S224779

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Citizens for Fair REU Rates, et al.
Plaintiffs and Appellants,
vs.
City of Redding, et al.,
Defendants and Respondents.

Fee Fighter LLC, et al.
Plaintiffs and Appellants,
vs.
City of Redding, et al.,
Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW

Of a Published Decision of the
Third Appellate District, Case No. C071906

Reversing a Judgment of the Superior Court of
the State of California for the County of Shasta,
Case No. 171377 (Consolidated with Case No. 172960)
Honorable William D. Gallagher, Judge Presiding

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STATUTES AND COURT RULES

I.

THE APPEALS COURT OPINION DOES NOT MERIT SUPREME COURT REVIEW EITHER TO ATTAIN "UNIFORMITY OF DECISION" OR TO SETTLE AN "IMPORTANT QUESTION OF LAW"

The Appeals Court opinion does not, unfortunately, bring a final resolution to the claims brought by the Plaintiffs in this matter, nor does it do much more than reveal the fallacy of defenses maintained by the City of Redding to resist judicial review of its electric rates under the strictures of Proposition 26. The case is to be remanded to the trial court to examine whether the City's electric rates are cost-justified per the requirements of Proposition 26, and specifically whether the inclusion of the PILOT amount (Payment In Lieu Of Taxes) in the rates is cost-justified. That basic inquiry did not occur in the trial court essentially because the trial court stopped its examination after finding for the City on its defenses. You are now asked to review an opinion that merely eliminates defenses that were specious at the outset, in an on-going case where the heart of the matter is yet to be determined. The Appeals Court decisions on defenses that the City would have you review do not conflict with established law or other published appeals court opinions, nor do they pose important questions of law.

The two main defenses brought by the City were struck down by the Appeals Court opinion as follows:

(1) The City's historical budget process and the adoption of a budget document that merely accounts for the PILOT transfer of money from the electric utility to the general fund does not make the

PILOT a permanent legislatively enacted fee or charge. "The PILOT's regular appearance in Redding's budgetary process does not mean it was a permanent or continuing transfer compelled by ordinance or other non-discretionary authority." (Opinion at p. 19.) The PILOT was not grandfathered-in under Proposition 26 "simply because it has been a customary recurrence in the Redding municipal budget." (Opinion p. 19.) "As a budget line item, the PILOT is subject to annual discretionary reauthorization by Redding's City Council. The PILOT does not escape the purview of Proposition 26." (Opinion p. 3.)

This is not ground-breaking law, nor is it in conflict with any other published decisions. As noted in the Opinion (p.18) "Each budget is a discretionary legislative act made by each city council. (See *Scott v. Common Council* (1996) 44 Cal.App.4th 684, 690-694; *County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 698.) The broad legislative discretion with which a city council is imbued stands in stark contrast to a tax or fee fixed by ordinance." Consider the implications if the adoption of a budget were deemed to elevate all of the hundreds of fees, or revenue transfers of any kind, referenced directly or indirectly in the budget (because their revenues must be accounted for in planning for the support of City departments) to the status of a fee created by ordinance or resolution. City budgets formerly largely immune from legal attack would become the potential target of lawsuits from a thousand directions – i.e., from anyone who disagreed with the City's budgetary allocation or who may be slighted by a change in the budget mid-stream in the fiscal planning year. California's courts have scrupulously avoided entry into the minefield of litigation over City budgets, because budgets are inherently a tool of the legislative

branch of government, budgets necessarily are subject to changes as circumstances dictate, and it risks violating the separation of powers doctrine for the judiciary to invade the budgetary process. The City of Redding, to serve its own purposes in just this case, would invite the Supreme Court to wade into this territory reserved for the legislative branch. You should decline the invitation.

(2) The Appeals Court dispenses with the defense that fees or charges must be deemed "reasonable" if purely on a market comparison basis they are less than those charged by other purveyors of the same product or service. The Opinion states (at p. 22):

> "We disagree with Redding's assertion , in its supplemental brief, that the PILOT comports with Proposition 26 because Redding's electric rates are lower than those paid by others in California. **Even if Redding's rate were the lowest in California, Proposition 26 would nonetheless require the PILOT to either reflect the city's reasonable cost of providing electric service or be approved by voters.** An unconstitutional tax is not rendered lawful simply by being bundled with otherwise reasonable utility rates." (emphasis added)

The City would ask that the Supreme Court turn back the clock to the days when municipal utilities were allowed to operate at a profit (See *Hansen v City of San Buenaventura* (1986) 42 Cal.3d 1172), with the apparent rationale that somehow its fine to take money from rate payers in the form of a PILOT as long as the total electric rates don't get too high in comparison to the marketplace. Not only does that approach violate the clear language and intent of

Proposition 26, it is repugnant to the interests of municipal ratepayers. Municipal utilities are created by democratically elected city councils because these municipal utilities can offer advantages to their citizens and their ratepayers (though not complete, the overlap of "citizens" and "ratepayers" is compelling, as in Redding where the City provides the only electric service available). Citizen ratepayers deserve the advantage of relatively low cost power, and Proposition 26 requires that their rates be cost-justified. The City wants to preserve its ability to exploit ratepayers with extraneous charges – the PILOT – as long as it can claim the total rates are "reasonable" in the marketplace. You should not indulge this request.

There are no appeals court opinions in direct conflict with this one, and the defenses struck down by the Court of Appeal in this case are not based on important or new questions of law. This Court should decline review and allow the case to go back to the trial court for final determinations required as directed in the Opinion.

II.
THE PETITION FOR REVIEW LARGELY SEEKS ANTICIPATORY DECLARATORY RELIEF FOR ISSUES THAT ARE NOT ADDRESSED BY THE COURT OF APPEAL OPINION BUT MAY BE RAISED IN THE FUTURE OR ARE OF GENERAL INTEREST AS TO PROPOSITION 26.

This Petition For Review goes far beyond what the Opinion of the Appeals Court directly addresses and asks for review of matters that are not ready for review or are of general interest to the community of public power agencies with regard to Proposition 26.

This Court should resist the temptation to delve into issues not actually presented as a concrete controversy. The matters or issues for which the City inappropriately seeks review are listed below.

A. Retroactivity Of Proposition 26.

This is not an issue at all. Plaintiffs have not tried to make the case that Proposition 26 has *retroactive legal affect*. The Appeals Court and the trial court did not determine that Proposition 26 has retroactive legal effect. There has not been a question as to whether Proposition 26 has retroactive effect. Yet the City incessantly raises the issue as if it were a center of contention.

The only real question (discussed above) was whether the City's long standing "custom" of taking money from the electric utility in the form of a PILOT and putting it in the general fund, denominated an inter-fund transfer in the budget, could be described as a legislatively established fee or charge that existed prior to the approval of Proposition 26 in November of 2010. That is a completely different issue than whether Proposition 26 has retroactive affect. As noted above, the Court of Appeal found the City's argument wanting (Opinion at 18-19): "longtime government custom 'even if conducted in the best of faith will not make legal what is illegal.'"

B. The "Parade Of Horribles."

As it did in the trial court and continues to do so here, the City claims that invalidation of the PILOT may somehow lead *also* to the invalidation of a variety of "public goods" that that are mandated by

State law to be funded in part through electric rate revenues. These include (see Petition at p. 11-12) programs to reduce greenhouse gases, "green" power development, solar energy mandates, renewable energy mandates and discounted rates for the poor and the elderly. However, the Plaintiffs in this matter have never contended that these "public goods" are not valid components of the rates or that the principles litigated here would result in their elimination. And the matter now before the Court has no impact on any of those items – only the money the City of Redding skims for itself (a little over 6% of the rates) in the form of the PILOT to put in the general fund for its own purposes.

Of course the loss of the funding from the PILOT for the general fund is even more alarming to the City. A similar argument was made by the League of California Cities in *Jacks v. City of Santa Barbara* (February 26, 2015) 2015 WL 899246 (Cal.App. 2 Dist.) p. 13-14, that the cities would face a "parade of horribles" if they could not continue to collect franchise fee revenues from electric utilities despite the absence of cost-justification for those fees. That Court's reply was that "[i]t is not an onerous requirement that local governments seek taxpayer's consent before subjecting them to new and increased taxes."

C. Guidance On Imposition Of The PILOT Is Not Necessary.

The City goes beyond the boundaries of the case at hand in arguing that the Opinion creates uncertainty as to whether the City must observe Proposition 26 constraints in trading wholesale power day-to-day, as opposed to creating rates for the consumers of electricity (Petition, p. 19-20). The Opinion does not constrain

wholesale power trading, nor should it. If the issue were to arise, Plaintiffs are confident that the "fee payors" protected by Proposition 26 would be would be found to be consonant with the resident tax payers for whom this initiative (and others) were approved for "taxpayer relief." This would exclude "Enron" and wholesale power trading generally. Regardless, the Opinion does not delve into that issue and this Court should not review it simply for declaratory relief of some sort.

D. Guidance On Remedies – Gov. Code §53728.

Lastly, the Petition asks this Court to decide on the availability and scope of remedies, in particular the remedy mandated by Government Code §53728 (Proposition 62). However, the Opinion expressly declined to address the remedies (p.25, fn. 7) and instead remanded the case to the trial court for that determination. Perhaps this question will return after trial court review, but that would be speculation. It is not the practice of this Court to explore issues that have not been adjudicated or simply provide declaratory relief for issues that have yet to go before the trial court, much less the Court of Appeal.

The City fears that the remedy of Government Code §53728 is unworkable or unwieldy, but Plaintiffs believe that there is a clear path to understand and enforce the remedy as set forth in the statute. The dollar-for-dollar reduction in property tax revenues equivalent to the unlawfully collected taxes is accomplished in Rev. & Taxation code §96.8 by reducing the property tax collections in one or more future years. It is an indirect refund remedy that is admittedly imperfect (because it doesn't match up to fee payers

neatly) but accomplishes the purpose of getting illegally collected taxes back to the taxpayers in general. Regardless, this issue is not ready for Supreme Court review, when it has not even been litigated to conclusion in the trial court yet.

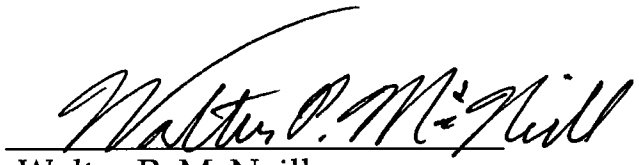
CONCLUSION

For all of the reasons discussed above, it is respectfully submitted that the Petition for Review should be denied.

Respectfully submitted,

MCNEILL LAW OFFICES

Dated: March 23, 2015



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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.504(d)(1))

The text of this brief, exclusive of cover page, tables and attachments, consists of 1,957 words, as counted by the word processing program that was used to generate this brief.

Respectfully submitted,

MCNEILL LAW OFFICES

Dated: March 23, 2015

Walter P. McNeill
Attorney for Plaintiffs and Appellants

PROOF OF SERVICE

I am employed in the County of Shasta, California. I am over the age of 18 years and not a party to the within action. My business address is 280 Hemsted Drive, Suite E, Redding, California 96002. On this date I served:

Answer to Petition for Review

X **BY FIRST CLASS MAIL:** The envelope was mailed with postage thereon fully prepaid in a sealed envelope addressed as follows:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Redding, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 23, 2015 at Redding, California.

Jennifer Dugan