

March 19, 2015

SUPREME COURT
FILED

MAR 20 2015

Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Frank A. McGuire Clerk
Deputy

Re: ***Citizens for Fair REU Rates v. City of Redding***
No. C071906 (filed January 20, 2015)
Request for Depublication (Cal. Rules of Court, rule 8.1005(c)(2))

To the Chief Justice and Associate Justices:

The League of California Cities (“the League”) requests depublication of *Citizens for Fair REU Rates v. City of Redding*, No. C071906, filed January 20, 2015 (“*Citizens*”). This request is made in the alternative, should this Court not grant the City of Redding’s pending petition for review. The League will separately file a letter supporting that Petition.¹

Like many California cities, the City of Redding owns and operates its own municipal utility, which provides electric service for the City’s residents and businesses. Importantly, but virtually ignored by the *Citizens* decision, Redding’s utility also generates additional electricity which it sells on the open market to wholesalers, such as the former Enron. By employing an obviously flawed analysis, and by ignoring this critical fact, *Citizens* strongly calls into doubt the ability of cities such as Redding to sell

¹ The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide significance. The Committee has identified this case as having such significance. The League previously filed an *amicus* brief in support of the City of Redding in the appellate proceedings below.

electricity wholesale at market prices, effectively holding instead that, under Proposition 26, such cities instead may only sell electricity at actual cost. Such a holding only benefits wholesale purchasers, such as former Enron, who will no doubt resell the electricity at a profit. Of course, in adopting Proposition 26, the voters only sought to restrict the ability of local agencies to impose taxes, and had no intent to regulate an agency's sale of any product on the open market. If left published, the *Citizens* decision will potentially result in significant confusion and uncertainty for all California cities that operate their own utilities and sell electricity (or other utility products, such as water) in the open market. As Justice Duarte correctly recognized in her dissent below, the result of the *Citizens* decision "is disruptive, uncertain, and chaotic and . . . is not compelled by Proposition 26" (*Citizens*, Dis. Op. at p. 1.)²

Citizens specifically considered a challenge to Redding's long-standing practice of regularly transferring certain sums from the Redding Electrical Utility ("the Utility") to Redding's general fund. Because it is publicly owned, the Utility is not subject to the one percent ad valorem property tax that is imposed on privately owned utilities. To compensate for this loss of tax revenue, Redding has long directly transferred the equivalent amount of the ad valorem property tax which would otherwise be due for private utilities as a "payment in lieu of taxes" or "PILOT." Many of the League's member cities have similar PILOTs.

Citizens holds that this PILOT – a regular intrafund transfer from the Utility fund to Redding's general fund – is, by itself, somehow a "tax" regulated subject to Proposition 26. And it expressly holds that Redding cannot make this transfer unless it can prove at trial that "the PILOT does not exceed reasonable costs" (*Citizens*, at p. 4, see also, p. 22, as modified Feb. 19, 2015 [holding "Proposition 26 would nonetheless require the PILOT to either reflect the city's reasonable cost of providing electric service or be approved by voters."].)

²This letter cites to the *Citizens* Opinion as filed January 27, 2015, as modified in the Order Modifying Opinion and Denying Petitions for Rehearing filed on February 19, 2015.

Under the plain language of Proposition 26, the PILOT does not satisfy the definition of a tax. Proposition 26 defines “tax” as “any levy, charge, or exaction of any kind imposed by a local government, except the following: [list of exceptions].” (Cal. Const. Art. XIII C, § 1, subd. (e).) Redding’s act of transferring sums from one fund to the other does not involve any such imposition and thus cannot be found, by itself, to be a “tax.” Yet the *Citizens* decision repeatedly refers to the PILOT itself as being a tax which, in the court’s view, must directly comply with Proposition 26.

Had the *Citizens* decision employed the correct analytical methodology, it would have instead considered the extent to which the actual electricity rates Redding arguably “imposes” on its residents are “taxes.”³ The decision recognizes that Proposition 26 excepts from the definition of “tax” any “charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.” (Cal. Const. Art. XIII C, § 1, subd. (e)(2).) So Redding’s utility rates could only be found to be “taxes” if Redding directly charged its residents more than “the reasonable costs” Redding incurs in providing such service.

Under this correct analytical methodology, the court would then have to consider whether Redding’s electricity rates exceed “reasonable costs” – and are thus taxes – to the extent that the rates include a share of the cost of the PILOT, and to the extent that this share of the PILOT does not itself reflect Redding’s actual costs of providing service. On this point, the *Citizens* decision does properly recognize that the City’s general fund incurs potentially significant costs for the benefit of the Utility, which should suffice to justify *some* transfer between funds. (*Citizens*, at pp. 21-22 [“Undoubtedly, Redding incurs costs to provide infrastructure and support to the Utility. For example, Redding police protect the Utility property and the Utility’s workers. Redding’s streets, used by the Utility in its operations, are built and maintained by Redding’s general fund.

³ For only the purpose of this letter requesting depublication, the League is assuming the correctness of some of the legal holdings in the *Citizens* decision, such as its determination that Redding’s charging of rates for electricity service may constitute the imposition of a tax. The League will file a separate letter in support of Redding’s pending Petition for Review seeking broader review by this Court of these various holdings.

Redding’s fire department stands ready to respond if a Utility transformer sparks a fire, or a downed tree cuts a live utility line, endangering Redding’s citizens.”.) So the *Citizens* decision remands the case back to the trial court for a factual determination as to whether the amount of the PILOT exceeds actual costs incurred by the general fund for the benefit of the Utility.

However, the *Citizens* decision creates significant confusion and uncertainty by holding that the entire amount of the PILOT transfer itself – rather than just the Utility’s electricity rates actually charged to Redding’s residents – must be tied to the Utility’s actual costs. As noted earlier, in addition to providing electric service to Redding’s residents, the Utility also generates additional electricity for sale in the open market to other wholesalers. Obviously, Proposition 26 does not regulate such sales as “taxes” – they do not involve any “imposition” of a “levy, charge, or exaction” subject to Article XIII C, section 1, subdivision (e) – and Redding (and all other California cities) should be free to sell on the wholesale market at market rates rather than actual costs. To the extent that any portion of (or the entire amount of) such a PILOT reflects a component of “profit” to a municipal utility from such sales, then there is absolutely no reason for any court to mandate that a city must prove that the entire amount of the PILOT does not exceed actual costs.

On this point, the League understands that the trial court found that the amount of Redding’s PILOT could be funded three times over from the Utility’s revenues from its sale of electricity to wholesale customers. (See Redding’s Petition for Review at pp. 19-20, citing 3 CT 741 [trial court Memorandum of Decision].) This fact alone strongly suggests that the entire amount of the PILOT merely reflects a transfer of some of the profit of such sales to the City’s general fund, and there was thus no reason for the court below to interpret Proposition 26 to mandate that the City must prove that the PILOT itself (as opposed to the Utility’s electricity rates) does not exceed its actual costs. But the *Citizens* decision virtually ignores this critical fact, aside from two brief references to it. (*Citizens* at pp. 15 [briefly acknowledging “Redding’s insistence it could cover the PILOT costs with non-retail income”], 22-23 [confusingly stating that “[t]he possibility that non-rate revenues exceed the PILOT does not satisfy Proposition 26’s requirement that Redding demonstrate the collected tax reflects the reasonable costs of providing electric service.”].)

The *Citizens* holding thus improperly implies that a municipal utility cannot charge market rates for selling electricity (or other utility products such as, perhaps, water) to other wholesalers, or at least that it cannot transfer any component of “profit” from such sales to the municipality’s general fund. But, to the extent that Redding or any other California city has chosen to invest in such a utility, there is no reason that the city’s general fund should not be allowed to recover some modest return on that investment, at least where that return is funded from independent sources other than the municipal utility’s electricity rates arguably “imposed” on its customers. And it is certainly to the benefit of a city’s residents that the city be able to utilize some of these proceeds to fund critical public services.

If left published, the *Citizens* decision will likely result in significant and costly confusion and litigation regarding the extent of a municipal utility’s ability to sell at market rates to wholesale customers. While the League strongly supports Redding’s pending Petition for Review, should that petition not be granted, the League respectfully requests that this Court at least order that the *Citizens* decision be depublished.

Very truly yours,

JARVIS, FAY, DOPORTO & GIBSON, LLP

A handwritten signature in black ink, appearing to read "R. Jarvis", with a long horizontal flourish extending to the right.

by: Rick W. Jarvis, SBN 154479
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Counsel for *Amici* League of California Cities

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay, Doportto & Gibson, LLP, 492 Ninth Street, Oakland, California 94607.

On March 19, 2015, I served the within

LETTER REQUESTING DEPUBLICATION

on the parties in this action, by placing a true copy thereof in a sealed envelope, each envelope addressed as follows:

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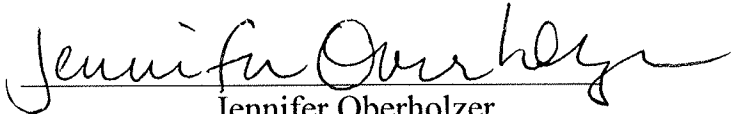
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I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 19, 2015, at Oakland, California.


Jennifer Oberholzer