S224779

Exempt from Filing Fees
Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

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

REPLY TO 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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INTRODUCTION

The Answer's brevity cannot conceal its inability to evade the force of the questions presented for review here. This case raises vital questions affecting the finances of the State and every local government within it. Conflicting appellate decisions regarding Proposition 26 and its application to local revenue legislation have already been published, and more can be expected in the cases noted in the motion for judicial notice that accompanied the Petition — a motion unopposed by Appellant Citizens for Fair REU Rates ("Citizens"), and unaddressed in the Answer.[1] The credit markets have already begun to react to the uncertainty the Court of Appeal's Opinion creates, and every municipal utility in the state wonders whether its budget is secure.

Review is plainly appropriate.

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[1] Indeed, Citizens' failure to oppose the City's MJN can be taken as acquiescence in it. (Cal. Rules of Court, rule 8.54, subd. (c) ["A failure to oppose a motion may be deemed a consent to the granting of the motion."]; see also *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1221 [granting notice in absence of opposition].)

I. THE PETITION RAISES QUESTIONS WORTHY OF REVIEW

As the Dissent makes clear, the Opinion affects California's entire public power industry (Dissent at p. 1), not least by making uncertain whether public utilities are limited to cost of service when they participate in wholesale markets. The Opinion itself notes that "PILOTs are not uncommon among California municipalities." (Opinion at p. 4, fn. 2.) Furthermore, the question whether government utilities "impose" wholesale power prices on those who voluntarily negotiate such transactions is vital to that industry. (See Opinion at p. 14 [suggesting Prop. 26 makes no distinction between wholesale and retail rates].) If public utilities are limited to cost of service when selling power at wholesale, but investor-owned utilities are not, wholesale power markets will become two-tiered systems with players of unequal power governed by disparate rules. This will hardly protect the tax- and rate-payers who fund our local governments — the stated goal of each of the constitutional measures at issue here. (See *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 [Prop. 218, like Prop. 13 before it, intended to protect taxpayers].)

The markets have already begun to react just a month after the Opinion was published, reflecting the uncertainty and disruption Justice Duarte's Dissent predicted. For instance, Moody's Investor Services' newsletter published February 19, 2015 notes the Opinion suggests that retroactivity under Proposition 26 turns on the form of

legislation which created the PILOT. (MJN, Exh. I.) However, the article cannot say with certainty that the 28 cities which may be affected by the Opinion will be able to successfully defend their PILOTS. Thus the market lacks clear guidance as to the financial stability of at least 42 cities and utility districts identified in Justice Duarte's Dissent. (Dissent, p. 1, fn. 1.) In bond markets, uncertainty is expensive. Thus, resolution of this issue is of statewide importance, and cannot await further developments in the Court of Appeal. Although a challenge to Los Angeles' General Fund Transfer has already been filed (MJN, Exh. J),that case will take years to reach this Court, while the costs to public utilities arrived with the Opinion. The City respectfully urges this Court to resolve the issue now.

II. RETROACTIVITY OF PROPOSITION 26 IS SQUARELY AT ISSUE

The Answer argues unconvincingly that retroactivity of Proposition 26 is "not an issue at all" (Ans. at p. 5) although the Opinion devotes three pages to the issue and it was litigated at every stage of these two consolidated cases. Whether Redding's payment in lieu of taxes (PILOT) from its electric utility to its general fund is a pre-Proposition 26 legal obligation grandfathered by the measure is plainly the heart of this case: it was a core defense at trial, a basis for the trial court's ruling (3 CT 736, 739), and a central issue in the Opinion (Opinion at pp. 17–20).

The Answer cannot avoid this issue merely because it would be convenient to do so, and because Citizens did not raise this defensive argument. (Ans. at p. 5 ["Plaintiffs have not tried to make the case that Proposition 26 has retroactive legal [e]ffect."].) Although the parties, and the courts, agree Proposition 26 does not have a retroactive effect as a matter of law, the Opinion nonetheless applies 2010's Proposition 26 to a PILOT legislated decades earlier. Thus, the Court of Appeal has indeed applied Proposition 26 retroactively by mistaking the continuation of legislation for its enactment.

It seems the parties and the Opinion agree the City's adoption of a budget is a legislative act. (See *Great Oaks Water Company v. Santa Clara Valley Water District* (2015) ___ Cal.App.4th ___ (6th District Case No. H035260), slip. op. at pp. 54–55 ["*Great Oaks*"].)[2] Although the Opinion acknowledges that some PILOTS will not be subject to Proposition 26 because adopted by earlier ordinances, it does not explain why Redding's budget resolutions are insufficient to do so. The absence of a rationale leaves lower courts and affected public utilities sure that PILOTs adopted by ordinance are grandfathered, Redding's is not, and uncertain as to the status of

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[2] As this Answer is drafted, *Great Oaks* is available only as a slip opinion. Even a Westlaw cite is as yet unavailable.

PILOTs adopted by provisions of city charters or by other local resolutions.

Thus the question is squarely presented here: does Proposition 26 invalidate some forms of pre-existing legislation, but not others, and what rule of decision distinguishes the two? The Opinion provides no answer to these questions even though they were identified by the City's Petition for Rehearing. This Court should grant review to resolve them.

Further, the Opinion's conclusion ignores the canons of construction which require legislation readopted without change to be construed to continue legislative policy rather than to adopt it anew. (Gov. Code § 9605; *State Dept. of Public Health v. Superior Court of Sacramento County* (2015) 60 Cal.4th 940, 962 [statutory amendments "reaffirm," but do not reenact unchanged provisions].) The Opinion overrules this canon, noting Redding's budget legislation creating and maintaining the PILOT is open to reconsideration and amendment. (Opinion at p. 18.) However, **all** legislation is open to reconsideration and amendment whenever the legislative body is in session. Thus, the Opinion not only fails to provide any clear rationale for invalidating the PILOT while preserving other, more "permanent" legislative acts, it undermines an established canon of construction, inviting other disputes about the meaning of legislation.

The Answer (as does the Opinion) confuses this canon of construction with the substantive standards of judicial review of budget-related legislation. (Ans. at p. 2, citing *Scott v. Common Council* (1996) 44 Cal.App.4th 684, 690–694 and *County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 698.) These cases address the standard for judicial review of legislative acts, not whether an act was a continuation of prior legislation or new legislation. Of course, the degree of judicial deference appropriate to a given legislative act depends on its substance — not whether it is adopted anew or continued. Decisions to spend discretionary revenues are pure questions of legislative policy, and will rarely face probing judicial review. (*Scott, supra,* 44 Cal.App.4th at p. 693 ["rare cases in which a court imposed limits on the budgetary actions of the board of supervisors"]; see also *County of Butte, supra,* 176 Cal.App.3d at p. 698 ["a court is generally without power to interfere in the budgetary process."].) However, *Scott* found its facts to be such a "rare case," and affirmed a trial court writ of mandate compelling the San Bernardino Common Council to fund positions in the elected City Attorney's office required by the City charter:

> The general rule that the courts may not interfere with the legislative process must therefore yield to the exception that such interference is authorized when the trial court makes a factual finding that the budget cuts

eliminate the ability of the government official to perform his mandated duties.

(44 Cal. App. 4th at p. 698.) Moreover, a bill of attainder included in a budget bill would offend the Constitution and compel the attention of courts regardless of its context.

The essential question here, then, is whether Redding's PILOT — adopted by budget resolutions and readopted without change from 2005 to the 2011 budget adoption challenged in the second of the two cases consolidated here — predates Proposition 26 so as to be grandfathered by it. That question warrants review.

III. THESE ISSUES HAVE ALREADY GENERATED CONFLICTING APPELLATE DECISIONS

Aside from the pending cases cited in the Motion for Judicial Notice which accompanied the City's Petition for Review, recent Court of Appeal decisions underscore the need for review here. The Answer cites *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925 ("*Jacks*") finding a franchise fee for use of public rights-of-way by a for-profit electric utility to be a special tax requiring voter approval because a regulation of the Public Utilities Commission requires the utility to pass that fee on to its customers as a separate line item on

bills.[3] That case's reliance on the economic incidence of the fee on utility customers, rather than its legal incidence on the utility, is at variance with case law.[4]

This invites attention to an even more recent decision from that same Division Six of the Second District: *City of San Buenaventura v. United Water Conservation District* (2015) ___ Cal.App.4th ___, (Case No. B251810, filed Mar. 17, 2015), 2015 WL

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[3] The Court of Appeal denied rehearing of *Jacks* without change to its opinion on March 27, 2015. The City of Santa Barbara has announced it will petition for review of that decision by the April 7th deadline to do so.

[4] "The economic incidence of a tax refers to the party or parties who will ultimately bear the economic burden of the tax. The economic incidence of a tax may differ from the legal incidence of the tax, which refers to the party or parties who are responsible for remitting a particular tax to the government. The *Fulton Corp.* court explained this distinction by stating, 'It is well established that the ultimate distribution of the burden of taxes [may] be quite different from the distribution of statutory liability [citation], with such divergence occurring when the nominal taxpayer can pass it through to other parties....' (*City of San Diego v. Shapiro* (2014) 228 Cal. App. 4th 756, 784 quoting *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 341, internal quotation marks omitted.)

1212205 ("*Ventura*").[5] *Ventura* is inconsistent with the case at bar and with *Great Oaks*.

Ventura applied substantial evidence review of mixed questions of law and fact in a Proposition 26 case even though the case arose in mandate on a cold legislative record. (*Id.* at p. *7.) Of course, this Court has recently and repeatedly held such a case requires de novo review:

> An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo.

(*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2009) 40 Cal.4th 412, 426–427 [citations omitted]; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431,

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[5] As this Answer is written, only a Westlaw cite is available for *Ventura*, thus the page cites are to Westlaw's star pages. The City has announced it will seek rehearing in that case; its petition for rehearing is due April 1st.

448–450 [de novo review of Prop. 218 dispute]; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 138 [reviewing court must exercise its independent judgment upon "constitutional facts"].)

Thus, the remand the Opinion orders here (Opinion at p. 23) is impermissible under *Ventura's* substantial evidence standard of review.

The Opinion here is also inconsistent with *Great Oaks,* which also applied substantial evidence review — albeit because the respondent water district waived the protection of the rule of *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 that limits mandamus review of legislative action to the agency's administrative record. (*Great Oaks, supra,* at p. 60 et seq.)

Ventura and *Great Oaks* are also flatly inconsistent: *Ventura* concludes groundwater augmentation charges are subject to Proposition 26 rather than Proposition 218 and *Great Oaks* holds the reverse. (*Ventura, supra,* at p. 24; *Great Oaks, supra,* at pp. 1–2.)

Plainly Proposition 26 is generating appellate decisions which are difficult to reconcile. Without this Court's guidance, this discord will multiply.

IV. CITIZENS CONCEDE THE APPLICABILITY OF PROPOSITION 62'S REMEDY MUST BE RESOLVED

In their Petition for Rehearing, Citizens faulted the Opinion for remanding to the trial court application of Proposition 62's property-tax-offset remedy (Gov. Code, § 53728), rather than

addressing it as a matter of law. (App. Pet. Rhg. at pp. 5, 11.) Citizens thus agree that the application of Proposition 62 is a question worthy of appellate attention. As the Court of Appeal has not provided it, the City urges this Court to do so.

V. THE OPINION THREATENS ALL PUBLIC GOODS CHARGES ON CALIFORNIA UTILITIES

The practical implications of the Opinion on legislation similar to Redding's PILOT are uncertain. Because the Opinion offers no rationale why the PILOT is not grandfathered by Proposition 26, similar legislation raising the cost of electric service to accomplish other social goals is also threatened. Citizens argue that they never intended to undermine anything except the PILOT. However, the legal effect of the Opinion does not turn on Citizens' subjective intent. Because the Opinion finds Redding's PILOT unprotected from Proposition 26 due to the form of its adoption, other public goods charges adopted in the same or similar ways must meet the same fate under the usual rules of stare decisis and res judicata.

If the Opinion holds that legislative policy that takes the form of an ordinance — or, perhaps, a city charter provision — survives Proposition 26, but legislation adopted by budget resolution may not, the City has two questions:

1. What basis in the text or legislative history of Proposition 26 supports the distinction? And

2. How can that distinction not also imperil other public goods charges borne by the public power industry?

Both questions are unanswered in the Opinion, and will necessitate further litigation unless this Court grants review to address them.

As discussed repeatedly at trial and on appeal, the City's low-income and senior household discount policies were adopted by resolution, just as was the PILOT. (See, e.g. IV AR Tab 142, pp. 719-720; IV AR Tab 145, p. 830; IV AR Tab 148, pp. 869–870.) Thus, the logic of the Opinion imperils these discount rates.

The Opinion's logic suggests the City's low-income rates would not survive Proposition 26 because the City adopted them by resolution rather than ordinance. (Opinion at p. 18.) The Opinion claims to preserve low income rates, asserting that variable rates were approved under *Brydon v. East Bay Municipal Utility District* (1994) 24 Cal.App.4th 178: "Thus, the fact that customers of the Utility in this case might pay more because of renewable energy mandates, or some rates might subsidize low-income households, does not violate Proposition 26." (Opinion at p. 16.) Obviously, *Brydon* did not address Proposition 26 (it predates the ballot measure by 16 years) or cross-subsidies among rate-payers. *Brydon* held only that, under Proposition 13, an inclining block rate structure that charges more for each successive unit of water used was not a tax under Proposition 13. (*Brydon, supra,* 24 Cal.App.4th at p. 195.)

Brydon may not have survived Proposition 218 (See Article XIII D, § 6, subd. (b)(3) [property related fee may not exceed proportional cost of service attributable to a parcel]; see also *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934 [tiered water rates must meet proportionality requirement]),[6] nor does it apply to Proposition 26 which expressly requires such proportionality. (See article XIII C, § 1, subd. (e)(2) and XIII A, § 3, subd. (b)(2) [service fees are taxes under Prop. 26 unless limited to "the reasonable costs to the government of provide the service"].)

Thus the Opinion's attempt to distinguish myriad legislatively-imposed costs of electrical service which are unrelated to producing electricity lacks a coherent rationale, much less support in the text or legislative history of Proposition 26. More problematically, the Opinion affirmatively suggests that electric rates disproportionate to the cost to serve the customer class on which they are imposed are permissible in plain contravention of the constitutional text the Opinion interprets.

The Opinion will, as a practical matter, effect all legislation which impacts electric rates, although distinguishing among those prior legislative acts will be difficult under the confusing language

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[6] This issue is also pending before the Fourth District in *Capistrano Taxpayers Association v. City of San Juan Capistrano*, Case No. G048969 (argued and submitted Jan. 21, 2015).

of the Opinion. This is more than an advocate's "parade of horribles" as Citizens claim. This is the observation of experienced counsel who anticipates further litigation, a concern shared by Justice Duarte. (Dissent at p. 1, fn. 1.) Amici curiae have expressed the same concerns — in the Court of Appeal, in letters seeking depublication of the Opinion and in letters in support of review which the City anticipates will be filed in the coming weeks. These are real concerns shared widely by those with experience in municipal finance, and those concerns counsel for review here.

VI. THIS COURT SHOULD GRANT REVIEW TO CONSIDER JUSTICE DUARTE'S ARGUMENT

Justice Duarte's Dissent argues:

> Therefore, if the amount of a PILOT is consistent with Proposition 13 and implementing legislation, the PILOT perforce is fair and reasonable. Proposition 26 was not designed to allow the utility to use Redding's general civil services without paying its "fair share."
>
> By requiring the utility to pay the same amount that a private utility would pay in taxes, Redding recoups the reasonable or — as stated by Proposition 13 — 'fair' costs incurred in providing electric service.

(Dissent at p. 6.) This aligns with the City's argument that electric rates do not violate Proposition 26 merely because they include the PILOT, because that is a lawful, pre-Proposition 26 legal obligation of the utility. The Answer does not address this point likely because Citizens have no answer to it.

This is not just Justice Duarte's view, but also that of the Court of Appeal in *Ventura*, which concludes that a 1966 statute requiring a 3 to 1 ratio for groundwater charges favoring agricultural groundwater users over municipal users is "fair and reasonable" under Proposition 26. (*Ventura, supra,* at *1.) *Ventura,* of course, is flatly inconsistent with *Great Oaks* and logically inconsistent with *Jacks* as detailed above. Thus, it can hardly be read to settle the law on the terms Justice Duarte's Dissent suggests.

The conflicts among these decisions will confound the lower courts, State and local governments, and those who advise them. Accordingly, review is appropriate here to confirm or disavow this view of Proposition 26 before more disparate case law develops, which will cost local governments and their constituents dearly to litigate.

CONCLUSION

This case raises vital questions affecting the State and all local governments in California. This Court should not defer review. The effect of the Opinion is already felt — it creates uncertainty and credit risk which harms all public power utilities in California.

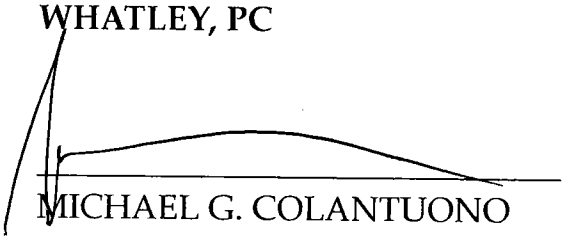
Moreover, the lower courts are already producing conflicting decisions regarding the application of Proposition 26 to water and power rates. The disparate analyses of the Opinion, *Ventura, Jacks,* and *Great Oaks* demonstrate as much, reaching conflicting conclusions as to the propriety of remand of contested factual issues and the propriety of legislative determinations of "fair and reasonable" allocations of costs among fee-payors.

In addition, this case is a good vehicle to address the issues identified in the Petition. Counsel for both parties have advocated in this Court before. (See, e.g. *Richmond v. Shasta Community Service District* (2004) 32 Cal.4th 409 [Mr. McNeill representing appellants; Petitioner's counsel here representing respondent there]; and *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685 [Mr. McNeill representing appellants].) Able amici have appeared below and here. Finally, this case arises on the full records of two separate actions — judicial review of the adoption of power rates in December 2010 and of the adoption of a biennial budget in June 2011. Thus the case is fully presented for this Court's review.

The City respectfully urges this Court grant review to resolve the vital questions the Petition raises.

DATED: April 2, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.504(D)

Pursuant to Rule 8.504, subdivision (d) of the California Rules of Court, I hereby certify that the foregoing Petition for Review contains 3,473 words (including footnotes, but excluding the tables and this Certification) and is within the 4,200 word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: April 2, 2015

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CITY OF REDDING

PROOF OF SERVICE

Citizens for Fair REU Rates v. City Of Redding
Third District Court of Appeal Case No. C071906
California Supreme Court Case No. S224779

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 95946. On April 2, 2015 I served the document(s) described as **REPLY TO ANSWER OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

X BY MAIL: The envelope was mailed with postage thereon fully prepaid. 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 Penn Valley, 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 affidavit.

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

Executed on April 2, 2015 at Penn Valley, California.

Ashley A. Lloyd

SERVICE LIST

Citizens for Fair REU Rates v. City of Redding
Third District Court of Appeal Case No. C071906
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