No. 51695-1

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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-Respondents,

v.

CITY OF TACOMA,

Defendant-Petitioner.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Defendant City of Tacoma ("Tacoma").

II. DECISION BELOW

On March 2, 2018, the Pierce County Superior Court entered an order granting Plaintiffs' motion for partial summary judgment ("Order"). Motion for Discretionary Review Appendix ("MDRA") 1045-48. The court found that "Tacoma Power electric utility revenues and funds may not lawfully be used to pay for Click! Network expenses or capital improvements that are attributable or properly allocable to commercial telecommunications service rather than electric utility service." *Id.* 1048.

III. ISSUES PRESENTED ON REVIEW

1. Did the court misinterpret Tacoma City Charter § 4.5, where it plainly concerns entities (*i.e.*, utilities) rather than services (*i.e.*, electricity)?
2. Did the court misinterpret the accountancy act, RCW 43.09.210, where binding precedent holds that the act does not apply to separate activities funded from a single account?
3. Did the court err in resolving genuine issues of material fact on summary judgment, where it could not have issued its Order without finding that Click was "separate" from Tacoma Power?
4. Did the court err in declining to apply *res judicata*, where it had previously approved that ratepayers may have to fund Click?

IV. STATEMENT OF THE CASE

Tacoma Power is a public utility of Defendant-Petitioner Tacoma. Using excess capacity on its telecommunications system ("System"), Tacoma Power offers its customers TV and internet service through its proprietary Click! Network ("Click"). Tacoma's City Council approved the System in 1996 via Ordinance No. 25930. MDRA 540-72. The Ordinance created the System to serve Tacoma Power's electric utility functions, including connecting grid substations, supporting "smart meters" for customers, and better providing power for customers. *See id.* 543-47, 566, 901. The Ordinance also authorized Tacoma Power to provide TV and internet via the System's excess capacity.[1] *Id.* 566.

Before building the System, Tacoma sought a judicial declaration of its authority to engage in the activities authorized in the Ordinance and to fund those activities with electric revenues. *Id.* 758-89, 804-05. The Pierce County Superior Court ruled for Tacoma and against a certified ratepayer representative. *Id.* 836-37, 895-96.

Click's revenues go into Tacoma Power's Power Fund, just like revenues from electricity sales or other Tacoma Power activities. *Id.* 534-

[1] Due to changes in the power industry and metering technology, Tacoma Power has not been able to fully utilize the System for its original purposes, but continues to maintain and operate the System, including Click, while it searches for the best use of these assets. MDRA 901-02, 976-77. As described in Tacoma's companion Motion to Stay, the search for potential business partners is at a critical point.

35, 662-64, 676-77. The Power Fund in turn pays expenses for Click and other Tacoma Power services. *See id.* When Click operates at a loss, as it often has on paper due to System depreciation costs, Tacoma Power uses electric revenue to cover shortfalls for accounting purposes. *Id.* 662-64, 676-78.

Although all Tacoma Power revenues and outlays come in and out of the Power Fund, Tacoma Power also records Click's finances separately in a sub-fund to track its performance. *See id.* 662-64. It does so to inform Tacoma Power's policy makers, as State law and generally accepted accounting principles only require the parent Power Fund, but not sub-funds like Click, to have a positive year-end balance. *Id.* 535-36, 965-66.

More than twenty years after the declaratory judgment proceedings, Plaintiffs sued, arguing that using electric revenues to "cover" Click's financial shortfalls violated Tacoma City Charter § 4.5 and RCW 43.09.210 (the "accountancy act"). MDRA 3, 8. Plaintiffs moved for summary judgment on this issue, relying heavily on a 2015 memorandum from Tacoma's City Attorney (the "2015 Memo"). See *id.* 31-32. Defendants countered that Click was part of Tacoma Power and thus complied with both provisions and that Plaintiffs were precluded from relitigating claims that could have been brought, and issues that were actually addressed, over twenty years ago. *Id.* 508-32. The trial court

rejected these arguments and granted Plaintiffs' summary judgment motion. *Id.* 1045-49. But it certified its ruling under RAP 2.3(b)(4). MDRA 1090-91.

V. ARGUMENT

A. The Trial Court's RAP 2.3(b)(4) Certification is Independently Sufficient for This Court to Accept Review.

This Court may accept discretionary review if the trial court "has certified . . . 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)(4). Such certifications "should be entitled to substantial weight, and certification on an issue of first impression will likely be given great weight." 1 WASH. APPELLATE PRACTICE DESKBOOK § 4.4(2)(d) (Wash. State Bar Ass'n 4th ed. 2016).

Here, the trial court explained its ruling:

> I don't willy-nilly send things up to the Court of Appeals . . . . I have only certified something—if I've done it a handful of times in 12 years, I'd be surprised . . . . I would not have said it at summary judgment [oral argument] that if one of the parties felt that I should certify this that I would consider that, if I didn't think that there was substantial ground for a difference of opinion.

MDRA 1124-25; *see also id.* 1118 (explaining that court "had suggested to the parties [at summary judgment hearing] that I might certify this, given the magnitude of this issue."). While the certification does not mandate

discretionary review, it is sufficient in itself to permit review. *See In re Marriage of Ruff & Worthley*, 198 Wn. App. 419, 422 n.2, 393 P.3d 859 (2017) ("We granted [petitioner's] motion for discretionary review under RAP 2.3(b)(4)."); *State v. Ortiz-Abrego*, 2018 WL 417967, at *2 (Wn. App. Jan. 16, 2018) (unpublished) ("This court granted discretionary review, accepting the trial court's RAP 2.3(b)(4) certification . . . .").

This case also presents issues of first impression, as no appellate court has yet interpreted Charter § 4.5 or held that payments within a single utility fund violate the accountancy act. As explained in the accompanying stay motion, rushing to a monetary judgment here also may have serious ramifications outside the litigation that are potentially very damaging to Tacoma citizens. This Court should accept the wisdom of the trial court's certification order and review these important disputed issues now.

B. The Trial Court Committed "Obvious" and "Probable" Error. RAP 2.3(b)(1) & (2).

Plaintiffs challenge Tacoma Power's continued operation of Click when it has not proven as lucrative as hoped. Review of Tacoma Power's business decision should focus on whether (1) Click's continued operation is within the purpose and object of relevant enabling statutes; (2) any express limitations apply; and (3) it is arbitrary, capricious, or

unreasonable:

> [I]f municipal utility actions come within the purpose and object of the enabling statute and no express limitations apply, this court leaves the choice of means used in operating the utility to the discretion of municipal authorities. We limit judicial review of municipal utility choices to whether the particular contract or action was arbitrary or capricious, or unreasonable.

Municipality of Metro. Seattle v. Div. 587, Amalgamated Transit Union, 118 Wn.2d 639, 646, 826 P.2d 167 (1992). The Plaintiffs should not have prevailed on any of these issues, let alone on summary judgment.

1. Plaintiffs Do Not Challenge Click's Enabling Statutes.

Tacoma explained the enabling statutes for Tacoma Power's launch and continued operation of the System, including the lease of excess System capacity via Click.[2] MDRA 520 n.6, 529. Plaintiffs did not challenge any of the expansive enabling authority Tacoma cited. *Id.* 1034 ("Plaintiffs are not challenging the City's right to . . . operate . . . Click . . .

[2] Those statutes include RCW 35.22.280(3) (power to control municipal finances and property); RCW 35A.11.020 (broad grant of authority to code cities, including to operate utilities and provide municipal services); RCW 35.22.570 (omnibus grant of power to charter cities, including all powers of code cities); RCW 35.22.900 (requiring liberal construction of powers granted); RCW 35.94.040 (right to lease or sell utility property and equipment surplus to the City's needs); and RCW 80.36.300 (promoting diversity in supply of telecommunications services). Additional enabling authority includes City Charter § 9.1 (allows leasing of City property); *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) (affirming broad municipal powers when city acts in proprietary capacity); *Hite v. PUD No. 2*, 112 Wn.2d 456, 772 P.2d 481 (1989) (confirming production and sale of electricity are proprietary functions); *Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980) (recognizing municipal authority to offer telecommunications services); and *POWER v. Utilities, Transp. Comm'n*, 104 Wn.2d 798, 805, 820-22, 711 P.2d 319 (1985) (municipal utility may recover investments in stranded assets through electric rates, so long as the original investment was prudently made).

."); *id.* 1099 ("We do not challenge the City' right to establish a telecommunications business."). Instead, they relied upon multiple cases decided under a different statute (RCW 35.92.050) that is not at issue here. *See* MDRA 44-46.

2. No Express Limitations Apply.

Plaintiff asserted two limitations on Click's continued operation and funding by Tacoma Power: Charter § 4.5 and the accountancy act. *See* MDRA 44-47. Because Click is an integrated part of Tacoma Power and its Power Fund, the court erred by accepting either argument. This is particularly true where, as here, Plaintiffs' claims turn on disputed fact issues regarding Click's configuration. This Court should grant review.

a. Click's Funding Does Not Violate Tacoma's Charter.

Charter § 4.5 provides:

> 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**.

(Emphasis added). The Power Fund holds utility revenue, including that generated by the sale and lease of excess System capacity via Click. MDRA 534-35, 662-64, 676-77. Whether the money may be used for

Click turns on whether such funding involves (1) either (a) "necessary operating expenses [of a utility]," or (b) "the making of additions and betterments [to the utility] and extensions [of it]; or (2) a prohibited "loan[] to . . . any other utility." Charter § 4.5.

Plaintiffs' analysis, and the trial court's Order, instead ask whether Click expenses are "attributable or properly allocable to commercial telecommunications service rather than electric utility service." MDRA 48, 1048. This analysis ignores how the word "utility" is used in § 4.5.[3]

Plaintiffs seem to suggest that "utility" in § 4.5 means the ***service*** or ***function*** of providing electricity rather than the ***entity*** providing the service or function. But § 4.5 is not susceptible to that interpretation. "Under the principle of noscitur a sociis, a single word in a statute should not be read in isolation . . . . [i]nstead, the meaning of words may be indicated or controlled by those with which they are associated." *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012); *see also Burns*, 161 Wn.2d 129, 148, 164 P.3d 475 (2008) ("[A] doubtful term or phrase in a statute or ordinance takes its meaning from associated words and phrases."). Applying this canon to § 4.5, the phrase "any other utility,

[3] "Our goal in statutory interpretation is to effectuate the legislature's intent. . . . [W]e give effect to . . . plain meaning as an expression of legislative intent. Plain meaning is discerned from viewing the words . . . in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2008) (citations omitted).

department, or agency of the City" indicates that the term "utility" refers to the ***entity providing the service*** and not to the service itself.

Indeed, the fact that loans between "utilities" are prohibited confirms this reading: electricity and water—the services—cannot lend money (they are services, not entities with money). Only a utility—an entity—has money to lend. Had the Charter's drafters intended to refer to the service (rather than the entity) they would have said so.[4] Indeed, they did so when distinguishing "revenues ***of utilities***" (in the first clause of § 4.5) from "charges for ***supplying utility services*** to consumers" (in the final clause of § 4.5's first sentence).

Under § 4.5, Tacoma Power is a "utility." It operates Click. Thus, in relation to Tacoma Power, Click is a "necessary operating expense[] thereof." Even if that were not so, the System (and Click's use of its excess capacity) is an "addition and betterment" and an "extension" of Tacoma Power: It allows the utility to provide more services and functionality to its customers. Finally, Tacoma Power operates Click, so using its Power Fund revenues to cover its operating costs is not a prohibited "loan to . . . any other utility." By holding otherwise on these

[4] Narrower language specifying a utility service or function—versus an entity providing the same—has been used in other charters that more strictly control utilities' spending than Tacoma's. *See Cedar River Water & Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 801-02, 315 P.3d 1065 (2013) (discussing King County charter provision requiring that "[r]evenues . . . received for such [utility] ***functions*** shall never be used for any purpose other than the operating expenses thereof" (emphasis added)).

issues, the trial court committed obvious and probable error under RAP 2.3(b)(1) and (2).

b. The Accountancy Act Does Not Apply.

Plaintiffs invoke the following part of the accountancy act:

> 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.

RCW 43.09.210. Whether Click's funding violates this statute depends on whether Click is a separate "department, public improvement, undertaking, institution, or public service industry" from Tacoma Power. It is not.

"This law applies to services that one government body provides for another . . . ." *Lane v. City of Seattle*, 164 Wn.2d 875, 889, 194 P.3d 977 (2005) (holding that Lake Forest Park had to pay Seattle for fire hydrants). Because Click is not a separate "government body," the accountancy act does not apply here. The trial court obviously or probably erred.

This point was further established in the analogous (and controlling) case of *Rustlewood Association v. Mason County*, 96 Wn.

App. 788, 794-97, 981 P.2d 7 (1999). There, a county charged uniform sewer fees to residents of multiple communities and segregated the revenues from each community into separate sub-accounts contained in one combined fund. The county assessed a "recoupment fee" against Community A's residents after realizing that their sewer system, which cost more to maintain, had been subsidized by Community B's residents for years. *Id.* The court rejected the county's position that the accountancy act required imposition of the fee, reasoning that "the County treated the sewer/water fees from the three subdivisions as part of the same fund." *Id.* at 797. The court noted that maintaining "separate subsidiary accounts for each of the three subdivisions" did not make any of them a "separate entity for purposes of the accountancy act." *Id.* Rather, "these subsidiary accounts are a single combined fund operated by a single department; they constitute one public service industry for the purposes of the accountancy act." *Id.* at 796.

Like the sewer fund in *Rustlewood*, the Power Fund holds the monies for both Click and for Tacoma Power's sale of electricity (and other activities) as a single fund operated by a single department (Tacoma Power). MDRA 533-35, 662, 676-77. *Rustlewood* is binding authority: The trial court had to either (i) rule for Tacoma on the accountancy act

issue; or (ii) let a jury decide the factual issue of Click's "separateness" from Tacoma Power.[5]

c. The Court Improperly Resolved an Issue of Fact That Should Have Precluded Summary Judgment.

As the preceding analysis demonstrates, Tacoma would only violate Charter § 4.5 and the accountancy act if Click were a separate entity under those statutes. The evidence before the trial court showed that Click's "separateness" was, at the very least, a disputed issue of material fact precluding summary judgment.

To show that Click was not part of Tacoma Power, Plaintiffs submitted evidence that:

- The ordinance creating the System called for "a separate system of the City's Light Division [i.e. Tacoma Power]." MDRA 136.
- The resolution authorizing use of the System to provide broadband services mentioned "revenue diversification through new business lines." *Id.* 163
- A tax opinion from a bond issuance called Click a "commercial telecommunications service" *Id.* 117. *But see id.* ("Click! Network is accounted for as part of the Electric System.").
- Tacoma Power's electricity service is taxed differently than its Click service. *Id.* 302. *But see id.* (broadband and electric revenues are taxed the same; only cable revenues are taxed differently).
- Tacoma's City Attorney once said that Click "exists separate and

[5] Plaintiffs relied heavily on the 2015 Memo: "In applying this law [accountancy act] the State Supreme Court held in Okeson that the City's electric utility could not maintain the City's . . . street lights without being paid for the value of the service." MDRA 69-70 (citing *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) ("*Okeson I*")). But *Okeson I* never reached the issue. *Id.* at 556-57 ("Because we rule that the ordinance imposed an unconstitutional tax, the statutory issues [under RCW 43.09.210] are moot.)"

apart from the City's electric utility functions." MDRA 74.

- City Finance Department monthly financial reports for Tacoma Power include a separate breakout for Click finances but not for those of Tacoma Power's other divisions. *Id.* 482-83 (showing 2-page "Click! Network Operational Summary").

This scattershot (and often contradictory) evidence failed to carry Plaintiffs' burden to show, as a matter of law, that Click was separate from Tacoma Power.

On the contrary, Tacoma's evidence showed that Click is indeed part of Tacoma Power:

- Click is merely one of Tacoma Power's business divisions. MDRA 107-08, 900, 997.
- Click is an integrated part of Tacoma's Power Fund. *Id.* 533-35, 662-64, 676-77, 741, 744-45.
- Click's and Tacoma Power's finances appear in the same financial statements and are audited independently by a single firm, Moss Adams LLP. *Id.* 535, 662, 965-66.
- This funding arrangement was never questioned by Moss Adams or the State Auditor. *Id.* 536.
- Click and Tacoma Power are operated by the same public officials. *Id.* 106-07, 126 (5-member public utility board and Tacoma City Council).
- Click's general manager reports to the Tacoma Power superintendent and is part of the Tacoma Power management team. *Id.* 900, 997.
- All Click customers are also Tacoma Power electric customers. *Id.* 998.
- Parts of the System used for Click are also used to support electric operations. *Id.* 117, 239-40, 974-75.

As Tacoma argued below, its evidence justifies summary judgment

for Tacoma. But at the very least, the trial court had to draw all facts and reasonable inferences "in the light most favorable to the nonmoving party." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). It failed to do this. "Separateness" is a fact question, but the trial court could not have made the ruling it did without resolving that fact question in Plaintiffs' favor. This is an obvious or probable error requiring review. *See Giordano v. McNeilab, Inc.*, 35 Wn. App. 221, 225, 666 P.2d 384 (1983) (improper inference in moving party's favor is obvious error under RAP 2.3(b)(1)).

3. The Court Erroneously Failed to Give its Prior Rulings Preclusive Effect.

Tacoma filed a 1996 declaratory action to ensure that its proposal to operate and fund Click was lawful. MDRA 758-89. A defendant was certified as the class representative for all Tacoma Power ratepayers, and Plaintiff Mark Bubenik (then a Deputy Tacoma City Attorney assigned to Tacoma Power) swore in a declaration that the defendant would "fully and fairly" represent the interests of all ratepayers. *Id.* 791-96, 804-05. The ratepayers argued, *inter alia*, that TV and internet revenue was unlikely to cover the cost of providing those services. *Id.* 871 ("When the proposed 'revenue' bonds cannot be paid off with the revenues from . . . services such as cable television . . . the ratepayers . . . will have to pay the tab").

That case resulted in two orders. The first affirmed Tacoma's ability to offer cable television and lease the network to internet service providers. *Id.* 847-48. The second affirmed Tacoma's ability to pay for these operations with electric revenue bonds, which could only be paid off using electric revenues. *Id.* 895-96. Thus, the court confirmed that Tacoma could fund Click operations using electric revenues.

Plaintiffs argued in the trial court that declaratory rulings have a limited preclusive scope that does not bar their present claims. MDRA 1035 (citing Restatement (Second) of Judgments § 33; 22A Am. Jur. 2d, Declaratory Judgments § 244; 15 Wash. Prac. Civ. P. §§ 35:41, 42:25 (2d ed.)). The authorities they invoked say only that preclusion does not bar later suit for coercive relief to vindicate rights already declared. *See* Rest. (2d) Judgments § 33, Illust. 1 (After A wins a declaration that B breached a contract, A is not precluded from later suing B for damages for the breach). This does not mean Plaintiffs may re-assert previously rejected arguments or claims that had accrued at time of the prior suit.

Plaintiffs are now suing, as ratepayers, to collaterally attack the use of electric revenues to fund Click operations. Even worse, many of the Plaintiffs are former Tacoma or Tacoma Power employees who were fully aware that Tacoma Power had spent two decades and many millions of dollars investing in Click before they decided to attack Click's funding

under legal theories that were available in the first action. MDRA 3-4; *see also Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 529, 262 P.3d 81 (2011) ("Merely asserting a new legal basis for a claim that has already been decided does not bar the application of res judicata."). The trial court erred in concluding that claim and issue preclusion do not prohibit this second lawsuit.

C. The Court's Obvious and Probable Errors Render Further Proceedings Useless and Alter the Status Quo.

Under RAP 2.3(b), this Court may grant discretionary review if (1) "an obvious error" "would render further proceedings useless"; or (2) a "probable error" "substantially alters the status quo or limits the freedom of a party to act." As demonstrated above, the trial court made obvious and probable errors. It even acknowledged this possibility:

> I don't profess to understand this the way you [counsel] all understand this . . . . I suspect that [Plaintiffs' counsel] may be able to argue this again in front of the Supreme Court because I don't think it'll end with me, having looked at both sides of this, regardless of the outcome.

MDRA 1110-11; *see also id.* 1125 (calling its summary judgment decision "critical to the outcome of this case").

Further proceedings are "useless" where, as here, reversal on appeal could result in dismissal of a claim. *Long v. Dugan*, 57 Wn. App. 309, 311, 788 P.2d 1 (1990) (denial of motion to dismiss based on

misapplication of wrongful death statute satisfied RAP 2.3(b)(1)). This is so here.

The court's decision also alters the status quo and implicates Tacoma's (and Tacoma Power's) freedom to act outside the litigation, not only with respect to Click funding, but also for many programs not fully covered by their revenues. MDRA 904, 999. Furthermore, it does so at a critical time for Click's future, where Tacoma Power is seeking potential partners to operate, lease, or even acquire the System. *See* Tacoma's Mot. to Stay Trial Ct. Proceedings; *Dep't of Revenue v. Nat'l Indem. Co.*, 45 Wn. App. 59, 60 n.1, 723 P.2d 1187 (1986) (decision that "might deprive the Departments of the bond proceeds" satisfied RAP 2.3(b)(2)). This Court should grant review.

VI. CONCLUSION

For all of the foregoing reasons, Tacoma respectfully asks the Court to accept discretionary review.

DATED this day of April 23, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I caused to be served a copy of the foregoing document via CM/ECF (JIS) and Electronic Mail to the following persons below:

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Signed this 23rd day of April, 2018, at Seattle, King County, Washington.

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