December 14, 2023

Via Electronic Filing

The Honorable Chief Justice Patricia Guerrero, and
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: California Community Choice Association Letter in Support of Request for Depublication (Cal. Rules of Court, Rule 8.1125(b)(1)); *Michael E. Boyd v. Central Coast Community Energy,* Case No. H050140, Court of Appeal, Sixth Appellate District (Opinion Filed October 4, 2023)

Honorable Chief Justice Guerrero and Associate Justices:

Pursuant to Rule 8.1125(b)(1) of the California Rules of Court (Rules), California Community Choice Association ("CalCCA") hereby responds in support of Central Coast Community Energy's ("3CE's") December 4, 2023, request for this Court to order depublication of the Sixth District Court of Appeal decision filed on October 4, 2023, in *Michael E. Boyd v. Central Coast Community Energy,* Case No. H050140 ("*Boyd*" or the "Boyd Decision"). The Boyd Decision affirmed the trial court's judgment in 3CE's favor, but overruled a key trial court finding that 3CE's electricity rates fall outside the definition of a general "tax" under Article XIII C of the California Constitution. As set forth below, given the likely unintended consequences of this improper finding for all statutorily authorized community choice aggregators ("CCA") in California and the potentially anticompetitive impacts on California's retail electricity markets, CalCCA supports 3CE's request for depublication.

I. CALCCA STATEMENT OF INTEREST

CalCCA is a trade association representing the interests of local government bodies and joint powers authorities that operate or plan to operate a CCA. CalCCA represents the interests of 24 of the 25 CCAs (including 3CE) operating in California[1] with the aim of fostering a legislative and regulatory environment that supports the development and long-term sustainability of CCAs. The Boyd Decision's misunderstanding of CCAs and the California energy regulatory environment could frustrate these aims, giving CalCCA a direct interest in the decision's depublication.

II. THE BOYD DECISION SHOULD BE DEPUBLISHED

CalCCA agrees with 3CE that the Boyd Decision should be depublished given its potential unintended and anticompetitive impacts. First, the Boyd Decision's reliance on *Zolly v. City of Oakland*[2] is misplaced; *Zolly* was decided after the trial court's decision in *Boyd* and, therefore, a record considering *Zolly* was not established. In addition, CCA rates, unlike the franchise fees in *Zolly,* are not

[1] CCAs represent communities from Humboldt to San Diego Counties serving desert, mountain, and coastal areas. An interactive map demonstrating CCA territories is available at: https://cal-cca.org/cca-map/.

[2] *Zolly v. City of Oakland* (Aug. 11, 2022) 13 Cal.5th 780.

"imposed" since customers may choose service from a CCA or investor-owned utility ("IOU")[3] and, therefore, do not fit into the general definition of "taxes." Second, the Boyd Decision places CCAs at a competitive disadvantage by potentially exposing CCAs to the need for a vote on their rates by not only their customers but also by IOU customers – a requirement not faced by competing IOUs. Finally, due to *Boyd's* reliance upon *Zolly* and the unintended consequences of applying *Zolly*, the Boyd Decision does not qualify for certification under Rule 8.1105(c).

A. The Boyd Decision's Reliance on Zolly is Misplaced

The Boyd Decision's reliance on *Zolly* to find that CCA rates fall within the general definition of "taxes" is misplaced for several reasons. In *Boyd,* Plaintiff/Appellant argued that electricity rates charged by governmental entity 3CE are invalid because they are "taxes" not approved by voters as required by Article XIII C of the California Constitution. The trial court in *Boyd* made two findings in support of its judgment for 3CE. First, 3CE's rates do not fit into the Constitution's definition of "taxes" because customers, like Boyd, are statutorily authorized to opt out of 3CE service and return to IOU service if they wish not to pay 3CE rates. Second, even if 3CE's rates do fall into the general definition of "taxes," they fit within an enumerated exception to that definition because they do not exceed 3CE's reasonable costs. The Sixth Appellate District court affirmed the overall judgment, but overruled the first finding, concluding that 3CE's rates <u>*do*</u> fall into the general definition of "taxes." The appellate court noted that Article XIII C defines a "tax" to mean "any levy, charge, or exaction of any kind imposed by a local government."[4] Applying the Supreme Court's interpretation of "imposed" in *Zolly* to mean "established," the appellate court concluded that "<u>*any charge that is established*</u> by a local government entity <u>*is a tax*</u> under Article XIII C's general definition." (Emphasis added).

Two points regarding *Zolly* warrant highlighting in the context of the appellate court's finding. First, as noted in the Boyd Decision, the Supreme Court decided *Zolly* after the trial court decision in *Boyd,* and the appellate court made its decision after minimal briefing on the eve of oral argument. Therefore, a thorough record was not established at the trial court level to distinguish the *Boyd* circumstances from *Zolly.*

Second, *Boyd* is distinguishable from *Zolly* on the facts. The "taxes" at issue in *Zolly* concern franchise fees imposed by the City of Oakland for waste haulers granted an exclusive franchise for waste collection services.[5] The City argued that the fee could not be a tax because the waste haulers were not "coerced" into accepting the waste hauling agreement and therefore the fee was not "imposed."[6] *Zolly* found that coercion over the waste haulers or even "compulsory charges" is not necessary to determine

[3] The three largest electric IOUs in California are Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company.
[4] California Constitution, Article XIII C.
[5] *Zolly,* 13 Cal.5th at 791.
[6] *Id.* at 791-792.

if the fee is "imposed."[7] Instead, it found that the establishment of the tax occurred when Oakland "impos[ed] these fees on the waste haulers *that are indisputably obligated to pay them*."[8] In other words, the waste haulers had no choice but to pay the franchise fees if they wanted to serve the customers.

The circumstances in *Zolly* are not present in *Boyd*. The Boyd Decision considers CCA customer rates, charged pursuant to the statutory framework authorizing CCAs through Assembly Bill (AB) 117 (2002).[9] AB 117 allows "[c]ustomers . . . to aggregate their electric loads" through local government bodies which can procure electricity to their community's needs."[10] A core element of AB 117 is that customers within the geographical territory of a CCA are initially *opted in* to CCA service, but always have the *choice of opting out* to receive their electricity from the IOU serving that geographic area.[11] Through the establishment of CCA, the Legislature intended to continue the constraining of the IOUs' service monopoly begun during the restructuring of the electric industry.[12] As part of the retail electricity market, CCAs therefore *compete* for retail electricity customers with the IOUs, offering product and rate choices in addition to those offered by the IOUs. Unlike the waste haulers in *Zolly,* therefore, CCA customers have the *choice* to receive the same product (electricity service) from either a CCA or an IOU. In fact, CCAs serve only 33 percent of customer usage in the service territory of the three major IOUs, with IOUs and other public utilities serving the remaining usage. Unlike in *Zolly,* CCA customers are not "indisputably obligated" to pay CCA rates. The statutory framework allowing CCAs to charge customers contemplates choice and competition, distinct from the situation in *Zolly* in which a waste hauler being granted a "franchise" could not operate without paying the charge (equating to a "tax"). *Zolly* thus should not have dictated the outcome in Boyd, from either a procedural or substantive perspective. As a result, the Boyd Decision should not be published given the improper reliance on *Zolly.*

B. The Boyd Decision Has Potentially Unintended and Anticompetitive Consequences

Wide application of the finding that CCA rates are a "tax" under the California Constitution could have unintended and anticompetitive impacts on California retail electricity markets. Through the establishment of CCA, the Legislature intended to expand customers' alternatives to IOUs' retail service.[13] As part of the retail electricity market, CCAs *compete* for retail electricity customers with the IOUs, offering product and rate alternatives. Application of the Boyd Decision's finding that CCA rates

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7 *Ibid.*

8 *Id.* at 792.

9 Assemb. Bill 117, Ch. 838 (Cal. Stat. 2002).

10 Cal. Public Utilities Code § 366.2(a)(1). Note that even if a customer chooses to receive electricity from a CCA, the electricity will still be physically delivered to the customer through the IOU's transmission and distribution lines.

11 *See* Cal. Public Utilities Code § 366.2(a)(2) ("Customers may aggregate their loads through a public process with [CCAs], *if each customer is given an opportunity to opt out of the customer's community's aggregation program")* (emphasis added); *see also* § 366.2(a)(3) ("*If a customer opts out* of a [CCA's] program, or has no [CCA] program available, *that customer shall have the right to continue to be served by the existing electrical corporation or its successor in interest*") (emphasis added).

12 Senate Rules Committee, Office of Senate Floor Analysis of AB 117 (Aug. 28, 2002).

13 Senate Rules Committee, Office of Senate Floor Analysis of AB 117 (Aug. 28, 2002).

equate to taxes will place CCAs at a competitive disadvantage to IOUs. Unlike an IOU, a CCA will need to prove that its rates fall under the exception to the definition of "taxes" or face a vote by the general electorate (many of whom are IOU customers, not CCA customers). If this occurs, CCA rates will no longer be able to be changed quickly in response to market conditions, which can be as unpredictable as a weather event, and customer legal challenges to rates could undermine the efficient provision of electricity services. To avoid these unintended results, the Boyd Decision should be depublished.

C. The *Boyd* Decision Does Not Meet Standards for Publication

For many of the same reasons, the Boyd Decision does not meet applicable standards for publication of appellate opinions.[14] Nothing in the Decision expressly "[e]stablishes a new rule of law" or "[a]pplies an existing rule of law" to a new set of facts.[15] Rather, *Boyd* largely fails to apply existing rules of law. For example, the Boyd Decision does not analyze how the legislative opt-out structure is distinguishable or similar to the facts in Zolly. Nor should *Boyd* be published solely because it "creates an apparent conflict in the law."[16] Unlike an opinion holding, after careful analysis, that a prior case was incorrectly decided or that a rule of law should be changed, the Boyd Decision contains no analysis explaining or supporting the conflict it creates. Finally, although *Boyd* arguably involves "legal issue[s] of continuing public interest,"[17] publication of opinions that deviate from and create confusion in the case law – without any explanation or analysis – does not serve the public interest. As none of the other criteria for publication apply, the Boyd Decision should not have been, and should not remain, published.

III. CONCLUSION

For the reasons set forth above, CalCCA supports 3CE's request for depublication of the Boyd Decision.

Respectfully,

CALIFORNIA COMMUNITY CHOICE ASSOCIATION

Evelyn Kahl
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14 *See* Rule 8.1105(c).
15 *See* Rule 8.1105(c)(1), (2).
16 *See* Rule 8.1105(c)(5).
17 *See* Rule 8.1105(c)(6).