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Ariz. Utility Hinders Solar Competition, DOJ Tells 9th Circ.

By [Hannah Albarazi](#)

Law360 (February 2, 2021, 11:36 PM EST) -- The [U.S. Department of Justice](#) stood with solar power customers urging a Ninth Circuit panel to revive their antitrust action against [Salt River Project Agricultural Improvement](#) and Power District, with the DOJ arguing Tuesday that the Arizona utility cannot charge "anticompetitive penalties" to consumers who use its solar rivals.

Consumers who say the utility's alleged penalties for generating their own power using solar panels contributed to the utility's monopoly on the electricity market around the city of Phoenix had support from the federal government during oral arguments before the Ninth Circuit on Tuesday.

Matthew C. Mandelberg, of the U.S. Department of Justice's antitrust division, told the three-judge Ninth Circuit panel that U.S. antitrust laws are for the welfare of consumers and that the utility's "anticompetitive penalties charged to solar consumers" is a direct harm to consumers.

Mandelberg said the district court correctly found the utility's high prices imposed on solar customers amounted to exclusionary penalties, but that the district court erred in its finding that the solar users had not properly alleged antitrust injury.

Mandelberg said the SRP's efforts to maintain its regional electricity monopoly injured plaintiffs when it levied a monetary penalty on customers who chose the utility's competitors.

"When plaintiffs' injury is the means of exclusion, that satisfies causation," Mandelberg told the court.

SRP is not authorized "to set anti-competitive rates in the form of penalties on consumers who use its solar rivals," Mandelberg told the panel.

But SRP's attorney, Daniel S. Volchok of WilmerHale, fired back, saying that "every one of plaintiffs' claims is an impermissible, collateral attack on the district's ratemaking."

The customers [filed their suit in 2019](#) in Arizona federal court, accusing SRP of charging customers more for generating a portion of their own power using solar panels. The customers claimed those charges contributed to the utility's stranglehold on the electricity market in its territory around the city of Phoenix.

SRP had a rate structure that charged solar customers about \$600 per year more than what they would be paying at the rates other customers are charged, the customers alleged.

But SRP said the customers did not follow the proper regulatory path for disputing rates and claimed the state authorized the practices, giving the utility state action immunity that shields certain state-directed activity from antitrust laws.

The court dismissed the suit in January 2020, finding that the customers had failed to plead an injury and that their claims were filed too late. The customers appealed the decision to the Ninth Circuit, filing their brief in July.

SRP also appealed the decision, telling the Ninth Circuit the lower court had incorrectly rejected some of its arguments.

The DOJ [filed an amicus brief](#) to the circuit court supporting the consumers, claiming the lower court's findings were "contradictory" when it concluded consumers have not been injured by the utility's rates while also finding that the utility's conduct constitutes monopolization. The Ninth Circuit allowed the DOJ to argue alongside the consumers.

The DOJ previously supported a unit of [Tesla Inc.](#) that challenged the same rate structure as the utility's attempt to stamp out competition from the solar installation business. The case was appealed to the [U.S. Supreme Court](#), but was [settled before the justices heard oral arguments](#) on the matter.

During oral arguments Tuesday, Volchok, counsel for the utility, argued that all of plaintiffs'

state claims are barred and that their federal claims are barred by the filed rate doctrine, a common law rule that essentially says rates approved by a governing regulatory authority are unassailable in judicial proceedings.

Circuit Judge William A. Fletcher told the utility that he hadn't been persuaded "that the filed rate doctrine protects you because you're not just setting the rate, you're charging the rate." The judge said he's not convinced the utility is protected by the doctrine.

But Volchok warned the panel that, "If the doctrine doesn't apply here, if these claims are not barred, if there can be a federal lawsuit every time a customer is dissatisfied with how a utility has set his or her rate" it could threaten to unleash "enormous disruption and uncertainty for millions of utility customers."

The consumers' attorney, Hart L. Robinovitch of [Zimmerman Reed LLP](#), argued that the district court did not properly apply Arizona's notice of claims statute, saying that it conflicted directly with federal procedural law and that state laws must yield to federal ones.

Robinovitch also argued that the district court erred in finding the claims untimely, telling the panel that civil claims accrue when a person is injured, not when a statute or rate is enacted.

Judge Fletcher indicated that the panel agreed with the consumers' argument on that point and encouraged Robinovitch to move on, saying, "You may be pushing on an open door on this question."

Following oral arguments Tuesday, Robinovitch said there's a conflict between the "overly restrictive" state notice of claim statutes and Federal Rules of Civil Procedure. He told Law360 they're optimistic the panel "will determine that it is simply not possible for a representative plaintiff to comply with both" without breaching their duties to the class and surrendering their claims and standing.

Robinovitch told Law360 that the case "presents a number of really interesting legal issues that hopefully the Ninth Circuit will provide needed clarification on."

SRP spokesperson Scott Harelson told Law360 on Tuesday afternoon that the utility is "committed to treating all of its more than 1 million customers fairly and providing them with

reliable and affordable electricity — including those customers who choose to install rooftop solar systems, battery storage and other sustainable energy sources in their homes."

The plaintiffs' attempt to bring class claims challenging SRP's price plans for self-generating customers "is meritless," the utility said.

The [Center for Biological Diversity](#), which is also amicus curiae in this case, told Law360 on Tuesday that this is "a critically important case in tackling the climate emergency."

Jean Su, energy justice director and an attorney at the Center for Biological Diversity, said, "The Salt River Project has used quintessentially anti-competitive means to unlawfully penalize customers who embrace clean energy and reject fossil fuels. Tragically, Salt River Project is not alone among dinosaur utilities across the nation that are strangling the clean energy transition. Antitrust laws forbid these dirty tactics."

Su said the Center for Biological Diversity is confident the Ninth Circuit will "follow the judiciary's long-standing history of policing discriminatory behavior, especially when the stakes of climate change are so high."

The DOJ did not immediately respond to requests for comment Tuesday afternoon.

Judges William A. Fletcher, Eric D. Miller and Danielle J. Hunsaker sat on the panel for the Ninth Circuit.

The DOJ is represented by Matthew C. Mandelberg and Steven J. Mintz of the U.S. Department of Justice's Antitrust Division.

The Center for Biological Diversity is represented by Jean Su and Howard Crystal.

SRP is represented by Elizabeth Bewley, Christopher E. Babbitt, Daniel S. Volchok and David Gringer of WilmerHale and Eric Dell Gere of [Jennings Strouss](#) and Salmon PLC.

The consumers are represented by Hart L. Robinovitch of Zimmerman Reed LLP and Daniel E. Gustafson and Daniel C. Hedlund of [Gustafson Gluek PLLC](#).

The appeals are Ellis et al. v. Salt River Project, case numbers [20-15301](#) and [20-15476](#), in

the [U.S. Court of Appeals for the Ninth Circuit](#).

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