission’s resetting of the rate for an upstream wholesale sale or the prevention of the recovery of a wholesale price paid for that gas in a Commission-approved wholesale transaction – trapping. *See Stanislaus*, 114 F.3d at 863; *Nantahala*, 476 U.S. at 970. Accordingly, the filed rate doctrine could only apply if the Gas Companies could show from the face of the Complaint that every wholesale transaction through which Nevada Power’s gas flowed was subject to the Commission’s jurisdiction and filing requirements

⁹ The Gas Companies contended below that Nevada Power’s purchases of natural gas do not qualify for the retail sale exemption from the Commission’s jurisdiction because Nevada Power resold some small portion of the gas. (C-135, *Sempra Mot. to Dismiss*:16-17.) The Complaint states: “Nevada Power buys natural gas for its own consumption, not intending any of this natural gas [to] be resold unless load requirements were to unexpectedly change. Nevada Power does not purchase gas with the intent to resell it.” (ER-128:28.) Whether Nevada Power resold an incidental amount of the gas it purchased when the electricity load fell and the gas-powered generators were not needed and whether such resale would have been exempt from the Commission’s jurisdiction as, for example, financial transactions that occurred prior to any physical delivery of gas, pose questions of fact inappropriate for resolution at the motion-to-dismiss stage. *See Kaiser*, 347 F.3d at 1111; *Katy Interchange Serv.*, 48 FERC at ¶¶ 62,108, 62,109, 1989 WL 262421 (noting in a natural gas case that “[t]he trading of futures contracts” is not regulated by the Commission).

and the district court would have had to re-calculate Commission-approved wholesale rates. Such is not the case here.

b. The Commission Has No Jurisdiction over Nevada Power's Suppliers' Wholesale Purchases of Natural Gas and Requires No Filing or Approval.

Unlike wholesale sales of electricity, Congress mandated that the Commission's jurisdiction "**shall not apply**" to first sales of natural gas beginning in 1993. WDA § 3(b)(7); 15 U.S.C. § 3431(a)(1)(A). Nevada Power's Complaint alleges that the natural gas typically was sold from producers at the wellhead to merchant energy traders in wholesale sales that qualified for the "first sale" exemption. (ER-128:13-17.) Michael Quinn, an economist whom the Commission itself retained to analyze the western energy markets, explained in his affidavit:

It is standard and usual practice in the industry for [natural gas] producers to make a first sale to marketers, . . . and then . . . [for] such marketers to sell directly to electricity generating utilities such as Nevada Power [in a retail sale]. Based upon my experience in the industry, all or virtually all of Nevada Power's purchases would have been in this manner.

(ER-128:17; Ex.B:5) (emphases added).

Because the record does not show (and, at the motion-to-dismiss stage, the district court cannot assume) that the merchant energy traders are pipeline

companies, LDCs, or their affiliates, each wholesale sale to these merchant energy traders was, for purposes of Rule 12(b)(6), Fed. R. Civ. P., a “first sale” to which the Commission’s rate-setting jurisdiction “**shall not apply.**” See WDA § 3 (b)(7); 15 U.S.C. § 3431(a)(1)(A); *NAGC Proceeding*, 106 FERC at ¶¶ 61,247-248, 2004 WL 179284, at *2 (“[A]ll sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution company (LDC).”)

Further, unlike market-based sales of electricity, the Commission does not, and cannot, require filing of rates, transaction data, or quarterly reports for exempt gas sales. See Order 2001, *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107, ¶ 103-105, 2002 WL 977239, *18-*19 (stating that unlike “jurisdictional public utilities” and “their jurisdictional activities,” for which the Commission requires the filing of transactional data on electricity transactions to comply with the rate filing requirement of Section 205(c) of the FPA, “many of the gas sales . . . are no longer jurisdictional” and thus, “[t]he Commission terminated the data collection”).

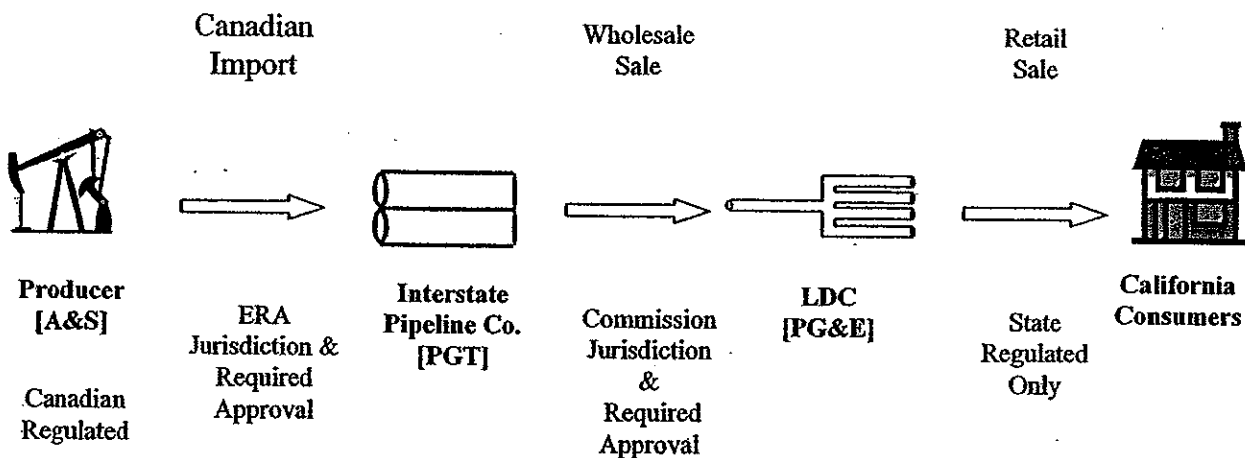
Because Congress has provided that the Commission’s rate-setting jurisdiction “shall not apply” and the Commission has stated that the filing of transaction data is no longer required, the filed rate doctrine poses no bar to Nevada Power’s claims. See *Columbia Gas*, 404 F.3d at 462 (filed rate doctrine

does not apply where statute says Commission's jurisdiction "shall not apply"); *Arkla*, 453 U.S. at 576 n.5 & 584 n.14 (holding that where the Commission did not require tariff filings, the filed rate doctrine posed "no bar to damages").

c. The District Court's Reliance on *Stanislaus* was Misplaced.

The impact of Congress' exemption of first sales of natural gas from the Commission's rate-setting jurisdiction on the application of the filed rate doctrine is illustrated by comparing the jurisdictional transactions in *Stanislaus* with the non-jurisdictional transactions in this case. In *Stanislaus*, 114 F.3d 860-62, this Court held that the filed rate doctrine barred claims by retail consumers challenging wholesale transactions of natural gas from the Canadian border to California for which there was both jurisdiction and filed tariffs.

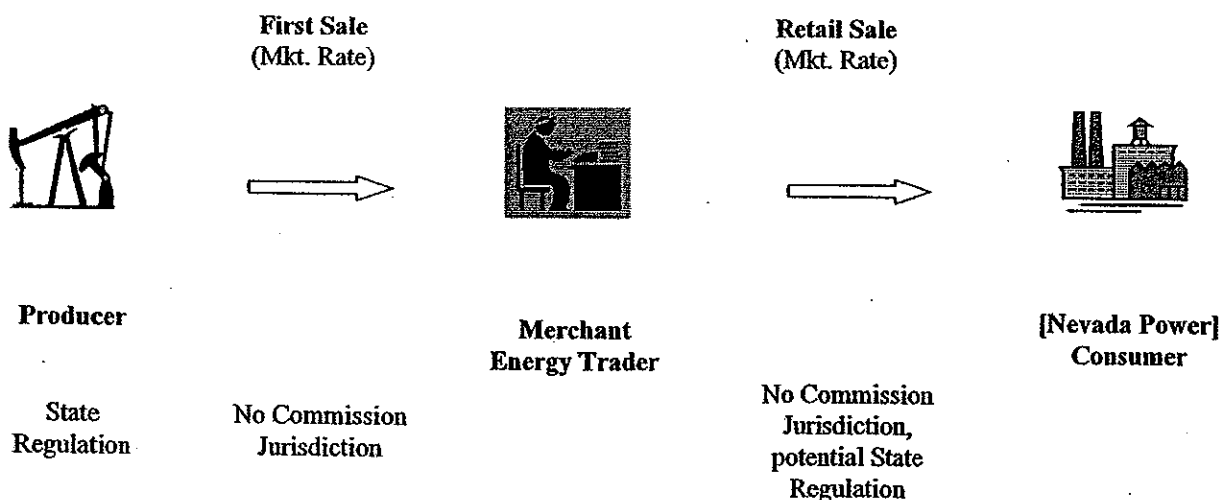
Stanislaus: Old Natural Gas Regime



(C-140, Opp. to Mot. to Dism.:12-13.)

Under the old cost-based regime applicable in *Stanislaus*, the claimants' retail prices were based on the upstream wholesale prices paid for the same gas. See *Nantahala*, 476 U.S. at 970. Because the Economic Regulatory Agency ("ERA"), and the Commission had jurisdiction over and had approved the upstream wholesale transactions. *Stanislaus*, 114 F.3d at 864. Thus, the filed rate doctrine barred the claimants' attempt to reduce the prices they had paid in their retail purchases. *Id.* Such a reduction would have prevented the upstream wholesalers from recovering the Commission-approved wholesale prices that the wholesalers had paid, thus "trapping" those costs. *Id.* at 863. No such issues arise here as the following chart illustrates:

Nevada Power's Transactions Under Current Deregulated Regime



(ER-128:16-17) (C-140, Opp. to Mot. to Dism.:18.)

Under the statutorily deregulated market regime applicable to Nevada Power's 2000-2001 gas purchases, the Commission had no jurisdiction over the upstream wholesale sales because Congress had provided that the Commission's jurisdiction "**shall not apply**" to these transactions. See WDA § 3 (b)(7); 15 U.S.C. § 3431(a)(1)(A); *NAGC Proceeding*, 106 FERC at ¶¶ 61,247-248, 2004 WL 179284, at *2. Further, the Commission had no jurisdiction over the downstream retail sales to Nevada Power under section 1(b) of the NGA.

Moreover, in *Stanislaus*, 114 F.3d at 861, this Court cited several filed tariffs. See, e.g., *id.* ("Re *Pacific Gas Trans. Co.*, 40 F.E.R.C. ¶ 61,193 at ¶ 61,622 n.29, 1987 WL 117714 (1987)."). In this case, the Gas Companies cannot cite any filed and approved tariffs, because there are none.

E&J Gallo Winery v. EnCana Energy Service, Inc., No. CV F 03-5412 (E.D. Ca. May 14, 2004) (attached as Appendix A), a natural gas case, sets forth an analysis that directly distinguishes *Stanislaus*:

EnCana's [the gas company defendant's] claim that County of Stanislaus "comes down on all fours" with respect to the present case is incorrect. In County of Stanislaus, the court very specifically tied its holding to the fact that the rates that were being challenged by that action had been filed with FERC and had been reviewed and approved prospectively by both state and federal agencies. County of Stanislaus, 114 F.3d at 863. While County of Stanislaus did address the issue of the applicability of the filed rate doctrine to the computation of damage[s] arising from retail trades, **this court is aware of no authority that extends the holding in Stanislaus to the situation where there has been no prospective review of rates and**