SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION

LAFCo

44 N. SAN JOAQUIN STREET SUITE 374 ☐ STOCKTON, CA 95202

Local Agency Formation Commission Special Meeting Agenda
Thursday, February 3, 2022 9:00 A.M.

In accordance with the Ralph M. Brown Act (Cal. Gov. Code 54950 *et seq.*), as amended by Assembly Bill 361 (2021), the San Joaquin Local Agency Formation Commission and staff will be participating in this meeting via teleconference. In the interest of maintaining appropriate social distancing, members of the public may participate in the meeting by teleconference.

TO ATTEND:

Join Zoom Meeting:
https://us02web.zoom.us/j/82275157066?pwd=S20wTVNTZWJhUkhIRFpQMXBPM3Zodz09

Meeting ID: 822 7515 7066

Passcode: 450488

Dial by phone 669 900 6833 US

Note: If you don't have access to a smart device or a computer with a webcam & a mic, you can dial in using the teleconference number and meeting ID above.
Attention Callers: Please mute the call unless speaking.

*****To be recognized to speak, please use the "raise hand" or chat feature in Zoom. *** We have also provided a call-in number, as identified on this Agenda, and encourage you to attend by telephone. ***To be recognized to speak, press *9 to signal the moderator.*****

Download Agenda Packet and Materials at: www.sjgov.org/commission/lafco

* * * *

Call to Order
Announce Date and Time of Meeting for the Record
Roll Call
Pledge of Allegiance

Recognition of Service for Chairman Villapudua
Announcement of Board of Supervisors Regular Voting Members and Alternate Member.

CONSENT ITEMS

1. MEETING MINUTES OF JANUARY 6, 2022
   (Action by All Members)
   Approve Summary Minutes of the regular meeting.

2. OUT-OF-AGENCY SERVICE REQUEST
   (*Action by Regular Members)*
   Request from the City of Stockton to provide out-of-agency sewer service outside the City boundary under Government Code §56133 to 3344 West Lane, 1648 Myran Avenue, 3536 Mourfield Avenue, 1887 Anita Avenue, and 1863 Anita Avenue in Stockton.

3. DISCUSSION AND POSSIBLE ACTION REGARDING MEETINGS OF THE SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION UNDER AB 361 USING TELECONFERENCE DURING A PROCLAIMED STATE OF EMERGENCY
   (Action by All Members)
   Consider Resolution to conduct meetings of the San Joaquin Local Agency Formation Commission using teleconferencing pursuant to Government Code 54953 as amended by Assembly Bill 361 for the period February 6, 2022 to March 8, 2022

ACTION ITEMS

4. ELECTION OF CHAIR AND VICE-CHAIR
   (Action by All Members)
   Election of Chair and Vice-Chair to serve during the 2022 calendar year.

SPECIAL MATTERS

5. TRANSMITTAL OF THE STATEMENT OF DECISION AND JUDGMENT AND TRANSMITTAL OF PETITION FOR REVIEW IN THE SUPREME COURT OF CALIFORNIA REGARDING EXISTING LITIGATION PURSUANT TO GOVERNMENT CODE SECTION 54956.9(a)

   Name of Case: Pacific Gas & Electric Company v. San Joaquin Local Agency Formation Commission, Defendant and Appellant; South San Joaquin Irrigation District, Real Party in Interest and Appellant
   (San Joaquin County Superior Court Case No. STK-CV-YJR-2015-0001266)

   Name of Case: South San Joaquin Irrigation District, Plaintiff and Appellant v. Pacific Gas & Electric Company, Defendant and Respondent v. Pacific Gas & Electric Company, Defendant and Respondent.
   (San Joaquin County Superior Court Case No. STK-CV-UED-2016-0006638)

PUBLIC COMMENTS

6. Persons wishing to address the Commission on matters not otherwise on the agenda

EXECUTIVE OFFICER COMMENTS

7. Comments from the Executive Officer

COMMISSIONER COMMENTS

8. Comments, Reports, or Questions from the LAFCO Commissioners

ADJOURNMENT

SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION

AGENDA ITEM NO. 1

LAFCo

44 N. SAN JOAQUIN STREET SUITE 374 ☐ STOCKTON, CA 95202

SUMMARY MINUTES OF SPECIAL MEETING
January 6, 2022

VIDEO CONFERENCE

Chairman Villapudua called the meeting to order at 9:02 A.M.

MEMBERS PRESENT	Commissioners Breitenbucher, Johnson, Lincoln, Patti and Chairman Villapudua.
MEMBERS ABSENT:	None
ALTERNATE MEMBERS PRESENT:	Commissioners Diallo, Morowit and Winn
ALTERNATE MEMBERS ABSENT:	None
OTHERS PRESENT:	James Glaser, Executive Officer; Rod Attebery, Legal Counsel and Mitzi Stites, Commission Clerk

CONSENT ITEMS

A motion was made by Commissioner Johnson and seconded by Commissioner Breitenbucher, to approve the Consent Calendar.

The motion for approval of the Summary Minutes of December 9, 2021 meeting was passed by a unanimous vote of the Commission.

The motion for approval for the out-of-agency service request to property located at 4715 East Fourth Street was passed by a unanimous vote of the regular voting members of the Commission.

The motion for approval authorizing the San Joaquin Local Agency Formation Commission to conduct meetings using teleconferencing pursuant to Government Code 45953 as amended by

AB 361 for the period of January 7, 2022, to February 6, 2022, was passed by a unanimous vote of the regular voting members of the Commission.

SPECIAL MATTERS

Mr. James Glaser, Executive Officer mentioned that the 2022 Commission Meeting Schedule has been included in the Agenda Packet but that LAFCo following the AB 361 rules would be having Special Meetings that may take the place of the Regular LAFCo Meetings.

PUBLIC COMMENTS

No one came forward.

EXECUTIVE OFFICER COMMENTS

Mr. James Glaser, Executive Officer, stated that at the February Meeting the agenda would include the decision and judgement involving the lawsuit with SSJID/ PGE.

COMMISSIONER COMMENTS

Comments, Reports, or Questions from the LAFCO Commissioners

Commissioner Breitenbucher wished everyone a Happy New Year

The meeting adjourned at 9:10 a.m..

SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION
LAFCo
44 N. SAN JOAQUIN STREET SUITE 374 ☐ STOCKTON, CA 95202

AGENDA ITEM NO. 2

EXECUTIVE OFFICER'S REPORT

February 3, 2022

TO: LAFCo Commissioners

FROM: James E. Glaser, Executive Officer

SUBJECT: **CITY OF STOCKTON OUT-OF-AGENCY SERVICE REQUESTS**

Recommendation

It is recommended that the Commission approve the requests from the City of Stockton to provide out-of-agency sewer service under the Government Code §56133 to properties located at 3344 West Lane, 1648 Myran Avenue, 36536 Moorefield Avenue, 1887 Anita Street, and 1863 Anita Street in Stockton.

Background

Government Code Section §56133 states that the Commission may authorize a city or special district to provide new or extended services outside its jurisdictional boundaries but within its sphere of influence in anticipation of a later change of organization and that prior to providing new or extended service, the city or district must first receive approval from LAFCo. The Commission adopted a policy that conditions their approval for out-of-agency service requiring the recordation of an agreement with the landowner consenting to annexation of their property when annexation becomes feasible.

The City of Stockton submitted requests for approval to extend sanitary sewer services to single-family residences outside the city limits but within the City's sphere of influence. A vicinity map is attached showing the locations of each out-of-agency request. Connections to City sewer lines are available to the properties and the property owners have paid the appropriate connection fees to the City. The requests for out-of-agency service are in compliance with the Government Code §56133 and Commission policies. Staff recommends approval of the attached Resolution 1462 approving out-of-agency services.

Attachment: Resolution No. 1462
Vicinity Map

Resolution No. 1462

BEFORE THE SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION APPROVING AN OUT-OF-AGENCY SANITARY SEWER SERVICE FROM THE CITY OF STOCKTON TO 3344 W. LANE , 1648 MYRAN AVENUE, 3536 MOURFIELD AVENUE, 1887 ANITA AVENUE, AND 1863 ANITA AVENUE IN STOCKTON

WHEREAS, the above-reference requests have been filed with the Executive Officer of the San Joaquin Local Agency Formation Commission pursuant to §56133 of the California Government Code.

NOW THEREFORE, the San Joaquin Local Agency Formation Commission DOES HEREBY RESOLVE, DETERMINE, AND ORDER as follows:

Section 1. Said out-of-agency service request is hereby approved.

Section 2. The proposal is found to be Categorically Exempt from CEQA.

Section 3. The proposal is subject to the following conditions:

a. Prior to connection to the city sewer or water, the City of Stockton shall record a covenant and agreement with the property owners to annex to the City of Stockton in a form acceptable to the Executive Officer.

b. This approval and conditions apply to current and future property owners.

PASSED AND ADOPTED this 3th day of February 2022, by the following roll call votes:

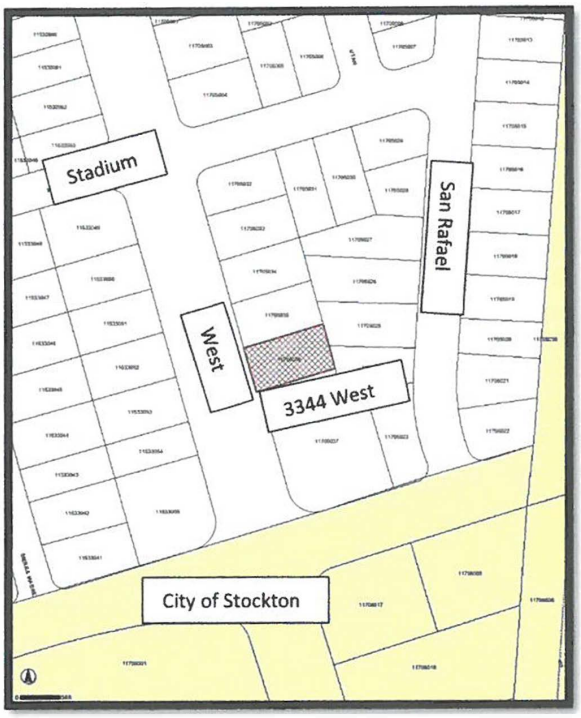
AYES:

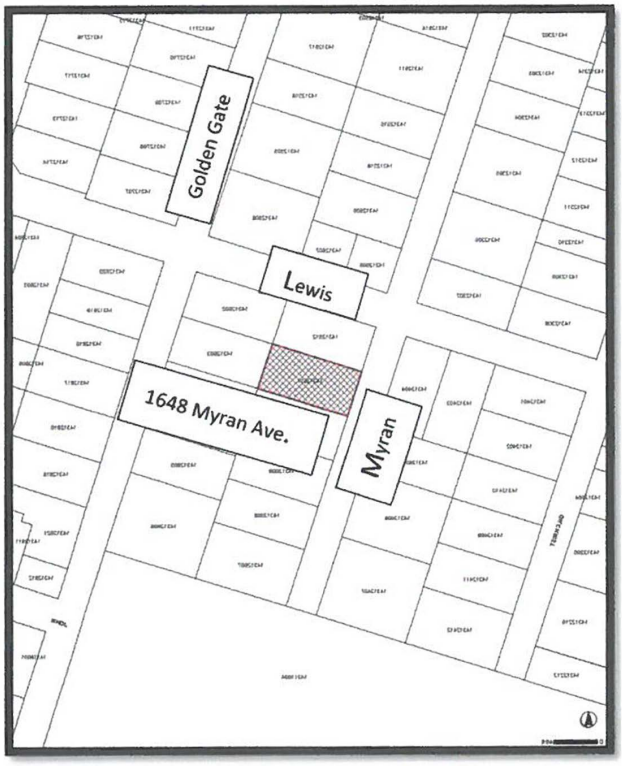
NOES: None

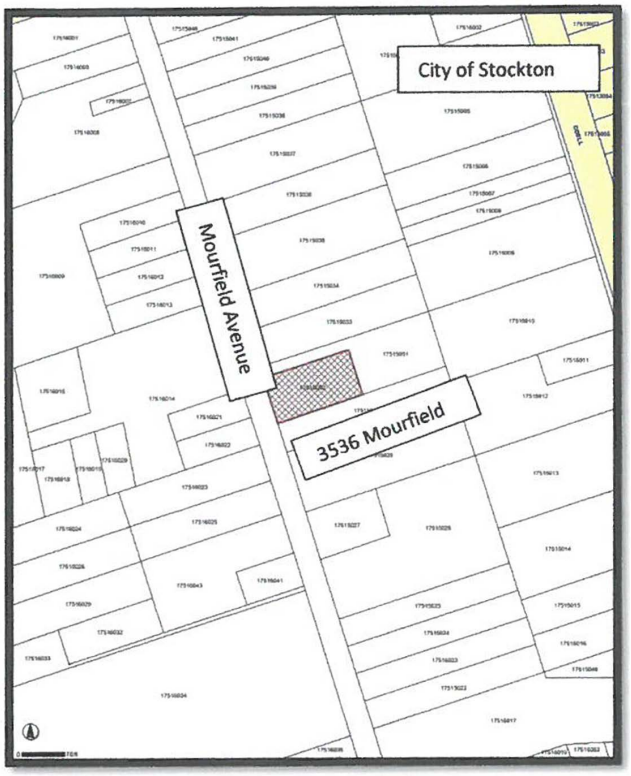
ABSENT:

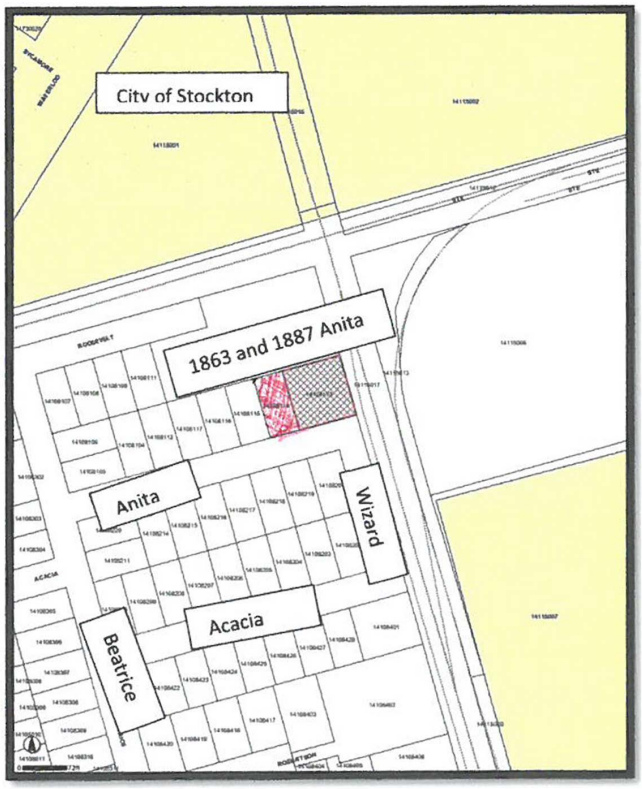
_____
MIGUEL VILLAPUDUA, Chairman
San Joaquin Local Agency
Formation Commission

Res. No. 1462
02-03-22


Stadium
San Rafael
West
3344 West
City of Stockton


Golden Gate
Lewis
1648 Myran Ave.
Myran


City of Stockton
Mourfield Avenue
3536 Mourfield


City of Stockton
1863 and 1887 Anita
Anita
Wizard
Acacia
Beatrice

SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION

AGENDA ITEM No. 3

LAFCo

44 NORTH SAN JOAQUIN STREET, SUITE 374 ☐ STOCKTON, CA 95202

EXECUTIVE OFFICER'S REPORT

DATE: February 3, 2022

FROM: Rod Attebery, General Counsel

SUBJECT: Discussion and Possible Action Regarding Meetings of the San Joaquin Agency Formation Commission Under AB 361 Using Teleconference During a Proclaimed State of Emergency

Recommendation
It is recommended that the Commission approve the attached LAFCo resolution 1461 authorizing Commission to conduct meeting of the San Joaquin Local Agency Formation Commission using teleconferencing pursuant to Government Code 45942 as amended by AB 361 for the period of February 6, 2022 to March 8, 2022.

Background
On September 16, 2021, Governor Gavin Newsom signed Assembly Bill 361 ("AB 361") into law, amending the Ralph M. Brown Act (Gov. Code, § 54950 *et seq.*) (the "Brown Act"). AB 361 codified certain modified requirements for teleconference meetings held by public agencies, similar to those previously authorized and extended by executive order during the COVID-19 State of Emergency.

AB 361 was introduced to provide a longer-term solution for teleconference meetings during states of emergency, effective until January 1, 2024. AB 361 amends Section 54953 of the Government Code to allow the legislative body of a local agency to meet remotely without complying with the normal teleconference rules for agenda posting, physical location access, or quorum rules. To do so, one of three scenarios must exist, all of which require that the Governor has proclaimed a State of Emergency pursuant to Government Code section 8625:

A. State or local officials have imposed or recommended measures to promote social distancing;

B. The agency is holding a meeting for the purpose of determining whether meeting in person would present imminent risks to the health or safety of attendees; or

C. The agency is holding a meeting and has determined that meeting in person would present imminent risks to the health or safety of attendees.

(Gov. Code, § 54953(e)(1).)

An agency and any committee that is required to comply with the Brown Act, that holds a meeting under either of the three scenarios must continue to post its agenda in the time required by the Brown Act, and ensure that the public is able to address the agency or committee directly through teleconference means. (*Id.* at subd. (e)(2). If a disruption prevents the agency or committee from broadcasting the meeting or receiving public comments in real time, the agency or committee cannot take further action until those functions are restored; any actions taken during such a disruption are subject to legal challenge. (*Id.*)

Assuming the State of Emergency remains in effect, if the San Joaquin Local Agency Formation Commission ("LAFCo" or the "Commission") or LAFCo committees wish to continue meeting under the modified rules, then the Commission, and each committee that wants to continue to meet using teleconference must each individually adopt an initial resolution within 30 days of the first teleconference meeting, and then must adopt an extension resolution at least every 30 days thereafter. (*Id.* at subd. (e)(3).) The resolutions must contain findings stating that the Commission or committee has reconsidered the circumstances of the State of Emergency and either (1) the State of Emergency continues to directly impact the ability of the members to meet safely in person; or (2) State or local officials continue to impose or recommend measures to promote social distancing. (*Id.*)

Where consecutive regular meetings fall outside the 30-day time frame, the Commission or committee should hold a special "AB 361" remote meeting within the 30-day window simply to re-authorize the AB 361 exceptions. Without the AB 361 exceptions, the Commission or committee will be required to return to normal in-person meetings or provide public access at each remote location under the traditional teleconference rules, as of October 1, 2021. Therefore, if the AB 361 authorization lapses and the Commission or a committee wishes to hold a teleconference meeting, it will be required to post agendas and provide public access at each remote location, identify those locations in the agenda, and maintain a quorum of the Commission within agency boundaries. If a meeting is not held in conformity with AB 361, commissioners may not teleconference from their residences or other locations which are not open and accessible to the public.

FISCAL IMPACT:

None.

Attachment: Resolution 1463

Resolution No. 1463

BEFORE THE SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION AUTHORIZING COMMISSION TO CONDUCT MEETINGS OF THE SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION USING TELECONFERENCING PURSUANT TO GOVERNMENT CODE 54953 AS AMENDED BY AB 361 FOR THE PERIOD FEBRUARY 6, 2022 TO MARCH 8, 2022

WHEREAS, the San Joaquin Local Agency Formation Commission ("LAFCo") is committed to preserving and nurturing public access and participation in meetings of the Commission; and

WHEREAS, all meetings of LAFCo's legislative bodies are open and public, as required by the Ralph M. Brown Act (Cal. Gov. Code 54950 – 54963), so that any member of the public may attend, participate, and watch LAFCo's legislative bodies conduct their business; and

WHEREAS, the Brown Act, Government Code section 54953(e), as amended by AB 361 (2021), makes provisions for remote teleconferencing participation in meetings by members of a legislative body, without compliance with the requirements of Government Code section 54953(b)(3), subject to the existence of certain conditions; and

WHEREAS, a required condition is that a state of emergency is declared by the Governor pursuant to Government Code section 8625, proclaiming the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions as described in Government Code section 8558; and

WHEREAS, it is further required that state or local officials have imposed or recommended measures to promote social distancing, or, the legislative body meeting in person would present imminent risks to the health and safety of attendees; and

WHEREAS, on March 4, 2020, the Governor proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS, Cal-OSHA adopted emergency regulations (Section 3205) imposing requirements on California employers, including measures to promote social distancing; and

WHEREAS, an Order of the San Joaquin County Public Health Officer acknowledges that close contact to other persons increases the risk of transmission of COVID-19; and

WHEREAS, currently the dominant strain of COVID-19 in the country, is more transmissible than prior variants of the virus, may cause more severe illness, and that even fully vaccinated individuals can spread the virus to others resulting in rapid and alarming rates of COVID-19 cases and hospitalizations, therefore, meeting in person would present imminent risks to the health or safety of attendees.

NOW, THEREFORE, BE IT RESOLVED, that the San Joaquin Local Agency Formation Commission approves

Section 1. Recitals. The Recitals set forth above are true and correct and are incorporated into this Resolution by this reference.

Section 2. Finding of Imminent Risk to Health or Safety of Attendees. LAFCo does hereby find that the current dominant strain of COVID-19 in the country, is more transmissible than prior variants of the virus, may cause more severe illness, and that even fully vaccinated individuals can spread the virus to others resulting in rapid and alarming rates of COVID-19 cases and hospitalizations has caused, and will continue to cause, conditions of peril to the safety of persons, thereby presenting an imminent risk to health and/or safety to LAFCo's employees and attendees of the Commission's public meetings; and

Section 3. Teleconference Meetings. LAFCo does hereby determine as a result of the State of Emergency proclaimed by the Governor, and the recommended measures to promote social distancing made by State and local officials that the Commission may conduct their meetings without compliance with paragraph (3) of subdivision (b) of Government Code section 54953, as authorized by subdivision (e)(1)(A) and (B) of section 54953, and shall comply with the requirements to provide the public with access to the meetings as prescribed in paragraph (2) of subdivision (e) of section 54953; and

Section 4. Direction to Staff. The Executive Officer and LAFCo staff are hereby authorized and directed to take all actions necessary to carry out the intent and purpose of this Resolution including, conducting open and public meetings in accordance with Government Code section 54953(e) and other applicable provisions of the Brown Act.

Section 5. Effective Date of Resolution. This Resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED this 3rd day of February 2022, by the following roll call vote:

AYES:

NOES:

ABSENT:

MIGUEL VILLAPUDUA, Chairman
San Joaquin Local Agency
Formation Commission

SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION

LAFCo

44 SAN JOAQUIN STREET SUITE 374 ☐ STOCKTON, CA 95202

AGENDA ITEM NO. 4

EXECUTIVE OFFICER'S REPORT

February 3, 2022

TO: LAFCo Commissioners

FROM: James E. Glaser, Executive Officer

SUBJECT: **ELECTION OF CHAIR AND VICE CHAIR**

At the beginning of each year, the Commission selects its Chair and Vice-Chair. Rotation of the Chair has traditionally been City-County-City-County-Public Member. Although this has been the usual order for selection, the Rules of the Commission policy does not specify the order of the rotation. If the Commission chooses to follow past practice, a City Member would serve as Chairperson and a County Member will serve as Vice-Chair in 2022.

	Chair		Vice-Chair	
2015	Mike Maciel	City	Chuck Winn	County
2016	Chuck Winn	County	Doug Kuehne	City
2017	Doug Kuehne	City	Tom Patti	County
2018	Tom Patti	County	Peter Johnson	Public
2019	Peter Johnson	Public	Jesus Andrade	City
2020	Jesus Andrade	City	Miguel Villapudua	County
2021	Miguel Villapudua	County	David Breitenbucher	City

SAN JOAQUIN
LOCAL AGENCY FORMATION COMMISSION
LAFCo
44 N. SAN JOAQUIN STREET SUITE 374 ☐ STOCKTON, CA 95202

AGENDA ITEM NO. 5

EXECUTIVE OFFICER'S REPORT

PROJECT: Pacific Gas & Electric Company v. San Joaquin Local Agency Formation Commission, Defendant and Appellant; South San Joaquin Irrigation District, Real Party in Interest and Appellant (San Joaquin County Superior Court Case No. STK-CV-YJR-2015-0001266

RECOMMENDATION

There is no action required by the Commission. This matter is for information only.

BACKGROUND

At the January meeting of the Commission, staff reported that there was a ruling in favor of LAFCo regarding the Pacific Gas and Electric (PG&E) v. San Joaquin LAFCo and South San Joaquin Irrigation District (SSJID). Transmitted herewith is the Statement of Decision of the Court of Appeal, Third Appellate District.

In December 2014, LAFCo approved the SSJID application to provide electric service subject to several conditions. Condition No. 2 sought to replace lost tax revenue currently paid by PG&E by requiring SSJID to pay 2.5 percent of its gross revenue from retail service as payment in lieu of taxes (PILOT) that would fund approximately 160 agencies in San Joaquin County. Condition No. 4 barred SSJID from taking final action to acquire PG&E's electrical infrastructure until SSJID could show it could provide retail electric service at a 15 percent discount from PG&E's forecasted rates for the next decade. Both conditions were the subject of the appeal.

LAFCo and SSJID prevailed on all of the issues. The Court ruled that the transfer of monies from SSJID to the other agencies in the county was not unconstitutional, did not require a vote and was not a gift of public funds. They reasoned that since the money doesn't come directly from taxpayers (they had other sources of funding), it was not considered a tax and therefore not subject to any vote. They also reasoned that since the money was being used for a public purpose it was not a gift of public funds. A gift of public funds, in their opinion, refers to monies that are being used for a private purpose.

PG&E has filed a Petition for Review by the Supreme Court of California (copy attached). The Supreme Court must decide if they will hear the case. Special recognition should be given to Dan Truax and Rod Attebery of the law firm of Neumiller and Beardslee for their efforts in this matter.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

PACIFIC GAS AND ELECTRIC COMPANY, Plaintiff and Appellant, v. SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION, Defendant and Appellant; SOUTH SAN JOAQUIN IRRIGATION DISTRICT, Real party in Interest and Appellant.	C086008 (Super. Ct. No. STK-CV-UJR-2015-0001266)
SOUTH SAN JOAQUIN IRRIGATION DISTRICT, Plaintiff and Appellant, v. PACIFIC GAS AND ELECTRIC COMPANY, Defendant and Respondent.	C086319 (Super. Ct. No. STK-CV-UED-2016-0006638)

Since 1988, the South San Joaquin Irrigation District (Irrigation) has sought to expand its services to provide retail electric service to more than 38,000 customers within its service area. (See *San Joaquin County Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 163 (*Formation*).) For this expansion into retail electric service, Irrigation proposed to purchase or use eminent domain to acquire the existing electrical system located in an area of more than 100 square miles in San Joaquin County from the current retail electric service provider, Pacific Gas and Electric Company (PG&E). In 2005, Irrigation sought approval for the plan from the San Joaquin Local Agency Formation Commission (Formation). Formation denied the application on grounds that Irrigation had not provided sufficient information regarding the expansion plan.

After being rebuffed by Formation, Irrigation attempted to proceed without approval of Formation. Formation sought a writ of mandate in this court to stop Irrigation's planned expansion without Formation's prior approval. In *South San Joaquin Irrigation Dist. v. Superior Court* (2008) 162 Cal.App.4th 146 (*Irrigation*), this court held that Formation's approval was a prerequisite for any expansion by Irrigation into retail electric service. (*Id.* at pp. 156-157.) Shortly thereafter, Irrigation sought to "take the depositions of the commissioners to learn what extra-record information the commissioners had when they denied the application." (*Formation, supra,* 162 Cal.App.4th at p. 163.) This court held that such depositions could not be taken. (*Ibid.*)

In September 2009, Irrigation filed a new application with Formation that detailed its plan to expand into retail electric service. In December 2014, Formation approved Irrigation's application subject to several conditions. Condition Nos. 2 (Condition No. 2) and 4 (Condition No. 4) are pertinent to these consolidated appeals. With Condition No. 2, Formation sought to replace lost tax revenues currently paid by PG&E by requiring Irrigation to pay 2.5 percent of its gross revenues from retail electric service as a payment in lieu of taxes (PILOT) that would fund approximately 160 public agencies in

San Joaquin County. Condition No. 4 barred Irrigation from taking final action to acquire PG&E's electrical infrastructure until Formation approved an analysis to be provided by Irrigation that would show it could provide retail electric service at a 15 percent discount from PG&E's forecasted rates for the next decade.

In February 2015, PG&E filed a reverse validation action to challenge Formation's conditional approval of Irrigation's retail electric expansion plan. (Code Civ. Proc., § 860 et seq.; Gov. Code, § 56000 et seq.)[1] The trial court entered judgment in favor of PG&E on grounds that the conditions of approval imposed by Formation violated the California Constitution. Irrigation and Formation appeal from this judgment for which this court assigned case No. C086008. PG&E cross-appeals.

In case No. C086008, Irrigation and Formation have advanced the same arguments: (1) PG&E lacks standing to challenge the PILOT, (2) the PILOT imposed in Condition No. 2 does not violate the California Constitution as an unlawful property tax, and (3) the PILOT does not a constitute an unlawful gift of public funds. In its cross-appeal, PG&E argues that (4) Formation unlawfully delegated to Irrigation the duty to determine whether Irrigation had demonstrated sufficient revenues to support its expansion into retail electric service, and (5) the PILOT imposes taxes that are unconstitutional because they were not approved by the voters.

Even though the trial court entered a judgment in favor of PG&E on grounds that Formation imposed unconstitutional conditions on its approval of Irrigation's expansion into retail electric services, Irrigation proceeded on its plan by negotiating to buy PG&E's electrical infrastructure. After PG&E refused to sell to Irrigation, Irrigation filed an eminent domain action to take PG&E's electrical infrastructure located in Irrigation's district. Rather than relitigate the constitutionality of Condition No. 2 in the new action,

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1 Undesignated statutory references are to the Government Code.

the parties stipulated to be bound by the outcome in PG&E's reverse validation action. After the trial court entered judgment in the reverse validation action, PG&E moved to dismiss the eminent domain action on grounds that the trial court had ruled that the conditional approval granted by Formation to Irrigation violated the California Constitution. In January 2018, the trial court entered a judgment of dismissal in the eminent domain action. Irrigation appeals. This court assigned case No. C086319 to the appeal from the eminent domain action.

In case No. C086319, Irrigation argues that (6) the trial court erroneously dismissed its eminent domain action because Irrigation had the prerogative to take PG&E's electrical infrastructure even before securing all necessary regulatory approvals, and (7) we should advise the parties on the proper scope of review and standard of proof to be employed by the trial court on remand in the eminent domain action.

In case No. C086008, we accept Irrigation and Formation's abandonment of their argument that PG&E lacks standing. As to the remaining issues, we conclude that Condition No. 2 does not violate the California Constitution as an unlawful property tax, gift of public funds, or tax that requires prior approval of voters. We further conclude that Formation did not unlawfully delegate to Irrigation the duty to determine whether Irrigation had sufficient revenues to support retail electric service. The record shows that Formation commissioners gave conditional approval based on substantial evidence showing Irrigation's financial ability to provide the new electric service. Formation's inclusion of Condition No. 4 to ensure the viability of a 15 percent discount for retail electric service does not undermine Formation's finding that Irrigation had the financial ability to provide retail electric service.

In case No. C086319, we conclude that the trial court did not err in holding Irrigation to its stipulation that it would be bound by the determination of the lawfulness of Formation's approval in the reverse validation action. However, our reversal of the trial court's determination in the reverse validation action also compels reversal of the

judgment in the eminent domain action. We decline to provide an advisory opinion on standards of review and proof that might arise as issues in the eminent domain action. Accordingly, we reverse the judgments in cases Nos. C086008 and C086319, and remand for further proceedings consistent with this opinion.

APPEAL BY IRRIGATION AND FORMATION IN CASE NO. C086008

BACKGROUND

Irrigation's 2005 Application to Formation

Irrigation is a California special district formed in 1909, and is governed by the Irrigation District Law. (Wat. Code, § 20500 et seq.; see generally *Formation*, *supra*, 162 Cal.App.4th at p. 163.) Irrigation's service territory encompasses approximately 112 square miles that includes the incorporated cities of Escalon, Manteca, and Ripon as well as unincorporated portions of San Joaquin County. Among its services, Irrigation provides drinking water to Manteca, Lathrop, and Tracy, and also provides raw water to the City of Stockton. Irrigation holds rights to 72.5 megawatts of electric generation capacity through construction of the Tri-Dam Project. The Tri-Dam Project is comprised of the Donnells, Beardsley, and Tulloch dams. Irrigation also holds a 50 percent interest in the Tri-Dam Power Authority, a joint powers authority that has rights to 19 megawatts of generating capacity at the Sands Bar Project. In addition, Irrigation owns two hydroelectric generation plants and a renewable energy portfolio. As a wholesale electricity provider, Irrigation has extensive experience in scheduling, purchasing, and marketing electricity.

As this court has previously detailed, Irrigation filed a plan in 2005 with Formation to expand the scope of its services to provide retail electric service within its existing service territory. (*Formation*, *supra*, 162 Cal.App.4th at p. 164.) The plan was premised on acquisition of PG&E's existing distribution facilities either through purchase or eminent domain. PG&E opposed Irrigation's plan. (*Ibid.*) Formation's staff recommended approval of the plan. However, several Formation commissioners

expressed concern about the possible need to use eminent domain to acquire PG&E's facilities. (*Ibid.*)

In June 2006, Formation held a formal hearing on Irrigation's application. (*Formation, supra*, 162 Cal.App.4th at p. 164.) Formation's commissioners voted to deny the application. One commissioner had reservations about staff relying solely on information provided by Irrigation. Other commissioners believed "there was a lack of sufficient information to prove the case as required by Government Code section 56824.12," which enumerates information required in a plan for new or different services by a special district. (*Id.* at pp. 164-165 & fn. 2.) Thus, "[a]bout three months after the hearing, [Formation] adopted a resolution stating the [a]pplication 'is denied on the basis that [Irrigation] did not demonstrate its administrative, technical, and financial capabilities to provide retail electrical service to the satisfaction of [Formation] pursuant to the requirements of Government Code section 56824.12.' " (*Id.* at p. 165.)

Before Formation filed its resolution denying the application, Irrigation filed an action against Formation for declaratory relief and inverse condemnation. (*Formation, supra*, 162 Cal.App.4th at p. 165.) Irrigation also sought a writ of administrative mandamus against Formation for prejudicial abuse of discretion and a writ of mandate on grounds that Formation had improperly considered issues related to eminent domain. (*Ibid.*) PG&E moved to intervene. (*Id.* at p. 166.) Irrigation noticed the taking of depositions of several Formation commissioners, and Formation responded by seeking a protective order. (*Id.* at p. 163.) After the trial court partially granted the protective order, Formation sought a writ of mandate directing the trial court to grant the protective order in its entirety. (*Ibid.*) This court granted writ relief and held that Irrigation was not entitled to engage in the proposed discovery of information regarding extra-record evidence. (*Id.* at pp. 168-169.) In *Irrigation Dist., supra,* 162 Cal.App.4th 146, this Court held that Irrigation could not circumvent the requirement to obtain approval from

Formation before expanding its service to provide retail electric service. (*Id.* at pp. 148-149.)

Irrigation's 2009 Application to Formation

In September 2009, Irrigation filed a second application with Formation to provide retail electric service within Irrigation's service area. Irrigation's plan promised that retail electric customers would benefit from electric rates that would be 15 percent lower than those charged by PG&E. In support of the financial feasibility of the proposed plan, Irrigation emphasized its "ownership interest in Tri-Dam and other generation; the recent growth in and substantial cash reserves held by [Irrigation]; and revenues [Irrigation] will continue to receive in the future in excess of the amount necessary for [Irrigation] to provide the existing services it currently provides." Irrigation indicated its preference to purchase PG&E's existing electrical system but stated that it would likely be required to proceed by eminent domain in light of PG&E's stated refusal to sell its infrastructure.

Irrigation's application pledged to backfill lost revenues to local government that would result from taking over retail electric sales from PG&E. Irrigation stated that "the benefit of reduced rates to retail customers will not come at the expense of local governments. [Irrigation's] Board of Directors has pledged to provide the cities within its boundaries and the County with the same revenue as they currently receive from PG&E's electric revenues when [Irrigation] assumes the obligation to provide retail electrical service. [Irrigation's] economic model allocates 2.5 percent of gross revenues to local governments. PG&E's existing franchise agreements provide 2 percent."

On December 10, 2014, Formation's executive officer, James Glaser, issued a report recommending that Formation commissioners reject the application on grounds that Irrigation "failed to demonstrate its financial capability to feasibly provide retail electrical service at a 15% discount from PG&E rates." Even so, Glaser's report "further recommended that [Formation] find that [Irrigation] has the financial capability and can

feasibly provide retail electrical service at a 2.5% discount from PG&E rates," but that this minor reduction in rates did not warrant granting the application.

Glaser's report noted that Irrigation – as a publicly owned utility – would not be required to pay taxes as does a private company such as PG&E. The report pointed out that some of the taxing entities that would lose revenues as a result of Irrigation's plan for retail electrical service are within the County of San Joaquin but outside Irrigation's service area. As the report explains, "Each local taxing agency gets a share of the countywide pool [of the unitary tax imposed on private utilities], regardless of whether any state-assessed property is within that agency's boundaries." (Italics omitted.) The report further noted that the proposed PILOT that Irrigation would pay in lieu of PG&E's unitary tax lacked the benefit of voter approval: "Without an election [by voters] there remains a risk that reimbursement of these in lieu fees/and or in lieu property taxes could be challenged and there remains a risk that an estimated $962,276 in property taxes and $766,400 in franchise fees could be in jeopardy under the proposed electric plan."

In December 2014, Formation commissioners approved Irrigation's retail electrical service expansion plan. The approval, however, was subject to several conditions. As pertinent here, Condition No. 2 of Formation's approval provided: "2. Payments in lieu of taxes and franchise fees [¶] [Irrigation] shall allocate two and one-half percent of gross retail revenues to payments in lieu of franchise fees and property taxes as a cost of providing retail electric service, subject to the terms of agreements to be executed with the County of San Joaquin and the cities of Manteca, Escalon and Ripon, to pay franchise fees to the three cities and county and property tax (unitary tax) to the county on behalf of itself and all of the districts in the county."

Condition No. 4 required Irrigation to report back to Formation about the practicability of the 15 percent retail electric discount rate once Irrigation had more information about the costs of acquiring PG&E's electric infrastructure. To this end, Condition No. 4 provided: "4. Feasibility/Rate Discount [¶] a) After acquisition costs

and exit fees have been determined and the terms and conditions of financing have been approved [Irrigation] shall prepare a comprehensive economic report analyzing [Irrigation's] proposed retail rates and the calculation of the percentage rate savings from PG&E's retail rates. It shall make the report available for written public comment for at least 30 days before the hearing and include in the notice of the meeting that the report is available on [Irrigation's] website. [¶] b) [Irrigation] shall not take final action to acquire the PG&E system and implement retail electric service until it has held a public meeting advertised in the same newspapers as those utilized by [Formation] in this proceeding. The notice shall state the action to be taken and shall specifically indicate the proposed level of discount for the first 10 and 30 years of operation based upon an updated financial analysis demonstrating and supporting the financial ability of [Irrigation] to support such a discount. [Irrigation] shall not commence providing retail electric service unless the District's Board adopts a finding at the hearing based on substantial evidence that it can provide retail electric service at a 15% discount from PG&E's forecasted rates then filed with CEC for the first 10 years. [¶] c) In addition, before [Irrigation] begins providing retail electric service, [Irrigation's] Board shall adopt a finding based on substantial evidence that the implementation of retail electric service shall not impact the irrigation subsidies or rates."

The Validation Action: PG&E's Challenged the Constitutionality of Formation's Conditional Approval

In February 2015, PG&E filed a reverse validation action under the validation statutes (Code Civ. Proc., § 860 et seq.) and Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (§ 56000 et seq.). PG&E argued inter alia that Condition No. 2 violated the California Constitution because it required a public entity to pay property taxes and also that the PILOT constituted an unlawful gift of public funds. The trial court determined that PG&E had standing under the validation statutes to challenge Condition No. 2 of Formation's approval of Irrigation's application.

As to Condition No. 2, the trial court reasoned that this condition was invalid because it requires Irrigation to replace lost property taxes currently paid by PG&E even though Irrigation is exempt from payment of property taxes. The trial court further reasoned that Condition No. 2 requires Irrigation to make an unconstitutional gift of public funds. On these grounds, the trial court entered judgment in favor of PG&E. Irrigation and Formation appeal. PG&E cross-appeals the trial court's failure to address its argument that voter approval was necessary because the PILOT constitutes a tax.

I

Whether Condition No. 2 Imposes an Unconstitutional Property Tax

Irrigation and Formation argue that the PILOT imposed in Condition No. 2 does not violate the California Constitution as an unlawful property tax. Closely related to Irrigation and Formation's argument is PG&E's contention on cross-appeal that the PILOT constitutes a property tax that requires prior voter approval. We conclude that the record establishes that Irrigation had revenue available from the Tri-Dam Project and other sources to cover the PILOT. As a consequence, the PILOT is not a property tax or a charge that would increase the electricity charge to consumers. Because the PILOT is not a tax, it does not require voter approval.

A.

Irrigation's Revenue from Other Sources

PG&E's action alleged causes of action asserting the invalidity of Formation's approval of Irrigation's plan for violating article XIII C, section 1, of the California Constitution. PG&E subsequently moved for summary adjudication of this constitutional claim based on the argument that "[t]he PILOT condition is an unconstitutional tax on tax-exempt government property and cannot be cured even through voter approval."

On March 7, 2016, the trial court denied summary adjudication. In denying summary adjudication, the trial court summarized its reasoning as follows: "PG&E's facial challenge to Condition No. 2 is ripe, but the challenge fails because Condition

No. 2, on its face, does not pose a present, total and fatal conflict with applicable constitutional prohibitions. *Tobe v. City of Santa Ana* (1995) 9 C[al].4th 1069, 1084. Instead, Condition No. 2 allows for multiple scenarios and options in terms of funding and/or structuring payments which will, in turn, affect the characterization of the payments as a 'tax' or a 'gift.' Thus, PG&E has not established that Condition No. 2 is unconstitutional on its face. [¶] With regard to PG&E's as-applied challenges to Condition No. 2, the Court notes that [Irrigation] has not decided, committed to, or otherwise implemented any of the several options available to it, and other aspects of the payments require negotiations which have not yet occurred. Therefore, it [is] impossible for the Court to determine whether the Condition No. 2 payments are a 'tax' or a 'gift.' Thus, the as-applied challenges are not ripe; they are premature." The trial court set the matter for trial.

Trial was limited to the question of the legality of Condition No. 2 and was presented solely on documents in the administrative record. The trial court determined that PG&E had standing to bring the action under the validation statutes. On the merits of PG&E's constitutional challenge, the trial court ruled that Condition No. 2 unlawfully required Irrigation to pay property taxes (in the form of the PILOT) even though it was a tax exempt local governmental agency. The trial court further ruled that Condition No. 2 required Irrigation to make an unconstitutional gift of public funds. The trial court invalidated Condition No. 2 as violating the California Constitution and entered a judgment in favor of PG&E.

B.

Review

As this court has previously explained, Formation "is a quasi-legislative administrative agency. [Citations.] Its proceedings are 'quasi-legislative in nature' . . . ." (*Formation*, *supra*, 162 Cal.App.4th at p. 167.) Thus, "[a]n action or proceeding to attack a determination of [Formation] extends 'only to whether there was fraud or a

prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the court finds that the determination or decision is not supported by substantial evidence in light of the whole record.' (Gov. Code, § 56107, subd. (c).) This substantial evidence review is purely a question of law and is limited to the administrative record." (*Ibid.*) In other words, " 'the *ultimate question*, whether the agency's action was arbitrary or capricious, *is a question of law*. [Citations.] Trial and appellate courts therefore perform the same function and the trial court's statement of decision has no conclusive effect upon us.' (*Shapell Industries*[, *Inc. v. Governing Board* (1991)] 1 Cal.App.4th [218] 233, italics added; accord, *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387; *Personnel Com. v. Board of Education* (1990) 223 Cal.App.3d 1463, 1466.) 'We are not undertaking a review of the trial court's findings or conclusions. Instead, "we review the matter without reference to the trial court's actions. In mandamus actions, the trial court and appellate court perform the same function . . . ." [Citations.]' " (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1275 (*Carrancho*), quoting in part *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393.) However, when we review issues of law such as matters of constitutional or statutory interpretation we apply the independent standard of review. (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 803.)

The parties differ on whether the trial court's judgment after trial determined Condition No. 2 to be unconstitutional on its face or as applied. The California Supreme Court has set forth the general rule that "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) By contrast, "[a]n as applied challenge may seek . . . relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a

result of the manner or circumstances in which the statute or ordinance has been applied . . . ." (*Ibid.*) In the context of restrictions imposed by an administrative agency on proposed actions, considerations of the restrictions imposed under a specific circumstance generally presents an as-applied challenge. (See *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 14.)

Here, the trial court noted that PG&E argued "Condition No. 2 expressly requires [Irrigation] to replace the property taxes that will be lost if [Irrigation] displaces PG&E, the county's largest property tax payer, with an equivalent payment." To resolve PG&E's argument, the trial court found that Formation "was unwilling to approve [Irrigation's] application if, due to [Irrigation's] takeover, those taxes [currently paid by PG&E] would be lost by other government entities in the county and not replaced by [Irrigation]." Thus, the trial court found that the PILOT was intended "to replace the taxes and fees historically paid by PG&E." This consideration of the factual context and Formation's intent for Condition No. 2 signaled that the trial court determined the PILOT was unconstitutional as applied. That the trial court considered whether Condition No. 2's constitutional violation was a "curable defect" further shows that the issue was resolved as an as-applied, rather than a facial, challenge.

C.

Condition No. 2's Imposition of a PILOT

Condition No. 2 requires Irrigation to make a payment in lieu of taxes – essentially a substitute for taxes that PG&E would otherwise pay on its retail electric service business. In considering the PILOT imposed by Condition No. 2, we benefit from the California Supreme Court's guidance in *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 (*Redding*). The *Redding* court set forth the context within which any analysis of a PILOT must be made, namely the pertinent provisions in the California Constitution that address taxes and fees imposed by local government. (*Id.* at p. 5.) Since November 2010, "[s]ubject to certain exceptions, the term ' "tax" ' is now defined

as 'any levy, charge, or exaction of any kind imposed by a local government.' (Art. XIII C, § 1, subd. (e).) The definition excludes a charge imposed for a specific government service or product if: (1) the service or product is provided directly and exclusively to those who pay the charge; and (2) the charge does not exceed the reasonable costs to the local government of providing the service or product. (Art. XIII C, § 1, subd. (e)(2).)" (*Ibid.*)

A PILOT is not a tax but a levy intended to replace lost tax revenues. (*Redding*, *supra*, 6 Cal.5th at p. 4.) The PILOT in *Redding*, for example, involved a "compensatory transfer, called the 'payment in lieu of taxes' . . . . The PILOT is based on the amount [the City of Redding Electric Utility] would pay in property taxes under Proposition 13 if it were a private enterprise, rather than a city department. (See [6 Cal.5th at p. 10] [discussing Proposition 13].) While [the City of Redding Electric Utility]'s property is not subject to taxation (art. XIII, § 3, subd. (b)), the city is entitled to recover the value of its provided services. Rather than calculate the actual cost of those services, the city used the amount a private utility would pay in property taxes as a proxy for the actual cost." (*Id.* at p. 6.)

In *Redding*, the City Council "recognized the PILOT *as a cost of operation*." (*Redding, supra,* 6 Cal.5th at p. 6, italics added.) The PILOT in *Redding* did not constitute a tax because its inclusion in the overall price of electricity to retail consumer did not cause the electricity rate to exceed reasonable costs of the service. (*Id.* at p. 13.) Moreover, the utility in *Redding* had sources of funding for the PILOT that did not come from retail electricity customers. (*Ibid.*) Thus, the salient point in *Redding* and this case is that both PILOT's are components of the total cost of providing electric service to be paid by the retail electric customer.

So long as the retail electric customer does not pay an unreasonable cost for electricity service resulting from the inclusion of a PILOT, the PILOT does not constitute a tax to which article XIII C of the California Constitution applies. This principle is

illustrated in *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244. In that case, the City of Riverside operated an electrical utility service. On an annual basis, the City of Riverside transferred funds from the utility to the city's general fund. (*Id.* at p. 248.) Although the City of Riverside increased the transfer amount, electric rates for customers were not increased. Thus, the increase in the transferred amount did not amount to a tax increase on electricity consumers as *their* bills were not affected. (*Id.* at p. 249.) As the California Supreme Court would subsequently note, "*Webb* correctly identifies the electric *rate* charged by the utility as the ' "levy, charge, or exaction" ' subject to article XIII C's restrictions." (*Redding*, *supra*, 6 Cal.5th at pp. 14-15.)

D.

The PILOT is Not a Property Tax

In this case, the trial court erred in determining that the California Constitution prevents Irrigation from paying the PILOT imposed by Formation. We recognize that the trial court lacked the benefit of the Supreme Court's holding in *Redding* that a PILOT may be lawfully collected from a municipal electric utility when the PILOT does not result in an unreasonable cost of electric service. (*Redding*, *supra*, 6 Cal.5th at p. 6.) Under *Redding* and the undisputed facts of this case, the PILOT imposed in Condition No. 2 passes constitutional muster because it can be funded from income that Irrigation derives from sources other than the rate to be paid by Irrigation retail electric consumers. (*Id.* at pp. 6, 13.)

In presenting its plan for retail electric service, Irrigation emphasized its "ownership interest in Tri-Dam and other [electricity] generation" sources. With these additional sources of electricity and revenue, Irrigation pointed out "the recent growth in and substantial cash reserves held" and that Irrigation "will continue to receive in the future in excess of the amount necessary for [it] to provide the existing services it currently provides." During the years of 2005 to 2009 (the period for which Irrigation reported figures to Formation), Irrigation received an average of $10 million each year

from its share of Tri-Dam revenues. During the same period, Irrigation's unrestricted cash reserve increased from approximately $25 million to $51 million. By contrast, the PILOT was projected to amount to only $2,029,987 in the first year of retail electric service and $2,286,095 after several years of operation. The record shows that Irrigation had ample resources with which to cover the PILOT from sources other than charges to retail electric customers.

The record also shows that Irrigation's plan would ensure that the retail electricity cost to ratepayers would be reasonable even with the PILOT imposed by Formation. As the California Supreme Court noted in *Redding*, article XIII C, section 1, subdivision (e)(2) of the California Constitution excludes from taxes any charge for a service directly provided to the ratepayer and the charge does not exceed the reasonable cost of providing the service. (*Redding*, *supra*, 6 Cal.5th at p. 5.) Here, the 15 percent discount that Irrigation would provide for retail electricity customers to be assumed from PG&E would result in a reasonable electricity rate. Notably, none of the parties in this case asserts that PG&E's retail electricity rates are anything other than reasonable.

Although PG&E disputes the ability of Irrigation to save retail customers 15 percent on their electricity rates, substantial evidence supports Irrigation's claim of ratepayer savings. Irrigation submitted a retail electric financial analysis that concluded Irrigation's "retail electric utility will be entirely self-funding and that no equity contributions will be needed." Under adverse conditions, the discount rate might fall to 13.5 percent "to maintain positive net cash flow and meet all financial requirements." Formation's executive officer, however, believed that Irrigation was likely to provide only a 2.5 percent discount on PG&E's rate. Because even this lesser cost saving to retail electricity consumers constitutes a reasonable charge to ratepayers, Formation's imposition of the PILOT in Condition No. 2 does not render the transfer a tax that requires voter approval. (*Redding*, *supra*, 6 Cal.5th at pp. 4-5.)

PG&E emphasizes that the PILOT would benefit taxing agencies outside of Irrigation's service area. For example, PG&E asserts that "[m]any of the 160 agencies that will receive the PILOTs are outside [Irrigation's] service area, yet [Irrigation] does not attempt to explain how those agencies (which include local governments and schools) will provide [Irrigation] (a water and electricity provider) with services." We conclude that the PILOT's benefit to taxing agencies outside Irrigation's service area does not cause Condition No. 2 to violate the California Constitution.

In addressing this issue, we draw from this court's prior analysis in *Northern California Water Assn. v. State Water Resources Control Bd.* (2018) 20 Cal.App.5th 1204 (*Northern California Water*). *Northern California Water* involved an annual water fee imposed by the State Water Resources Control Board (Board) on various water right permit and license holders in order to defray costs incurred by the Board's Water Rights Division. (*Id.* at p. 1209.) Plaintiffs in that case argued that the fee "constituted an unlawful tax, as opposed to a valid regulatory fee, under article XIII A, section 3, of the California Constitution (Proposition 13) because it required fee payors to pay more than a de minimis amount for regulatory activities that benefited non-fee-paying right holders." (*Ibid.*, fn. omitted.) Specifically, plaintiffs argued that the permit fee was actually a tax because others who were not subject to the fee also benefitted from the efforts of the program. (*Id.* at p. 1218.) This court rejected the argument that the fee was unconstitutional because some " 'non-fee paying rights holders,' . . . received something for nothing . . . ." (*Id.* at p. 1221.) Instead, this court held the fee passed constitutional muster because the fee *to affected payors* was reasonable and proportionate to the costs related to those payors. (*Id.* at pp. 1221, 1227.)

In deciding the matter in *Redding*, the California Supreme Court examined and approved our approach in *Northern California Water*. As pertinent here, the Supreme Court noted an additional ground for the result in *Northern California Water*, namely that "even though non-payors benefitted from program activities, that fact was 'relevant only

if the regulatory costs attributable to [them] necessarily were allocated *to the affected fee payors*. If other sources of funding, such as the state's general fund, were sufficient to cover the regulatory costs attributable to [those who benefitted but did not pay], it does not matter that [they] were not charged a fee.' ([*Northern California Water*, *supra*, 20 Cal.App.5th] at p. 1221, italics added.) The [*Northern California Water*] court then concluded the fee was not a tax because 'general fund support for the Division's regulatory activities . . . was more than enough . . . to cover the costs attributable to [those who benefitted but did not pay].' (*Id.* at p. 1224.) In other words, fee payors were not being forced to cover those costs because there was sufficient general fund support to cover them. [¶] *Northern California Water* demonstrates that the mere existence of an unsupported cost in a government agency's budget does not always mean that a fee or charge imposed by that agency is a tax. . . . If the agency *has sources of revenue other than the rates it imposes, then the total rates charged may actually be lower than the reasonable costs of providing the service*." (*Redding*, *supra*, 6 Cal.5th at pp. 16-17, italics added.)

The record in this case establishes that Irrigation would have income from sources other than retail electricity sales that would be sufficient to cover the PILOT imposed by Condition No. 2. These other revenue sources preclude the PILOT from being an unconstitutional tax even if the PILOT funds taxing agencies that are outside of Irrigation's service area.

PG&E also argues that the PILOT represents an unconstitutional tax based on its reliance on *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914 and *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637. Specifically, PG&E argues that Irrigation "cannot meet its burden of showing that a tax is no more than necessary to cover the reasonable costs of the government activity, as required by article XIII C, section 1, subdivision (e), because Condition No. 2 requires that [Irrigation] make PILOTs in the flat fee amount of 2.5 percent of gross retail

revenues. . . . Such a flat fee will rise and fall with [Irrigation]'s revenues. It does not represent, nor does it relate to, [Irrigation's] reasonable costs."

We reject this argument's basic premise, which assumes that the PILOT imposed in Condition No. 2 is a tax. As the *Redding* court held, a PILOT on electric utility income that is funded by sources of revenues other than from ratepayers is not a tax. (*Redding, supra*, 6 Cal.5th at pp. 4-5.) Moreover, the Supreme Court pointed out that under the circumstances presented in *Fresno* and *Roseville* "it was clear the interfund transfers *directly increased* customer rates." (*Redding,* at p. 15.) In *Redding*, however, the PILOT passed constitutional muster because "there [was] no evidence that [the City of Redding Electric Utility] customers paid the PILOT through rate payments. Instead, as described below, [the City of Redding Electric Utility] had more than enough nonrate revenue to cover the PILOT. Unlike the in-lieu fees in *Roseville* and *Fresno*, the PILOT was not necessarily passed through to and imposed on ratepayers." (*Ibid.*) Here, as in *Redding*, the electricity provider has more than enough nonrate revenue to cover the PILOT. In short, the PILOT imposed by Condition No. 2 is not a tax because it will be covered by sources of revenue other than charges paid by Irrigation's retail electric customers.[2] In their briefing, none of the parties assert that the PG&E retail electricity rates are unreasonable. That the rate will be 15 percent less than that paid by ratepayers to PG&E establishes that Irrigation's service will be a reasonable cost for electricity service. Thus, the rate for electricity service does not constitute a tax under article XIII C, section 1, subdivision (e)(2) of the California Constitution. Because the PILOT is not a tax, it does not require voter approval. The trial court erred in determining the PILOT imposed by Condition No. 2 to be a tax.

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[2] Because we resolve on the merits the issue of whether the PILOT constitutes a tax, we deny Irrigation's motion to partially dismiss PG&E's cross-appeal in C086008.

II

Whether Condition No. 2 Makes a Gift of Public Funds

Irrigation and Formation next argue that the PILOT does not a constitute an unlawful gift of public funds. The argument is meritorious.

A.

Condition No. 2 Was a Requirement Imposed by Formation

During the hearing on Irrigation's retail electricity expansion application Formation commissioners discussed the fact that Condition No. 2 was based on "the intent that each city will be made whole as they were during the [period when retail electric service was provided by] PG&E." Formation's chairman noted that commissioners had the prerogative to impose conditions on approval of Irrigation's proposal. Consistent with these statements on the record during Formation's hearing, PG&E would subsequently assert in the trial court that Formation's "[c]ommissioners wanted to be certain that all 160 public entities currently receiving funds from PG&E's tax payments would receive the same funds from [Irrigation]'s PILOT." On appeal, PG&E acknowledges that "Condition No. 2 was necessary for the application's [Formation] approval."

B.

Gifts of Public Funds

Chief Justice Traynor explored the issue of gifts of public funds in *County of Alameda v. Janssen* (1940) 16 Cal.2d 276 (*Alameda County*). Writing for a unanimous court, Chief Justice Traynor explained:

"Section 31 of article IV of the California Constitution prohibits the legislature from making or authorizing a gift of public money or thing of value to any individual or corporation. . . .

"It is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be

used for a 'public' or a 'private' purpose. If they are for a 'public purpose', they are not a gift within the meaning of section 31 of article IV. (*County of San Diego v. Hammond* [(1936)] 6 Cal.2d 709; *City of Oakland v. Garrison* [(1924)] 194 Cal. 298; *Allied Architects' Association v. Payne* [(1923)] 192 Cal. 431; *Veterans' Welfare Board v. Riley* [(1922)] 188 Cal. 607.) The benefit to the state from an expenditure for a 'public purpose' is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. (*Allied Architects' Association v. Payne, supra.*)

"The determination of what constitutes a public purpose is primarily a matter for legislative discretion (*Veterans' Welfare Board v. Riley, supra*; *Allied Architects' Association v. Payne, supra*; *Daggett v. Colgan* [(1891)] 92 Cal. 53), which is not disturbed by the courts so long as it has a reasonable basis. (*Nebbia v. New York* [(1934)] 291 U.S. 502 [78 L.Ed. 940]; *Powell v. Pennsylvania* [(1888)] 127 U.S. 678 [32 L.Ed. 253].) This court has frequently upheld the expenditure of funds by the state or its subdivisions for the benefit of individuals as for a 'public purpose' and hence not within section 31 of article IV." (*Alameda County, supra*, 16 Cal.2d at pp. 281-282.)

In the matter of approving Irrigation's planned retail electricity expansion, Formation constitutes the legislative body that may consider and impose conditions of approval. (§ 56001.) As this court has recognized, a local agency formation commission makes quasi-legislative determinations when it reviews and approves annexations and conditions of annexation. (*Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1116 (*Voices*).) "As such, a public agency charged with enforcing or complying with an annexation's conditions of approval has no discretion to disregard them." (*Ibid.*) The same is true of approvals for expansion of services by a local agency under the jurisdiction of a local agency formation commission. (§ 56001.) Finally, we note that a local agency formation commission "may make its approval conditional on a

virtually limitless array of factors . . . ." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 912.)

C.

The PILOT Is Not a Gift

In this case, Formation exercised its prerogative to impose Condition No. 2 on Irrigation to require Irrigation to pay a PILOT as a prerequisite to providing retail electric service within San Joaquin County. As a requirement imposed by Formation, Irrigation has no discretion to ignore Condition No. 2. (*Voices, supra,* 209 Cal.App.4th at p. 1116.) Consequently, the PILOT does not represent a payment of funds akin to a gift. Instead, Irrigation must pay the PILOT in order to provide retail electricity. As a required payment, the PILOT is not a gift.

We are also not convinced by PG&E's reliance on *Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204. In that case, the revenues collected for tolls across the Golden Gate Bridge "increased spectacularly" to the point that the district operating the bridge developed surplus revenues. (*Id.* at pp. 206-207.) The district's directors proposed to pay out some of the surplus revenues to the county governments of the six counties within the district. (*Ibid.*) The question presented in *Golden Gate Bridge* was whether these proposed payouts to the county governments would be an unconstitutional gift of public funds under article XIII, section 25 (now article XVI, section 6) of the California Constitution. (*Golden Gate Bridge,* at pp. 206-207; *California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1498.) The *Golden Gate Bridge* court held that the proposed payouts would violate the prohibition on gifts of public funds, reasoning that "a showing is needed that the counties would use the funds for purposes for which the district itself could have used them." (*Golden Gate,* at p. 208.) The California Supreme Court would later survey *Golden Gate Bridge* and summarize that holding that "[s]uch transfer would have taken funds collected from one class of users,

bridge patrons, and delivered them to another class, county taxpayers, for a purpose unrelated to the limited special purpose of the bridge district." (*Matosantos*, at p. 1499.)

Here, the PILOT replaces the tax that PG&E pays to fund 160 taxing agencies within San Joaquin County. There is no suggestion by PG&E that its current tax constitutes a gift of public funds. Replacing these tax revenues with a PILOT does not change the character of the transfer from a tax that has a public purpose into a gift of funds.[3] The purpose of the PILOT is that the same public taxing entities will receive the same funding from the same ratepayers through the PILOT. Formation had discretion to impose the PILOT and it does not constitute a gift of public funds.

III

Whether Condition No. 4 Improperly Delegates Authority from Formation to Irrigation

On cross-appeal in case No. C086008, PG&E argues that Condition No. 4 unlawfully delegated to Irrigation the duty to determine whether Irrigation had demonstrated sufficient revenues to support a permanent 15 percent discount from PG&E's retail electricity rates. We reject the argument.

A.

Formation's Consideration of Irrigation's Financial Ability

In 2009, Irrigation submitted its application to become a retail electric service provider. As part of its application, Irrigation submitted a financial analysis demonstrating "that it will be able to provide retail electrical service at rates 15 percent below PG&E's rates under a wide range of potential conditions." After receiving Irrigation's application Formation retained its own independent consulting firm, PA

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[3] Our conclusion that the PILOT does not constitute a gift of funds under the holding of *Golden Gate Bridge*, obviates the need to consider whether Irrigation's alternative funding sources available for the PILOT from its profitable holdings in the Tri-Dam Project do not remove it from the purview of article XVI, section 6 of the California Constitution.

Consulting, to assess the financial viability of Irrigation's proposal. PA Consulting released a report concluding that Irrigation's rates would be 2.3 percent higher than those charged by PG&E. Irrigation responded with a supplement to its application. In that supplement, Irrigation explained how "important facts [were] not evaluated in the consultant's model." Irrigation asserted that, when the omitted facts are considered, it becomes clear that it can provide electricity at a 15 percent discount. Irrigation detailed how these omitted considerations involved Irrigation's reinvestment of its net operating revenues into retail electric service, investment of additional equity in providing the service, and a prediction that PG&E's rates would rise as well.

PA Consulting analyzed Irrigation's supplement to the application and concluded that to achieve the 15 percent rate reduction, Irrigation would need to invest $39 million up front and invest $15 million per year thereafter. Irrigation's board responded to PA Consulting's supplemental report by adopting a resolution committing to the 15 percent rate reduction by meeting PA Consulting's "investment targets," and "reaffirming that it would '. . . commit the additional equity determined by PA to be necessary to provide retail electric service' " at the promised rate. In 2013 and 2014, further financial analyses by Irrigation and PG&E reached different conclusions about whether Irrigation could durably achieve the promised 15 percent discount electricity rate.

In December 2014, Formation held a two-day hearing on Irrigation's application to provide retail electric service. The hearing culminated with Formation's conditional approval of Irrigation's application to provide retail electric service. Formation expressly found that Irrigation "has the administrative, technical *and financial ability* to operate the system." (Italics added.) As pertinent to this issue, Formation sought to ensure that Irrigation would have the financial ability to offer a permanent retail electric rate at a 15 percent discount to the rate charged by PG&E. Thus, Condition No. 4 required Irrigation to "prepare a comprehensive economic report analyzing [Irrigation's] proposed retail rates and the calculation of the percentage rate savings from PG&E's retail rates"

once "acquisition costs and exit fees have been determined and the terms and conditions of financing have been approved." Until Irrigation presented this additional information to Formation and Formation had the opportunity to assess the report in a public meeting, Irrigation was barred from taking "final action to acquire the PG&E system and implement retail electric service . . . ."

After Formation issued its conditional approval, PG&E urged Formation to reconsider the matter. On February 12, 2015, Formation commissioners conducted a hearing on PG&E's request for reconsideration. One of main arguments advanced by PG&E was that Condition No. 4 was unlawful because "[Formation] and not [Irrigation] must be the one to determine whether there is sufficient revenue for a permanent 15 percent discount, not a discount just for 10 years." Thus, PG&E's argument focused on the question of whether Formation commissioners had made the required findings *in support of the 15 percent discount*. PG&E did not dispute that Irrigation had sufficient revenues to fund retail electric service in the absence of a discount. Indeed, PG&E's counsel said of the two-day hearing, "it was a heck of a process and really a lot of effort went into it." Thus, PG&E focused on its assertion that Formation commissioners – in adopting Condition No. 4 – had unlawfully delegated to Irrigation the responsibility to analyze whether the full 15 percent discount could be assured to retail electricity customers.

One commissioner responded to PG&E's argument by noting that Formation made "a decision and the decision is based on numbers . . . ." The commissioner explained that the analysis of the 15 percent discount was difficult because no one knew what the acquisition price of infrastructure would be that Irrigation would have to acquire from PG&E. Another commissioner explained that Formation had done its statutory duty because Irrigation "does not need to achieve a 15 percent retail rate reduction in order to demonstrate that it has sufficient revenue to carry out the proposed new or different functions. The PA [Consulting] report, the [Formation] staff report, the MRW report, in

combination or individually, provides substantial evidence in the record proceedings that's credible and reasonable for the Commission to reply to a conclusion that [Irrigation] has sufficient revenue to carry out the proposal."

PG&E's counsel noted the voluminous data and reports regarding Irrigation's financial wherewithal: "There's so much stuff in this record, if the question is, 'Is there any substantial evidence?' you could pull out evidence to prove rates are going to go through the sky or they're going to – everything. Okay? [¶] I'll admit that because you've had all these reports. *Yeah, there's substantial evidence*. But you needed to make the determination. And you didn't." (Italics added.)

The hearing concluded with Formation commissioners denying PG&E's request for reconsideration.

In the reverse validation action subsequently filed by PG&E, the trial court addressed this unlawful delegation argument as follows: "Government Code, [section] 56824.14[, subdivision](a) requires that [Formation] determine whether [Irrigation] has sufficient revenue to expand its services to include the provision of retail electric services to customers within its territory as authorized by Water Code, [section] 22115. After the December 2014 hearings, [Formation] issued its Findings which specifically stated that [Irrigation] has the financial ability/sufficient revenue 'to carry out the proposed new or different function or service (retail electric).' " The trial court further found that "[t]he record includes substantial evidence that [Irrigation] has the financial capability to feasibly provide retail electrical service. . . . In fact, substantial evidence presented to [Formation's] commission indicates that at a minimum, [Irrigation] can provide retail electrical service at a 2.5% discount from PG&E's rates." The trial court noted, "importantly, nothing in the [local agency formation commission] statutes or its legislative history requires a [l]ocal [a]gency [f]ormation [c]ommission to also find that the proposed/project differs from or *improves* the current function or services." To this, the trial court added, "And if the statutes or legislative history did, it is undisputed

that, at a minimum, [Irrigation] could provide the service at a 2.5% discount from PG&E's rates."

B.

Government Code Sections 56824.12 and 56824.14

As this court has previously explained, "investigation and information gathering in aid of, or as a basis for, prospective legislation is [a] legislative function that may be accomplished through administrative agencies. (See *In re Battelle* (1929) 207 Cal. 227, 241; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 62-63; see also 2 Cal. Jur.3d (1999) Administrative Law, § 285, p. 308 ['Fact-finding for the purpose of supplying the legislature with information on which to base general legislative action is obviously legislative, the determination of facts and formulation of legislative policy being the very core of the legislative function.'] In authorizing administrative agencies to investigate, hold hearings, and report findings, the Legislature is, in effect, using those agencies as an 'arm' of the Legislature itself, performing functions that are quasi-legislative in nature." (*Carrancho, supra,* 111 Cal.App.4th at p. 1266.)

Sections 56824.12 and 56824.14 represent the Legislature's authorization of local agency formation commissions to make findings and determinations regarding whether a local governmental agency may expand its services. To this end, section 56824.12 provides in pertinent part: "(a) A proposal by a special district to provide a new or different function or class of services or divestiture of the power to provide particular functions or classes of services, within all or part of the jurisdictional boundaries of a special district . . . shall be made by the adoption of a resolution of application by the legislative body of the special district and shall . . . be submitted with a plan for services . . . . The plan for services for purposes of this article shall also include all of the following information: [¶] (1) The total estimated cost to provide the new or different function or class of services within the special district's jurisdictional boundaries. [¶] . . .

[¶] (5) A plan for financing the establishment of the new or different function or class of services within the special district's jurisdictional boundaries."

Section 56824.14, subdivision (a), provides that a local agency formation commission "shall review and approve with or without amendments, wholly, partially, or conditionally, or disapprove proposals for the establishment of new or different functions or class of services, or the divestiture of the power to provide particular functions or class of services, within all or part of the jurisdictional boundaries of a special district, after a public hearing called and held for that purpose. The commission shall not approve a proposal for the establishment of new or different functions or class of services within the jurisdictional boundaries of a special district *unless the commission determines that the special district will have sufficient revenues to carry out the proposed new or different functions or class of services* except as specified in paragraph (1) [by resorting to taxes, assessments, charges, and/or bonds]." (Italics added.)

PG&E emphasizes that the Legislature amended section 56824.14 in 2008 to ensure that local agency formation commissions determine that special districts have sufficient revenues to undertake the proposed new classes of service. (Assem. Bill No. 2484 (2007-2008 Reg. Sess.).) The Legislative Counsel's digest for Assembly Bill No. 2484 stated that it was intended to "require the commission to review and approve or disapprove proposals for the divestiture of the power to provide particular functions or class of services, within all or part of the jurisdictional boundaries of a special district, and would prohibit the approval of proposals where the commission has determined that the special district will not have sufficient revenues to carry out the proposed new or different functions or class of services, except as specified." (Legis. Counsel's Dig., Assem. Bill No. 2484 (2007-2008 Reg. Sess.).) PG&E also points out that the Senate Local Government Committee's report mentioned the matter of *Irrigation, supra,* 162 Cal.App.4th 146, as part of its analysis of Assembly Bill No. 2484. The committee's report stated that "AB 2484 fills the gap between local enthusiasm and fiscal reality. The

bill's key reform requires [local agency formation commissions] to deny a district's request to exercise a latent power if the district can't pay for the new service. When local boosters want their special district to deliver a popular service, AB 2484 requires [a local agency formation commission] to ask the tough question: who's going to pay?" (Sen. Local Gov. Com., Analysis of Assem. Bill No. 2484 (2007-2008 Reg. Sess.) as amended May 21, 2008, p. 2.)

In reviewing PG&E's challenge to Formation's determination that Irrigation had adequate financial resources to provide retail electric service, we apply a deferential – but not perfunctory – review. (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1273.) "[I]t is clear the function of judicial review of discretionary actions of an administrative agency is to 'ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.' " (*Id.* at pp. 1273-1274, quoting *California Hotel & Motel Assn. v. Indus. Welfare Com.* (1979) 25 Cal.3d 200, 212.)

C.

Analysis

PG&E's argument is that Formation did not meet its statutory duties under sections 56824.12 and 56824.14. In particular, PG&E contends that Formation itself was required to make the determination that Irrigation could provide a permanent 15 percent discount on retail electricity rates. Notably, PG&E's attorney acknowledged before the Formation commissioners that there was substantial evidence that Irrigation had the financial ability to provide retail electricity service and that the problem lay with Formation unlawfully delegating a finding regarding *the discount*.

As PG&E's attorney acknowledged before Formation's commissioners, the record in this case was extensive and included detailed studies of Irrigation's financial ability to provide retail electric service. There was essentially no dispute that Irrigation had the financial ability to provide retail electricity without a discount. Even the report by

Glaser, which recommended against approval of the application, acknowledged that Irrigation had the financial ability to provide electricity at a greater than 2 percent discount. Instead, the dispute centered on whether Irrigation could permanently provide the 15 percent discount.

The record shows that commissioners grappled with the issue of the permanent discount on retail electric service promised by Irrigation's application. As one commissioner explained, the difficulty in making the appraisal of ability to provide the discount on a permanent basis was that the acquisition cost of the infrastructure was not yet certain. To ensure that the promised discount would be realized, the commissioners decided to condition their approval on a requirement that Irrigation conduct further analysis and report back to Formation. We decline to hold that Formation's commissioners were derelict in their duty to ensure Irrigation's financial ability to provide retail electric service by exercising caution about the viability *of the discount.*

Sections 56824.12 and 56824.14 do not require that Formation find Irrigation had the ability to provide a discount to consumers in providing a new service. Instead, sections 56824.12 and 56824.14 are satisfied by a finding based on substantial evidence that the local agency has the financial ability to provide the new service. Formation declared that it "finds the conclusion of PA, the [Formation] staff and [Irrigation], individually and in combination, to be credible and reliable evidence that the Commission can reasonably rely upon to support a conclusion that [Irrigation] has a sufficient revenue source to carry out the proposed new or different function of service (retail electric)." Section 56824.14, subdivision (a), requires only that Formation "determine[]" that Irrigation "will have sufficient revenues to carry out the proposed new . . . class of services . . . ." Thus, we agree with Formation when it stated that, "[i]n order to approve the Application the Commission does not have to find that the proposal will achieve a fifteen percent retail rate reduction . . . ." Accordingly, we reject the argument that Formation's approval violated its duties under sections 56824.12 and 56824.14.

APPEAL BY IRRIGATION IN CASE NO. C086319

BACKGROUND

Irrigation's retail electrical service expansion plan was approved by Formation in December 2014, and PG&E filed its reverse validation action in February 2015. In July 2016, Irrigation filed an eminent domain action to take PG&E's electric distribution system within Irrigation's service area even though judgment had been entered against Irrigation in the earlier action brought by PG&E to challenge Formation's conditional approval. Irrigation's eminent domain action was deemed related to PG&E's action to challenge Formation's conditional approval, and both matters were assigned to the same trial judge for all purposes. PG&E opposed the eminent domain action on grounds that Irrigation had not obtained valid approval from Formation for its plan to provide retail electric service.

In the eminent domain action, Irrigation and PG&E stipulated that they would be bound by the determination of the issues relating to the constitutionality of Formation's conditional approval in the validation action. As the trial court recounted, "Pursuant to a November 1, 2016 Stipulation and Order . . . the parties agreed and the Court ordered that because issues raised in Paragraphs 9 and 12[4] in PG&E's Answer were being litigated in

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4 In paragraph 9 of its answer, PG&E "object[ed] to the taking under Code [of] Civ[il]. Proc[edure,] [section] 1250.360[, subdivision](h) on the ground that there was a failure to comply with [the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)] before [Irrigation] adopted the Resolution of Necessity."

In paragraph 12 of its answer, PG&E "further object[ed] to the taking under Code [of] Civ[il] Proc[edure,] [section] 1250.360[, subdivision](h) on the ground that . . . [Irrigation] has failed to obtain the valid approval from [Formation] to provide such services pursuant to Gov[ernment] Code[,] [sections] 56375[, subdivision](p) and 56133. [Irrigation] received conditional approval from [Formation] in December 2014. However, that conditional approval was both procedurally and substantively improper.

the [validation statutes] Action, those issues 'shall not be relitigated or tried . . . nor shall any discovery be taken in' the Eminent Domain Action 'pertaining to such issues.' Instead, the parties agreed and Court ordered that 'the issues pertaining to Paragraphs 9 and 12 in PG&E's Answer have been and continue to be litigated in the [validation statutes] Action, and the determination of those issues in the [validation statutes] Action shall be binding and determinative of the issues pertaining to Paragraphs 9 and 12 of PG&E's Answer in this eminent domain action.' "

PG&E moved to dismiss the eminent domain action on grounds that the trial court ruled in the validation statutes action that the conditional approval granted by Formation to Irrigation violated the California Constitution. In January 2018, the trial court entered a judgment of dismissal in the eminent domain action. Irrigation timely filed a notice of appeal.

IV

Dismissal of Irrigation's Eminent Domain Action

Irrigation contends the trial court erred in dismissing the eminent domain action because Irrigation had the prerogative to exercise eminent domain over PG&E's electrical infrastructure even before securing all necessary regulatory approvals.

A.

Irrigation's Latent Power

Water Code section 22115 provides that a special district, such as Irrigation, "may provide for the acquisition, operation, leasing, and control of plants for the generation, transmission, distribution, sale, and lease of electric power, including sale to municipalities, public utility districts, or persons." Thus, retail electricity service is a latent power that Irrigation may exercise. (*Irrigation*, *supra*, 162 Cal.App.4th at pp. 150,

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PG&E incorporates herein by reference the allegations in its [first amended complaint in the validation action], which set forth in detail the bases supporting the procedural and substantive deficiencies in [Formation's] conditional approval."

153.) However, to exercise that latent power, Irrigation must first secure a valid approval from Formation. (*Id.* at pp. 156-157.) As this court has previously held, "[t]his conclusion is consistent with the purpose of [local agency formation commissions] as ' "the 'watchdog' the Legislature established to guard against the wasteful duplication of services . . . ." ' " (*Ibid.*, quoting *Bookout v. Local Agency Formation Com.* (1975) 49 Cal.App.3d 383, 388.)

Here, the trial court determined that Formation did not give valid approval to Irrigation's application because the conditions of approval conflicted with the California Constitution. Under the trial court's judgment in the reverse validation action, Irrigation lacked the prerogative to exercise its latent power to provide retail electric service. (*Irrigation*, *supra*, 162 Cal.App.4th at pp. 156-157.) As this court held in *Irrigation*, "[t]here would be no point in establishing a detailed, timely and costly procedure for [local agency formation commission] approval if a disappointed applicant could simply disregard the decision of [the local agency formation commission] and proceed with its plan to provide a new or different service." (*Id.* at p. 154.)

Despite the trial court's judgment vitiating Formation's approval, Irrigation proceeded to pursue eminent domain against PG&E as if Irrigation could provide retail electric service. Under the holding of our prior decision, Irrigation did not have the ability to simply ignore the lack of valid approval for its retail electric service plan and proceed as if it could exercise that latent power. (*Irrigation*, *supra*, 162 Cal.App.4th at pp. 156-157.) The trial court's judgment had the effect of cancelling Formation's approval and Irrigation was bound by that judicial determination.

B.

The Parties' Stipulation

PG&E points that "[i]t is hornbook law that the parties are bound by their stipulation . . . ." The point is well taken. Trial courts may enter orders binding parties to their stipulation. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 540-541.) "Such

an order may have preclusive effect as between the parties to the underlying stipulation, but not because it satisfies the criteria for claim preclusion or issue preclusion. Rather it is binding on the parties to the extent they have consented to be bound by it." (*Id.* at p. 540.) As this rule applies to Irrigation, it means that Irrigation's eminent domain action depended on the validity of the conditional approval by Formation at issue in the reverse validation action. In the absence of a reversal of the judgment in the reverse validation action, Irrigation cannot simply ignore the trial court's judgment to proceed on its plan to expand into retail electric service. (*Ibid.*)

As this rule applies to PG&E – the other party to the stipulation – it means that PG&E is also bound by the fate of the judgment in the reverse validation action. Indeed, PG&E recognized this when it argues that "this court should consolidate the two appeals and apply its ruling in the Reverse Validation appeal when deciding this appeal. That is the only result consonant with judicial economy that would give proper effect to the parties' stipulation." We agree. As we explained above, we reverse the judgment in the reverse validation action because Formation issued a valid conditional approval of Irrigation's retail electric service application. As a result, the stipulation in the eminent domain action acts to restore Irrigation's approval by Formation to pursue its expansion into retail electric service.[5]

V

Standards Irrigation Hopes to Be Applied in the Eminent Domain Action

Anticipating a reversal and remand for further proceedings, Irrigation urges this court "to provide *guidance* that validity of the [Formation's] Resolution [approving the application to provide retain electric service], including the determinations of public necessity and more necessary public use, are reviewed by the trial court under the gross

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[5] We deny PG&E's request for judicial notice and Irrigation's first amended request for judicial notice as unnecessary to the disposition of this appeal.

abuse of discretion standard of review." (Italics added.) Irrigation asks us to opine on issues – from the level of deference to be shown to Formation's quasi-legislative determinations to the burden of proof in a takings action – that Irrigation imagines will arise in the trial court. Irrigation's request for an advisory opinion concerns issues that the trial court has not yet reached in the eminent domain action in which they might arise.

The California Supreme Court has admonished that it is "prudent to follow a 'cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.' " (*People v. Contreras* (2018) 4 Cal.5th 349, 381, quoting *PDK Laboratories Inc. v. U.S. Drug Enforcement Administration* (D.C. Cir. 2004) 362 F.3d 786, 799 (conc. opn. of Roberts, J.).) We will not issue an advisory opinion on issues that might arise in the trial court.

DISPOSITION

The judgments in cases Nos. C086008 and C086319 are reversed and the matters are remanded for further proceedings consistent with this opinion. Irrigation and Formation shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2), & (5).)

HOCH, Acting P. J.

We concur:

RENNER, J.

KRAUSE, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Pacific Gas and Electric Company v. San Joaquin Local Agency Formation Commission
C086008
San Joaquin County
Nos. STKCVUJR20150001266

And: South San Joaquin Irrigation District v. Pacific Gas and Electric Company
C086319
San Joaquin County
No. STKCVUED20160006638

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IN THE SUPREME COURT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff and Appellant,

v.

SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION,
Defendant and Appellant;

SOUTH SAN JOAQUIN IRRIGATION DISTRICT,
Real Party in Interest and Appellant.

SOUTH SAN JOAQUIN IRRIGATION DISTRICT,
Plaintiff and Appellant,

v.

PACIFIC GAS AND ELECTRIC COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NOS. C086008 & C086319

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

This petition presents two unsettled questions regarding the effect of the California Constitution, one of which is pending before this Court in another case:

1. Article XIII C of the California Constitution requires that local governments obtain voter approval before imposing new taxes. Subject to certain exceptions, article XIII C defines a tax to include any levy or charge of any kind imposed by a local government. When one public entity imposes a tax on another, does the application of article XIII C depend on the further requirement that, as the Court of Appeal held below, the tax has been passed through directly to individuals? This relates to an issue pending before this Court in *Zolly v. City of Oakland* (2020) 47 Cal.App.5th 73 (*Zolly*), review granted August 12, 2020, S262634.

2. Article XVI, section 6 of the California Constitution prohibits gifts of public funds. Can a public entity circumvent that constitutional bar by consenting to an order or judgment mandating the voluntary gift? As a related matter, can the donor public entity transfer such funds to other public entities outside its territory to be used for purposes unrelated to any purpose for which the donor entity itself is authorized to use the funds?

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

Through a string of voter initiatives including Propositions 13 and 218, California voters have created an important constitutional check on the ability of local governments to impose new taxes. Before a local government can impose any new tax, article XIII C of the California Constitution (article XIII C) first requires it to obtain approval from two-thirds of voters.[1] But despite the voters' expressed will, local governments continue to concoct new ways to avoid article XIII C's mandate by dressing up taxes as something else " 'in order to extract even more revenue from California taxpayers without having to abide by [the] constitutional voting requirements.' " (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 11 (*Citizens for Fair REU Rates*).) To ensure the effectiveness of Propositions 13 and 218, the voters passed Proposition 26 in 2010 to define taxes broadly and prevent local governments from circumventing these constitutional restrictions. (*Ibid.*)

The South San Joaquin Irrigation District, with approval from the Court of Appeal, has flipped Proposition 26 on its head. The Irrigation District argues, and the Court of Appeal agreed, that if a public entity imposes a tax or fee on another public entity, the tax or fee is immune from voter approval no matter how excessive it may be. According to the Court of Appeal, such a tax or fee evades scrutiny under article XIII C so long as it is

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[1] Further references to constitutional provisions are to the California Constitution.

not imposed directly on an individual. The Irrigation District's argument as adopted by the Court of Appeal echoes those made by the City of Oakland in the *Zolly* matter pending before this Court.

Review is necessary to determine whether local public entities can evade the string of voter initiatives over the last four decades by taxing one another and evading the express constitutional requirement that franchise fees be reasonably related to the value of the franchise. That the Third District's opinion is unpublished is of little consequence. The Third District plays a significant role in interpreting the law governing public entities. When it, as here, deviates from the clear text and intent of constitutional amendments and fails to properly apply binding precedent from this Court, review is necessary to ensure the uniform application of law throughout the state.

Section 1, subdivision (e) of article XIII C defines "tax" as "any levy, charge, or exaction of any kind imposed by a local government, except for" seven exceptions. The second exception applies to a franchise fee: a charge "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (*Id.*, § 1, subd. (e)(2).)

The local government entity has the burden to show that a fee it seeks to charge is not a tax or that it satisfies an exception to a tax. To carry its burden, a local government is required to prove that the proposed charge is no greater "than necessary to

cover the reasonable costs of the governmental activity" and is fairly allocated in proportion to "the payor's burdens on, or benefits received from, the governmental activity." (Art. XIII C, § 1, subd. (e).)

In the *Zolly* matter, the City of Oakland entered into contracts with waste haulers that imposed franchise fees on the haulers. (*Zolly*, *supra*, 47 Cal.App.5th at p. 79.) Waste disposal customers brought an action against the City to challenge the constitutionality of those franchise fees under article XIII C. (*Id.* at pp. 79–80.) The customers argued that the fees were not reasonably related to the value of the franchise. (*Id.* at p. 80.)

The City of Oakland argued that the franchise fees did not constitute a "tax" under article XIII C because they were not "imposed by local government." (*Zolly*, *supra*, 47 Cal.App.5th at p. 88.) According to the City, the franchise fees constituted contract consideration and were not imposed merely because they might be passed on to ratepayers. (*Ibid.*) The First District Court of Appeal rejected this argument, holding that, if it were to "accept the City's reasoning, any local government could avoid running afoul of article XIII C by merely contracting with a third party to impose the desired tax on residents rather than enacting it directly. This result would directly conflict with the purpose of Propositions 218 and 26." (*Ibid.*)

Here, the Court of Appeal adopted the same argument that the *Zolly* Court of Appeal rejected. Pacific Gas & Electric Company (PG&E) challenged a requirement that the Irrigation District make payments in lieu of franchise fees and taxes to 160

other public entities. (Typed opn. 2–3, 7–8.) The payments are based on a fixed fee of 2.5 percent of the Irrigation District's gross retail revenues. (*Ibid.*) Further, many of the payments benefit "taxing agencies *outside* of Irrigation's service area." (Typed opn. 17, emphasis added.) The Irrigation District cannot explain how these fixed fees bear a reasonable relation to costs.

Yet the Court of Appeal concluded that the question was not relevant. (Typed opn. 10, 17–18.) It held there was substantial evidence that the Irrigation District will have sufficient revenues available from other sources to cover these payments in the future so that the payments will not be passed through directly to individuals. (Typed opn. 10.) On that basis, the court concluded that the payments are "not a tax" and do "not require voter approval." (*Ibid.*)

The Court of Appeal's holding finds no support in the constitutional text. Article XIII C defines a tax "broadly." (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 11.) The term includes, when imposed by a local government, a charge, levy, or exaction " 'of any kind.' " (*Ibid.*, quoting art. XIII C, § 1, subd. (e).) Review is warranted to settle the important issue of whether article XIII C applies to excessive franchise fees and taxes that one public entity imposes on another even if those fees or taxes are not directly passed through to an individual. (See Cal. Rules of Court, rule 8.500(b)(1).) At a minimum, this Court should grant review and hold this case pending its decision in *Zolly*.

Review is warranted on the additional issue, not presented in *Zolly*, of whether the constitutional prohibition against gifts of public funds applies when a public entity consents to an order or judgment mandating the gift. Article XVI, section 6 prohibits gifts of public funds. The primary question in determining whether an appropriation of funds is a gift is whether the funds will be used "for a 'public' or a 'private' purpose." (*Alameda County v. Janssen* (1940) 16 Cal.2d 276, 281 (*Janssen*).) When an appropriation is from a local government agency that the Legislature has vested with only limited powers, the appropriation must serve the public purpose of the donor agency. (*Santa Barbara County Water Agency v. All Persons and Parties* (1957) 47 Cal.2d 699, 707 (*Santa Barbara*), revd. on another ground in *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, 300 [78 S.Ct. 1174, 2 L.Ed.2d 1313], opn. mod. 53 Cal.2d 743.)

The trial court ruled that the Irrigation District's payments in lieu of franchise fees and taxes violate this provision because they will go to 160 other public entities for their general benefit and will not be used for the purposes for which the Irrigation District was created, namely, to provide water and electricity services in its limited area. (Typed opn. 10; 25 AA 4214.)

The Court of Appeal reversed. It acknowledged that the Irrigation District had volunteered to make these payments. (Typed opn. 7–8.) Nonetheless, the Court of Appeal concluded that the subsequent approval of these payments by another public entity had the effect of converting them from the voluntary to the involuntary. (Typed opn. 22.) The Court of Appeal's

opinion undermines the prohibition against gifts of public funds. The opinion allows a public entity to make gifts of public funds so long as the entity consents to an order or judgment mandating the voluntary gift. Review should be granted to ensure that the prohibition against gifts of public gifts under the California Constitution retains validity for the protection of all.

STATEMENT OF THE CASE

A. When applying to provide retail electric service, the South San Joaquin Irrigation District proposes making payments in lieu of taxes and franchise fees. Its application is approved.

PG&E brought this reverse validation action challenging the legality of the conditional approval by San Joaquin Local Agency Formation Commission of a proposal by the Irrigation District to enter the retail electric business. (Typed opn. 9.) The Irrigation District proposes entering that business by taking PG&E's electric distribution facilities in a 112-square-mile area through eminent domain. (Typed opn. 5, 7.)

The Irrigation District's proposal will cause about 160 local governments in San Joaquin County to lose property taxes and franchise fees currently paid by PG&E. (Typed opn. 2–3, 7.) PG&E annually pays an estimated $962,276 in property taxes and $766,400 in franchise fees, while the Irrigation District, as a publicly owned utility, pays no taxes. (Typed opn. 8.) As part of its plan to seize PG&E's grid and enter the retail electric business, the District has pledged to make up for those lost revenues. (Typed opn. 7.)

The Commission conditionally approved the Irrigation District's application on this basis. The Commission's Condition No. 2 requires that the District allocate 2.5 percent of its gross retail revenues to make payments in lieu of taxes to other local government entities to make up for the lost taxes and franchise fee revenues. (Typed opn. 7–8.)

B. The superior court invalidates the approval because the proposed payments to other public entities are unconstitutional taxes and gifts.

Article XIII, section 3 exempts from taxation property owned by a local government. (See 25 AA 4209.) The trial court ruled that Condition No. 2 violates this provision by mandating payments in lieu of property taxes. (Typed opn. 10; 25 AA 4212–4214.) As the court noted, many of the 160 public entities that would receive these payments operate outside of the Irrigation District's geographic service territory in southern San Joaquin County, which calls into question how those agencies will provide the District (a water and electricity provider) with any services. (Typed opn. 17; 25 AA 4211, 4213.)

Article XVI, section 6 prohibits gifts of public funds. The trial court ruled that Condition No. 2 violates this provision because the payments in lieu of taxes, which would go to 160 other public entities for their general benefit, would not be used for the purposes for which the Irrigation District was created, i.e., to provide water and electric services for its limited service area. (Typed opn. 10; 25 AA 4214.)

The trial court did not reach PG&E's argument under article XIII C that Condition No. 2 imposes taxes that are unconstitutional because they lack voter approval. (Typed opn. 10.)

C. The Court of Appeal reverses, holding that the payments are not taxes unless directly passed through to individuals and are not gifts unless voluntary both now and when made.

The Court of Appeal concluded that the Irrigation District's payments in lieu of franchise fees and taxes were not a tax, no matter how excessive. (Typed opn. 14.) Using an acronym for payments in lieu of taxes (PILOT), the court held: "A PILOT is not a tax." (*Ibid.*) Based on that conclusion, the Court of Appeal did not decide whether the District could meet its burden under article XIII C of proving "by a preponderance of the evidence" that the payments it must make to 160 other public entities are "no more than necessary to cover the reasonable costs of the governmental activity." (Art. XIII C, § 1, subd. (e).)

The Court of Appeal concluded that the payments evaded scrutiny under Propositions 13, 218, and 26 so long as they were not passed through to the utility customer. (Typed opn. 14–15.) According to the court, there was substantial evidence that the Irrigation District will have sufficient revenues available from other sources to make these payments. (Typed opn. 10.) On that basis, the court concluded that the payments are "not a tax" and do "not require voter approval." (*Ibid.*) The court reasoned this would be true even if the payments fund "taxing agencies that

are outside of Irrigation [District]'s service area." (Typed opn. 18.)

The Court of Appeal also held that the payments did not violate the constitutional prohibition against gifts of public funds. (Typed opn. 22.) The court acknowledged that the Irrigation District had volunteered to make the payments. (Typed opn. 7.) Nonetheless, the court concluded that the Commission's subsequent action in mandating the payments converted them from the voluntary to the involuntary: "As a required payment, the PILOT is not a gift." (Typed opn. 22.)

LEGAL ARGUMENT

I. Review is needed to resolve whether article XIII C of the California Constitution applies to franchise fees and taxes that one public entity imposes on another whether or not those charges are directly passed through to individuals.

Over the last four decades, California voters have adopted a series of initiatives to limit the authority of state and local governments to impose taxes without voter approval. (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 10.)

The first of these was Proposition 13, adopted in 1978. It limited local government authority to increase property taxes. Among other things, it required that any "increase in statewide taxes be approved by two-thirds of both houses of the Legislature" and that any "special tax imposed by a local government entity be approved by two-thirds of the qualified electors." (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 10, citing art. XIII A, §§ 3, 4.)

In 1996, the voters adopted Proposition 218, "known as the ' "Right to Vote on Taxes Act." ' " (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 10, quoting *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 259 (*Jacks*).) Proposition 218 added articles XIII C and XIII D to the Constitution. (*Ibid.*) Those articles prohibited local governments from imposing, increasing, or extending: "(1) any general tax, unless approved by a majority vote at a general election; or (2) any special tax, unless approved by a two-thirds vote." (*Id.* at pp. 10–11, citing art. XIII C, § 2, subds. (b) & (d).)

Proposition 218 did not define the term "tax." That definition was provided more than a decade later, with the passage of Proposition 26. The findings supporting Proposition 26 stated that, "despite the adoption of Propositions 13 and 218, 'California taxes have continued to escalate.' " (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 11, quoting Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Proposition 26, § 1, subd. (c), p. 114.) The findings also noted a " 'recent phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" in order to extract even more revenue from California taxpayers without having to abide by [the] constitutional voting requirements.' " (*Ibid.*, quoting Voter Information Guide, *supra*, § 1, subd. (e), p. 114.)

As this Court has recognized, the purpose of Proposition 26 "was to *reinforce* the voter approval requirements set forth in Propositions 13 and 218." (*Jacks*, *supra*, 3 Cal.5th at pp. 262–

263.) Proposition 26 made two changes to article XIII C to ensure the effectiveness of Propositions 13 and 218. First, it defined "tax" broadly. Subject to certain exceptions, a tax includes "any levy, charge, or exaction of any kind imposed by a local government." (Art. XIII C, § 1, subd. (e); see *Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 11.) Second, Proposition 26 "shifted to the state or local government the burden of demonstrating that any charge, levy, or assessment is not a tax." (*Templo v. State* (2018) 24 Cal.App.5th 730, 736 [addressing art. XIII A, § 3].) Thus, Proposition 26 required the local government to prove "by a preponderance of the evidence that a levy, charge, or other exaction is not a tax" and that the "amount is no more than necessary to cover the reasonable costs of the governmental activity." (Art. XIII C, § 1, subd. (e).)

Condition No. 2 does not satisfy Proposition 26. The condition mandates that the Irrigation District allocate 2.5 percent of gross retail electric revenues to payments in lieu of franchise fees and property taxes. (Typed opn. 8.) These payments will be made to 160 local entities including the County of San Joaquin and the Cities of Manteca, Escalon, and Ripon. (Typed opn. 8, 20; 25 AA 4210–4211.) The payments fit squarely within the category of new levies or charges imposed by a local government, which Proposition 26 defines as a tax. (See Art. XIII C, § 1, subd. (e).)

To satisfy the California Constitution, these payments would have to be approved by two-thirds of the voters (art. XIII C, § 2, subd. (d)) or the Irrigation District would have to

prove that the payments do not exceed the reasonable costs of the governmental activity (*id.*, § 1, subd. (e).) Even then, payments in lieu of property tax would violate California Constitution article XIII, section 3, which exempts from taxation property owned by a local government. (See *Sacramento Mun. Utility Dist. v. County of Sonoma* (1991) 235 Cal.App.3d 726, 732–737 [holding that the imposition of an excise tax on public entities to substitute for lost property tax revenue was unconstitutional].)

The Irrigation District cannot make either showing. First, it cannot show that the payments reflect the reasonable costs of the government activity. Many of the 160 agencies that will receive these payments are outside the Irrigation District's service area. (Typed opn. 17; 25 AA 4211.) The District cannot explain how those agencies will provide it with any services, much less how the fixed fee reflects the reasonable cost of any such services.

Second, the taxes were imposed without voter approval. (Typed opn. 8, 10.) Without voter approval, these payments are unconstitutional. (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1152 ["All taxes imposed by a local governmental entity are subject to voter approval"].)

Using the previously mentioned acronym for payments in lieu of taxes, the Court of Appeal cited *Citizens for Fair REU Rates* for the proposition that a "PILOT is not a tax." (Typed opn. 14.) According to the Court of Appeal, a PILOT is only a component of the "total cost of providing electric service to be

paid by the retail electric customer." (*Ibid.*) The Court of Appeal concluded, that, so long "as the retail electric customer does not pay an unreasonable cost for electricity service resulting from the inclusion of a PILOT, the PILOT does not constitute a tax to which article XIII C of the California Constitution applies." (*Ibid.*)

The Court of Appeal misconstrued both *Citizens for Fair REU Rates* and article XIII C. As this Court has recognized, Proposition 26 defines a tax broadly to include any levy or charge of any kind "*imposed* by a local government." (Art. XIII C, § 1, subd. (e), emphasis added; see *Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at p. 11.) Condition No. 2 imposes taxes on the Irrigation District for the benefit of 160 other public entities. (Typed opn. 8, 17.) Whether or not those taxes are passed through directly to utility customers does not alter the fact that they have been imposed on the Irrigation District. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 944 [the term "impose" is construed as synonymous to enact, create, or establish].)

In *Citizens for Fair REU Rates*, this Court held that an "interfund transfer" between two accounts of the same public entity was not a tax. (*Citizens for Fair REU Rates*, *supra*, 6 Cal.5th at pp. 4–5, 12.) The Court reasoned that the " 'budgetary act of *transferring sums* from one fund to the other does not constitute' the *imposition* of a levy, charge, or exaction by a local government on those who pay the charge." (*Id.* at p. 12, second emphasis added.) Such an interfund transfer between

accounts of the same public entity is merely a "budgetary *transfer*." (*Id.* at p. 4.)

Unlike *Citizens for Fair REU Rates*, this case does not involve an interfund transfer. As the Irrigation District has already acknowledged, Condition No. 2 "requires an *inter-governmental* transfer of funds from the District to the County and affected municipalities." (AOB 37, emphasis added.)

The Court of Appeal here nonetheless approved Condition No. 2 in part because the Irrigation District "would have income from sources other than retail electricity sales that would be sufficient to cover the PILOT imposed by Condition No. 2." (Typed opn. 18.) But the temporary and inherently changeable financial condition of a local government entity like the Irrigation District is not a workable basis for determining whether such a charge to be assessed in perpetuity is or is not a tax. Perhaps the Irrigation District will direct such surplus funds to make the payments at times, or perhaps it will always choose to fund the payments by charging taxpayers increased electric rates. But the Court of Appeal's decision defers entirely to the Irrigation District to decide how the payments will be funded.

The imposition of such a tax without voter approval violates Proposition 26. Review should be granted to give effect to the requirement of voter approval for local taxes.

II. Review is needed to clarify whether article XVI, section 6 prohibits gifts of public funds when the public entity consents to an order or judgment mandating the gift.

Article XVI, section 6 prohibits "the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . ." The constitutional prohibition applies to gifts to both private and governmental entities. (*Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 207 (*Golden Gate Bridge*).)

In determining whether an appropriation of funds is a gift, "the primary question is whether the funds are to be used for a 'public' or a 'private' *purpose*." (*Janssen*, *supra*, 16 Cal.2d at p. 281, emphasis added.) "The determination of what constitutes a public purpose is primarily a matter for the Legislature." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 746.)

If the appropriation is from an agency that the Legislature has vested with only limited powers, the appropriation must "serve[ ] the public purpose of the donor agency." (*Santa Barbara*, *supra*, 47 Cal.2d at p. 707.) An appropriation by a limited purpose agency "must not only be used by the recipient entity for a *public* purpose, but must be used in furtherance of the *particular* public purpose of the transferring governmental entity." (*Golden Gate Bridge*, *supra*, 4 Cal.App.3d at p. 208; see *City of Azusa v. Cohen* (2015) 238 Cal.App.4th 619, 629 ["this provision prohibits taking funds from one group of taxpayers and transferring them to benefit another group of taxpayers unless the funds are used to further the purpose of the donor entity"];

Edgemont Community Service Dist. v. City of Moreno Valley (1995) 36 Cal.App.4th 1157, 1165 (*Edgemont Community Service Dist.*) ["the transfer of funds by a limited purpose agency" to a city "must have as its purpose the promotion of the interests of the donor agency"].)[2]

This constitutional prohibition applies with particular force to special districts like the Irrigation District. In *Golden Gate Bridge*, *supra*, 4 Cal.App.3d at page 210, the Court of Appeal held that a statute authorizing the Golden Gate Bridge and Highway District to transfer funds to counties was unconstitutional because there was no assurance that "any, let alone all, of the money would be spent" on projects furthering the district's purposes. In *Edgemont Community Service Dist.*, *supra*, 36 Cal.App.4th at page 1165, the Court of Appeal likewise held that article XVI, section 6 prohibited a city from requiring a community services district to pay the cost of collecting a city tax on sewer services provided by the district.

Condition No. 2 does not further the Irrigation District's statutory purposes. The District's statutory purposes are limited to water, drainage, electricity, and certain ancillary services. (*Turlock Irrigation Dist. v. Hetrick* (1999) 71 Cal.App.4th 948,

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[2] *Santa Barbara* and *Golden Gate Bridge* addressed earlier iterations of the constitutional provision at issue here, article XVI, section 6. (See *Santa Barbara*, *supra*, 47 Cal.2d at p. 707 [addressing former art. IV, § 31]; *Golden Gate Bridge*, *supra*, 4 Cal.App.3d at p. 207 [addressing former art. XIII, § 25].) The earlier iterations contained the same relevant language. (See, e.g., *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 210, fn. 2; *Golden Gate Bridge*, at p. 207 & fn. 1.)

953; see Wat. Code, §§ 22075–22982.) But Condition No. 2 requires the Irrigation District to make payments to numerous other public entities including school districts and fire departments, many outside the District's service territory, with no limitation on how the payments will be used by the recipients, let alone any assurance that they would (or even could) be used to further the District's limited irrigation-related purposes. (See typed opn. 8, 17.) As the trial court properly found, this "renders Condition No. 2 unconstitutional." (25 AA 4214.) Indeed, the payments are designed to replace the tax revenue these 160 other public entities received and used historically for *their own unlimited purposes*, not limited to providing water, drainage, or electrical services to the District's customers.

The Irrigation District voluntarily proposed these payments. (Typed opn. 7.) It "pledged to backfill lost revenues to local government that would result from taking over retail electric sales from PG&E." (*Ibid.*) Nonetheless, the Court of Appeal concluded that the Commission's subsequent action in mandating the payments converted them from the voluntary to the involuntary. (Typed opn. 22.)

The Court of Appeal's opinion adopts new legal standards governing the constitutional prohibition against gifts of public funds. Until now, the primary question has been the *purpose* of the funds. (See *Janssen*, *supra*, 16 Cal.2d at p. 281; *Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450 (*Jordan*); *Golden Gate Bridge*, *supra*, 4 Cal.App.3d at p. 208 [an appropriation by a limited purpose agency must be used for

the public *purpose* of the transferring governmental entity].) But the Court of Appeal's opinion changes the focus from the appropriation's purpose to its enforceability.

Moreover, the term "gift" in this context has been understood to include " 'all appropriations of public money for which there is no authority or enforceable claim,' even if there is a moral or equitable obligation." (*Jordan, supra*, 100 Cal.App.4th at p. 450, quoting *Conlin v. Board of Sup'rs of City and County of San Francisco* (1893) 99 Cal. 17, 21–22.) But the Court of Appeal's opinion alters this definition to create an exception for an appropriation that is voluntary when first made but, as a result of the government's own action, later becomes involuntary.

The constitutional bar against gifts of public funds is an important part of our state's laws intended to promote public integrity. For example, the Auditor of the State of California issued a public letter in October of last year relying on the provision in discussing its concerns regarding the City of Montebello. (Auditor of the State of California, letter to the Governor of California (Oct. 14, 2021) <https://bit.ly/3mTGnuH> [as of Jan. 20, 2022].) The Auditor found that Montebello "used public funds to purchase about $7,600 worth of gifts for its employees, which we think constitutes a gift of public funds. The California Constitution prohibits such gifts of public funds." (*Ibid.*)

The Court of Appeal's opinion will undermine the constitutional prohibition against gifts of public funds. In the Court of Appeal's view, a public entity that makes an

unconstitutional gift can avoid scrutiny by consenting to an order or judgment embodying the gift. Review should be granted to clarify that an appropriation is enforceable, and thus not a gift, only if involuntary when first made.

CONCLUSION

For the reasons explained above, this Court should grant the petition for review and review this case on the merits or, at a minimum, grant review and hold this case pending its decision in *Zolly*.

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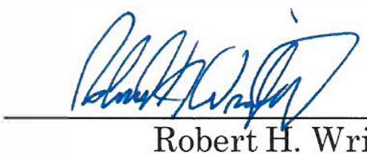
By: 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 4,945 words as counted by the program used to generate the petition.

Dated: January 21, 2022

Robert H. Wright

Court of Appeal 12/15/2021 Opinion
Case Nos. C086008 & C086319
Third Appellate District