

March 11, 2022

Members of the Arizona State Senate  
Members of the Arizona State House of Representatives  
Arizona State Capitol Complex  
1700 W Washington St  
Phoenix, AZ 85007

**Re: HB 2101 and SB 1631**

Dear Concerned Members of the Legislature,

We represent William Ellis, Robert Dill, Edward Rupprecht and Robert Gustavis and other similarly situated Arizona homeowners who use solar energy systems to self-generate a portion of their electricity needs, but also purchase additional electricity from SRP, in a matter currently proceeding before the Honorable Judge Brnovich in the United States District Court for the District of Arizona, *Ellis et. al. v. Salt River Project Agricultural Improvement and Power District*, No. 19-1228 (D. Ariz.). Plaintiffs in the *Ellis* action allege that SRP implemented a discriminatory pricing scheme intended to discourage solar power use by its customers and eliminate solar energy competition, contrary to Arizona law and public policy. We are writing you to address the bills pending before the legislative body: HB 2101 and companion bill SB 1631. Further, we would like to address statements on behalf of SRP made by its Associate General Manager and Chief Legal Executive Mr. Michael O'Connor before the Arizona Senate Natural Resources, Energy and Water Committee on February 16, 2022, regarding his perception of the impact of these bills on our case.

As you may be aware, the United States Court of Appeals recently determined that SRP's E-27 plan, which charges an additional fee and higher rates to homeowners based solely on the fact that they use solar panels and self-generate a portion of their electricity, could be challenged in court by its customers as illegal. *Ellis et. al. v. Salt River Project Agricultural Improvement and Power District*, 24 F.4th 1262 (9th Cir. 2022). In so doing, the Court of Appeals held that such discriminatory rates may violate the Equal Protection Clause of the 14th Amendment to the United States' Constitution, as well as federal antitrust laws, and that SRP does not enjoy the legal shields of state action immunity or the filed rate doctrine.

In his recent statements before the Senate Committee, Mr. O'Connor represented that HB 2101/SB 1631 would have no impact on the *Ellis* case. Mr. O'Connor represented that "[he] will clearly and unequivocally indicate that if this bill is passed, it will not in any way be used in the *Ellis* case; so therefore, there is no tie-in between this bill and the *Ellis* case." Mr. O'Connor further represented "if this bill goes forward, as I indicated, I have the binding authority with respect to indicating it will not be used in any way, shape or form with respect to what is remaining in that case."

The issues decided by the Court of Appeals are not new – the very statutes proposed to be deleted and amended today have played a core role in the *Ellis* matter since the case was filed in 2019.

Even taking Mr. O'Connor at his word, that SRP will not use the proposed bill, if passed, in any way in the *Ellis* matter, HB 2101/SB 1631 would still have a devastating impact on Arizona's established dual public policy of fostering a fiercely pro-competitive business environment in the generation and supply of electricity to Arizonans and protecting Arizona homeowners from the burdens of higher, discriminatory rates for that power. Those policies have been firmly entrenched in both Arizona's Constitution (Art. 15, Sec. 12) and statutes, including A.R.S. § 30-801 *et seq.* and A.R.S. § 40-334.

Furthermore, Arizona has long promoted and encouraged consumer's conversion to solar power systems—harnessing one of Arizona's greatest, free, and sustainable assets—yet the proposed bills would appear to allow discriminatory, higher rates to be adopted that would be directly contrary to that. Since the *Ellis* matter began, SRP has imposed three more rating plans that impose penalty fees on solar customers that are yet to be challenged. These bills could have the effect of denying such challenges.

The proposed bills appear to contravene Arizona's long-standing policies and Constitutional provisions prohibiting discriminatory rates and anticompetitive activity in Arizona's electricity market. Ariz. Const., Art. 15, Sec. 12; A.R.S. § 30-805(A), (D), § 30-813; and § 40-334. The proposed bills aim to *eliminate* competition at a time when innovation and choice in the generation and supply of energy has never seen a higher need. To be clear, the proposals seek to curtail the future ability of not only solar customers, but also *any* electricity customer, from having legal recourse for the charging of discriminatory or anti-competitive rates.

The proposed language for amended A.R.S. § 30-807 also appears to be an attempt to insulate SRP's self-approved rates from challenge despite them not being reviewed and approved by any external agency. This is directly contrary to the Court of Appeals' holding. *Ellis*, 24 F.4th at 1275-76 ("The problem for SRP, however, is that it does not file its rates with anyone other than itself... We have never extended the filed-rate doctrine to unilateral, unsupervised rate-setting by a market participant. In that context, there is no reason to presume that 'rates are just and reasonable as a matter of law' and should be immune from collateral challenge. We decline to extend the doctrine here.").

Additionally, the proposed language for amended A.R.S. § 30-808 and § 30-809 seeks broadly to confine consumers' abilities to challenge discriminatory rates in court to a short period following the initial ratemaking which can be long *before* affected consumers may actually be charged the rates and any claim accrues. This provision is directly contrary to the determination in *Ellis* that injured consumers retain the right to challenge a rate through the times they are actually charged the rate and injured. 24 F.4th at 1271-72. Thus, proponents of the bills appear to be trying to codify the very type of activity that the Court of Appeals specifically rejected and determined was contrary to law.

The current bills propose a sea change in Arizona law and policy as it applies to the generation and provision of electricity to Arizonans. They seek to eliminate the ban on discriminatory electrical rates by repealing § 30-805 and to provide legal immunity to electricity providers from antitrust laws, thus greenlighting anti-competitive activity, through changes to A.R.S. § 10-2081, § 30-803 and § 30-813, among other laws. The proposed provisions also contravene the stated public policy of Arizona as a state that fosters fierce, pro-consumer and pro-business competition

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in the generation of electricity for public consumption by eviscerating A.R.S. § 40-202 and § 30-803, among other provisions.

Currently, Arizona law provides, “It is the public policy of this state that a competitive market shall exist in the sale of electric generation service” and “that the most effective manner of establishing just and reasonable rates for electricity is to permit electric generation service prices to be established in a competitive market.” A.R.S. § 40-202(B) and (D); *see also* A.R.S. § 30-803(A); *Ellis*, 24 F.4th at 1276 (same). Antitrust laws provide similar pro-business incentives. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 380 (1973) (“The [Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. [Defendant’s] theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.”).

The passage of HB 2101/SB 1631 would upend Arizona’s current law and established public policy to promote competition in the retail electricity marketplace. Regardless of SRP’s commentary on the *Ellis* case, we would ask legislators to focus on the negative impact of permitting anti-competitive and discriminatory retail pricing along with the positive impact of continuing to foster the twin pillars of fair competition and renewable energy as essential assets to the State of Arizona.

Respectfully Yours,



Hart Robinovitch

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