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7 CITY COUNCIL FOR THE CITY OF LONG BEACH,
HENRY TABOADA, in his official capacity
8

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES, CENTRAL DISTRICT

12 JOHN DONALDSON, ADREA AND
13 PETE STOKER, AMELIA NIETO,
ROGER ERICKSON, JOHN RICHARD
14 DEATS, TRACI WILSON-KLEEKAMP
AND STEVE KLEEKAMP, JOSEPH
15 WEINSTEIN, COLETTE MARIE AND
RICHARD MCLAUGHLIN, RONALD B.
16 NOE, AND LONG BEACH CITIZENS
FOR UTILITY REFORM,

17 Plaintiffs,

18 vs.

19 CITY OF LONG BEACH, CITY
20 COUNCIL FOR THE CITY OF LONG
BEACH, HENRY TABOADA, in his
21 official capacity, and DOES 1-100,

22 Defendants.
23
24

CASE NO. BC251505

DEFENDANTS' NOTICE OF MOTION
FOR DEMURRER AND DEMURRER
TO PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER
[Defendants' Request for Judicial Notice
and Motion to Strike filed concurrently
herewith]

DATE: August 23, 2001

TIME: 9:00 a.m.

JUDGE: Hon. Anthony J. Mohr

DEPT: 309, ROOM: 1409

PLACE: Los Angeles Superior Court
600 S. Commonwealth Ave.
Los Angeles, CA 90005

Complaint Filed: May 31, 2001
Trial Date: None

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DEMURRER

1
2 Defendants, CITY OF LONG BEACH, CITY COUNCIL FOR THE CITY OF LONG
3 BEACH, and HENRY TABOADA, in his official capacity (collectively "Long Beach"), submit
4 the following Memorandum of Points and Authorities in Support of their Demurrer to
5 Plaintiffs' Complaint for violation of Section 1501 and Section 1502 of the Long Beach City
6 Charter (Charter), violation of Section 15.36.100 of the Long Beach Municipal Code
7 (LBMC), and violation of Section 526a of California Code of Civil Procedure (CCP).

MEMORANDUM OF POINTS AND AUTHORITIES

8
9 **I. INTRODUCTION**

10 1. The City of Long Beach owns and operates a gas utility called Long Beach Energy,
11 previously known as the Long Beach Gas Department (Cmplt. ¶¶22). Long Beach is a
12 charter city and thus governed by its charter. Charter §1502 (Cmplt. ¶¶2) requires Long
13 Beach to base its customer rates upon the rates of like utilities in the Southern California
14 area (Cmplt. ¶¶28, 32).¹ In addition to Long Beach, there are three other utilities operating
15 in the Southern California area. (J.N. #10, #11.) Within the past nine months, Long Beach
16 and two other utilities purchasing gas at the California border, have seen the prices paid
17 for purchasing natural gas for their utility customers spike dramatically. Long Beach has
18 reluctantly passed on those higher prices of gas to its customers as provided in its rate
19 resolution. (Cmplt. ¶¶37, Exh. A, B).

20 2. Plaintiffs, purporting to be customers and representative of a customer class (Cmplt.
21 ¶¶21), have brought this action against Long Beach alleging that those pass-through gas
22 costs are illegal. Specifically, plaintiffs allege that Long Beach charged significantly more
23 for gas than the prevailing rates charged by like utilities in the Southern California area in
24 violation of Charter §1502 (First Cause of Action; Cmplt. ¶¶28, 41) and in violation of LBMC
25 §15.36.100 (Third Cause of Action; Cmplt. ¶¶29, 49). Plaintiffs allege also that Long Beach
26 failed to establish adequate reserves to be available to be tapped in order to ensure rate
27

28 ¹See defendants' Request for Judicial Notice of Charter §1502, Item #2. Hereinafter the
defendants' Request for Judicial Notice will be identified using "J.N." and the Item number (J.N. #2)

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1 stabilization in violation of Charter §1501 (Second Cause of Action; Cmplt ¶¶27, 45).
2 Finally, plaintiffs allege that the purported violations of Charter §1502 and LBMC
3 §15.36.100 constitute a waste of public funds, in violation of CCP §526a (Fourth Cause of
4 Action; Cmplt ¶¶54, 57).

5 3. Plaintiffs' Complaint is premised on the unsupported proposition that Long Beach
6 has a legal duty to sell gas at rates comparable to those of Southern California Gas
7 Company (SoCal Gas) even if it paid more than SoCal Gas for the gas (Cmplt. ¶¶36,37)
8 and that Long Beach must maintain a reserve to insure rate stabilization (Cmplt. ¶45). But
9 this is clearly not the law. It is well established by the California Supreme Court that "it is
10 not the function of the courts to evaluate the wisdom of the city's rate-fixing decisions. In
11 that context, we cannot determine what constituted 'sound business practices,' but may
12 only consider that narrower legal question whether the rates were unreasonable or
13 arbitrarily established." (Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1188)

14 4. Plaintiffs have not and cannot maintain that Long Beach gas rate increases were
15 anything but a measured and reasonable response to increases in the cost of gas to Long
16 Beach which were passed through to the customers as required by the rate resolution.
17 Accordingly, defendants' demurrer should be sustained without leave to amend.

18 **II. IN THE FIRST AND THIRD CAUSES OF ACTION, PLAINTIFFS CAN NOT PLEAD**
19 **SUFFICIENT FACTS TO STATE A CAUSE OF ACTION AGAINST LONG BEACH**
20 **FOR VIOLATIONS OF CHARTER SECTION 1502 OR LONG BEACH MUNICIPAL**
21 **CODE 15.36.100 IN SETTING ITS GAS RATES**

22 5. Plaintiffs bear the burden of pleading all essential elements to their cause of action:
23 "Whatever a plaintiff is obligated to plead, plaintiff is obligated to prove. (1 Witkin, Cal.
24 Evidence (3d ed. 1986) Burden of Proof and Presumptions, §§ 131, p. 116)."
25 (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 654; Evidence Code § 500.)
26 There is no exception to this rule in the instant case.

27 6. Plaintiffs ignore the fact that Long Beach and three other private investor owned
28 utilities ("IOU's") provide gas service to both residential and business customers in the
Southern California area. The private utilities are Southern California Gas Company

1 ("SoCal Gas"), San Diego Gas & Electric Company ("SDG&E"), and Southwest Gas
2 ("Southwest"). (J.N. #10,#11). The rates and fees of the private utilities are regulated and
3 approved by the California Public Utilities Commission ("CPUC"). The CPUC "has
4 historically been the agency charged by the Legislature with regulation of privately owned
5 public utilities." (Orange County Air Pollution Control Dist. v. Pub. Util. Comm. (1971) 4
6 Cal.3d 945, 947.) The rates and fees of Long Beach are based upon its Charter and set
7 by rate resolutions passed by the City Council.

8 7. Section 1502 of the Long Beach City Charter (as amended 1980) (Cmplt. ¶¶2, 28)
9 states as follows:

10 Section 1502. UTILITY RATES

11 The rates to be charged users for any services or commodities supplied by
12 any public utility owned and operated by the City shall be based upon the prevailing
13 rates for similar services and commodities supplied or sold by other like utilities
14 whether public or private, operating in the Southern California area. (J.N.#2)

14 8. The Complaint alleges that LBMC §15.36.100 (Cmplt. ¶¶2, 29) requires that the
15 rates be "reasonable and comparable to rates, fees, and charges by other like utilities in
16 the Southern California area." (J.N. #5) This statement is not in dispute.

17 9. Both Charter §1502 and LBMC §15.36.100 provide that Long Beach rates shall be
18 "based upon" or "comparable to" rates by "other like utilities...in the Southern California
19 area." The first sentence of LBMC §15.36.100 reiterates the language found in Charter
20 §1502 and provides the changes will be approved or disapproved by the City Council by
21 resolution. (Cmplt. ¶¶28, 29; J.N. #2, #5.)

22 10. **The variable element of the Long Beach Rate is a pure pass-through of cost**
23 **of gas.** Long Beach Rate Resolution No. C-27411 (Cmplt Exh. A) effective October 1,
24 1998, authorized Long Beach to change its pricing methodology for charging for gas to
25 reflect Long Beach's actual monthly cost of gas. This pricing change was based on the
26 fact that the CPUC had approved a similar change in Socal Gas' pricing methodology
27 (Cmplt. Exh. A, p. 15). Pursuant to this Rate Resolution, the rates charged by Long Beach
28 consisted of both fixed and variable elements. The fixed elements are to remain

unchanged unless modified by a subsequent rate resolution. The variable element, called the weighted average cost of gas (WACOG), is the utilities' cost per therm for gas (Cmplt Exh. A, p.19). The WACOG is to be calculated on a monthly basis, and "[t]here will be no markup to the customer above the City's true cost of gas. . ." (Cmplt Exh. A, p.19). Thus the variable element of the rate is a pure pass through to Long Beach customers. Long Beach makes no profit on this element of the rate. The net revenue which covers all operations, maintenance, acquisitions, improvements, debt service and reserves for the utility is included in the fixed portion of the rate.

11. The Complaint states plaintiffs' (Cmplt. ¶ 7 lines 7-8; ¶8 lines 17-19, ¶10 lines 1-2, etc.) residential gas bills grew dramatically beginning in December, 2000 after the rate increase; however, the relevant Rate Resolutions of Long Beach reflect a continuing **decrease** in the fixed portion of the Residential Rates. Exhibits A and B (Rate Resolutions No. C-27411 and No. C-27584) to the Complaint contain the Long Beach rate resolutions effective October 1, 1998 and October 1, 1999 respectively. Additionally, Long Beach adopted Rate Resolution No. C-27794 on January 9, 2001, which became effective February 1, 2001, and is the current rate resolution. (see J.N. #8.) As shown in the chart below, the fixed elements of the gas rates for Long Beach residential customers decreased during the relevant time, while the WACOG varied depending on the actual cost of gas.

Long Beach Gas Rate Resolutions for Residential Customers:

| Residential Rate Schedule | Exh. A Cmplt.(p.17) Rate Resolution No. C-27411 Effective 10/1/98 | Exh. B Cmplt. (p.57) Rate Resolution No. C-27584 Effective 10/1/99 | J. N. #8 (p.60) Rate Resolution No. C-27794 Effective 2/1/01 |
|--|--|---|---|
| Fixed Elements: | | | |
| Daily Meter Chg. (per day) | \$0.1644 | \$0.1644 | \$0.1644 |
| Baseline Rate (per therm) | \$0.3524 | \$0.2819 | \$0.2441 |
| Non-Baseline Rate (per therm) | \$0.5241 | \$0.4428 | \$0.4239 |
| Variable Element--Changes monthly with market price of gas: | | | |
| Commodity Charge (per therm) | Cost of Gas (WACOG) | Cost of Gas (WACOG) | Cost of Gas (WACOG) |

12. The theory underlying plaintiffs' Complaint is that Long Beach is legally required to purchase wholesale gas for its customers but it can not pass through the actual cost it paid for the gas if Long Beach paid more for its gas than SoCal Gas. Thus, the only "facts" alleged in the Complaint make reference solely to comparing the variable gas costs portion of the rates of SoCal Gas and Long Beach. Plaintiffs nowhere allege that Long Beach's rates were greater than the rates of SDG&E or Southwest Gas. These additional missing critical facts for comparison are required to state a claim against Long Beach and are properly placed before the court on demurrer. In supplying these missing facts to the Court through its Judicial Notice Request, Long Beach has compared the monthly gas cost rates of all Southern California utilities for procuring gas (J.N. #12) with the monthly Long Beach cost of gas (J.N. #13), for the period relevant to the Complaint. The only conclusion possible is that Long Beach is in compliance with Charter §1502 as to its rates. The following comparison provides the historical actual procurement cost of gas passed through to the customers by each utility:

Monthly Published Gas Procurement Costs (J.N. #12, 13)
All Southern California Utilities
 (\$ per therm)

| <u>Month/Year</u> | <u>J.N. #13 p.144 Long Beach</u> | <u>J.N.#12p.110 SoCal Gas</u> | <u>J.N.#12p.118 SDG&E</u> | <u>J.N.#12p.126-131 Southwest</u> |
|---|--------------------------------------|---|-----------------------------------|---------------------------------------|
| December, 2000 | 1.44650 | 0.65307 | 1.55554 | 0.86220 |
| January, 2001 | 1.62440 | 0.65206 | 1.26275 | 1.29631 |
| February, 2001 | 1.43320 | 0.66215 | 1.20000 | 1.57597 |
| March, 2001 | 0.69000 | 0.74043 | 1.20000 | 1.57597 |
| April, 2001 | 0.19140 | 0.69401 | 1.37500 | 1.19096 |
| May, 2001 | 0.93100 | 0.62049 | 1.50000 | 1.19096 |
| Average Cost of Gas Per Therm | \$1.05275 | \$0.67037 | \$1.34888 | \$1.28206 |
| Average Cost of Gas of Private Utilities | | \$0.67037+\$1.34888+\$1.28206/ 3 = \$1.10044 | | |

13. The above variable monthly gas cost comparisons demonstrate that with respect to the period at Issue in the Complaint (1) Long Beach's average gas cost rates were lower than the average of the other three utilities operating in the Southern California area; (2) Long Beach had the second lowest average gas cost rates for utilities in the Southern

1 California area, and (3) Long Beach's rates were reasonable and in compliance with the
2 mandate of Charter § 1502 (Cmplt ¶28). The rate increases beginning in December of
3 2000 (Cmplt ¶36) resulted solely from the increase in the prices Long Beach paid for gas.

4 14. Plaintiffs quote the provisions of Charter § 1502 and LBMC § 15.36.100 that Long
5 Beach rates shall be similar to "other like utilities whether public or private operating in the
6 Southern California area" throughout the Complaint (Cmplt. ¶¶2, 28, 29, 32, 41, 49, 50);
7 however, plaintiffs ignore this mandate and look solely to the gas costs of SoCal Gas as
8 the basis of their first, third and fourth causes of action in the Complaint (Cmplt. ¶37) as
9 the sole basis for the alleged violations of Charter §1502, LBMC §15.36.100, and CCP
10 §526a.

11 15. The clear language of Charter §1502 and LBMC §15.36.100 requires Long Beach
12 to look to "other like utilities whether public or private operating in the Southern California
13 area" when establishing its rates, fees, services, and charges. The CPUC and all utilities
14 operating in California recognize the Southern California area to include the customer
15 service territories of Long Beach, SoCal Gas, SDG&E and Southwest Gas as reflected in
16 the annual report of gas utilities prepared at the request of the CPUC pursuant to Decision
17 No. 95-01-039 (J.N.#10, at pg. 94-97 and pg.103-105; J.N.# 11, Map).

18 16. The language of Charter §1502 is clear and unambiguous. The fundamental rules
19 of statutory construction apply to interpret Charter provisions. (neto v. City of Fresno
20 (1982) 136 Cal.App.3d 460, 465.) Our Supreme Court has noted: "If the language is clear
21 and unambiguous there is no need for construction, nor is it necessary to resort to indicia
22 of the intent of the Legislature..." (Delaney v. Superior Court (1990) 50 Cal.3d 785, 798.)
23 In other words, Charter §1502 says what it means.

24 17. When the Charter was amended in 1980, if the intent was to compare Long Beach
25 rates solely to SoCal Gas, then Charter §1502 would have limited the comparison to SoCal
26 Gas and would **not** have stated "rates for similar services and commodities ...by other like
27 utilities whether **public or private, operating in the Southern California area**" which can
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1 only be interpreted to include all public or private utilities that serve both residential and
2 business customers like Long Beach that are located within Southern California.²

3 18. It appears that plaintiffs have failed to investigate the rates charged users for
4 services or commodities supplied by other utilities in the Southern California area besides
5 SoCal Gas because if they had, this complaint would not have been filed. When giving a
6 plain and commonsense meaning to the language of Charter §1502 and by reference to
7 matters subject to judicial notice herein, plaintiffs have not and can not plead facts
8 sufficient to save the First or Third Causes of Action within the Complaint; therefore, Long
9 Beach's demurrer as to these causes of action should be granted without leave to amend.

10 **III. NO VIOLATION OF CHARTER SECTION 1501 CAN BE ALLEGED AGAINST**
11 **LONG BEACH IN THE SECOND CAUSE OF ACTION BECAUSE THE AMOUNT**
12 **OF ANY UTILITY RESERVE FUND IS DISCRETIONARY**

13 19. Long Beach City Charter Section 1501 (Cmplt. ¶27) states as follows:

14 **Section 1501. UTILITY REVENUES**

15 All revenues received from the operation of each public utility owned and
16 operated by the City shall be deposited and kept in a separate revenue fund in the
17 name of the utility operation generating the revenue and shall be disbursed
18 therefrom on behalf of each such utility operation in the following order of priority:

19 (a) Payment of interest and principal coming due on any bonded
20 indebtedness relating to the utility which generates the revenue in each such
21 specified fund;

22 (b) Payment of the annual operating and maintenance expenses,
23 acquisitions, improvements and extensions of the respective utility system;

24 (c) **Set aside a portion of each fund as a reserve to be used for**
25 **contingencies in the operation of each such utility;**

26 (d) **The remainder in any of these funds determined by the City Manager**
27 **to be unnecessary to meet the above obligations may be transferred into the**
28 **General Purpose Fund of the City as approved in the annual budget by the City**
Council. (emphasis added.) (J.N. #1)

29 20. Perhaps recognizing that there are no operative facts which would give rise to
30 liability for Long Beach in Charter §1501, plaintiffs seek to impose liability in the Complaint
31 by asserting a statutory duty where none exists.

32 ² In comparing the similarity of utilities, Long Beach, SDG&E and Southwest are all
33 wholesale utility customers of SoCal Gas, and all serve both residential and business customers
34 numbering between 100,000 and 750,000 customers, compared to SoCal Gas which has a much
35 larger customer base (over 5 million customers), possessing its own interstate pipeline capacity (which
36 allows it to avoid the higher price currently charged for gas at the California border paid by Long Beach,
37 SDG&E and Southwest), and has many more commercial customers than the other three Southern
38 California utilities.

1 21. Plaintiffs contend that Long Beach must "draw on reserves to stabilize the rate
2 increases" (Cmplt. ¶38) and that "defendants' failure to maintain adequate reserves which
3 could have been tapped to ensure rate stabilization" (Cmplt. ¶45) has caused in excess of
4 \$38 million in damages to plaintiffs.³ Although the Complaint alleges that Long Beach is
5 in violation of Charter §1501, nothing in the language of Charter §§ 1501, 1502 or LBMC
6 §15.36.100 create a duty on the City to maintain reserves to either stabilize rate increases
7 (Cmplt. ¶38) or to ensure rate stabilization (Cmplt. ¶45).

8 22. In analyzing the language of Charter §1501, the court must apply well recognized
9 principles of statutory construction. The fundamental rules of statutory construction apply
10 to interpret Charter provisions. (Oneto v. City of Fresno (1982) 136 Cal.App.3d 460, 465.)
11 "To interpret statutory language, we must 'ascertain the intent of the Legislature so as to
12 effectuate the purpose of the law.'[citation.]" (California Teachers Assn. v. Governing Bd.
13 of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 632.) "Our first step is to scrutinize
14 the actual words of the statute, giving them a plain and commonsense meaning." (People
15 v. Valladoli (1996) 13 Cal. 4th 590, 597.)

16 23. The entire language of §1501 must be considered in interpreting the clear meaning
17 of the charter mandate. "If possible, significance should be given to every word, phrase,
18 sentence and part of an act in pursuance of the legislative purpose. (citation). A
19 construction making some words surplusage is to be avoided." (Moyer v. Workmen's
20 Comp. Appeals Bd (1973) 10 Cal.3d 222, 230.) Without doubt, the clear language of
21 Charter §1501(c) and (d) allows legislative discretion in the amount of transfers of funds
22 to the General Fund and provides no specific amount, minimum, or percentage that must
23 be kept in reserves in the gas fund for contingencies in operations of the gas utility, and
24 it provides no criteria for what portion of the fund should be held as contingencies. Thus
25 this determination must be left to the discretion of the legislative body during the annual
26 budget hearings, at which time, the balance remaining in the fund and unnecessary to

27
28 Although not essential to this pleading, Long Beach has filed a lawsuit against Southern
California Gas Company and others in an effort to recover a portion of the high gas costs it paid to
others which would result in refunds to its residents and businesses if successful. (See J.N. #14)

1 meet the obligations of Charter §1501(a)-(c), may be transferred to the General Purpose
2 Fund upon approval by the City Council. Plaintiffs travel far beyond any reasonable,
3 common, or logical interpretation of the words "contingencies in operations" to contend
4 such words create a duty on Long Beach to maintain reserves to either stabilize rate
5 increases (Cmplt. 38) or to ensure rate stabilization (Cmplt. 45).

6 24. Further, it is obvious from the clear language in Charter §1501(d) that it
7 contemplates annual review and transfer of all surplus funds to the General Purpose Fund
8 upon approval by the City Council. The words "annual," "transferred," and "General
9 Purpose Fund" are all contained in Charter §1501(d).

10 25. If Charter §1501 (c) and (d) were intended to create such a reserve to insure rate
11 stabilization for its customers, this item would have been specifically identified in the "order
12 of priority" of disbursements set out in §1501 (a) through (c) in a manner which would
13 provide that the utility shall "set aside a portion of the revenue in such fund as a reserve
14 to be used to stabilize customer rates during periods of substantial price increases
15 resulting from increases in the cost of gas to customers." BUT no such language appears
16 in Charter §1501 or can be implied, giving the actual words of the charter provisions a plain
17 and commonsense meaning as required by the California Supreme Court in People v.
18 Valladoli, supra 13 Cal. 4th at 597.

19 26. The allegations in plaintiffs' Complaint challenging the legality of transfers to the
20 general fund are very similar to Jarvis v. City of Los Angeles (2000) 85 Cal.App.4th 79.
21 Jarvis filed a class action suit against the City of Los Angeles (LA) for declaratory relief,
22 taxpayers' injunctive relief, writ of mandate, and damages. Jarvis alleged LA and its
23 Department of Water and Power (LADWP) were overcharging for water services. In
24 sustaining the city's demurrer without leave to amend, (Jarvis supra 85 C.A.4th at pages
25 82, 84, 85), the Court states:

26 "Water rates established by the lawful rate fixing body are presumed
27 reasonable, fair and lawful. (citation.) A plaintiff contesting the rates bears the
28 burden of proof of unreasonableness. (citation.)

In this case, appellants...seem to allege that the existence of a surplus in the
Water Revenue Fund proves that the DWP is overcharging for water... However,

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1 according to *Hansen*, a municipal utility is entitled to a reasonable rate of return and
utility rates need not be based purely on costs. (*Id. at p. 82*)

2 The General Fund "is established as a medium of control of and accounting
3 for municipal activities other than activities authorized or contemplated by special
4 funds. All revenues and receipts which are not by law or Charter pledged or
encumbered for special purposes shall be credited to the general fund... Any transfer
from the Water Revenue Fund... was a lawful exercise of the City's power. (*Id. at*
5 *p. 84.*)

6 Since we can find nothing prohibiting the City from making the transfers by
the method it employed, appellants' argument fails. (*Id. at p. 85.*)

7 27. The court in *Jarvis*, supra 85 Cal.App.4th at 82, states clearly that a municipal utility
8 is entitled to a reasonable rate of return. The existence of a surplus in the gas revenue
9 fund which was transferred to the General Fund as alleged by plaintiffs (Cmplt. ¶45) does
10 not make the transfer per se illegal or voidable. It is logical to assume profits were
11 anticipated to be generated from the utility operations where Charter §1501(d) provides
12 that the excess "may be transferred into the General Purpose Fund as approved in the
13 annual budget by the City Council." Plaintiffs have no statutory basis for the allegations
14 that Long Beach should maintain reserve funds to "stabilize the rate increases" (Cmplt.
15 ¶38) or "ensure rate stabilization" (Cmplt. ¶45). Transfers from the Gas Revenue Fund to
16 the General Fund by Long Beach are a lawful exercise of the City's legislative discretionary
17 authority as provided in Charter §1501(d).

18 28. Plaintiffs' Complaint alleges that there is not sufficient surplus in the gas reserve
19 fund to "draw on reserves to stabilize the rate increases" (Cmplt. ¶38) and to "ensure rate
20 stabilization" (Cmplt. ¶45); thus, plaintiffs conclude there is a violation of Charter §1501(c).
21 This conclusion is reached without any factual basis. Charter §1501 neither states or
22 implies any such obligation to maintain a reserve for rate stabilization, and no additional
23 "facts" could ever be alleged to cure this defect. Plaintiffs have alleged nothing prohibiting
24 the City from making the transfers by the method it employed; therefore, plaintiffs' Second
25 Cause of Action is subject to demurrer without leave to amend.

26 **IV. ANY CHALLENGE IN THE FIRST, SECOND, OR THIRD CAUSES OF ACTION IN**
27 **THE AMOUNT OF GAS REVENUES OR RESERVES IMPACTING THE**
28 **ADOPTION OF THE APPROPRIATION ORDINANCE MUST BE MADE BY**
TRADITIONAL MANDAMUS (CCP §1085)

29. In challenging the amount of gas revenue (first and third causes of action), reserves

1 (second cause of action), or the amount of money transferred to the General Fund (second
2 cause of action), plaintiffs have impliedly challenged the transfers into the General Fund
3 in the appropriation ordinance. The annual adoption of the appropriation ordinance is a
4 legislative act. During the relevant period, Appropriation Ordinance No. C-7705, was
5 adopted September 12, 2000, by the City Council after noticed public hearings on the
6 annual budget. (J.N. # 6, #9.) California Teachers Assoc. v. Ingwerson, (1996) 46
7 Cal.App.4th 860, 866-867 describes the legislative function of adopting a budget as
8 follows:

9 Citing extensive prior California decisional authority, the Court of Appeal for the
10 Third Appellate District has held: "[It is a] fundamental proposition . . . that the
11 adoption of a budget is a legislative function, and that under the 'separation of
12 powers' principle which is fundamental to our form of government a court is
13 generally without power to interfere in the budgetary process." (citation.)

14 30. Charter §1705 establishes a general budgetary process under which the City
15 Manager is to prepare and transmit to the City Council a proposed budget based on
16 estimates of revenue and expenditures received from each of the various City
17 departments. (J.N. #3.) The City Council is then to consider the proposed budget, make
18 appropriate revisions and, following a public hearing, adopt an annual budget.

19 31. The adoption of the annual budget is, of course, the primary tool by which the City
20 Council translates legislative policy into action. The City Council projects revenues and
21 determines levels of fees and taxes. It appropriates funds for mandatory costs, basic City
22 services, and discretionary programs. It authorizes expenditures for personnel, ordinary
23 expenses, and capital improvements desired in the forthcoming fiscal year.

24 32. The Long Beach City Council in its budget process and pursuant to Charter §1705,
25 adopted Appropriation Ordinance No. C-7705 at a noticed public hearing on September
26 12, 2000. (J.N. # 3, 6, 9.) This legislative determination sets the expenditure amounts for
27 Long Beach for the next fiscal year (October 1, 2000 through September 30, 2001). Long
28 Beach is now only two months away from its next fiscal year.

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1 33. The sole method for plaintiffs to challenge this legislative function is by mandamus
2 under CCP §1085. In Mike Moore's 24-Hour Towing v. City of San Diego (1996) 45
3 Cal.App.4th 1294, 1303, the court states:

4 "Review of a local entity's legislative determination is through ordinary mandamus
5 under section 1085. 'Such review is limited to an inquiry into whether the action was
6 arbitrary, capricious or entirely lacking in evidentiary support. (citation.)' This test
7 has also been formulated to add an inquiry whether the agency's decision was
8 'contrary to established public policy or unlawful or procedurally unfair.' (citation)
9 However the test is formulated, '... the ultimate questions, whether the agency's
10 decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary
11 to established public policy or unlawful or procedurally unfair, are essentially
12 questions of law.'"

13 34. Plaintiffs' Complaint for damages, injunctive and declaratory relief is not the
14 appropriate action in seeking judicial review of administrative acts of a municipality.
15 Plaintiffs must seek a writ pursuant to CCP §1085. In any event, based upon the clear
16 mandates of Charter §§1501 and 1502, and LBMC §15.36.100, plaintiffs have no basis for
17 seeking judicial relief.

18 **V. THE CLAIM OF VIOLATION OF CCP §526a IN THE FOURTH CAUSE OF**
19 **ACTION IS SOLELY DERIVATIVE AND THERE IS NO WASTE UNDER CCP**
20 **§526A THAT CAN BE ALLEGED**

21 35. Plaintiffs, as taxpayers of Long Beach (Cmplt. ¶15), allege that Long Beach's actions
22 and practices allegedly in violation of Charter §1502 and LBMC §15.36.100 constitute a
23 "waste" of public funds (Cmplt. ¶¶54, 57) and thus a violation of CCP §526a. This claim
24 of waste against Long Beach is therefore only derivative of the prior causes of action
25 alleging violations of Charter §§1502 (Cmplt ¶41), Charter §1501 (Cmplt. ¶45), and LBMC
26 §15.36.100 (Cmplt. ¶49) that its rates are not reasonable or not comparable to other
27 utilities, or that Long Beach did not maintain an adequate reserve.

28 36. CCP §526a states in pertinent part: "An action to obtain a judgment, restraining
and preventing any illegal expenditure of, waste of...funds...of a ...city...may be
maintained against any officer thereof, or any agent, or other person, acting in its behalf
...by a citizen resident therein..."

37. Plaintiffs are not arguing that there was an illegal expenditure, but rather that Long
Beach collected too much in gas rates from plaintiffs (Cmplt. ¶¶36, 41) and that Long

1 Beach transferred money to the General Fund rather than maintaining the funds in a
2 reserve account (Cmplt. ¶31).

3 38. The court has stated that in a taxpayer action pleading: "General allegations,
4 innuendo, and legal conclusions are not sufficient (citation); rather, the plaintiff must cite
5 specific facts and reasons for a belief that some illegal expenditure or injury to the public
6 fisc is occurring or will occur. (citation)." (Waste Management of Alameda County, Inc. v.
7 County of Alameda (2000) 79 Cal. App. 4th 1223, 1240.

8 39. Plaintiffs have failed to allege any specific facts concerning illegal expenditure or
9 waste under CCP §526a in connection with the actions of Long Beach in passing through
10 the higher cost of gas to its ratepayers, or in its transfers to the General Fund; therefore,
11 Long Beach's demurrer to the Fourth Cause of Action should be sustained without leave
12 to amend.

13 **VI. PLAINTIFFS HAVE THE BURDEN OF PLEADING ALL ESSENTIAL ELEMENTS**
14 **OF THEIR CAUSES OF ACTION AND OVERCOMING A PRESUMPTION OF**
15 **REASONABLE RATES**

16 40. As previously stated, plaintiffs bear the burden of pleading all essential elements to
17 any cause of action.

18 41. Plaintiffs' Complaint acknowledges throughout that Charter §§1501, 1502, and
19 LBMC §15.36.100 require that Long Beach rates be reasonable and comparable to rates
20 and services of like utilities in the Southern California area (Cmplt. ¶¶2, 28, 29, 32, 41, 49,
21 50); however, the Complaint excludes consideration of all other utilities except SoCal Gas
22 (Cmplt. ¶36, 37). Plaintiffs' complaint asserts that Long Beach must maintain fair and
23 reasonable rates (Cmplt. ¶¶2, 49), but plaintiffs' theory is unreasonable because a utility
24 cannot maintain reasonable rates and services for any length of time, if it collects from its
25 ratepayers less than it pays for gas. Several decisions contradict plaintiffs' position. The
26 California Supreme Court stated in Hansen v. City of San Buenaventura (1986) 42 Cal.
27 3d 1172, 1182: "Municipal utilities have historically incorporated a rate of return on
28 investment on rates charged customers...common sense and basic economic principles
dictate the necessity of such a rule." (*Id.* at 1182.) Hansen goes on to state that "the

1 'lowest possible cost' cannot be read to mean 'break-even cost'; rather, it would seem only
2 to bar unreasonable or excess profits. It is not for the court to determine what constitutes
3 sound economy and prudent management, but only to determine the narrow issue of
4 whether the rates imposed are reasonable." (*Id* at 1188.)

5 42. The Supreme Court recognizes a presumption supporting such rates and rate-
6 setting. "Rates established by the lawful rate-fixing body are presumed reasonable, fair
7 and lawful. (citation) Thus, plaintiffs bear the burden of showing that the rates fixed are
8 unreasonable or unfair. (citation)." Hansen, supra 42 Cal.3d at 1180; see also, Jarvis v.
9 City of Los Angeles (2000) 85 Cal.App.4th 79, 82. The courts have long held that

10 "In the absence of any showing of any character that the [municipal utility's] charges
11 were unreasonable, unfair or fraudulently or arbitrarily established, the trial court
12 had no case for any relief to respondent. In short, the respondent has sought to
13 substitute the court for the city council and have the court fix the charges which he
14 should pay. The universal rule is that in these circumstances the court is not a rate-
15 fixing body, that the matter of fixing water rates is not judicial, but is legislative in
16 character, and that the limit of its function and jurisdiction is to find, upon a proper
17 showing, that the rates fixed are unreasonable and unfair."

18 Durant v. City of Beverly Hills (1940) 39 Cal.App.2d 133, 139.

19 43. Plaintiffs have failed to meet their burden of pleading the essential elements of the
20 First, Second, Third or Fourth Causes of Action in the Complaint, or of overcoming the
21 presumption that the rates of Long Beach are unreasonable or unfair; therefore, this
22 demurrer should be sustained without leave to amend.

23 VII. CONCLUSION

24 44. Plaintiffs' Complaint for violations of Charter §§1501 and 1502, LBMC §15.36.100,
25 CCP §526a, and damages, injunctive relief and declaratory relief is without merit or
26 substance and plaintiffs have failed to plead sufficient facts to state a cause of action as
27 to any of these claims, thus City's demurrer should be sustained without leave to amend
28 pursuant to CCP §430.10(e).

45. Plaintiffs' Complaint for violations of Charter §§1501 and 1502, LBMC §15.36.100,
CCP §526a, and damages, injunctive relief and declaratory relief contains no facts and is

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1 uncertain as to all causes of action in the Complaint, thus City's demurrer should be
2 sustained without leave to amend pursuant to CCP §430.10(f).

3 46. In the First and Third Cause of Action for violation of Charter §1502 and LBMC §
4 15.36.100, plaintiffs can not plead any facts alleging violations because these provisions
5 require Long Beach's rates be established based upon the prevailing rates of other like
6 utilities in the Southern California area. Plaintiff can not refute the reasonableness of the
7 Long Beach rates when compared to the posted tariff rates of the three other utility
8 companies operating in Southern California area. Plaintiffs have not and cannot maintain
9 that Long Beach gas rate increases were anything but a measured and reasonable
10 response to increases in the cost of gas to Long Beach.

11 47. Plaintiffs' Second Cause of Action for violation of Charter § 1501 can not plead facts
12 sufficient to state a cause of action because plaintiffs seek to establish a statutory duty
13 where none exists by the clear meaning of the charter.

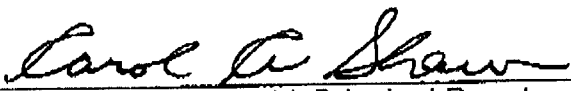
14 48. Plaintiffs' Complaint in the Fourth Cause of Action for violation of CCP § 526a can
15 not plead facts sufficient to state a cause of action because no illegal act or waste was
16 committed by Long Beach under Charter §§ 1501, 1502 or LBMC § 15.36.100.

17 49. A writ pursuant to CCP §1085 is the sole remedy for plaintiffs to challenge the City's
18 legislative discretionary authority. Therefore, Long Beach respectfully requests the court
19 sustain its demurrer without leave to amend against the entire Complaint and all causes
20 of action therein.

21 Dated: July 26, 2001

ROBERT E. SHANNON, City Attorney

22 By:


23 DANIEL S. MURPHY, Principal Deputy
24 CAROL A. SHAW, Deputy City Attorney
25 Attorneys for Defendants CITY OF LONG
26 BEACH, CITY COUNCIL FOR THE CITY OF
LONG BEACH, HENRY TABOADA

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