# Bond Case Briefs

*Municipal Finance Law Since 1971*

---

## 9th Circuit Rules Publicly Owned Utilities Not Exempt From Federal Antitrust Challenges Under Filed-Rate Doctrine.

On January 31, 2022, the 9th Circuit Court of Appeals reversed and remanded a district court's dismissal of an antitrust challenge by a class of solar rooftop customers against their municipal utility, the Salt River Project Agricultural Improvement and Power District (SRP).

SRP is a political subdivision of the State of Arizona and provides power and water service to most of the Phoenix metropolitan area. State law gives it the authority to set prices for the sale and distribution of electricity to the approximately one million customers in its service territory.

In its opinion, the Court of Appeals determined that because the publicly owned utility sets its own electric rates, it does not benefit from the legal protections enjoyed by other regulated entities. Specifically, the filed-rate doctrine—which can bar federal antitrust claims based on rates approved by state agencies—was inapplicable because SRP "does not file its rates with anyone other than itself."

**Background**

In 2015, SRP adopted a new pricing scheme that established separate rates for rooftop solar customers, charging solar customers up to 65 percent more than its non-solar customers (who saw their rates go up approximately 4 percent). After adopting the new pricing plan, SRP then ran advertising that promoted its increased rates for solar customers, which resulted in a huge decrease in applications for third-party solar energy systems in SRP's territory.

Some of SRP's solar rooftop customers filed suit against the utility, asserting claims under the Sherman Act, the equal protection clauses in the Arizona and U.S Constitutions, and various Arizona consumer protection and price discrimination laws. The complaint alleged that the price plan "discriminates against customers that use solar energy systems and disincentivizes further purchases and use of solar energy systems" by eliminating "the economic value in investing in solar energy systems to self-generate electricity."

The district court dismissed the complaint in its entirety, finding that the federal equal protection claim was untimely and that the complaint failed to show that the rate hike violated federal antitrust laws. The court found that the state-law claims were barred because they failed to plead injury under the state statutory requirements. On appeal, the 9th Circuit panel reversed, rejecting SRP's argument that the filed-rate doctrine barred the federal Sherman Act antitrust claim.

**The Court's Ruling**

The filed-rate doctrine, a judicially created rule, bars individuals from asserting federal civil antitrust challenges to a utility's rates that were previously approved by the Federal Energy Regulatory Commission (FERC) or a state public utility commission such as the Arizona Corporation Commission (ACC). The 9th Circuit explained that the doctrine "presumes at least some degree of independent oversight."

In this case, however, because SRP's board sets the utility's rates, without review by the FERC or the ACC, the appellate court found the doctrine inapplicable. Thus, the Court of Appeals reversed the dismissal of the federal claims and remanded the case to the district court for further proceedings. The 9th Circuit, however, did uphold the application of the Local Government Antitrust Act, which bars money damages, leaving only the possibility for declaratory and injunctive relief going forward.

This case arose in the context of distributed solar generation, and is important for that reason alone, but more broadly it could impact the rate setting of publicly owned utilities as they address the growing movement of their customers toward various forms of distributed generation and storage. Specifically, it could open the door to more antitrust litigation against publicly owned utilities as they navigate the balance between deployment of third-party vs. utility-owned energy resources.

**Davis Wright Tremaine LLP – Barbara S. Jost, Patrick J. Ferguson and Taylor Sutton**

February 18 2022