

SEP 24 2007

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION,

TEXAS-OHIO ENERGY, INC.,

Plaintiff - Appellant,

v.

AEP ENERGY SERVICES, INC.;
AMERICAN ELECTRIC POWER
COMPANY, INC.; CENTERPOINT
ENERGY, INC.; DUKE ENERGY;
DUKE ENERGY & MARKETING, LLC;
DUKE ENERGY CORP.; DUKE
ENERGY TRADING AND
MARKETING, LLC; EL PASO
CORPORATION; RELIANT ENERGY
SERVICES, INC.; RELIANT
RESOURCES, INC.; SEMPRA ENERGY;
SEMPRA ENERGY TRADING CORP.;
WS ENERGY SERVICES, INC.; XCEL
ENERGY, INC.,

Defendants - Appellees.

No. 05-15919

D.C. Nos. CV-03-01431-PMP
CV-04-00465-PMP

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted February 13, 2007
San Francisco, California

Before: B. FLETCHER, CLIFTON, and IKUTA, Circuit Judges.

The district court granted the defendants' motion to dismiss on the ground that the filed rate doctrine barred all of Texas-Ohio's claims. As we clarified in *E. & J. Gallo Winery v. Encana Corp.*, No. 05-17352, —F.3d— (9th Cir. filed Sept. 19, 2007), the Filed Rate Doctrine, as defined in that case, bars claims based on FERC-approved rates. FERC's jurisdiction does not include approving the rates in first sales transactions and claims based on such transactions are not barred by the Filed Rate Doctrine or principles of preemption. *Id.* at ___. On a motion to dismiss, "[a]ll allegations and reasonable inferences are taken as true, and the allegations are construed in the light most favorable to the non-moving party." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). Based on the record, it is reasonable to infer that some of the transactions between Texas-Ohio and the defendants are first sales and thus Texas-Ohio's claims based on such transactions are not barred by the Filed Rate Doctrine.

REVERSED AND REMANDED.