

CASE NO. D06990

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

THE PROTECT OUR COMMUNITIES
FOUNDATION
Appellant and Cross-Respondent

v.

THE CITY OF SAN DIEGO, et al.
Respondent and Cross-Appellant

SAN DIEGO GAS & ELECTRIC CO.
Real Party in Interest and Cross-Appellant

APPELLANT'S OPENING BRIEF

On Appeal from the Superior Court for the State of
California,
County of San Diego, Case No. 37-2021-00029833-CU-WM-
CTL
Hon. Katherine Bacal

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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PARTIES.....	2
TABLE OF AUTHORITIES.....	7
INTRODUCTION.....	12
STATEMENT OF APPEALABILITY AND REQUEST TO TREAT THE APPEAL AS AN EXTRAORDINARY WRIT	14
STATEMENT OF THE CASE	15
I. The City’s approval of the Gas and Electric Franchises.....	15
A. The anti-competitive invitations to bid and negotiation process.....	15
B. Approval of the Franchises	18
II. Trial court proceedings.....	19
III. Proceedings in this Court	20
ARGUMENT	20
I. This action raises legal issues subject to de novo review.....	20
II. The City violated the California Constitution by imposing taxes without a vote of the people.....	23
A. Proposition 26 amended Article XIIC to close loopholes so that local governments could not avoid voter approval by characterizing taxes as “fees.”	24
B. The Charges constitute a “tax” under Proposition 26.	25
C. The Charges do not fall within Proposition 26’s exemptions.	25
1. The trial court properly concluded that Exemption 1 does not apply: SDG&E receives the benefit of being awarded the lucrative Franchises but does not pay the Charges.....	26
2. Exemption 4 does not apply because	

	those who pay the Charges (San Diego ratepayers) do not obtain a right to use City property in exchange.	27
	a. Under <i>Zolly</i> , the City failed to meet its burden of proving that the Charges fall within the scope of Exemption 4.	28
	b. Pre-Proposition 26 caselaw does not support the trial court’s holding.	30
III.	The City violated the competitive bidding mandates set forth in its Charter.	32
	A. The invitations to bid failed to provide a common standard, in violation of competitive bidding mandates.	33
	1. Other entities were required to bid on entirely different terms than SDG&E.	33
	2. The invitations to bid improperly required non-SDG&E bidders to bid on a “black box.”	36
	3. The trial court applied the wrong standard.	37
	B. The City improperly changed the requirements established in the invitations to bid after bids were submitted.	38
	1. The City and SDG&E renegotiated “the most sensitive and material terms” of the Franchise Agreements.	39
	a. The City allowed major changes to the payment provisions in favor of SDG&E.	39
	b. The renegotiated terms limited SDG&E’s obligations to comply with City climate policies.	40
	c. The City bargained away its police power over the use of City streets	41

	d.	The City impermissibly allowed post-bid changes to the governing MOUs.....	42
	2.	Allowing major changes to the requirements of the invitations to bid after the bidding was closed violated competitive bidding law.....	43
IV.		The trial court order contained erroneous or missing references to the Franchises.	45
V.		The City failed to comply with CEQA.	46
	A.	The trial court properly found that the City’s approval of the 20-year Franchises is a “project” subject to CEQA.....	47
	B.	The trial court erred in concluding that the Franchise Approvals are categorically exempt from CEQA review.	47
	1.	The Approvals do not just allow the continued operation of existing facilities, but rather establish new environmental and energy policy.	48
	2.	The Approvals anticipate and approve new infrastructure construction and increased operations.	52
	3.	The City cannot rely on the “existing facilities” exemption because the unusual circumstances exception to the exemption applies.	55
	a.	The Franchise Approvals differ from typical projects that fall within the existing facilities exemption.....	55
	b.	The Franchise Approvals will have significant environmental impacts.	57
	C.	The City cannot rely on the Programmatic EIR for the 2015 Climate Action Plan.	59
CONCLUSION			60

CERTIFICATE OF WORD COUNT 61

TABLE OF AUTHORITIES

Page

CALIFORNIA CONSTITUTION

Art. XIII A	24
Art. XIII C	13, 23, 24
Art. XIII C, § 1	passim
Art. XIII C, § 2	24, 30

FEDERAL CASES

<i>Gamewell Co. v. City of Phoenix</i> (9th Cir. 1954) 216 F.2d 928	36
--	----

STATE CASES

<i>Arcadians for Environmental Preservation v. City of Arcadia</i> (2023) 88 Cal.App.5th 418	56
<i>Association for a Cleaner Environment v. Yosemite Community College Dist.</i> (2004) 116 Cal.App.4th 629	51
<i>Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster</i> (1997) 52 Cal.App.4th 1165	22, 48, 56
<i>Baldwin-Lima Hamilton Corp. v. Superior Court San Francisco</i> (1962) 208 Cal.App.2d 803	passim
<i>Berkeley Hillside Preservation v. City of Berkeley</i> (2015) 60 Cal.4th 1086	23, 55, 59
<i>California Building Industry Association v. State Water Resources Control Board</i> (2018) 4 Cal.5th 1032	24, 30
<i>California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.</i> (2009) 178 Cal.App.4th 1225	50, 54, 55
<i>Center for Biological Diversity v. Department of Fish & Wildlife</i> (2015) 62 Cal.4th 204	58

<i>Citizens for Fair REU Rates v. City of Redding</i> (2018) 6 Cal.5th 1	24
<i>City of Marina v. Board of Trustees of California State Univ.</i> (2006) 39 Cal.4th 341	23
<i>Communities for a Better Environment v. South Coast Air Quality Management District</i> (2010) 48 Cal.4th 310	52
<i>County of Amador v. El Dorado County Water Agency</i> (1999) 76 Cal.App.4th 931	53
<i>County of Ventura v. City of Moorpark</i> (2018) 24 Cal.App.5th 377	43
<i>DeSilva Gates Construction, LP v. Department of Transportation</i> (2015) 242 Cal.App.4th 1409	44
<i>Domar Electric, Inc. v. City of Los Angeles</i> (1994) 9 Cal.4th 161	32
<i>Don't Cell Our Parks v. City of San Diego</i> (2018) 21 Cal.App.5th 338	21
<i>Eel River Disposal and Resource Recovery, Inc. v. Humboldt</i> (2013) 221 Cal.App.4th 209	passim
<i>Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.</i> (2016) 1 Cal.5th 937	59
<i>Golden Door Properties, LLC v. County of San Diego</i> (2018) 27 Cal.App.5th 892	58
<i>Golden Door Properties, LLC v. County of San Diego</i> (2020) 50 Cal.App.5th 467	22, 49, 58
<i>IBC Business Owners for Sensible Development v. City of Irvine</i> (2023) 88 Cal.App.5th 100	passim
<i>Jacks v. City of Santa Barbara</i> (2017) 3 Cal.App.5th 248	21, 24, 25, 31
<i>Kirk v. First American Title Ins. Co.</i> (2010) 183 Cal.App.4th 776	31
<i>Konica Business Machines U.S.A., Inc. v. Regents of University of California</i> (1988) 206 Cal.App.3d 449	38, 44, 45
<i>Los Angeles Dept. of Water & Power v. County of Inyo</i> (2021) 67 Cal.App.5th 1018	52

<i>Mahon v. City of San Diego</i> (2020) 57 Cal.App.5th 681	26, 31, 32
<i>McCann v. City of San Diego</i> (2021) 70 Cal.App.5th 51	49, 59
<i>Meinhardt v. City of Sunnyvale</i> (2022) 76 Cal.App.5th 43	14, 20
<i>Meinhardt v. City of Sunnyvale</i> (No. S274147) 2024 WL 3561112	14, 20
<i>Olson v. Cory</i> (1983) 35 Cal.3d 390	15
<i>Pacific Rock & Gravel Co. v. City of Upland</i> (1967) 67 Cal.2d 666	21
<i>People ex rel. Younger v. County of El Dorado</i> (1971) 5 Cal.3d 480	21
<i>Save Our Carmel River v. Monterey Peninsula Water Management Dist.</i> (2006) 141 Cal.App.4th 677	48, 53
<i>Save Our Schools v. Barstow Unified School Dist. Bd. of Education</i> (2015) 240 Cal.App.4th 128	53
<i>Schram Construction, Inc. v. Regents of University of California</i> (2010) 187 Cal.App.4th 1040	38, 45
<i>Shrewsbury Management, Inc. v. Superior Court</i> (2019) 32 Cal.App.5th 1213	15
<i>Southern California Gas Co. v. Los Angeles</i> (1958) 50 Cal.2d 713	35
<i>T-Mobile W. LLC v. City & Cnty. of San Francisco</i> (2019) 6 Cal.5th 1107	35, 43
<i>Union of Medical Marijuana Patients, Inc. v. City of San Diego</i> (2019) 7 Cal.5th 1171	22, 47
<i>Valley Crest Landscape, Inc. v. City Council</i> (1996) 41 Cal.App.4th 1432	38, 44
<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i> (2007) 40 Cal.4th 412	22
<i>Voices for Rural Living v. El Dorado Irrigation Dist.</i> (2012) 209 Cal.App.4th 1096	56

<i>Weisblat v. City of San Diego</i> (2009) 176 Cal.App.4th 1022.....	24
<i>Zolly v. City of Oakland</i> (2022) 13 Cal.5th 780.....	passim

OUT OF STATE CASES

<i>Platt Elec. Supply, Inc. v. City of Seattle, Division of Purchasing</i> (1976) 16 Wash.App. 265	36
---	----

STATUTES

Pub. Resources Code, § 21065	47
Pub. Resources Code, § 21084	59
Pub. Resources Code, § 21094	59
Pub. Resources Code, § 21168.5	22
Pub. Util. Code, § 1001	33
Pub. Util. Code, § 1004	33
Pub. Util. Code, § 851	33

OTHER AUTHORITIES

Suede G. Kelly, <i>Municipalization of Electricity: The Allure of Lower Rates for Bright Lights in Big Cities</i> (1997) 37 Nat. Resources J. 43, 44	34
--	----

TREATISES

10 McQuillin Mun. Corp. § 29:51.50 (3d ed.)	36
64 C.J.S. Municipal Corporations § 1343	37
Practice Under the California Environmental Quality Act (2d ed. Cal. CEB 2024) §5.127	55

REGULATIONS

Cal. Code Regs., tit. 14, § 15064.4..... 49, 59
Cal. Code Regs., tit. 14, § 15065..... 59
Cal. Code Regs., tit. 14, § 15091..... 49
Cal. Code Regs., tit. 14, § 15165..... 55
Cal. Code Regs., tit. 14, § 15183.5..... 60
Cal. Code Regs., tit. 14, § 15300.2..... 55
Cal. Code Regs., tit. 14, § 15301..... 46, 48, 51, 56
Cal. Code Regs., tit. 14, § 15302..... 51
Cal. Code Regs., tit. 14, § 15303..... 51
Cal. Code Regs., tit. 14, § 15378..... 49, 51
Cal. Code Regs., tit. 14, § 15000 et seq. 20

SAN DIEGO CITY CHARTER

Section 100 32
Section 103 32
Section 103.1 41
Section 105 41
Section 11.1 43
Section 94 32

INTRODUCTION

By this appeal, The Protect Our Communities Foundation (“PCF”) challenges the City of San Diego’s award of gas and electric franchises (“Franchises”) to Real Party in Interest San Diego Gas & Electric Company (“SDG&E”). The City’s approval of the Franchises and associated agreements violated the California Constitution, the City Charter, and the California Environmental Quality Act (“CEQA”).

In 2020, the City of San Diego began the once-in-a-generation process of soliciting bids to award its gas and electric franchises to its next energy service provider. These Franchises would decide not only who would be granted the extraordinarily profitable benefit of serving the City’s million-plus residents with gas and electric power, but also how that power would be sourced and provided. As the Mayor’s office declared: “When it comes to creating an environmentally sustainable San Diego, awarding exclusive energy franchises is one of the most critical decisions the City will make.” AR:6025.

Far from moving the City towards sustainability, however, the franchise process undercut City climate goals, violated City competitive bidding requirements, and imposed an illegal tax on San Diego residents. From the start, the bidding process was stacked against any potential competitor to SDG&E, an investor-owned electric and gas utility with a vested interest in resisting the climate change goals of the City. The City failed to conduct any environmental review of the potential effects of awarding SDG&E the Franchises, or to consider alternatives or mitigation measures. And the Franchises required SDG&E to collect payments from San Diego ratepayers to support general City services—i.e., taxes—without a vote of the electorate. These actions violated both state and local law.

First, the inclusion of a substantial tax on San Diego’s residents

without voter approval violates California Constitution Article XIII C. These taxes comprise a significant part of the City's budget and pay for a host of City services, including libraries, homelessness programs, and landscaping maintenance. While these services are no doubt important, Article XIII C prohibits the City from paying for them by imposing taxes without voter approval. The charges—paid by San Diego ratepayers—do not fall within any exemption to the definition of “tax” established by Proposition 26, as the Supreme Court's decision in *Zolly v. City of Oakland* (“*Zolly*”) (2022) 13 Cal.5th 780, makes clear.

Second, the City violated competitive bidding requirements in the City Charter by forcing entities other than SDG&E to bid on draconian and uncertain terms and changing the material terms of the Franchises in favor of SDG&E *after* the bidding was closed. In upholding this skewed and unfair bidding process, the trial court applied the wrong standard of review and failed to address key aspects of the City's anti-competitive bidding process.

Third, the City violated CEQA by approving the Franchises and associated agreements, which establish this City's energy policy for the next 20 years, with no environmental review. These approvals govern the provision of power and electricity to over a million San Diegans and approve the expansion of services for two decades, a project with profound environmental consequences. The City's approval of long-term franchise ordinances and related agreements does not fall within the narrow CEQA exemption for minor modifications to “existing facilities.” The trial court's conclusion otherwise contradicts the record, CEQA precedent, and its own findings.

PCF requests that this Court find that the City violated the California Constitution, its own Charter, and failed to conduct environmental review

required by CEQA.

**STATEMENT OF APPEALABILITY AND REQUEST TO TREAT
THE APPEAL AS AN EXTRAORDINARY WRIT**

On December 8, 2023, PCF filed a notice of appeal of the trial court’s December 2022 order on PCF’s CEQA claims (“CEQA Order”) and October 2023 minute order (“October 2023 Order”) granting in part PCF’s petition for writ of mandate. JA3:1383.¹ The City and SDG&E (collectively, “Respondents”) each filed cross-appeals. JA3:1395, 1403. These appeals were filed after the trial court issued orders on the merits, and after PCF filed a motion for reconsideration, but before final judgment had been entered. All parties characterized their appeals as “protective” given the Supreme Court’s pending review of *Meinhardt v. City of Sunnyvale* (2022) 76 Cal.App.5th 43. JA3:1384, 1395, 1403.

On March 8, 2024, the trial court stayed the matter in light of the pending appeals. JA3:1443. On April 26, 2024, after requesting briefing by the parties, this Court found the question of appealability “unclear” but directed the appeal to proceed.

On July 29, 2024, the Supreme Court decided *Meinhardt v. City of Sunnyvale* (No. S274147) 2024 WL 3561112, at *1), adopting a bright line rule “that the time to appeal in administrative mandate proceedings begins with the entry of ‘judgment’ or service of notice of entry of ‘judgment.’”

PCF requests that, if this Court determines the appeals were premature, it nevertheless proceed to the merits and treat the appeal as an extraordinary writ. This is appropriate in “unusual circumstances” where there is an adequate record for review, the trial court as respondent is no more than a nominal party, and dismissing the appeal would be

¹ Citations to the parties’ Joint Appendix, filed herewith, appear as JA [volume]:page number(s).

“unnecessarily dilatory and circuitous.” *Olson v. Cory* (1983) 35 Cal.3d 390, 401.

Here, the pending *Meinhardt* appeal presented an unusual circumstance which, as this Court recognized, made the status of the appeal unclear. *See Shrewsbury Management, Inc. v. Superior Court* (2019) 32 Cal.App.5th 1213, 1221 (treating appeal as writ where “courts have reached conflicting conclusions regarding the appealability” of orders at issue). While PCF initially argued that the case should proceed to judgment in the trial court, the Joint Appendix is now final, briefing is underway, and the trial court proceedings are stayed. In light of these unusual circumstances, PCF believes it would conserve judicial resources and avoid unnecessary delay for this Court to treat the appeal as an extraordinary writ and proceed to the merits.

STATEMENT OF THE CASE

I. The City’s approval of the Gas and Electric Franchises.

A. The anti-competitive invitations to bid and negotiation process.

SDG&E’s gas and electric franchises, approved by the City in 1970 were due to expire at the end of 2020. Administrative Record (“AR”):7111-13, 7129-33. In December of 2020, after SDG&E submitted the sole and non-responsive bid, the newly elected Mayor of the City cancelled the initial bidding process, and the City extended the then-existing franchises for six months. AR:6028, 1921-24, 1925-28.

The Mayor released new invitations to bid in March 2021, informing the public that this was a “once-in-a-generation opportunity” for “achieving the best deal possible for San Diego’s households and workers and helping meet the City’s Climate goals.” AR:5781-5908, 5909-6022, 6028.

Environmental issues like “transitioning away from natural gas” and

implementing “fire protection and prevention measures” would supposedly be central to the new franchise terms. AR:6026. The City also claimed that the new bids were intended to “incentivize competition.” AR:6023. As the City’s consultant reported, San Diego is the largest California city “where investor-owned electric and natural gas utilities can sell their services,” making the franchises “extraordinarily valuable” for potential bidders with profit opportunities over a 20-year term exceeding \$6.4 billion. AR:2244, 2269. SDG&E has historically earned approximately \$322 million per year in profits from operations within the City while charging the highest rates in California. AR:2244, 2257.

However, the City tilted the scale in favor of SDG&E by setting forth a two-tiered bid invitation: Option 1 for SDG&E and Option 2—with uncertain terms that were far more costly and onerous—for all other bidders. Under Option 2, non-SDG&E bidders were required to acquire undefined property and equipment for the distribution of electricity and gas, “pay and indemnify the City” for these and related costs, and submit a deposit in an unknown amount to be determined *after* bid submission. AR:5785-86. Unsurprisingly, even entities that had earlier expressed strong interest and championed their commitment to renewable power, did not submit a bid. *See e.g.* 6396, 6393-99, 6400, 6420-24 (Indian Energy and Berkshire Hathaway indicating intent to bid and emphasizing wind, solar and renewable energy). In the end, SDG&E was able to retain its monopoly as the only bidder for each franchise. AR:883.

After accepting SDG&E’s bids that redlined key provisions, the City and SDG&E began renegotiating the material terms of the Franchises in April 2021. AR:883. These negotiations were hijacked from the start because SDG&E was threatening to withhold payments of the franchise fees due under the then-existing franchises unless the City granted it the

new franchises by June. AR:53693-694 (SDG&E requesting California Public Utilities Corporation (“CPUC”) approval of its proposal that approximately \$101.9 million in surcharges “will no longer be collected from City Residents [by SDG&E] or paid to the City of San Diego” unless it was awarded new franchises).

SDG&E also threatened the City about alleged “risks” in the event SDG&E “is not the winning bidder,” claiming that any new franchisee would have to acquire and pay for “extensive and highly valuable” SDG&E properties. AR:6181-82. In fact, the City could have awarded franchises without requiring a new franchisee to pay to acquire and litigate SDG&E’s property interests: a former franchisee has no right to compensation for an expired franchise, and SDG&E was already obliged to indemnify the City for any claims arising from its 1970 franchises. *See infra*, Section III.A.1.

City Councilmembers decried the City’s post-bid negotiating process, expressing concern that “reopening that negotiation leaves us with financial uncertainty and financial risk,” that the City was rushed and SDG&E “put the squeeze on us financially by threatening to withhold the surcharges” and “chose to hit us where we are most vulnerable,” that “SDG&E was our only bidder twice” and “has not been the best partner in the past,” and about difficulties in “get[ting] out from under the thumb of a monopoly,” and also questioning how “you negotiate with a monopoly.” AR:1560, 1561, 1563, 1562, 1572.

Despite these concerns, the City acceded to SDG&E’s demands and modified the terms specified in the invitations to bid by:

- 1) agreeing it would refund and lose payments if the Franchises were terminated or not extended to 20 years;
- 2) eliminating language requiring SDG&E to cooperate with amendments to the City’s Climate Action Plan and support City’s clean energy policies;

- 3) abdicating City authority over the streets to the courts and eliminating language requiring SDG&E to pay for relocating facilities that conflict with City projects;
- 4) eliminating the requirement that SDG&E comply with City requirements in memorandums of understanding (MOU) and the Energy Cooperation Agreement and instead deferring their terms to future bilateral negotiations.

See infra, Section III.B.1. The City ultimately awarded SDG&E the Franchises on terms that were materially different from the terms in the invitations to bid, exempting SDG&E from the obligation to adhere to key City energy and environmental policies.

B. Approval of the Franchises

The Franchises were never submitted to the electorate for a vote. Rather, the City Council approved the ordinances granting the Franchises to SDG&E in the form of four items (collectively, “Approvals”):

- Resolution R-313554 [2021-468] (concluding CEQA review unnecessary)
- Ordinance 21327 [2021-128] (awarding Gas Franchise)
- Ordinance 21328 [2021-129] (awarding Electric Franchise)
- Resolution 313555 [2021-460] (authorizing City to enter into the Energy Cooperation Agreement with SDG&E)

AR:876-877.

The Franchises establish two types of payments. First are payments by SDG&E shareholders: the “bid amount” of \$70 million for the Electric Franchise and \$10 million for the Gas Franchise, as well as \$20 million to the City’s General Fund to further City climate goals (all paid over time). AR:17, 60, 71. The City expressly prohibited SDG&E from passing these payments on to consumers. AR:23, 66-67, 71, 92, 862.

Second, the Franchises impose taxes on San Diego ratepayers via a “3% Charge” (three percent of gross receipts), plus additional surcharges. *See infra*, Section II. These taxes are paid by San Diegans, collected by SDG&E, and remitted to the City, and make up the bulk of the total payments to the City under the Franchises.

The Approvals also require the City and SDG&E to enter into an “Administrative MOU” (AR:17, 60, 32-33, 78), an “Undergrounding MOU” (AR:64, 85-86), and an “Implementation Plan” for the Energy Cooperation Agreement (AR:120-21), agreements which were not presented to the City Council prior to the Approvals.

Councilmembers expressed concerns that they were being asked to approve an Administrative MOU that was not before them and “as far as I know, as a council, [we] won’t be involved in that process.” AR:1562, 1576 (Councilmember stating “I continue to have trouble with ... the lack of the administrative MOU”). They also objected that the Franchises were presented for their approval without environmental review. *See, e.g.*, AR:1560 (stating a “study of public power” could show “it would be better financial and environmentally for San Diegans”); 1572 (City needs time “to understand how this franchise agreement would interact with updates to our climate action plan” given it “now requires SDG&E’s cooperation with only the December 2015” version). Nevertheless, the City Council approved all of the agenda items. AR:1582-83. Following the second reading of the ordinances, the date of “final passage” was June 11, 2021, making the new Franchise Agreements’ Effective Date July 11, 2021 (30 days later). AR:18, 62.

II. Trial court proceedings

PCF filed this lawsuit on July 12, 2021. Following briefing on the merits, the trial court issued an order bifurcating the hearing for the CEQA

claims from the remaining claims. JA3:1274. The trial court denied PCF’s CEQA claims on December 2022, 2021. The trial court concluded that the Franchise Approvals constituted a “project” subject to CEQA but were categorically exempt from environmental review under the “existing facilities” exemption (CEQA Guidelines § 15301²). JA3:1291-92.

The remaining causes of action were heard on August 25, 2023. The court’s October 2023 Order granted PCF’s petition for a writ of mandate in part, holding that Franchise terms requiring a two-thirds vote to terminate violated the City Charter. JA3:1333-32. The Order denied or did not address PCF’s remaining claims. JA3:1333-36.

On October 30, 2023, PCF filed a motion for reconsideration of the October 2023 Order. JA3:1338, 1341. Due to the uncertainty created by the Supreme Court’s pending review of *Meinhardt*, PCF also appealed the two trial court orders. JA3:1338. Respondents cross-appealed. JA3:1395, 1403. The trial court issued a minute order on March 8, 2024 staying the matter in light of the parties’ pending appeals in this Court. JA3:1384, 1395, 1403.

III. Proceedings in this Court

On March 18, 2024, this Court ordered the parties to submit briefing on the question of whether the October 2023 Order was an appealable order. On April 26, 2024, the Court directed the appeal to proceed and stated the “appealability of the order” could be addressed in the appellate briefing.

ARGUMENT

I. This action raises legal issues subject to de novo review.

The City’s Franchise Approvals were legislative acts reviewed under

² The CEQA Guidelines (“Guidelines”) are found at Cal. Code Regs., tit.14, § 15000 et seq.

CCP section 1085 and Public Resources Code section 21168.5. *See Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 668 (granting of a franchise is a legislative act). PCF is entitled to a writ where, as here, City has failed to comply with a “clear duty imposed by law” under the California Constitution, its Charter, or state statutes. *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491-92.

The Court reviews de novo PCF’s claim that the Franchises were approved in violation of the California Constitution. *See Jacks v. City of Santa Barbara* (2017) 3 Cal.App.5th 248, 267 (“Whether a charge is a tax or a fee ‘is a question of law for the appellate courts to decide on independent review of the facts.’”) (citation omitted). Under Proposition 26, the City bears the burden to prove that the Charges are not a tax. *Zolly*, 13 Cal.5th at 786; Cal. Const., Art. XIII C, § 1 (last paragraph) (all further references to articles are to the California Constitution).

PCF’s claims under the City Charter are also reviewed de novo. *Don’t Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338, 349-50 (“Construing a city charter is a legal issue we review de novo.”). The courts exercise independent judgment and apply “close judicial scrutiny” to deviations from strict adherence to competitive bidding mandates. *Eel River Disposal and Resource Recovery, Inc. v. Humboldt (“Eel River”)* (2013) 221 Cal.App.4th 209 225. The “mere potential for abuses likely to arise from significant deviations” from competitive bidding standards—which are “designed to eliminate favoritism, fraud, and corruption, avoid misuse of public funds, and stimulate advantageous market place competition”—is a sufficient basis for judicial relief “even without a showing that the deviations actually resulted in such abuses.” *Id.* at 238. Here, the issue of whether the City’s skewed bid process violated competitive bidding requirements raises largely legal questions requiring the Court to exercise

“independent judgment,” not factual issues subject to substantial evidence review. *Id.* at 224.

Under CEQA, appellate courts “review[] the agency’s action, not the trial court’s decision; in that sense appellate judicial review under CEQA is de novo.” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427. Courts must “afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 503 (internal quotation marks omitted) (“*Golden Door II*”). The Court determines whether there was “a prejudicial abuse of discretion,” which “is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” Pub. Resources Code, § 21168.5.

Appellate courts review de novo whether agency action constitutes a “project” for purposes of CEQA review. *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (“*UUMP*”) (2019) 7 Cal.5th 1171, 1198 (whether activity constitutes a project is “a question of law, rather than fact, to be decided on ‘undisputed data in the record on appeal’”) (citation omitted).

CEQA exemptions are narrowly construed and “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.” *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125. Erroneous reliance by an agency on a categorical exemption constitutes a prejudicial abuse of discretion and violates CEQA. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192.

An agency fails to proceed in the manner required by law when it ignores the unusual circumstances exception in applying a categorical

exemption. See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103 (agency must “make a finding of fact” as to whether unusual circumstances apply and whether a “fair argument” shows they may result in a significant environmental impact). A showing that a project *will* have a significant environmental effect establishes that unusual circumstances exist. *Id.* at 1105. Moreover, absent an express finding, the “court must assume that the entity found that the project involved unusual circumstances.” *IBC Business Owners for Sensible Development v. City of Irvine* (2023) 88 Cal.App.5th 100, 133. If there is a “fair argument” that this will produce a significant environmental effect, an exemption determination must be overturned. *Id.* at 134.

Whether an agency proceeded in the manner required by CEQA presents a purely legal question that courts review *de novo*. *City of Marina v. Board of Trustees of California State Univ.* (2006) 39 Cal.4th 341, 355-56, 365-66.

II. The City violated the California Constitution by imposing taxes without a vote of the people.

The Franchises here involve two kinds of payments: (1) unconstitutional taxes paid by San Diego customers to the City; and (2) payments by SDG&E to the City, which are not at issue. The unconstitutional taxes require San Diego ratepayers to pay the City (through SDG&E) three percent of SDG&E’s gross receipts for each franchise, plus additional gas and electric surcharges (collectively, Charges). AR:19-20, 22-23, 62-63, 66-67, 84. The Charges constitute taxes levied on San Diego customers under Article XIIC of the California Constitution, and do not fall within any of the enumerated exemptions. Because the City failed to carry its burden of showing the Charges are *not* a tax, and because the Charges were never approved by the voters, they

violate the Constitution and are void. Art. XIII C, § 1(d), § 2(d); *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1044.

A. Proposition 26 amended Article XIII C to close loopholes so that local governments could not avoid voter approval by characterizing taxes as “fees.”

Over the past four decades, California voters have “adopted a series of initiatives designed to limit the authority of state and local governments to impose taxes without voter approval.” *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 10 (“*Citizens*”). Proposition 13, adopted in 1978, limited the authority of state and local governments to impose property and other taxes. Art. XIII A; *Jacks*, 3 Cal.5th at 258. Proposition 218, adopted in 1996, added Article XIII C of the California Constitution to prohibit general taxes without approval by majority vote and to prohibit special taxes without approval by a two-thirds vote of the electorate. Art. XIII C, § 2(b)&(d) *Citizens*, 6 Cal.5th at 10–11.

In 2010, California voters passed Proposition 26, which amended Article XIII C to broaden the definition of “tax” to mean “any levy, charge, or exaction of any kind imposed by a local government” except seven specifically enumerated categories in subdivision (e). Art. XIII C, § 1(e); *Zolly*, 13 Cal.5th at 785-86. Proposition 26 also placed the burden on local agencies to prove that any charges they impose are not a tax. Art. XIII C, § 1 [last paragraph].

The voters adopted Proposition 26 to “close perceived loopholes” in Proposition 13 and 218. *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1047 (citation omitted); *Citizens*, 6 Cal.5th at 11 (voters expressly found local governments had disguised taxes as “fees” to extract revenue from taxpayers without a vote). Proposition 26’s broad definition of “tax” was intended to ensure that “neither the Legislature nor local governments can

circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as ‘fees.’” *Jacks*, 3 Cal.5th at 263 (citation omitted).

Because the Charges at issue here are nothing but taxes in disguise and were imposed on San Diego customers without voter approval, they violate Proposition 26.

B. The Charges constitute a “tax” under Proposition 26.

It is undisputed that the Charges in the Franchises fall within Proposition 26’s broad definition of “taxes” and that they were imposed by the City in the Franchise ordinances. *See* Art. XIIIIC, § 1(e) (defining tax as any kind of charge “imposed by a local government”); JA1:0280 (arguing only that exemptions applied).

C. The Charges do not fall within Proposition 26’s exemptions.

Because the Charges are taxes under Proposition 26, they can be upheld only if they fall within one of seven enumerated exemptions. Art. XIIIIC, § 1(e). Only two are at issue here: Exemption 1 for charges imposed in exchange for a “specific benefit” or “privilege” granted directly to the payor (Art. XIIIIC, § 1(e)(1)); and Exemption 4 for charges imposed for entrance to or use of government property (*id.* § 1(e)(4)). *See* JA1:0243, 0280 (Respondents arguing franchises fall within these two exemptions).

The City has the burden of proving that the Charges fall within these exemptions and do not exceed the reasonable costs of the governmental activity, and that costs are allocated reasonably to payors. Art. XIIIIC, § 1 [last paragraph].

The trial court properly determined that the Charges did *not* fall within Exemption 1 (JA3:1335) but erred in holding that the Charges fall within Exemption 4.

1. The trial court properly concluded that Exemption 1 does not apply: SDG&E receives the benefit of being awarded the lucrative Franchises but does not pay the Charges.

Under Exemption 1, a charge is not a tax if: (1) it is imposed “for a specific benefit conferred or privilege granted *directly to the payor* that is not provided to those not charged” *and* (2) it “does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.” Art. XIIC, § 1(e)(1) (emphasis added).

Here, as the trial court found, the Charges do not fall within Exemption 1 because they are not imposed for a “privilege granted directly to the payor”: SDG&E receives the privilege but does not pay the Charges. *See* JA3:1335. Rather, SDG&E collects the Charges from San Diego ratepayers, and then remits these customer payments to the City.³

The plain language of the Franchises makes clear that all of the surcharges are “to be levied solely on customers in the City.” AR:19-20, 22-23, 62-63, 66-67, 84; *see also* AR:23-24, 67 (any increase in 3% Charge will be “chargeable to the residents of the City”), 7033 (CPUC: “franchise fee surcharges should be billed and collected from” customers); *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681, 705, fn. 36 (Proposition 218 case recognizing ratepayers, not utility, paid undergrounding surcharge delineated in prior City franchise).

As both the City and SDG&E have explained, San Diego ratepayers also pay a portion of the Charges through base rates. AR:8439-40 (SDG&E explaining “[c]ustomers have always paid” average franchise fees collected

³ The CPUC does not determine “the City’s authority or right to levy a fee upon utility customers or the utility itself.” AR:7028; *see also* 7078 (determining city’s authority to impose “any form of tax or fee upon utility customers or the utility itself” is a matter for the courts).

in base rates), 2638 (City’s IBA discussing prior franchise: “City ratepayers also pay the remainder of the franchise fee through base rates...”), 7023, 2278 (historical breakdown under 1970 franchises); *see also* AR:53172 (Union Tribune discussing prior franchise: “franchise fees that SDG&E collects from the monthly bills of customers...are sent directly to the city”). Accordingly, when the City seeks to impose charges directly on SDG&E and not on SDG&E’s customers, it does so explicitly—as it did with the bid amounts and the \$20 million general fund payments. AR:23, 66-67 (Franchise terms expressly prohibiting SDG&E from collecting the bid amount from its customers), 71, 92, 862 (SDG&E CEO: shareholders will pay the \$20 million general fund payments).

Because the trial court properly found that the Charges did not fall within the scope of Exemption 1, it did not address the second prong of the Exemption 1 analysis: determining whether the Charges “do[] not exceed the reasonable costs to the local government of conferring the benefit.” Art. XIII C, § 1(e)(1). However, no record evidence establishes that the Charges are reasonably related to any City costs in granting SDG&E the Franchises.

2. Exemption 4 does not apply because those who pay the Charges (San Diego ratepayers) do not obtain a right to use City property in exchange.

Exemption 4 of Proposition 26 excludes from the definition of “tax” a “charge imposed for entrance to or use of local government property.” Art. XIII C, § 1(e)(4). The Charges here do not fit within Exemption 4 for the same reason they do not fall within Exemption 1: SDG&E does not pay the Charges in exchange for SDG&E to use City streets – or at all.

Moreover, the record shows that the Charges were not imposed for SDG&E to use City streets, but rather for generating revenue for the City.

a. **Under *Zolly*, the City failed to meet its burden of proving that the Charges fall within the scope of Exemption 4.**

In *Zolly*, the California Supreme Court considered the applicability of Proposition 26 and its exemptions to franchise fees for the first time. Plaintiffs alleged that franchise fees levied on waste haulers by the City of Oakland violated Proposition 26. *Zolly*, 13 Cal.5th at 787-88.

Zolly first held that franchise fees fell within Proposition 26's "general definition of a tax." *Id.* at 792. The Court then held that Oakland failed to show the fees were imposed for use of "government property," as required under Exemption 4. Under Proposition 26, the franchise itself did not constitute "government property." *Id.* at 794 (a franchise "cannot be said to be property belonging to the local government before the grant occurs"). And, while "actual physical objects or land, not property interests in such objects" can constitute local government property as that term is used in Exemption 4, the Supreme Court held that Oakland had "not demonstrated as a matter of law" that the waste management providers gained a special right to use the streets "in exchange for their payment of the challenged fees." *Id.* at 793, 794-96.

In reaching this conclusion, the Court repeatedly highlighted the fact that, under Exemption 4, the entity paying the charge must be the entity that gets the benefit of using the government property. The Court interpreted Exemption 4 to apply to charges imposed for the physical use of government property that "**those who pay the charge** can either enter or use." *Id.* at 793 (emphasis added). To fall within the scope of Exemption 4, a fee must reflect an "exchange" of interest between the government and the "payor":

Oakland has not demonstrated as a matter of law that the **payors paid** the challenged fees **in exchange for a specific use** of

government property that they would not have enjoyed had they not paid the fee. The text of Exemption 4 supports such a fact-specific requirement by focusing on the **actual benefit exchanged between the payor and local government**.

Id. at 794; *see also id.* (Exemption 4 applies only to “fees paid as consideration for a specific use of government property”); *id.* at 795 (“when Exemption 4 refers to a charge ‘**imposed for ... use of local government property,**’ that latter term is most sensibly read to refer to the **specific benefit that is being exchanged**”) (all emphasis in paragraph added).

Here, the Charges cannot fall within Exemption 4 because only *SDG&E* obtains the right to use City property while *San Diego ratepayers* pay the Charges. *See* Section II.C; *e* AR:22, 64; JA1:0283 (Respondents’ admission that the franchise fees are paid in exchange for a privilege “provided directly to SDG&E and not to anyone else”). In contrast to a person paying a park entrance fee or to lease government property, San Diego ratepayers cannot choose *not* to pay the Charges. Nor do their payments give them any right to enter or use City property. Thus, the Charges do not reflect the “exchange” of interests Proposition 26 requires.

Exemption 4 is also inapplicable here because the Charges were not imposed “for” the use of “local government property.” Art. XIII C, § 1(e)(4). Instead, the record shows that the Charges were imposed to generate revenue for the City. As staff explained, the “Electric and Gas Franchise generate a significant amount of revenue annually for the City,” with 75 percent of the revenue allocated to the General Fund and the remainder used for park and open space maintenance. AR:883; *accord* 6781 (chart showing \$68M 2020 SDG&E franchise fees and support trail restoration, playgrounds, dredging, etc.), 6791 (\$82M franchise fees constitute 7% of 2020 revenue).

As the City’s Chief Operating Officer warned, losing these fees

would result in major budget cuts to general City programs:

[W]e've identified a number of areas that we'd have to bring back to the city council, totaling about 60 million worth of potential budget cuts. Ranging from anything from some of the homeless programs to infrastructure, Climate Equity Fund funding would most likely be reduced from the budget, library hours, both some of the addition to the library in terms of the material budget as well as the hours that are being restored in the Mayor's May revise. And then some smaller dollar amounts being areas such as tree trimming, brush removal, brush management, and so forth. Short of decimating whole departments, those are some of the areas that we'd be presenting back to the city council to identify essentially roughly \$60 to \$70 million worth of budget cuts.

AR:1568-1569.

In short, the Charges constitute taxes imposed to generate revenue for programs—like libraries, tree trimming, and homeless programs—having nothing to do with SDG&E's use of the City's streets. While the City's general fund programs are certainly important, they cannot be paid for by taxes imposed on the electorate without a vote. Art. XIII C, § 2; *California Building Industry*, 4 Cal.5th at 1047 (stated goal of Proposition 26 is to bar fees that “are simply imposed to raise revenue for a new program”); *accord Zolly*, 13 Cal.5th at 785.

b. Pre-Proposition 26 caselaw does not support the trial court's holding.

The trial court's decision, while very brief, purported to rely on *Zolly*, which it erroneously characterized as “discussing cases in which exemption 4 applied to electric utility franchise fees.” JA3:1336. In fact, no published case has applied Proposition 26 or Exemption 4 to electric or gas franchise fees.

Zolly mentions two cases, *Mahon* and *Jacks*, in noting that franchise fees *paid by the utility* “may” fall within Exemption 4. *Zolly*, 13 Cal.4th at

795. But the fees at issue in both *Jacks* and *Mahon* preceded the adoption of Proposition 26. Thus, neither case addressed Proposition 26’s broad new definition of “tax,” the meaning of a charge “imposed” for “use of local government property” as the term is used in Exemption 4, or the effect of shifting the burden of proof to the local government. *See Jacks*, 3 Cal.5th at 263, fn. 6 (“We are concerned only with the validity of the surcharge under Proposition 218. Proposition 26’s exception from its definition of ‘tax’ with respect to local government property is not before us.”); *Mahon*, 57 Cal.App.5th at 704, fn. 34 (“plaintiffs do not make any claim premised on Proposition 26”).

Indeed, *Zolly* expressly distinguished *Jacks*’ general statements about franchises because *Jacks* did not address the term “local government property” as used in Exemption 4 under Proposition 26. *See Zolly*, 13 Cal.5th at 793 (“It is true that we stated in *Jacks* and other cases that “[a] franchise to use public streets or rights-of-way is a form of property” [Citations.] But none of those general statements were made in relation to the term “local government property” as used in article XIIC.”). Thus, reliance on the historical treatment of franchise fees in *Jacks* and *Mahon* and the rationale that a fee need only be reasonably related to the value of a franchise to be valid under Proposition 218 —are inapplicable to this Court’s interpretation of Exemption 4. *See Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 797 (the “language contained in a judicial opinion is to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered”) (internal quotation marks omitted).

Nor does *Zolly*’s reference to *Jacks* and *Mahon* support the argument that utility franchise fees paid by *consumers* (like the Charges here) are not taxes under Proposition 26. *See Jacks*, 3 Cal.5th at 283, fn.3 (dis. opn. of

Chin, J) (“nothing in Proposition 26 indicates that a charge imposed on one party for *someone else’s* use of government property comes within [Exemption 4]”). To the contrary, *Zolly* appears to assume that the fees in *Jacks* and *Mahon* were paid by the *utility*. See *Zolly*, 13 Cal.5th at 795 (noting that by “paying the franchise fee [in *Jacks*], *the utility* there had gained a specific ‘use of local government property’”); *id.* (explaining *Mahon* involved a franchise fee “*paid by a private electric utility*”) (both emphases added).

Here, the Charges challenged by PCF are undisputably paid by consumers who receive no special right to enter or use any City property. The Charges do not reflect an exchange of interest between the City and the payors. See *supra*, Section II.C.2.a; *Zolly*, 13 Cal.5th at 793-794. Thus, under Proposition 26, the Charges are taxes and Exemption 4 does not apply.

III. The City violated the competitive bidding mandates set forth in its Charter.

The City has a duty under the City Charter to ensure that grants of franchises shall be made “only after ... an opportunity for free and open competition.” See Charter Section 103. The Charter also provides that City contracts are “competitively bid” and that the City must avoid favoritism. See Charter Sections 94, 100. Such requirements exist to invite competition, guard against corruption, and protect taxpayer dollars and must be construed to serve these purposes and protect the public interest. *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173. Here, the City violated competitive bidding mandates by adopting a two-tiered bidding system that forced non-SDG&E bidders to bid on undefined and draconian terms and by changing the material terms of the Franchises *after* SDG&E submitted the only bid.

A. The invitations to bid failed to provide a common standard, in violation of competitive bidding mandates.

1. Other entities were required to bid on entirely different terms than SDG&E.

It is undisputed that the City’s invitations to bid allowed SDG&E to bid on terms that were entirely different from other bidders. The invitations had two “options”: Option 1 for those who could obtain within 30 days a valid Certificate of Public Convenience and Necessity (“CPCN”) and other necessary approvals from the CPUC, and Option 2 for bidders who agreed to “diligently seek” such approvals. *See* AR:5785.⁴ Only SDG&E had a pre-existing franchise and thus only SDG&E could proceed under Option 1. AR:5737, 5759, 7101-02. All other bidders were required to proceed under Option 2, because they could not commence operations without securing CPUC approval, which “often takes more than a year to complete.” AR:8425; Pub. Util. Code, § 851(a).

The two options subjected SDG&E and other bidders to dramatically different terms. Pursuant to the draconian “Paragraph B” (AR:5785-86 [(c)(2)(B)]; AR:5913-005914 [(c)(2)(B)]), all bidders proceeding under Option 2 (i.e., everyone but SDG&E) to agree to: acquire all property and facilities necessary to provide electricity or gas, the scope of which was entirely undefined; “pay and indemnify” the City for all acquisition costs, including attorneys’ fees, administrative and litigation costs, “without any right of refund ... whether or not the Facilities are ultimately acquired”; and deposit in advance “acquisition costs”—in an amount to be “estimated by the City manager” *after* the bids were submitted. *Id.* Moreover, if the

⁴ A CPCN constitutes the CPUC authorization required before a public utility company like SDG&E may lawfully commence construction of public utility facilities. Pub. Util. Code, §§ 1001, 1004.

facilities were not acquired within three years, the City could “rescind the award of the franchise” and the bidder would “have no recourse.” *Id.*

SDG&E did not have to agree to any of these provisions. These disparate terms did not allow fair bidding “upon a common standard.” *Baldwin-Lima Hamilton Corp. v. Superior Court San Francisco* (1962) 208 Cal.App.2d 803, 821.

The City could have leveled the playing field simply by eliminating the two-tiered system and requiring *all* bidders to provide whatever facilities were necessary to serve gas and electric customers in San Diego. This would have allowed each bidder to determine the best and most cost-effective way to provide service and to propose new facilities, technology and system designs to minimize or even eliminate use of SDG&E’s antiquated, fossil fuel-based infrastructure. *See e.g.* Suedeen G. Kelly, *Municipalization of Electricity: The Allure of Lower Rates for Bright Lights in Big Cities* (1997) 37 Nat. Resources J. 43, 44 (discussing methods for acquiring ownership and controlling distribution facilities and recognizing a “city could also build its own new and redundant electric distribution facilities”). The City should also have eliminated the one-sided requirement that non-SDG&E bidders indemnify the City for litigation against SDG&E. The City, however, failed to take these steps to achieve a common bidding standard.

Respondents justified the two-tiered bidding process below by claiming it merely reflected the “reality” that SDG&E claimed property rights in its existing infrastructure, as well “constitutional” franchise rights. JA1:0242, 275. But the bids fail to acknowledge SDG&E’s duty to indemnify the City against claims arising out of the 1970s franchises. AR:7121, 7145. And, as PCF demonstrated below, the scope of SDG&E’s property rights has never been established, and no chain of title evidence

establishes any effective transfer of a constitutional franchise to SDG&E. JA3:1205-06, 1320-21.

Prior to publication of the invitations to bid, other bidders expressed interested in bidding on the franchises (AR:6400-32 [Berkshire Hathaway]; AR:6396-99 [Indian Energy]). And after the bids went out, at least one party sought clarification about “the City’s existing rights to acquire Facilities from the current owner and any terms of such rights?” AR:6178, 6151. But the City’s only response was that the “‘terms’ of such rights would depend on the facts.” AR:6151; *see also* AR 6158 (explaining only that “Facilities to be acquired would be determined through consultation with appropriate parties ... and compliance with applicable legal procedures”). Potential bidders were not informed that SDG&E itself was already obliged to indemnify the City for claims arising out of SDG&E’s prior franchise, that denial of the franchise would bar SDG&E from operating within the City once a new franchisee began service, or that the City could require SDG&E to relocate its facilities at SDG&E’s expense. AR:7121, 7145; *T-Mobile W. LLC v. City & Cnty. of San Francisco* (“*T-Mobile*”) (2019) 6 Cal.5th 1107, 1119 (denial of franchise bars corporation from operating within a city); *Southern California Gas Co. v. Los Angeles* (1958) 50 Cal.2d 713, 716 (utility accepts franchise rights “subject to an implied obligation to relocate its facilities therein at its own expense” to make way for governmental use).

The City should not have forced SDG&E’s potential competitors to bear the entire burden and risk to resolve disputes (baseless or not) with SDG&E. Such a skewed bidding process prevented bidders from “compet[ing] on a level playing field.” *Eel River*, 221 Cal.App.4th at 238.

2. The invitations to bid improperly required non-SDG&E bidders to bid on a “black box.”

The bids also violated the “well-established rule” that “the proposals and specifications inviting [public] bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard.” *Baldwin-Lima*, 208 Cal.App.2d at 821. In *Baldwin-Lima*, the court held that San Francisco violated these rules where, to make a fair bid, bidders would be required to interpret and evaluate complex treaty provisions. *Id.* at 823. The court held that a bidder should not be compelled to “search out, examine and construe various public documents upon the contingency that they may in some way affect it,” a requirement that would improperly require the bidder to be both lawyer and judge and “in no small way a clairvoyant.” *Id.*

Likewise, *Gamewell Co. v. City of Phoenix* (9th Cir. 1954) 216 F.2d 928, 936-39 *opinion amended on reh'g* (9th Cir. 1955) 219 F.2d 180, held that an invitation to bid for a fire alarm system violated the city charter where “many matters were missing which were necessary to bid intelligently” and bidders would have to “ferret out” the information necessary to prepare a competitive bid, requiring “the expenditure of substantial sums of money.” The court emphasized that ““specifications should be clear, definite and identical to all the bidders”” so that ““all may know what each is bidding upon.”” *Id.* at 939 (citation omitted); *see also Platt Elec. Supply, Inc. v. City of Seattle, Division of Purchasing* (1976) 16 Wash.App. 265, 277 (bid invalid where scope of required warranty was not “sufficiently certain and definite to form a fair basis for competitive bidding”); 10 McQuillin Mun. Corp. § 29:51.50 (3d ed.) (bids must contain sufficient information “to enable bidders to intelligently calculate their bids, and freely and openly to compete upon a basis of equality”).

Here, the invitations to bid were not “sufficiently detailed, definite and precise” to allow competitive bidding. *Baldwin-Lima*, 208 Cal.App.2d at 821. Rather, the City required bidders to bid on a black box, agreeing to deposit an unspecified amount to cover unspecified costs to acquire unspecified property and related indemnification and litigation costs. This rendered the bidding process anti-competitive: no reasonable bidder would agree to turn over funds in an amount not yet specified and take on unspecified work and litigation whose scope was entirely undefined, while simultaneously giving up all “recourse” if the process was unsuccessful within three years.

The City could have provided greater specificity by determining what property interests (if any) a competitor franchisee would have to acquire and clarified those requirements in the invitations. *See* 64 C.J.S. Municipal Corporations § 1343 (“prior to the solicitation and reception of bids,” public agencies must adopt plans “definitely fixing the extent and character of the work to be done ... with such certainty and preciseness as to ... afford a basis for competitive bidding.”). But the City left all bidders—other than SDG&E—in the dark about what, exactly, they would be bidding on.

3. The trial court applied the wrong standard.

In denying the petition, the trial court found that PCF failed to point to “evidence in the record to show that any other potential bidders were actually dissuaded from submitting a bid on the basis that the procedures were anti-competitive.” JA3:1335. But it is not PCF’s burden to show improper bidding deterred competition. Rather, competitive bidding requirements are violated where it is “reasonable to assume the language of the bid would deter persons from submitting bids.” *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206

Cal.App.3d 449, 456-57. This is true even, unlike here, “where it is certain there was in fact no corruption or adverse effect upon the bidding process.” *Id.*; see also *Baldwin-Lima*, 208 Cal.App.2d at 822 (court made “reasonable assumption” that the terms of the bid “would deter persons from submitting bids...thus reducing the number of bidders and defeating the real objectives of competitive bidding”); *Schram Construction, Inc. v. Regents of University of California* (2010) 187 Cal.App.4th 1040, 1058 (bid process invalid where “information the [agency] failed to disclose would have impacted the analysis of any reasonable” bidder).

Thus, PCF was not required to show that bidders were actually deterred by Paragraph B, but only that the City failed to provide a common and definite standard. The starkly different terms of the two bidding options make this showing on their own.

B. The City improperly changed the requirements established in the invitations to bid after bids were submitted.

“A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted.” *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1440 (internal quotation marks omitted). By “establishing a clear, public, selection standard,” a public agency “prevents manipulation of the outcome and after-the-fact justifications.” *Schram*, 187 Cal.App.4th at 1055.

The City violated these basic requirements. First, it accepted SDG&E’s bid even though it did *not* conform to the terms of the bid. See AR:2010, 2028-55 (SDG&E’s “proposed redline” of Gas Ordinance); AR:2064, 2082-2119 (same, Electric Ordinance). It then began negotiating with SDG&E over “the **most sensitive and material terms** of the

Franchise Agreements.”⁵ See JA1:0278 (emphasis added); AR:1013-1030 (memo by City Attorney outlining changes); AR:883 (City “entered into negotiations with SDG&E on the terms of the agreement”). The end result was Franchises with terms differing dramatically from the terms outlined in the invitations to bid, providing an unlawful competitive advantage to SDG&E.

1. The City and SDG&E renegotiated “the most sensitive and material terms” of the Franchise Agreements.

a. The City allowed major changes to the payment provisions in favor of SDG&E.

The renegotiated agreements fundamentally changed the payment terms and made it more difficult for the City to exercise its right to terminate the Franchises. AR:69. As bid, the Electric Franchise required payment of the \$70 million Bid Amount in nine successive payments so it would be fully paid over the 10-year term and provided that “the City shall not be required to refund any amounts of the Bid Amount already paid” for early termination. AR:1016, 5798, 5799. As amended, the City cannot terminate the Franchise (even for SDG&E’s breach), without losing money and refunding portions of the Bid Amount. AR:69-71. If for example, the City terminated the Franchise on October 1, 2030, the City would not only lose the upcoming payments, it would also have to pay SDG&E over \$13 million. AR:70. Termination after the initial 10-year term requires payments to SDG&E of up \$23.625 million. AR:70-71.

For the Gas Franchise, as bid, the City required full payment of the bid amount by the end of the tenth anniversary. AR:5924-25. However,

⁵ Although this issue was briefed below (*see* JA1:0222-24), the trial court did not rule on this issue. *See* JA3:1346-47 (PCF’s Motion for Reconsideration).

after negotiating with SDG&E, payments were stretched out over a 20-year period. AR:17, 24. If the Franchise was terminated at the end of the 10-year term, SDG&E would pay only *half* the “minimum” \$10 million bid. AR:24, 1016, 5911.

The City Attorney further noted: “Unlike language in the ITB, ... the new language requires the City to refund portions of the Bid Amount even if Grantee breaches the Franchise or Energy Cooperation Agreement.” AR:1015-17. This all but ensured the City would be unable to terminate the Franchises as a practical matter. AR:1562, 1571 (Councilmember remarks that requiring the City “to give up a significant portion of the minimum bid” effectively changed the agreement to a “20 year agreement, not a 10 year agreement”).

Other changes regarding costs for liquidated damages and funding of employee bonuses were also made in SDG&E’s favor. *See* AR:1027-28 (liquidated damages provisions were “reduced to one-tenth of the amounts in the ITBs” from \$15,000 to \$1,500); *compare* AR:5875 with AR:86-87 (eliminating language prohibiting use of surcharge for employee bonuses).

b. The renegotiated terms limited SDG&E’s obligations to comply with City climate policies.

The City requires regular updates to its Climate Action Plan (or “CAP”) to mitigate “the cumulatively significant global warming impacts” of expected growth and development. AR:4102. Thus, the invitation to bid required the franchisee to cooperate in good faith to attain the goals of the CAP “**and any revised or successive climate plan**”; the adopted Ordinance, however, eliminated the language in bold and bound SDG&E only to comply with the 2015 version of the CAP. *Compare* AR:5816, 5938 (invitations to bid) *with* AR:38, 88 (adopted Ordinances); *accord* AR:21, 64; *see also* AR:5794, 21 (eliminating requirement that SDG&E eliminate

greenhouse gases to the “fullest” extent practical). As a result, the City eliminated SDG&E’s express duty to comply with mandatory imminent and future updates to the CAP (AR:4091, 4102), as well as past revisions. *See e.g.* AR:3897, 3374.

City policy also requires promotion of distributed energy resources like customer-owned solar and storage systems. AR:6999-7000. Thus, the invitation to bid required the franchisee to (1) “permit distributed energy resources to deliver all practical excess amounts of electric energy and capacity” not used on-site “to be made available to other customers” and, (2) “not unreasonably oppose or obstruct” expansion of net energy metering, feed-in tariffs, and other mechanisms to support renewable energy. AR:5938-5939; *see also* AR:5817, 1024. But in the renegotiated ordinances, the City eliminated these requirements. AR:38-39. Moreover, instead of requiring SDG&E to adhere to the terms of the Energy Cooperation Agreement, the details were deferred to a future Implementation Agreement never presented to the City Council before the Approvals. AR:38-39; *see also* AR:89.

c. The City bargained away its police power over the use of City streets .

Despite the City’s plenary control over the streets and the City Council’s right to set the terms and conditions of franchises, the City also bowed to SDG&E’s demand to change provisions regarding their ongoing fight over relocating infrastructure. Charter Sections 103.1, 105. The original language reflected the City’s attempt to “close loophole[s]” by clarifying that the franchisee must relocate infrastructure for future City water projects at their own expense. AR:1019; *see* AR:5865-66 (franchisee’s right to construct or remove infrastructure “shall be subject at all times to the right of the City” and franchisee must “pay all costs, and []

promptly and without any conditions not provided herein perform relocation or removal of its facilities that conflict with the City’s” rights).

The amended language (AR:32) deleted this provision and stated that the courts—not the Franchise terms—would determine “cost responsibility of all relocations” for “*all* City water projects from now until 2041, not just the two projects ... now before the courts.” AR:1019 (City Attorney memo) (emphasis added). As the City Attorney explained, the new provisions would also “prevent the City from directing relocations before it has substantially complete designs” and “cost and scheduling implications for the City.” AR:1018.

d. The City impermissibly allowed post-bid changes to the governing MOUs.

The post-bid changes also fundamentally altered the franchise terms governing the Administrative MOU. This critical document outlines what permitting would be required for various franchisee activities, covering issues like water quality requirements, traffic control, emergency work, construction standards, record requests, hazardous materials, and site restoration. *See* AR:5810, 5835-46. As one Councilmember described it, the Administrative MOU was “going to be the bread and butter of how the utility protects our assets, our streets, our sidewalks, our bike lanes.” AR:1566.

The invitation to bid stated that the adopted Administrative MOU “shall comply with the general terms” of the attached version “and any additional terms established by the City Manager.” *See* AR:5807, 5835 (attached MOU) [Electric]; 5934, 4945 (attached MOU) [Gas]. The amended language, however, provided that the MOU would include “terms agreed upon by the City and Grantee.” AR:33. As the City Attorney cautioned, these changes “transform[ed] the Administrative MOU” from a

document requiring SDG&E’s compliance “into a bilaterally negotiated instrument.” AR:1019.

Changes regarding the Undergrounding MOU also restricted the City’s rights, with the City “giving up its right to unilaterally make decisions that impact its own undergrounding projects.” AR:1022-1023.

The City Council has exclusive authority to establish City policy and did not have the authority to bargain away its duty to protect San Diegans against SDG&E’s operations. Charter Section 11.1; *County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 389 (agencies “may not contract away the right to exercise its police power in the future”); *T-Mobile*, 6 Cal.5th at 1124. Although the City Council never saw either MOU before the Approvals, the City changed the bid requirements to allow for bilateral negotiations regarding fundamental public policy.

2. Allowing major changes to the requirements of the invitations to bid after the bidding was closed violated competitive bidding law.

The numerous post-bid changes to the “most sensitive and material terms of the Franchise Agreements” (JA1:0196-97) violated competitive bidding law. As *Eel River* recognized, a contract must ““be set aside where specifications are changed after the bidding has been closed.”” 221 Cal.App.4th at 238 (citation omitted). There, the court found that an agency violated competitive bidding where it awarded a solid waste franchise to a local company, despite its low score on the criteria identified in the bid requests. *Id.* at 216-17. The court found that “bidders were misled and did not compete on a level playing field” where criteria were changed to favor local bidders after bids were submitted. *Id.* at 237-38. Here, potential bidders were likewise misled when material terms of the ordinances were changed *after* bids were opened to change basic payment terms, weaken commitments to comply with City climate policy, modify relocation

requirements, and make the MOUs subject to future bilateral negotiations.

Konica similarly held that the Regents violated competitive bidding laws when they accepted a bid for photocopy services that did not conform to the specifications set forth in the Request for Quotation (“RFQ”). 206 Cal.App.3d at 451-53. The Fourth District held that allowing such deviation “provides a competitive advantage not available to a bidder who strictly held to the University’s advertised specifications” because the RFQ “did not clearly notify bidders they could bid” without “meeting the listed specifications.” *Id.* at 455, 457; *see also Valley Crest*, 41 Cal.App.4th at 1442 (bidder “had an unfair advantage” where it was permitted to correct its bid after submission); *DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1424 (agency abused its discretion by waiving material defect in bid, giving bidder an unfair advantage). Here, as in *Konica*, the City violated competitive bidding laws by accepting SDG&E’s “redline” bids—and then modifying key terms of the ordinances in behind-closed-door negotiations.

Baldwin-Lima held that San Francisco violated charter competitive bidding requirements where it awarded a contract to a company that failed to comply with the bid requirement that all materials be made in the United States. 208 Cal.App.2d at 807-08. Even though the court affirmed the city’s (post-bid) conclusion that the buy-American requirement was legally unenforceable, the bid process was still unfair because bidders could not be reasonably expected to know this, and it would likely dissuade them from bidding. *Id.* at 822. Here, too the post-bid modifications failed to “provide a basis for full and fair competitive bidding upon a common standard.” *See id.* at 821. Potential bidders were informed that the franchise would be awarded in an ordinance “substantially in the form” attached. AR:5782, 5910. Knowing this was false—that the City would allow the winning

bidder to renegotiate “material terms” of the agreements—“would have impacted the analysis of any reasonable [entity] deciding whether to bid” on the Franchises. *See Schram*, 187 Cal.App.4th at 1058.

Competitive bidding requires “strict compliance with bidding requirements” and where deviations are made that are “likely to affect the amount of bids or response of potential bidders,” the bid must be set aside. *See Eel River*, 221 Cal.App.4th at 238-39. Bidders were entitled to assume that non-responsive bids like SDG&E’s would be rejected—and that the franchises would be rebid if material terms were changed. *See Konica*, 206 Cal.App.3d at 457.

The trial court did not rule on PCF’s claim that specifications in the invitations to bid were changed after the bidding was closed. JA3:1346-47, 1435-36; 1334-1335. PCF requests that this Court direct the trial court to enter judgment in its favor on this issue.

IV. The trial court order contained erroneous or missing references to the Franchises.

The trial court correctly held that the two-thirds termination vote requirements in Sections 13(c) and (d) of the Gas Franchise (Ordinance O-21327) were unlawful. JA3:1334; AR:47. However, the court (apparently inadvertently) did not address the identical provision in the Electric Franchise ((O-21328, Sections 15(c) and (d). AR:97; JA3:1333-34.

The trial court also erroneously referenced a two-thirds vote requirement in Section 13(e) of the Gas Franchise. JA3:1334. However, this Section does not contain a two-thirds vote requirement (AR:48, 98) and no such requirement was challenged (JA3:1344-45, 1432-33).

PCF attempted to correct these errors (JA3:1344-45), but the trial court did not rule on PCF’s motion for reconsideration due to the filing of these appeals. JA3:1443. Thus, PCF requests that this Court clarify that (1)

the termination provisions in both Ordinances violate the Charter and (2) any reference a two-thirds vote requirement in Section 13(e) of the Gas Franchise should be omitted.

V. The City failed to comply with CEQA.

Despite a clear record that the City’s approval of new, 20-year gas and electric franchises would have enormous environmental consequences, the City conducted no environmental review before approving the Franchises and related agreements (or “Project”). Instead, it claimed no CEQA review was required because the approvals did not constitute a “project” under CEQA, were subject to CEQA exemptions, or were covered by the Programmatic EIR (“PEIR”) for the City’s Climate Action Plan. AR:4, 13.

The trial court properly rejected the City’s argument that the Franchise Approvals did not constitute a “project” under CEQA, but erroneously concluded the Approvals fell within the “existing facilities” exemption in CEQA Guidelines section 15301 (“Section 15301”). JA3:1290-91. It did not reach the City’s claims about the CAP PEIR. *Id.*

The trial court’s CEQA determination must be reversed. The Franchise Approvals control the sourcing and distribution of gas and electric energy to San Diego for the next 20 years, not the use of existing “facilities” covered by Section 15301. Moreover, Section 15301 exempts only projects that involve “negligible or no expansion of use,” while the Franchise Approvals expressly allow new construction and expanded services. *Id.* Additionally, an exemption cannot be justified because the Project is not a typical Section 15301 project—it involves “unusual circumstances”—and has enormous environmental consequences, including cumulatively significant greenhouse gas (“GHG”) emissions.

A. The trial court properly found that the City’s approval of the 20-year Franchises is a “project” subject to CEQA.

The trial court’s determination that the Franchise Approvals are a “project” subject to CEQA is correct and should be upheld.

CEQA defines a “project” as an activity that “may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” and which an agency directly undertakes or approves. Pub. Resources Code, § 21065. In determining whether an activity is “project,” the California Supreme Court has emphasized that “[i]f the proposed activity is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment, some type of environmental review is justified, and the activity must be deemed a project. *UMMP*, 7 Cal.5th at 1198.

Applying the *UMMP* standard, the trial court found that the Franchises permit SDG&E to construct, maintain, and use pipes, poles, wires, and other infrastructure to distribute gas and electricity and that it is “reasonably foreseeable that the ordinances could result in new construction for these purposes.” JA3:1291. The court therefore concluded that the Approvals “have the potential to cause environmental change” and constitute a project under CEQA. JA3:1290. The trial court also rejected SDG&E’s argument that CEQA review could be postponed, recognizing that a “project” is still approved, and therefore subject to CEQA, even if “further decisions must be made before activities directly causing environmental change will occur.” JA3:1291 (citing *UMMP*, 7 Cal.5th at 1200).

B. The trial court erred in concluding that the Franchise Approvals are categorically exempt from CEQA review.

After correctly determining that the Franchise Approvals constitute a “project,” the trial court then erroneously concluded that the Approvals are

exempt from CEQA review under Section 15301's "existing facilities" exemption. JA3:1291-92. In doing so, the trial court failed to consider the Project as a whole or construe the exemption narrowly "in order to afford the fullest possible environmental protection." *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697. Its determination should therefore be reversed.

1. The Approvals do not just allow the continued operation of existing facilities, but rather establish new environmental and energy policy.

Section 15301 applies to the continued operation or "minor alteration" of "existing facilities" that involve "negligible or no expansion of use." Guidelines § 15301. A "facility is normally defined as 'something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.'" *Azusa Land Reclamation Co.*, 52 Cal.App.4th at 1193-94 (citations omitted) (holding a landfill did not fall within this narrow definition).

The Project does not fall within the scope of this exemption. The City did not just authorize the continued use of gas and electrical "facilities," it set new terms for the *use* and *source* of future energy to power the growing population of San Diego for decades to come. AR:1801 (City to "explore all options for how we supply energy in the future"), 1561 (Councilmember objecting to lack of terms as to "energy procurement"). Indeed, City staff emphasized that "the City's energy policies have an outsized impact on our region" given San Diego's vast energy consumption. AR:2221, 2223.

While the City claimed the Project was exempt from CEQA because it "related to existing facilities" (AR:113), the Franchise Approvals encompass far more than permitting the continued use of SDG&E's then-

existing pipes and poles. *See* Guidelines § 15378 (“whole of the action” must be exempt). The Approvals address the scope of the franchisee’s commitment (or lack thereof) to attaining the City’s climate change reduction goals and energy policies. AR:21, 38, 64-65, 88-89, 90-91, 120-24 (Energy Cooperation Agreement deferring development of “Implementation Plan” to address issues like green energy, electrification, solar, wildfire safety and sea level rise in “mutually agreed upon” manner). And, instead of discussing the Franchise terms in the open public forum CEQA requires, they were negotiated in behind-closed-doors bid renegotiations, where environmental protections were substantially *weakened*. *See supra*, Section II.B.1.b (discussing elimination of stronger environmental protections in the terms of the invitations to bid); JA1:0289-30 (Baker Decl.¶ 13 (rooftop solar, electrification, solar expansion and climate policy terms resolved during closed “negotiation sessions”)⁶; AR:1572 (Councilmembers concerns that renegotiated terms would interfere with City climate goals).

The City specified in the bid invitations that GHG reduction was a top public priority for any new franchise. AR:1436-39; 2223. Under CEQA, the City should have considered the “extent to which the project may increase or reduce [GHG] emissions,” whether emissions exceed established thresholds of significance, and the “extent to which the project complies with” requirements in “a statewide, regional, or local plan for the reduction or mitigation of [GHG] emissions.” Guidelines § 15064.4(b); *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 91 (agencies must

⁶ Even where the Approvals include environmental terms, they do not meet CEQA’s standards, which require that measures be “enforceable through permit conditions, agreements, or other legally-binding instruments.” *Golden Door II*, 50 Cal.App.5th at 506; Guidelines, § 15091(d) (mitigation must be “fully enforceable”).

“describe, calculate or estimate” the amount of GHG projects emit).

But here, the City did not quantify the Project’s GHG emissions, weigh them against a significance threshold, or adopt mitigation—as CEQA and its own policies require. AR:4098 (CAP referring to “General Plan policies to reduce greenhouse gas emissions with quantifiable data and benchmarks for success”), 4115 (requiring “cost-per-GHG reduction analysis”); 7020-21, 6997-7000 (describing actions needed to mitigate “cumulatively significant global warming impacts of the General Plan” including collaboration with “climate science experts” (AR:6998)). Nor could the City have determined the Project was consistent with City policies requiring “installation of renewable energy locally” (AR:4111, 4100) and rooftop solar energy generation (AR:3391, 3749, 4102, 4121, 6999-7000); *see supra*, Section III.B.1.b (bid requirement to support net energy metering and feed in-tariffs deleted). Accordingly, the public and decisionmakers could not evaluate the impacts of the Approvals on the City’s GHG reduction goals, including achieving 100% renewable electricity supply and net zero energy consumption by 2035. *See* AR:4121.

By locking in the Franchises without CEQA review, the City “lost the opportunity to consider possible alternatives and mitigation” to achieve its climate and energy goals. *See California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (“California Unions”) (2009) 178 Cal.App.4th 1225, 1242-47 (adoption of air quality rule not categorically exempt from CEQA review); *see e.g.* AR:2247-48 (City’s own consultant concluding a public power alternative would provide “more local control over the City’s energy future and consistency with its Climate Action Plan”), 772-73 (public proposing mitigation measures to promote climate justice, ensure “100% renewable energy,” achieve the City’s zero carbon goals, increase rooftop solar), 1437 (PCF advocating for reductions

in methane emissions caused by gas operations); *see also* AR:776-78 (requesting better environmental terms). Councilmembers themselves had lobbied for measures to help the City “establish large-scale energy efficiency programs and streamline installation ... of distributed solar and batteries,” invest in electric infrastructure, protect sensitive species, and support decarbonization. AR:7288, 7291, 7296, 7299. These measures were especially critical given Councilmembers’ repeated concerns that SDG&E and its parent company, Sempra, had not been “a good partner in transitioning off the fossil fuels and methane gas.” AR:1572; *see also* 1572 (Sempra “is engaged in a program to perpetuate the use of natural gas despite concerns that it is inconsistent with the State’s and the City’s climate action objectives”).⁷

In determining whether the Franchises were exempt from CEQA, the City was required to consider the “whole of the action” it was approving. Guidelines § 15378. Here, the “whole of the action” includes City policies and agreements on a wide array of environmental and energy issues that go far beyond use of existing “facilities.” Because the exemption does not cover these policies and agreements, it does not apply. *See Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 640. The scale and breadth of the Project also bar the City’s reliance on other exemptions designed to address small-scale infrastructure alterations. *See* Guidelines § 15302(c) & (d) (undergrounding of existing facilities on the “same site”); § 15303(d) (utility extensions for single parcels).⁸

⁷ *See also* AR:2259, 2253 (Sempra owns major investments in liquified natural gas), 1561 (Sempra “rejected the Paris Agreement, confirming this is not a partner aligned with our energy future”).

⁸ While the focus of the briefing was Guidelines Section 15301 (JA1:211- (footnote continued on next page)

The City recognized that the Franchise Approvals would determine San Diego’s climate future. Allowing the City to hide behind Section 15301 in making high-stakes environmental decisions violates “the basic principle that categorical exemptions should be interpreted narrowly to afford the fullest possible protection to the environment.” *See Los Angeles Dept. of Water & Power v. County of Inyo* (2021) 67 Cal.App.5th 1018, 1041; *id.* at 1024, 1030-31, 1039 (continued operation of existing landfills was not exempt under Section 15301 because a landfill did not unambiguously qualify as a “facility”). In stretching the exemption to include Franchise Approvals, the trial court impermissibly expanded the exemption “beyond the reasonable scope” of the statutory language. *Mountain Lion Foundation*, 16 Cal.4th at 125.

2. The Approvals anticipate and approve new infrastructure construction and increased operations.

The trial court also erred in applying Section 15301 because the Franchises expressly contemplate *new construction* and *expansion* of electric and gas service. The “key consideration” in determining whether Section 15301 applies turns on whether the project involves negligible or no expansion of use. Guidelines § 15301; *see Communities for a Better Environment v. South Coast Air Quality Management District* (“CBE”) (2010) 48 Cal.4th 310, 326 (no exemption under Section 15301 where project involved installation of new refinery equipment and increased operations).

Because categorical exemptions are construed “narrowly,” courts can apply the existing facilities exemption only where the record shows the

13, 241-42, 267-8; JA3:1216-17), the City raised other exemptions in passing below (JA1:257-58, 268; JA3:1216). These were not addressed in the CEQA Order. JA3:1290-91.

Project will *not* allow expansion beyond the existing facilities. *See Save Our Carmel River*, 141 Cal.App.4th at 699-700 (exemption inapplicable where record did not show development would be limited to replacing existing structure); *Save Our Schools v. Barstow Unified School Dist. Bd. of Education* (2015) 240 Cal.App.4th 128, 140, 142 (because categorical exemptions are “strictly construed,” exemption inapplicable where agency failed to show “transfers *would not* cause” over-enrollment).

Here, the record shows the contrary – that the Franchise Approvals allow and anticipate new construction and increased services. In 2020, the City’s annual power load totaled over 8,000 gigawatt-hours and the system was expected to serve a population of over 1.5 million. AR:2221, 3717. By 2035, however, that population is projected to grow by over 200,000 new residents, nearly 80,000 housing units, and 70 million square feet of commercial development. AR: 3717. The Franchises cover the new infrastructure and energy required to serve this growth—and more—through 2041. *See County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 967 (exemption inapplicable where agency action allowed increased consumption of water).

The Franchises on their face allow and anticipate new construction, as the trial court itself acknowledged. JA3:1291. The Franchises expressly anticipate *new* development and construction of pipelines, poles, wires, and other infrastructure, as well as undergrounding. *See* AR:20 (purpose of Gas Franchise is to “[c]onstruct ...all Pipes and Appurtenances ... necessary to transmit and distribute Gas”), 64 (similar language for Electric Franchise).

The Franchises and MOU also require SDG&E to submit a regular “Two-Year Plan” that identifies “major repairs or construction,” including those that will “require substantial permitting from the City, [or] impacts to traffic or surrounding properties.” AR:36-37, 82, 75298. SDG&E must

submit a twice-yearly presentation of “planned major energy and gas projects” AR:125. Indeed, the record shows that SDG&E was planning extensive new pipeline construction in San Diego at the time of Project approval. *See* JA1:0895-96, 0917 (maps showing new pipeline route in City of San Diego (shown in yellow/green)); JA2:1011-21, 1039-46 (recommended new route); AR:1567 (referencing upcoming Pomerado Road excavations). The Undergrounding MOU further provides for actions to “trench and conduit” for undergrounding, as well as “improvements” like “curbs, sidewalks, berms, barricades, gutters, . . .paths” and “parking lot berms,” including undergrounding in new locations. AR:75249, 75256 (SDG&E must identify “alternative feasible and viable locations” for undergrounding where appropriate).

Given these terms, the trial court expressly found it is “reasonably foreseeable that the ordinances could result in new construction” to provide utility services. JA3:1290. The new construction anticipated by the Franchises should have foreclosed the City’s reliance on the existing facilities exemption. Nonetheless, the trial court found the exemption was applicable because “future expansion of facilities and operations . . . would require specific future discretionary approvals.” JA3:1291.

Identical reasoning was rejected in *California Unions*. There, the air district argued that a rule that allowed air credits for road paving was categorically exempt from CEQA because “future paving offsets will be subject to environmental review if and when applicants seek them, but at this point, their environmental effects are speculative.” 178 Cal.App.4th at 1230. The Court of Appeal disagreed, finding that an “agency action is not exempt from CEQA simply because it will not have an immediate or direct effect on the environment. *CEQA applies if it is reasonably foreseeable that environmental impacts will ultimately result.*” *Id.* at 1242 (citation

omitted) (emphasis added). The court found the air district “intended at least some actual road paving to occur” and that “nothing in the definition of [the] categorical exemption turns on whether there will be a subsequent opportunity for environmental review.” *Id.* at 1244, 1246.

Here too, the City’s approval of the Franchises contemplates increased services and new construction and its CEQA review ““must address itself to the scope”” of these activities. *See California Unions*, 178 Cal.App.4th 1246 (quoting Guidelines § 15165).

3. The City cannot rely on the “existing facilities” exemption because the unusual circumstances exception to the exemption applies.

The existing facilities exemption also cannot be applied where, as here, “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” Guidelines § 15300.2. The Supreme Court has held that this exception applies if there is an unusual circumstance and a fair argument that a significant adverse effect will result from that circumstance; or the project “*will* result in a significant environmental impact.” Practice Under the California Environmental Quality Act (2d ed. Cal. CEB 2024) §5.127; *see Berkeley Hillside*, Cal.4th 1086 at 1105. Both standards are met here.

a. The Franchise Approvals differ from typical projects that fall within the existing facilities exemption.

Because the City did not make any express findings regarding a lack of unusual circumstances (AR:13), the court must *assume* that the City found the project involved unusual circumstances, an assumption that can be overcome only by finding no substantial evidence supports this assumption. *See IBC*, 88 Cal.App.5th at 133 (citation omitted).

Here, that finding cannot be made. Rather, substantial evidence in

the record shows there *are* unusual circumstances. The broad scope of the Franchise Approvals makes them very different from the typical operation or minor alteration of “existing facilities” subject to Section 15301. *See, e.g., Arcadians for Environmental Preservation v. City of Arcadia* (2023) 88 Cal.App.5th 418, 437 (applying exemption to addition to single family home). In *IBC*, for example, the court found an exemption inapplicable because the size of the development constituted an “unusual circumstance.” 88 Cal.App.5th at 133-35; *see also Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1109 (sheer scale of water to be conveyed distinguishes project “from the type of projects” contemplated by the exemption for small structures). Likewise, *Azusa* held that the unusual circumstances exception applied because a landfill was not a typical “facility” subject to the existing facilities exemption. 52 Cal.App.4th at 1189, 1207-09 (also finding potential water quality impacts).

Here, the “Franchise Approvals” are not a “facility” at all. And the City itself noted the circumstances were highly unusual due to the City’s “unique opportunity to reshape its franchises” and address environmental and energy issues for the first time in 50 years. *See* AR:2221. The City’s Mayor described the opportunity to secure new franchise terms as a “one-in-a-generation opportunity” that could help meet the City’s climate goals (AR:6028) and staff explained that San Diego “is the largest City in California that franchises its gas and electric services” and its “energy policies have an outsized impact on our region.” AR:2221. The City’s failure to adhere to its own energy and environmental policies also constitute unusual circumstances. *See infra*, Section V.B.3.b .

In short, nothing about the Project suggests the Franchise Approvals were typical of other projects subject to the existing facilities exemption.

b. The Franchise Approvals will have significant environmental impacts.

It is beyond question that the granting of Franchise Approvals governing the provision of gas and electricity to San Diego’s million-plus residents will have significant environmental impacts. AR:2259 (Consultant report: SDG&E’s perpetuation of natural gas “inconsistent with the State’s and the City’s climate action objectives”); 1801 (Franchises govern “how we supply energy in the future.”). The Franchises not only anticipate construction of new infrastructure, as the trial court found (JA3:1290), they set terms for energy use and environmental policy with significance environmental consequences. The City recognized that the franchises could involve “generation and storage of power” and “environmental impacts.” AR:6168. And the Gas Franchise requires the provision of methane gas with obvious environmental consequences. AR:3809 (discussing potency of methane).

The GHG emissions alone will be significant. In *IBC*, for example, the court found that the project’s potential GHG emissions—over five thousand metric tons—showed a reasonable possibility the project would have a significant environmental impact that necessitated CEQA review. 88 Cal.App.5th at 133-35. Here, the City found that electricity and natural gas use in San Diego in 2010 generated over five *million* tons of GHG emissions annually. AR:4107 (40% of the City’s total in 2010). Since then, the need to reduce GHG emissions has become far more critical. AR:1437 (citing to scientific reports identifying urgent need to reduce impacts from gas operations), 844 (“concentrations of atmospheric carbon dioxide averaged 419 parts per million last month, the highest tally for any month since records began”).

The City recognized that of the growth anticipated by its General

Plan—including necessarily new and expanded gas and electrical utilities—would result in “cumulatively significant global warming impacts.” AR:7020-21; *see also* AR:6923-24, 6928. And it acknowledged that major GHG reductions would be necessary to meet state and local climate goals. AR:4091, 4102; 6902 (City must adopt “measures to reduce GHG emissions”); 6883 (“local government actions play a significant role” in GHG reduction; City could take action to reduce “electricity and natural gas consumption” and increase “distributed energy resources”).

The City therefore adopted policies to reduce GHG emissions and its carbon footprint (AR:4102), like regularly updating the City’s CAP (AR:4102), collaborating with climate science experts (AR:6998), and promoting onsite solar energy and storage systems (AR:3391, 4121), installation of renewable energy locally (AR:3677-78, 4211, 6999-7000), and use of small, decentralized renewable power generation facilities (AR:3877, 6928).

These policies and climate science require a substantial *reduction* in GHGs to avoid exacerbating anticipated cumulative climate change impacts. *See Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 215, 224-29. An agency must calculate “what level of *reduction from business as usual*” is required and adopt “feasible alternatives and mitigation.” *Id.* at 229, 231 (emphasis added); *see also Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, 903-05 (reliance on unsupported and flawed GHG significance threshold violated CEQA); *Golden Door II*, 50 Cal.App.5th at 562-63 (GHG mitigation in San Diego County Climate Action Plan EIR inadequate where it failed to ensure adequate GHG reductions). Current GHG emissions will increase without concerted action. *See* AR:6923 (while City seeks to reduce GHG emissions “per capita fuel [and] energy” use

have increased).

Here, however, the City failed to even quantify the Project's GHG emissions, much less demonstrate the reductions needed to comply with the City's climate goals. *See* Guidelines § 15064.4 (requiring calculation of emission, comparison to significance threshold and applicable policies); AR:4115 (requiring "a cost-per-GHG reduction analysis"). The evidence that approving the 20-year Franchises will have unmitigated cumulative GHG emissions demonstrates far more than a "fair argument" that the Project will have significant environmental impacts and precludes application of a categorical exemption. Pub. Resources Code, § 21084(b); Guidelines § 15065 (mandatory findings of significance where a "project has possible environmental effects that are individually limited but cumulatively considerable"); *Berkeley Hillside*, 60 Cal.4th at 1105 (CEQA exemption inapplicable where project *will* have significant environmental effect); *IBC*, 88 Cal.App.5th at 132 (noting the fair argument standard "creates a low threshold favoring future environmental review") (citation omitted). Accordingly, the City was barred from relying on the existing facilities exemption.

C. The City cannot rely on the Programmatic EIR for the 2015 Climate Action Plan.

Although the trial court did not rule on this issue, the City, in approving the Project, also stated that it was exempt from CEQA because it was covered by the PEIR for the City's 2015 CAP. JA1:0271; AR:4. However, the City did not even go through the motions of preparing an initial study, as CEQA requires when an agency relies on a PEIR, or any consistency checklist. Pub. Resources Code, § 21094(c); *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 960; *see also McCann*, 70 Cal.App.5th at 93-96 (City

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On August 9, 2024, I served true copies of the following document(s) described as:

APPELLANT'S OPENING BRIEF

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on August 9, 2024, at San Francisco, California.

/s/ Sara L. Breckenridge
Sara L. Breckenridge

SERVICE LIST

The Protect Our Communities Foundation v. City of San Diego
Case No. D083588
In the Court of Appeal of the State of California - Fourth Appellate
District Division One

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CASE No. D083588

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

**THE PROTECT OUR COMMUNITIES
FOUNDATION**
Appellant and Cross-Respondent

v.

THE CITY OF SAN DIEGO, et al.
Respondent and Cross-Appellant

SAN DIEGO GAS & ELECTRIC CO.
Real Party in Interest and Cross-Appellant

PROOF OF SERVICE OF JOINT APPENDIX

On Appeal from the Superior Court for the State of
California,
County of San Diego, Case No. 37-2021-00029833-CU-WM-
CTL
Hon. Katherine Bacal

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On August 9, 2024, I served true copies of the following document(s) described as:

JOINT APPENDIX

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

Executed on August 9, 2024, at San Francisco, California.

/s/ Sara L. Breckenridge

Sara L. Breckenridge

SERVICE LIST

The Protect Our Communities Foundation v. City of San Diego

Case No. D083588

In the Court of Appeal of the State of California - Fourth Appellate District
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