

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD E. (TED) COATES;
MICHAEL CROWLEY; MARK
BUBENIK and MARGARET
BUBENIK, d/b/a Steele Manor
Apartments; THOMAS H. OLDFIELD;
and INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES, an Oregon
nonprofit corporation,

Respondents,

v.

CITY OF TACOMA,

Petitioner.

No. 51695-1-II

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DIVISION II
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STATE OF WASHINGTON
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RULING GRANTING REVIEW

The City of Tacoma seeks discretionary review of the trial court's March 2, 2018 order granting the Ratepayers'¹ Motion for Partial Summary Judgment Granting Declaratory Relief. Concluding that the trial court has appropriately certified its order for review under RAP 2.3(b)(4), this court grants review.

In 1996, the Tacoma City Council passed Ordinance No. 25930 establishing a telecommunications network designed to support smart grid and advanced metering infrastructure, provide retail cable television, wholesale high speed internet, and data

¹ Edward Coates, Michael Crowley, Mark Bubenik, Margaret Bubenik, Thomas Oldfield and Industrial Customers of Northwest Utilities.

transport services, and operate the City of Tacoma's Institutional Network (I-Net).² The Tacoma Power division of the Tacoma Department of Public Utilities manages the network. Tacoma Power is divided into six different "business units," five of which exist to generate, manage, and distribute electricity.³ Mot. for Disc. Rev., Appendix at 107. The sixth unit within Tacoma Power operates the Click! Network (Click), which provides cable television and internet access.

Revenue from electricity sales accumulate in the Tacoma Power Fund. Within this fund, the City "administratively created a sub-fund for Click" to track its performance. Mot. for Disc. Rev., Appendix at 535. The City of Tacoma intended that Click would be self-sustaining, but that has not been the case. Instead, assuming Click is responsible for ninety four percent of costs, Click lost approximately \$5,267,364 in 2015, and the City used revenue from electricity sales to keep Click solvent. If Tacoma Power did not use

² In 1996, Tacoma sought and received a judicial declaration affirming its authority to build the telecommunications network. Tacoma also sought and received a judicial declaration of its authority to issue and sell "Electric System revenue bonds in the aggregate principal amount of \$1,000,000 . . . in order to finance the first phase of construction and operating the Telecommunications System." Mot. for Disc. Rev., Appendix at 841. The taxpayers of Tacoma objected in part because electricity ratepayers would have to help pay off the bonds if the revenue from cable television was insufficient to cover the debt. The City of Tacoma responded by arguing that whether revenue from the telecommunications system was adequate to cover the debt on the bonds was unrelated to the question of the City's authority to issue the bonds. The court ruled that the City had authority to issue the bonds, but it "mad[e] no finding[s] as to the financial feasibility of the Project or as to the legality of any future bond issues." Mot. for Disc. Rev., Appendix at 896.

³ Ordinance No. 25930 created "a separate system of the City's Light Division to be known as the 'telecommunication system'" for the "public interest, welfare, convenience, and necessity." Mot. for Disc. Rev., Appendix at 136. Although Tacoma Power has stopped installing new smart meters that use the telecommunications system, it still operates approximately 14,240 meters to collect information and control its electrical generation and distribution.

electric revenue to pay for part of Click's expenses, electricity fees to all residents of Tacoma would decrease by two to three percent.

In June 2017, the Ratepayers sued the City, challenging the legality of Tacoma Power's practice of using revenue from electricity fees to pay for some of Click's expenses. They moved for partial summary judgment, seeking a judicial declaration that "electric utility revenues and funds may not be used to pay for Click expenses or capital improvements that are attributable or properly allocable to commercial telecommunications service rather than electric utility service." Mot. for Disc. Rev., Appendix at 49. On March 2, 2018, the trial court granted the Ratepayers' motion for partial summary judgment. On March 30, 2018, on the City's motion, the trial court certified its March 2, 2018 order for immediate review under RAP 2.3(b)(4). On April 6, 2018 the City of Tacoma filed a notice for discretionary review of the trial court's March 2, 2018 order "as certified for appeal by the trial court on March 30, 2018."⁴ Court Spindle, Notice of Discretionary Review.

Notice of Discretionary Review.

This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure

⁴ According to the Ratepayers, the remaining issue for trial is "whether the City should be enjoined from causing or permitting further electric utility subsidies for Click and whether the electric utility must be reimbursed for past subsidies, and in what amounts." Answer to Mot. for Disc. Rev. at 14. But a trial on remedies is useless if the City has not violated any law.

by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). The City seeks discretionary review under RAP 2.3(b)(1), (2), and (4).

Initially, the Ratepayers argue that this court should deny review because the City did not timely file its notice of discretionary review. Under RAP 5.2(b)(1), a notice for discretionary review must be filed within “30 days after the act of the trial court that the party filing the notice wants reviewed.” RAP 5.2(b)(1). The trial court entered the order granting the Ratepayers’ motion for partial summary judgment on March 2, 2018, but the City did not file its notice of discretionary review until April 6, 2018. Thus, the Ratepayers argue that the City’s notice of discretionary review was not timely filed. The City responds that where the trial court certifies its order for immediate review under RAP 2.3(b)(4), the 30-day period for filing a notice of discretionary review should run from the date of the certification order. It relies on two decisions in which this court granted review of orders that the trial court certified under RAP 2.3(b)(4) more than three months after entering its underlying order.⁵ However, those decisions do not make clear the circumstances for the granting of review and so do not establish a right to file a notice of discretionary review within 30 days of the filing of a RAP 2.3(b)(4) certification. But this court concludes that it would be most consistent with the Rules of Appellate Procedure to run the 30-day period

⁵ *In re Estate of Haviland*, 161 Wn. App. 851, 854, 251 P.3d 289 (2011), *aff’d*, 177 Wn.2d 68 (2013), and *Eleazer v. Bush House, LLC*, No. 70513-0-I, 2014 WL 4198384 at *3 (Aug. 25, 2014).

for filing a notice of discretionary review, *seeking review under RAP 2.3(b)(4)*, from the date that the RAP 2.3(b)(4) certification was filed. Thus, as to its motion for discretionary review under RAP 2.3(b)(4), the City's notice of discretionary review was timely filed.⁶

The Ratepayers contend that Tacoma Power violates Section 4.5 of the Tacoma City Charter⁷ and the local government accounting statute, former RCW 43.09.210 (2000),⁸ when it uses electrical utility revenues to make up Click's shortfall. Specifically, they allege that Click, the sixth "unit" of Tacoma Power, is a separate "utility" or "department" from electrical production and distribution, such that under the charter,

⁶ Because it need not do so, this court declines to address whether the City's notice of discretionary review was timely filed as to its motion for discretionary review under RAP 2.3(b)(1) or (b)(2).

⁷ Section 4.5 of the Tacoma City Charter provides:

Section 4.5 – The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including . . . the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

Mot. for Disc. Rev., Appendix 68-69; <http://cms.cityoftacoma.org/cityclerk/Files/Documents/CityCharter.pdf> at 11 (last visited June 14, 2018).

⁸ "The parties refer to RCW 43.09.210 as the State Accountancy Act; however, it is not a short title for this statute. For accuracy, [this court] will refer to RCW 43.09.210 as the local government accounting statute." *Okeson v. City of Seattle*, 150 Wn.2d 540, 545 n.2, 78 P.3d 1279 (2003). Former RCW 43.09.210 provides that:

All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another.

revenue from the City's electrical sales are allocable only to costs associated with providing electricity. Similarly, they allege that Tacoma Power violates the local government accounting statute because Click is one "undertaking" that is barred from receiving financial support from separate undertaking. The City denies that Click is a separate utility or undertaking for the purposes of the Charter and the local government accounting statute. It contends that Tacoma Power is a "utility" that supplies services, such as electricity, water, and broadband; electricity is not a "utility" in and of itself, and it cannot lend money. Further, it argues that Click is a "necessary operating expense" of Tacoma Power that "better[s]" the utility by allowing it to provide more services for its customers. Mot. for Disc. Rev. at 9; Mot. for Disc. Rev., Appendix at 68-69.

This court concludes that the trial court appropriately certified its order granting the Ratepayers' motion for partial summary judgment for immediate appellate review. Whether Tacoma Power may use revenue from electricity sales to pay for costs to operate Click is a controlling question of law as to which there is substantial ground for a difference of opinion. This grant of review also encompasses the issue of whether the trial court's 1997 ruling, declaring that the City had authority to issue bonds to fund the construction and operation of the telecommunications network, precludes the Ratepayers lawsuit. Immediate review of these issues will materially advance the ultimate termination of the litigation. Accordingly, this court grants review of the order under RAP 2.3(b)(4). Having concluded that review is appropriate under RAP 2.3(b)(4), this court does not address the City's argument that review would be appropriate under RAP 2.3(b)(1) or (2). Accordingly, it is hereby

ORDERED that the City of Tacoma's motion for discretionary review under RAP 2.3(b)(4) is granted. The Clerk will set a perfection schedule.

DATED this 14th day of June, 2018.



Eric B. Schmidt
Court Commissioner

cc: Elizabeth Thomas
Mark Filipini
Kari Vander Stoep
Kenneth W. Masters
Daniel-Charles V. Wolf
David F. Jurca
Andrew J. Kinstler
Emma Kazaryan
Hon. Susan K. Serko