

March 22 2018 1:34 PM

KEVIN STOCK
COUNTY CLERK
NO. 17-2-08907-4

Honorable Susan K. Seeley
Hearing Date: March 30, 2018
Hearing Time: 9:00 am

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No.: 17-2-08907-4

DECLARATION OF KARI L.
VANDER STOEP IN SUPPORT OF
CIVIL RULE 54(B) FINDINGS AND
ORDER AND IN SUPPORT OF A
STAY

I, Kari L. Vander Stoep, make the following declaration:

1. I am one of the attorneys of record representing the Defendant, City of Tacoma (the "City"), in this case. I make this declaration to provide factual evidence in support of the Court entering, in compliance with Civil Rule 54(b), an express determination, supported by written findings, that there is no just reason to delay an appeal of the Court's March 2, 2018 Order Granting Plaintiffs' Motion for Partial

DECLARATION OF KARI L. VANDER STOEP IN
SUPPORT OF CIVIL RULE 54(B) FINDINGS AND
ORDER AND IN SUPPORT OF A STAY - I

501151053 v3

1 Summary Judgment and Denying Defendant's Motion to Strike (the "Order"). Pursuant to
2 the companion Motion for Entry of CR 54(b) Findings and Final Judgment and Stay of
3 Litigation or New Trial Date, the City is respectfully requesting that the Court enter
4 judgment on the claims resolved in its Order, so that an immediate appeal can be taken by
5 the Defendant.

6 2. At the conclusion of oral argument on March 2, 2018, the Court asked the
7 parties if either was then requesting that the order be certified, which I understood to mean
8 an entry of judgment pursuant to Civil Rule 54(b). While the City needed additional time
9 to digest the Court's ruling and decide on an appropriate course of action, it has now
10 determined that the best interests of the City, its constituents, and Tacoma Power
11 ratepayers are served by taking the Court up on its offer. For the reasons expressed below,
12 we also believe that an immediate appeal and corresponding stay of the trial court
13 proceedings is in the best interests of the Plaintiffs and the Court as well.

14 3. There are a number of reasons why there is no just reason for delaying an
15 appeal of the Order. First, by finding that res judicata and collateral estoppel do not apply,
16 and that the relationship between Click! Network ("Click") and Tacoma Power is
17 governed or limited by RCW 43.09.210 and/or Tacoma City Charter § 4.5, the Order
18 decides crucial legal issues in the case. A reversal on one or more of these issues would be
19 dispositive and would save the Court and the parties from having to use extensive
20 resources to resolve the remaining issues in the case. That is, if the appellate court
21 determines that res judicata or collateral estoppel applies, the Plaintiffs have no case and
22 the matter will be dismissed. Likewise, if the appellate court determines that RCW
23 43.09.210 and Tacoma City Charter § 4.5 do not apply to the relationship between
24 Tacoma Power and Click, that would likely lead to the dismissal of the case or at least a
25 significant change in the relevant remaining issues or claims.

DECLARATION OF KARI L. VANDER STOEP IN
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ORDER AND IN SUPPORT OF A STAY - 2

501151053 v3

K&L GATES LLP
925 FOURTH AVENUE SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 A second reason for determining that there is no just reason for delay is that the
2 question of the legality of the City's funding of Click is a matter of great public interest
3 and concern to all of the taxpayers and electric ratepayers of the City. If it is determined
4 on appeal that Click's funding is not legal, then the City will need to deal with how and
5 whether to fund and operate Click going forward. The City will also have to determine
6 how to pay for any past expenditures that are determined to be unlawful, which Plaintiffs
7 estimate at over \$21 million.

8 A third reason is that, with the potential imposition of interest, the City is faced
9 with having to pay many thousands of dollars more in interest if it has to wait until all of
10 the remaining claims and issues in the case are decided before being permitted to appeal
11 the crucial claims regarding res judicata, collateral estoppel, and the applicability of RCW
12 43.09.210 and Tacoma City Charter § 4.5.

13 The fourth reason is that there are likely to be disputed issues in determining the
14 proper allocation of expenses and revenues between Click and Tacoma Power over
15 several years. Resolution of these issues will involve considerable discovery time and
16 trial/hearing time.

17 Finally, it is unlikely that the need for an appeal would be mooted by future
18 developments in the Superior Court. The Order sets up a trial or further motion practice to
19 determine a damages figure from zero up to or beyond the \$21 million Plaintiffs reference
20 in their Complaint. If the damages are relatively small, Plaintiffs will have an incentive to
21 appeal, and if the damages are large, the City will have an incentive to appeal. In either
22 case it is likely that the dispositive issues in the Order will be appealed regardless of
23 future developments in the Superior Court.

24 Any one of these reasons is a compelling ground for the Court to enter the Civil
25 Rule 54(b) findings. Together they constitute overwhelming grounds for it to do so.

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1 4. Given the magnitude of the issues in dispute and the ultimate outcome's
2 effect on the City, Tacoma Power, and Click customers, the Court should also stay
3 enforcement of the judgment on its Order until the City's appeal has run its course. If the
4 City were forced to promptly shut down Click, there would be an immediate negative
5 impact on Click's customer base, which includes elderly, low-income, governmental, and
6 student users who would suddenly be without service. In addition, Click would lose all of
7 its customers, employees, and goodwill, all of which have significant value and play an
8 important role in the request for information, proposals, or qualifications the City is
9 currently undertaking to find a third party partner for future operation of Click. Even if the
10 Order were later reversed after the conclusion of all proceedings in this Court, much of
11 Click's value will be irrevocably lost.

12 5. Similarly, because the resolution of these issues on appeal could end the
13 case or substantially change the relevant issues for trial, any continued litigation of these
14 issues in this Court should be stayed pending the outcome of the appeal in order to avoid
15 unnecessary time and expenses spent by the parties or the Court. Alternatively, at the very
16 least, the Court should continue the trial date (and all accompanying pre-trial deadlines
17 contained in the Order Setting Case Schedule) until a reasonable time in the future. Based
18 on the relevant deadlines in the Rules of Appellate Procedure and our estimation of the
19 Court of Appeals' current time to oral argument and written decision, the City believes a
20 reasonable new trial date would be no sooner than early 2019.

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

3 Executed at Seattle, Washington, on March 22, 2018.

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DECLARATION OF KARI L. VANDER STOEP IN
SUPPORT OF CIVIL RULE 54(B) FINDINGS AND
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