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

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

APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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INTRODUCTION

The City of San Diego's award of gas and electric franchises ("Franchises") to SDG&E violated the California Constitution, the City's Charter, and state environmental law. SDG&E is not entitled to Franchises granted via a process that violated both competitive bidding requirements and the California Environmental Quality Act ("CEQA"). Nor can the City include terms in the ordinances granting the Franchises that impose illegal taxes under Proposition 26 and violate the City Charter.

Contrary to Respondents' claim that the City's actions must be upheld to "keep the lights on" (RB 13), as a regulated monopoly utility, SDG&E remains statutorily obliged to provide reliable power to San Diego unless and until (1) the City or a different franchisee begins serving customers and (2) SDG&E has been formally released from its duty to serve the public by the California Public Utilities Commission ("CPUC"). Granting this appeal will in no way relieve SDG&E of its mandate to provide utility service in San Diego while the City complies with Proposition 26, CEQA, and its Charter.

Respondents' opposition brief consists largely of legal claims that are off base or simply wrong. For example, Respondents invoke pre-Proposition 26 precedent in claiming that the Franchises do not impose an illegal tax, even though Proposition 26 was adopted for the express purposes of superseding earlier law. Likewise, the City simply resurrects meritless arguments—like its baseless CEQA and Charter claims—without acknowledging that the courts have already rejected the City's arguments in nearly identical circumstances. And while Respondents assert the City's actions are supported by substantial evidence, this appeal should be granted exclusively upon questions of law subject to this Court's de novo review.

The Franchise Charges violate Proposition 26. Respondents insist the Charges are not taxes under "longstanding precedent." RB 35. But the

voters adopted Proposition 26—which included an expansive new definition of "tax"—to overturn the dated precedent upon which Respondents rely. The Charges here are indisputably a "tax" under Proposition 26's broad new definition. And the Charges do not fall within Proposition 26's narrow exemptions because the City ratepayers who pay the Charges do not receive the benefit of the Franchises or any right to use local government property in exchange for their payment. Instead, the highly profitable Franchises and the right to use the City's streets are conferred exclusively on SDG&E. The Franchises impose millions of dollars annually in illegal taxes that are paid by City residents without voter approval, collected by SDG&E, and remitted to the City. These City-imposed taxes violate Proposition 26 as a matter of law.

The bidding process was anti-competitive, in violation of the City Charter. The City cannot award new Franchises through a skewed and unfair bidding process. The blatantly indefinite and unfair terms of the invitations to bid (ITBs), and changing "the most sensitive and material terms" of the ITBs *after* the bidding was closed (JA1:0278), violated fundamental principles of competitive bidding as a matter of law.

Moreover, contrary to Respondents' repeated claims and the trial court's erroneous holding, The Protect Our Communities Foundation ("PCF") is not required to produce a "disgruntled bidder" to prove the bidding was anti-competitive. Competitive bidding requirements are enacted for the benefit of the public, precisely to avoid enriching incumbents through non-competitive, "inside-track" bidding processes that only the incumbent can win.

Approval of the Franchises and related agreements required environmental review under CEQA. The City's approvals of the ordinances granting the Franchises and the related agreements ("Approvals") are subject to CEQA because they set City energy policy for

the next two decades, authorize delivery of gas and electricity to a million-plus residents and businesses through 2041, require major new and different infrastructure to serve growth, and generate millions of tons of greenhouse gas emissions each year.

In defending its decision to proceed with no environmental review, the City makes the same CEQA arguments it made—and lost—in *Union of Medical Marijuana Patients, Inc. v. City of San Diego* ("*UMMP*") (2019) 7 Cal.5th 1171. The California Supreme Court rejected the City's argument that the impacts of a City-wide ordinance were speculative, finding that CEQA review was required *as a matter of law* when an approval has even a theoretical potential for causing environmental change. *UMMP*, 7 Cal.5th at 1198. The trial court found *UMMP* dispositive and correctly held that the Approvals constitute a project subject to CEQA.

This Court must reject Respondents' claim that the Approvals are categorically exempt under CEQA Guidelines section 15301[1] because Respondents fail to consider the project as a whole, addressing only a single component of the multi-faceted project. Because the Approvals set energy policy and authorize expanded energy delivery, they cannot be characterized as mere "existing facilities" and fall outside of the scope of section 15301 as a matter of law.

The environmental consequences of the Approvals here are far more than "theoretical," yet the City undertook no CEQA review at all. The City failed to prepare an initial study, failed to quantify the project's greenhouse gas emissions, and failed to incorporate enforceable mitigation measures. Because the City adopted the Approvals with no environmental review whatsoever, the Approvals violate CEQA and must be set aside.

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[1] CEQA's Guidelines ("Guidelines") are found at Cal. Code Regs., tit.14, § 15000 et seq.

Respondents' cross-appeal must be denied. The trial court properly found that imposing a two-thirds voting requirement on future City Council action to terminate the Franchises violated the plain language of the City Charter. Respondents erroneously argue that the Charter's majority voting requirement establishes a floor, not a ceiling. RB 16. But this Court rejected a nearly identical argument made by the City. In *Howard Jarvis Taxpayers Assn. v. City of San Diego* ("*Howard Jarvis*") (2004) 120 Cal.App.4th 374, 385-86, the Fourth District Court of Appeal held that the City could not impose a two-thirds vote requirement where controlling authority allowed majority rule. The same reasoning applies here. The trial court correctly held the Franchises' two-thirds voting requirement for termination violates the Charter.

ARGUMENT

I. The Charges are unconstitutional taxes under Proposition 26.

Proposition 26 established—for the first time—a constitutional definition of "tax." The definition makes any charge imposed by a local government a tax subject to voter approval unless it falls within the Constitution's specified exemptions. Respondents do not dispute that the Charges[2] meet Proposition 26's definition of a "tax" or that they were never put to a vote of the people. Nor do they dispute that the City imposed the Charges. *See* Cal. Const. art. XII, § 8 (cities' right to grant and set the terms of public utility franchises).

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[2] The "Charges" consist of 3% of gross receipts, plus certain surcharges. Specifically, the Gas Franchise requires payment of 3% of SDG&E's gross receipts (which includes the Gas Franchise Fee Surcharge), and the Gas Franchise Fee Surcharge which totals 1.03% of gross receipts. AR:19-20, 22-23. The Electric Franchise requires payment of 3% of SDG&E's gross receipts (which includes the Electric Franchise Fee Surcharge which totals 5.78% of gross receipts), and "the portion of Gross Receipts required to be paid for undergrounding." AR:62, 63, 66, 67, 87.

The sole issue before this Court is whether the Charges can be exempted from a vote of the people under Exemption 1 or Exemption 4. These narrow exemptions permit governments to impose a charge where the payors receive an exclusive benefit in exchange for their payment. *Zolly v. City of Oakland* ("*Zolly*") (2022) 13 Cal.5th 780, 794-5 . This benefit is referred to as a "benefit" or "privilege" in Exemption 1 and as "entrance to or use of local government property" in Exemption 4. The Charges here are paid by City ratepayers, but the benefits—the extraordinarily profitable Franchises in the case of Exemption 1 and the exclusive right to use City property in the case of Exemption 4—are conferred exclusively on SDG&E. Thus, the Charges imposed by the City in the Franchises lack the exchange between the payor and the local government required by the exemptions and, as a result, the exemptions do not apply. Because the City imposed the taxes without voter approval, they are void as a matter of law. *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1045 (taxes imposed in violation of the voter approval requirements in section 2 of article XIIIC are void).

Respondents defend the Charges based on case law addressing fees levied prior to the 2010 adoption of Proposition 26, which they invoke as binding and "longstanding precedent." *See, e.g.*, RB 35, 33. But the voters adopted Proposition 26 to "close perceived loopholes" in Proposition 218 and earlier laws, not to codify preexisting precedent. *Schmeer v. County of Los Angeles* ("*Schmeer*") (2013) 213 Cal.App.4th 1310, 1323. Prior to Proposition 26, the courts recognized that the term "tax" had "no fixed meaning, and that the distinction between taxes and fees [was] frequently 'blurred.'" *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 437 (quotation marks omitted). Proposition 26 was approved by the voters to clarify this blurred distinction and to preclude the government from disguising taxes as fees in order to

extract "revenue from California taxpayers without having to abide by [the] constitutional voting requirements." *Citizens for Fair REU Rates v. City of Redding* ("*Citizens for Fair REU Rates*") (2018) 6 Cal.5th 1, 11 (quoting Voter Information Guide). Thus, Respondents' reliance on pre-Proposition 26 cases is entirely misplaced. The pre-Proposition 26 cases upon which Respondents rely did not apply Proposition 26's definition of "tax" or consider the scope of its narrow exemptions.

The Charges here, which are paid by City ratepayers who are neither the recipients of the profitable Franchises nor granted any right to use the City's streets for private gain, and which were largely imposed for general fund purposes, are quintessential taxes under Proposition 26.

A. Pre-Proposition 26 case law does not support Respondents' position.

Respondents' assert that, even though the ratepayers are the actual payors of the Charges, the Charges do not constitute taxes under the analysis in *Jacks v. City of Santa Barbara* ("*Jacks*") (2017) 3 Cal.5th 248 and *Mahon v. City of San Diego* ("*Mahon*") (2020) 57 Cal.App.5th 681. RB 43. But the Courts analyzed the charges at issue in *Jacks* and *Mahon* cases under Proposition 218 and Proposition 13, not Proposition 26.

In *Jacks*, utility consumers challenged an electric utility surcharge as an invalid tax. The trial court initially found that, while the franchise fees were not invalid taxes under Proposition 218, they *were* invalid taxes under Proposition 26 because the initiative "altered the definition of a tax under Proposition 218 to encompass franchise fees." *Jacks*, 3 Cal.5th at 256. The trial court later concluded, however, that Proposition 26 did not apply retroactively and thus upheld the surcharge under Proposition 218. *Id.* The Court of Appeal reversed, finding the surcharge unconstitutional under Proposition 218. *Id.* at 257.

The California Supreme Court accepted review solely to consider the validity of the surcharge under Proposition 218. *Id.* at 257; *see also id.* at 260. 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."). The Court reasoned that "a franchise is a form of property" and that the franchise fees were not a "tax"—a term that was undefined under Proposition 218[3]—but a "fee" that was paid in compensation for the property interests conveyed. *Id.* at 267. The Court explained that pursuant to its decision in *Sinclair Paint Company v. State Board of Equalization* ("*Sinclair Paint*") (1997) 15 Cal.4th 866, valid fees under Proposition 218 were "restricted to an amount that had a reasonable relationship to the benefit or cost on which it was based," and thus that franchise fees would be invalid if the fees did not "reflect a reasonable estimate of the value of the franchise." *Jacks*, 3 Cal.5th at 267-68. In the end, *Jacks* did not rule on the validity of the surcharge under Proposition 218 but remanded the matter to the trial court for further proceedings consistent with its analysis. *Id.* at 274.

Mahon addressed a similar challenge to a utility surcharge under Proposition 218. Following *Jack's* reasoning closely, this Court found that an undergrounding surcharge under the City's former franchise ordinance was "a valid regulatory fee and not a tax." *Mahon*, 57 Cal.App.5th at 684. Like *Jacks*, the *Mahon* Court recognized that the surcharge at issue "was imposed prior to the enactment of Proposition 26, and plaintiffs do not make any claim premised on Proposition 26." *Id.* at 704, fn. 34.

The analysis in *Jacks* and *Mahon* does not apply here because those cases analyzed the validity of certain fees only under Proposition 218. As *Jacks* recognized, "Proposition 26's description of valid charges" does not

[3] *See Mahon*, 57 Cal.App.4th at 703.

mirror the Court's prior jurisprudence on the difference between taxes and regulatory fees. *Jacks*, 3 Cal.5th at 262, fn. 5. The issue before this Court involves only whether the Charges fall within the scope of Proposition 26's narrow exemptions, a question neither *Jacks* nor *Mahon* addresses.

The voters could have exempted "franchise fees" from the definition of "tax" under Proposition 26, but they did not. *See Zolly*, 13 Cal.5th at 794 ("Exemption 4 does not use the term 'franchise fees'"). Largely in response to *Sinclair Paint*, voters approved Proposition 26 "to close perceived loopholes in Propositions 13 and 218." *Schmeer*, 213 Cal.App.4th at 1322. Accordingly, the voters enacted an *expansive* definition of "tax" with only narrow, enumerated exemptions. *Citizens for Fair REU Rates*, 6 Cal.5th at 11. The voters enacted Proposition 26 to preclude agencies from circumventing voter approval requirements by making the exact claim Respondents make here: that a charge levied against the public is not a tax. *Ibid.* Interpreting Proposition 26 based on pre-Proposition 26 case law would subvert the voters' express purpose in passing Proposition 26 and would not comport with its plain language.

B. Exemption 1 does not apply to the Charges.

The only issue before this Court is whether the Charges fall within the scope of Exemptions 1 or 4. They do not fall within plain language of Exemption 1—charges imposed for a "specific benefit" given "directly to the payor that is not provided to those not charged"—because the ratepayers are the "payors," while SDG&E receives the "benefit." And "the reasonable costs to the local government of conferring the benefit" identified in the second clause of Exemption 1 cannot be construed to mean the "value of the franchises" to SDG&E as Respondents erroneously assert. RB 46. The Court may not rewrite the language of the exemptions to conform to precedent that no longer applies and is contrary to the text of Proposition 26.

1. The trial court properly found that the Charges were not imposed for a privilege granted "directly to the payor" because SDG&E is a tax collector, not a tax "payor."

Exemption 1 provides that a charge is not a tax if it is imposed "for a specific benefit conferred or privilege granted **directly to the payor** that is not provided to those not charged." Cal. Const., art. XIIIC ("Art. XIIIC"), § 1(e)(1) (emphasis added). The trial court properly found that the Charges do not fall within Exemption 1. While SDG&E receives the "benefit"—the franchises—the "payor" of the Charges is San Diego ratepayers. JA3:1335.

Respondents do not dispute that SDG&E is the sole beneficiary of the Franchises under Exemption 1. They acknowledge that the Franchises constitute a "specific benefit or privilege granted directly to SDG&E" and that "SDG&E receives these benefits and privileges provided by the City in exchange for the franchise fees." RB 42 (capitalization removed), 43. The Charges thus fall within the scope of Exemption 1 only if SDG&E—the recipient of the benefit—is also the "payor." Art. XIIIC, § 1(e)(1).

But Respondents essentially concede, as they must, that SDG&E is *not* the "payor" of the Charges. *See* RB 38 (arguing "Exemption 4 applies even though franchise charges are passed on to ratepayers") (capitalization omitted). SDG&E merely acts as a tax collector, collecting the Charges from ratepayers and remitting these payments to the City. All of the Charges are paid by San Diego ratepayers. AR:19, 62 (surcharges are "to be levied solely on customers in the City"); AR:23-24, 67 (any increase in 3% Charge will be "chargeable to the residents of the City"); AR:19-20, 63 (defining "Gross Receipts" as including "all gross operating revenues" plus "surcharges rendered solely upon the ratepayers within the City").

Contrary to Respondents' assertion, this Court in *Mahon* did *not* decide that SDG&E could be "deemed the payor of a franchise fee surcharge" in a challenge to an undergrounding surcharge in the City's

prior franchise ordinance. RB 39. To the contrary, *Mahon* explained that the Supreme Court in *Jacks* "expressly rejected the … argument that it was the utility, rather than its ratepayers, that paid the surcharge." *Mahon*, 57 Cal.App.5th at 705, fn. 36, 715; *see also id.* at 712, 714 (characterizing the surcharge as a "monetary obligation to be paid by ratepayers" or one that the "utility agreed to collect from its ratepayers (i.e., one that was not paid directly out of the utility's own assets)"). *Mahon* concluded that the surcharge at issue there was a fee under Proposition 218 *notwithstanding* that ratepayers paid the surcharge because the legal question under Proposition 218 involved whether a "franchise fee" exceeded the "reasonable value" of the franchise. *Mahon*, 57 Cal.App.5th at 705-06.

In contrast, under Proposition 26, a charge is a tax unless imposed for a specific benefit conferred directly to the payor. The text of Exemption 1 thus makes clear that the legal analysis under Proposition 26 differs from the legal analysis applied in *Jacks* and *Mahon* under Proposition 218 and requires a different result.

2. The Franchises specify when SDG&E must pay franchise fees; the franchise fees paid by SDG&E are not the subject of this lawsuit.

Respondents acknowledge there are various other payments required by the Franchises which, unlike the Charges, must be paid by SDG&E and not City ratepayers. *See* RB 21 (Bid Amount would be "paid by shareholders and not passed on to ratepayers"); RB 22 ($30 million of "additional funds coming solely from SDG&E shareholders (*i.e.*, not passed through to ratepayers)"); *accord* RB 67.

When the City sought to impose fees on SDG&E instead of ratepayers, the City explicitly itemized the amounts to be paid by SDG&E and the purpose for each. AR:23, 66-67 (Franchise terms expressly prohibiting SDG&E from collecting the Bid Amount from customers);

AR:5730, 5752 (SDG&E bids: "SDG&E agrees that the Bid Amount will not be paid by ratepayers at any time."); AR:92 (Cooperation Agreement funds prohibited from being collected from customers); AR:124 ($10 million Energy Cooperation Agreement funds to be paid by SDG&E to a non-profit organization selected by SDG&E); AR:71, 862 (City requiring SDG&E to confirm that 4(e)(7) $20 million will be paid by shareholders).

PCF does not challenge the Franchise fees required to be paid by SDG&E—the Bid Amount, the 4(e)(7) payment, or the charitable donations. *See* AOB 18. Nor is PCF challenging the rates consumers pay to SDG&E for providing gas and electric service, rates which the City cannot and does not impose and which SDG&E does not remit to the City. AR:861, 1563 (Councilmembers acknowledging they cannot set rates); *compare* Cal. Const. art. XII, § 8 (cities' right to grant and set the terms and conditions of franchises), Charter Sections 103, 103.1, 105 (Council's power to grant and set terms and conditions of franchises). PCF challenges only the Charges—taxes that the City imposed on its constituents without voter approval in violation of Proposition 26.

3. Respondents' "reasonable costs" argument contradicts the plain language of Proposition 26.

Respondents argue at length that the Charges should be upheld because they "'do[] not exceed the reasonable costs to the' City of granting the franchises to SDG&E." RB 44 (quoting Art. XIII C, § 1(e)(1) (second clause of Exemption 1 requiring that charge also must "not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege").

The trial court correctly held that it need not reach a determination on this issue. The Charges do not fall within the first clause of Exemption 1; and because both the first clause *and* the "reasonable costs" clause must be satisfied for the exemption to apply, no further analysis is required.

If this Court were to address the second clause of Exemption 1, contrary to Respondents' claim (RB 44) it would be *the City's* burden to show a reasonable relationship between the Charges and the City's costs in conferring the benefits. *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* ("*Coachella*") (Cal.Ct.App., Jan. 31, 2025, E080870) 2025 WL 353700, at *13 (rejecting district's argument that plaintiff failed to show costs were excessive and holding the burden was on the district, "not the other way around"); Art. XIIIC, § 1 ("The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.").

The City cannot, and does not, meet its burden. No record evidence establishes that the Charges are related to "costs to the [City]" in conferring a benefit on the payors, San Diego ratepayers, as required by the text of Exemption 1. *See* Art. XIII C, § 1(e)(1). Respondents do not even attempt to make such a showing. Rather, they argue that the "costs" to the City "includes the value of the benefit conferred on the grantee" because the Exemption 1 is "coextensive with" the "reasonable *value* analysis" in *Jacks* and *Mahon.* RB 44 (emphasis in original). Neither case provides any support for Respondents' "coextensive" concoction because neither interpreted the language of Exemption 1.

The language of Exemption 1 and the Supreme Court's decision in *Zolly* require that Respondents' argument be rejected. As *Zolly* explained, the language of Proposition 26's exemptions, which describe "the qualitative rationale for the charge instead of using any formal labels" like "franchise fee," shows that "voters intended to exempt only those fees that

adhered to the rational underlying that exemption." *Zolly*, 13 Cal.5th at 794; *id.* at 795 ("Comparing [Exemption 4] language to article XIII C's other enumerated exemptions reinforces this conclusion.").

Far from requiring that the cost to the City relate to the value of SDG&E's Franchises, the text of Exemption 1 requires that the cost to the City relate to the "specific benefit conferred or privilege granted directly to the payor." Art. XIII C, § 1(e)(1). The costs to the City of conferring "the benefit" described in the last clause of Exemption 1 refers to the "specific benefit" identified in the first clause. Because the Franchises were granted directly to SDG&E and not to the "payor" of the Charges, the value of the Franchises to SDG&E lacks any legal significance.

The plain language of Exemption 1 bars the City from imposing a charge (tax) on ratepayers that is disproportionate to any benefit they receive directly; and it certainly bars the City from imposing a charge (tax) on ratepayers that is related only to the value of a "benefit"—immensely profitable Franchises—conferred on a corporation like SDG&E.

Respondents' claims that the Charges are reasonable—based on a consultant's report that referenced the City's "leverage" and charges imposed in franchise agreements elsewhere—are similarly baseless. RB 46. These factors have nothing to do with whether the Charges are related to the City's costs for conferring a specific benefit directly to City ratepayers. The cited report does not even attempt to justify franchise fees as valid under Proposition 26. *See* AR:2265 (citing only to *Jacks*).

Respondents' remaining claims—which mischaracterize the Charges as unchanged and the negotiations as "arm's length" (RB 36, 45-47)—also fail to show any correlation whatsoever between the Charges and the City's "costs" in conferring any specific benefit directly on City ratepayers. As detailed above, Respondents cannot invoke the analysis in *Mahon* regarding the value of the Franchises as a matter of law because the payors do not

receive the valuable Franchises. But Respondents also cannot invoke the analysis regarding the value of the franchise in *Mahon* as a matter of fact: the prior franchises and the prior surcharge at issue in *Mahon* are not the same as the Franchises and the Charges now before this Court.

The Charges here are not only higher but structurally differ from those in prior ordinances. *See e.g.* AR:883 (2022 projected revenue), AR:1881 (2020 revenue); AR:61658 (ITB report on City's 2022 budget referring to "increase of projected franchise fees"). For example, unlike the Gas Franchise Fee Surcharge at issue here, the prior gas surcharge was not a separate obligation. AR:19-20, 22-23 (Gas Franchise requiring payment of 3% of SDG&E's gross receipts, and "[i]n addition" the Gas Franchise Fee Surcharge which totals 1.03.% of gross receipts); *compare* AR:7050 (prior surcharge not a separate obligation); *compare also* AR:5923, 6319 (Gas ITBs also lacking "[i]n addition" language).

Unlike the Electric Franchise here which emphasizes that the Municipal Undergrounding Surcharge funds "are City funds" and involve no allocation of funds by SDG&E, under the prior franchises SDG&E was required to allocate 3.53% for undergrounding projects. *See* Request for Judicial Notice, Exhibit 1, p. 4-5;[4] *compare* AR:62 (Electric Franchise defining Electric Franchise Fee Surcharge), 63 (defining Gross Receipts and Municipal Undergrounding Surcharge), 66 (requiring payment of 3% of gross receipts), 67 ("the portion of Gross Receipts required to be paid for undergrounding" must be paid "[i]n addition to the franchise fee required by Section 4(a)"), 84 (requiring SDG&E to merely "budget" for "3.35% in the form of a municipal undergrounding surcharge"), 87 (Municipal Undergrounding Surcharge funds "are City funds").

[4] PCF seeks judicial notice of O-19030 because the version of O-19030 inadvertently included in the record is partially illegible. AR:7042-7047.

Moreover, unlike the undergrounding surcharge at issue in *Mahon* which involved an undergrounding program managed by SDG&E, this case involves an undergrounding program managed by the City that emphasizes undergrounding in certain communities. AR:87 (City to "prioritize undergrounding projects, emphasizing undergrounding in communities of concern and high fire threat areas"); AR:75252 (new undergrounding MOU establishing the City "owns and is responsible for managing" the program); *compare* AR:7028 & fn. 1 (CPUC referring to 2001 undergrounding MOU and requiring CPUC approval only for "SDG&E-managed underground conversion programs"). The City has wholly failed to meet its burden to show that any of the Charges are "imposed for a specific benefit conferred…directly to the payor that is not provided to those not charged," much less that any such specific benefit "does not exceed the reasonable costs" to the City of conferring any such benefit.

Courts of appeal construe Proposition 26's language requiring an accounting of reasonable costs as the costs relate to the specific benefits at issue in the particular exemption under review. *See Sutter's Place, Inc. v. City of San Jose* (2024) 104 Cal.App.5th 855, 864 (holding that, under Exemption (e)(3), it is "not enough to show that the charge reflects the government's 'reasonable regulatory costs'; the government must also show that the costs are incurred in performing only permissible *activities*"); *Coachella*, 2025 WL 353700 at *12 (district failed to show a reasonable relationship between allocation of costs to non-agricultural customers and any benefits to non-agricultural customers). Here, none of the factors Respondents address show *any* correlation between the City's "costs" in granting the Franchises and the Charges paid by ratepayers.

In short, this Court need not address the "reasonable costs" prong of Exemption 1 because the Charges fail the predicate requirement necessary to fall within the scope of Exemption 1. Were the Court to address the

"reasonable costs" requirement, it could not find that Exemption 1 applies because Respondents have entirely failed to shoulder the City's burden of proof to establish any specific benefit "granted directly to the payor that is not provided to those not charged" or any costs to the City, much less any reasonable relationship between the two.

C. Exemption 4 does not apply to the Charges.

Exemption 4 excludes from the definition of "tax" a "charge imposed for entrance to or use of local government property." Art. XIIIC, § 1(e)(4). The Charges at issue here do not fit within Exemption 4 because they are imposed on City ratepayers, but the ratepayers receive no right to enter or use City property in exchange for their payment. It is undisputed that only SDG&E receives a right to use City property to exercise the extraordinarily profitable Franchises.

1. *Jacks'* and *Mahon's* analysis under Proposition 218 of franchises as property interests does not apply to Exemption 4's "local government property."

Respondents' defense consists largely of a lengthy argument of why the Charges are not taxes, relying on *Jacks'* and *Mahon's* analysis of Proposition 218. RB 35-41. Neither case addresses Proposition 26, and thus neither case can inform this Court's analysis of the Charges under Proposition 26. *See*, *supra*, Section I.A.

Jacks briefly discussed Proposition 26 in dicta that was superseded by the Supreme Court's later analysis in *Zolly*. *Jacks* noted that Proposition 218 on its face does not preclude charges "'paid in exchange for property interests'" and stated that a franchise itself "is a form of property, and a franchise fee is the purchase price of the franchise." *See* 3 Cal.5th at 262, 267; RB 35 (quoting *Jacks*). *Mahon* relied on *Jacks'* language in upholding the City's former undergrounding surcharge under Proposition 218. The *Mahon* court concluded that "consideration that is a 'charge' and is given in

exchange for franchise rights, constitutes 'compensation for the use of government property' **as that phrase is used in *Jacks***." *Mahon*, 57 Cal.App.5th at 704, 708 (emphasis added). *Jacks* and *Mahon* never addressed whether the fees in those cases were "imposed for entrance to or use of local government property" as that phrase is used in Exemption 4.

In *Zolly*, however, the Supreme Court rejected any application of *Jacks'* description of franchises as property when applied to the term "local government property" as used in Exemption 4. *Zolly* unequivocally held that a franchise is not "local government property" under Proposition 26. *Zolly*, 13 Cal.5th at 794. The Court held that "[a]lthough a franchise becomes a property interest that vests in the holder once granted, it does not exist as the local government's property prior to that vesting." *Id.* at 794 ("a franchise 'becomes property in the legal sense of the word' only 'when granted' to a franchise-holder [citation omitted], it cannot be said to be property belonging to the local government before the grant occurs.").

The Court explained that when it used the term "property" in *Jacks*, it was using the term broadly to mean a "bundle of property interests"—not the term as used in Proposition 26. *Id.* at 793. *Zolly* found that *Jacks* had not addressed the meaning of "property" "as used in Exemption 4," which refers to "actual physical objects or land, not property interests in such objects." *Id.* ("we reject Oakland's argument that a franchise is 'local government property' within the meaning of" Exemption 4). The Franchises are not physical objects or land and did not exist as the property of the City which awarded the Franchises, and thus the Franchises are not "property" within the meaning of Exemption 4. *Id.* at 793-794.

Rather than considering what physical government property the payor could use in exchange for paying the charge, *Jacks* and *Mahon* focused on the relationship between a "franchise fee" and the value of the "franchises," using a definition of "property" that *Zolly* held is inapplicable

under Proposition 26. Respondents' heavy reliance on the analysis of franchise fees as they relate to property interests (franchises) under *Jacks* and *Mahon* cannot be squared with the text of Exemption 4 and *Zolly*, which exempt only those charges "imposed for entrance to or use of local government property." Art. XIIIC, § 1(e)(4).

2. Under *Zolly*, a charge imposed on the public to pay for a private corporation's use of government property is a tax because it lacks the required exchange between the payor and their specific use of government property.

Contrary to Respondents' assertion, the Supreme Court did not recognize that Exemption 4 "plainly applies to" electrical franchise fees paid by *consumers*. *See* RB 36-37. Rather, *Zolly* suggested, in dicta, that an easement to use public property for utility infrastructure was a "use of local government property" and could fall within the scope of Exemption 4 if use of the property was paid for by *the utility*. *Zolly*, 13 Cal.5th at 795.

Zolly held that to qualify for Exemption 4, a local government must demonstrate "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." *Id.* at 794; AOB 28-29. *Zolly* further held that the "text of Exemption 4 supports such a fact-specific requirement by focusing on the **actual benefit exchanged between the payor and the local government**." *Id.* at 794. Under *Zolly*, the term "local government property" in Exemption 4 "means physical land, objects, or equipment that **those who pay the charge can either enter or use**. *Id.* at 793 (all emphasis in paragraph added).

Here the critical exchange between the payors and the local government is missing: San Diego ratepayers are the payors of the Charges, but they receive no right to use City property in exchange for their

payment. The right to use the City's property is provided only to SDG&E, as Respondents freely admit:

> What "distinguishes the charge from a tax," in this context, is **SDG&E's** "**receipt of value** in exchange for the payment." [Citation.] And Appellant does not and cannot dispute that **SDG&E receives value** in the form of a right to special, differentiated use of local government property.

RB 41 (emphasis added); *accord* at 38 (arguing only SDG&E receives a property right that is "plainly" not shared by the general public).

Zolly's statement—that certain kinds of franchise fees "may" meet Exemption 4's requirements if, "[b]y paying the franchise fee, the utility … gained a specific 'use of local government property' beyond what was otherwise available to the public"—assumes the utility is "paying the franchise fee." *Id.* at 795 (citation omitted) (also noting that *Mahon* involved a "'franchise fee' *paid by a private electric utility*") (emphasis added)). The Bid Amount, for example, could theoretically fall within the scope of Exemption 4 under *Zolly's* dicta because SDG&E pays the Bid Amount. But nothing in *Zolly* suggests, even in dicta, that the requirements of Exemption 4 are met where, as here, charges imposed for a franchisee's "use of local government property" are paid for by City ratepayers and not the franchisee. To the contrary, *Zolly* makes clear that to fall within the scope of Exemption 4, those who "pay the charge" must be those that receive the exclusive right to use the property. *Id.* at 793-794. No other reading of Exemption 4 makes sense.

Respondents again rely on cases interpreting Proposition 218 to claim it "would place 'form over substance' to attribute significance to the fact that a utility surcharge" is paid by ratepayers rather than the utility "when determining whether the surcharge is a tax." *See* RB 39 (quoting *Jacks* and *Mahon*). Under Proposition 26, however, all charges except the seven enumerated exemptions are taxes by definition. Art. XIIIC, § 1(e). As

Zolly explains, the "imposed for" language in each of the first four exemptions involve charges paid in exchange for an exclusive benefit or government service enjoyed by the payor. *Id.* at 795. Exemption 4 applies only where the charges are "imposed for" the payor's specific "entrance to or use of local government property." *Zolly*, 13 Cal.5th at 794.

Moreover, distinguishing between San Diego ratepayers and SDG&E hardly places "form over substance." RB 39. SDG&E is a private corporation that stands to gain billions of dollars in profits for shareholders and executives from the Franchises over a 20-year term. *See* AR:2269 ("A grant of 20-year electricity and natural gas franchises by the City of San Diego is the grant to a profit-making, investor-owned utility the opportunity to make over $6.4 billion in profit."); AR:2273 (SDG&E's high profits allow for increased shareholder dividends and "generous pay packages for executives"). Throughout the bid process and in their appellate briefing, Respondents themselves carefully distinguish franchise payments made by SDG&E and its shareholders (like the Bid Amount), from the Charges at issue here which are paid by ratepayers. *See* Section I.B.2, *supra*. The Franchises make the same distinction, imposing millions of dollars annually in taxes on *ratepayers* without their approval, while limiting other charges—like the Bid Amount—that are paid for by SDG&E. *Id.*

3. Proposition 26 prohibits the City from taxing City ratepayers for general fund and environmental growth fund purposes without voter approval.

As detailed above, the requirement of an exchange between the payor and the specific use of local government property is embodied in Exemption 4's requirement that an exempt charge be "imposed **for** entrance to or use of local government property." Art. XIIIC, § 1(e)(4) (emphasis added); *Zolly*, 13 Cal.5th at 795. Here, however, it is undisputed that City

residents do not pay the Charges in exchange for entering or using any City property. RB 38, 41.

Instead, the Charges are largely "imposed for" an array of City services, like libraries and tree trimming, that have nothing to do with gas or electrical service, as well as for environmental preservation purposes. AOB 30; AR:1569 ("Short of decimating whole departments," cuts to the city budget would have to be made if the City were to "lose our share of the franchise fee that goes to the general fund"); AR:87 (emphasizing that Municipal Underground Surcharge funds "are City funds"); Charter Section 103.1a (directing 25% of all moneys derived from revenues from Franchises to environmental growth fund). Proposition 26's findings make clear that fees that "are simply imposed to raise revenue … are actually taxes and should be subject to the limitations applicable to the imposition of taxes." *Schmeer*, 213 Cal.App.4th at 1323 (quoting Ballot Pamp., Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114).

Where a payor pays a fee in exchange for entering or using government property, the market ensures a rough reasonableness because a person can choose not to enter a park or not to enter into a government lease if the price is too high. *Cf. Zolly*, 13 Cal.5th at 795 (entrance or use "is limited unless the entrance or user fee is paid").[5] But here, both the existence and the amount of the Charges to be paid by ratepayers were negotiated solely between the City and SDG&E. Deprived of their constitutional right to vote on whether to impose any Charge, much less the amount, ratepayers have no option but to pay the Charges.

Respondents' argument that the funds from the Charges can be used for whatever purpose the City chooses (RB 41) proves PCF's point.

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[5] *Zolly* declined to address whether Exemption 4 should be interpreted to include a "reasonable costs" requirement. *See* 13 Cal.5th at 796.

Respondents essentially claim that the City may grant SDG&E an exclusive right to use City property, and simultaneously tax City residents (without their consent) any amount as long as it does not exceed the extraordinary "value of the Franchises" to SDG&E (RB 46)—and the City can then use the money for whatever purpose the City desires. Respondents would have this Court establish a loophole that would swallow Proposition 26 whole.

II. The award of the Franchises to SDG&E violated competitive bidding requirements in the City Charter.

City Charter Sections 94, 100, 103 require that awards of City franchises be subject to competitive bidding. As the City has long recognized (RB 16, 18), and as Respondents stated below citing these provisions, "San Diego's City Charter generally requires that public contracts and franchises be competitively bid and awarded without favoritism." JA1:0242; *see also* JA1:0272 (acknowledging that the City Charter "mandate[s] a competitive bidding process"). Respondents now reverse course, suggesting for the first time that the Charter did not require competitive bidding for the Franchises at all, or if it did, the bidding was exempt from well-established principles governing such bidding. Respondents then argue that the City's skewed and unfair bid process complied with the minimal requirements that Respondents concede apply.

As set forth below, Respondents' claims contradict the plain text of the Charter, the record, and established law. The Charter required competitive bidding for the Franchises and the City failed to comply with its requirements where it failed to provide a definite and common standard for competitive bidding; and changed the material terms of the invitations to bid ("ITBs") after the bidding was closed.

A. Competitive bidding requirements are strictly construed to protect the public, not disgruntled losing bidders.

Respondents repeatedly assert that the City cannot have violated competitive bidding laws absent a claim by a "disgruntled losing bidder." RB 50, 57, 62, fn. 10. The trial court erroneously held the same. *See* JA3:1335 (denying PCF's writ of mandate because "petitioners do not point to any 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.").

Because controlling authority holds that violations of competitive bidding requirements are designed to protect the *public*, not incumbents or their competitors, the trial court's rejection of PCF's petition for a writ of mandate must be reversed. *Schram Construction, Inc. v. Regents of University of California* ("*Schram*") (2010) 187 Cal.App.4th 1040, 1058 (court focuses "on the public interest, not the loss" to potential bidders).

1. The anti-competitive invitations to bid effectively ensured no other bidders would participate.

The terms of the ITBs here all but ensured that there would be no disgruntled bidder because the terms favored SDG&E, failed to provide a common standard, and no reasonable bidder would have agreed to the "black box" terms of the ITBs that were required of all bidders other than SDG&E. *See* Section II.C, *infra*.

At least two potential bidders expressed interest in bidding before the one-sided ITBs were initially published in the fall of 2020. AOB 16, 35; AR:6400-32 (email and attached materials from President and CEO of Berkshire Hathaway Energy expressing interest); 6396-99 (letter of interest and "concept framework" from Indian Energy LLC); AR:6188-93, 6306-6311 (2020 ITBs). Thereafter, the City rebuffed requests for more information regarding the cost and scope of the property rights that non-

SDG&E bidders were obliged to acquire. AR:6151, 6158. Instead, the City made clear that bidders would be taking on expensive and uncertain disputes with SDG&E, a point SDG&E was eager to drive home. *See* AR:6157-58 (explaining successful bidders would be required to work with SDG&E to ascertain extent of the acquisition costs); AR:6184-87 (SDG&E list of questions including "How would it be determined which of the incumbent's facilities would be acquired?"); AR:9958 (SDG&E inquiring when its questions and City answers would be publicly posted).

Unsurprisingly, no bidders, including those previously interested, elected to participate in such an obviously skewed and unfair bidding process either in the initial round of bidding or when the bids were reissued in 2021 with the same unfair terms.

Although the record thus shows that potential bidders were dissuaded from bidding, no such showing was required. Any number of reasons exist for why a disgruntled bidder, or a potential bidder who did not bid, would not go public with their concerns about the unfairness of bidding procedures. Establishing an anti-competitive bidding process does not depend on a disgruntled bidder or potential bidder coming forward with their complaints. The City's bidding process "would have impacted the analysis of any reasonable" bidder, and PCF was not required to show more. *See Schram*, 187 Cal.App.4th at 1058.

2. Courts must closely scrutinize deviations from competitive bidding mandates with sole reference to the public interest.

The California Supreme Court has made clear that the purposes of competitive bidding requirements are to invite competition and "guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of *public* funds; and to obtain the best economic result *for the public*," and they "are enacted for the benefit of property holders and

taxpayers, and not for the benefit or enrichment of bidders, and should be so construed … to accomplish such purpose fairly and reasonably with *sole reference to the public interest*." *Domar Electric, Inc. v. City of Los Angeles* ("*Domar*") (1994) 9 Cal.4th 161, 173 (emphasis added; internal quotations omitted). Strict compliance with bidding requirements is mandated because of "[t]he importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut." *Eel River Disposal and Resource Recovery, Inc. v. County of Humboldt* ("*Eel River"*) (2013) 221 Cal.App.4th 209, 239 (citations and emphasis omitted).

To ensure the public benefits of competitive bidding requirements are achieved, "the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside." *Konica Business Machines U.S.A. Inc. v. Regents of University of California* ("*Konica*") (1988) 206 Cal.App.3d 449, 456. Although the trial court failed to engage in the searching review this standard requires, it did acknowledge that the "close judicial scrutiny" standard of review was undisputed. *See* JA3:1334 (under "the standard of review acknowledged by the parties, 'close judicial scrutiny' is required due to 'the potential for abuse arising from deviations from strict adherence to competitive bidding standards.'") (quoting *Eel River*, 221 Cal.App.4th at 225)).

Respondents now argue, however, that this Court should not undertake "close judicial scrutiny" of the City's bid process. RB 48. They assert the Court should determine only whether the bidding process was "arbitrary, capricious, or entirely lacking in evidentiary support," review which they characterize as requiring deference to the City actions. RB 53, 63. Contrary to Respondents' argument, the City's failure to comply with

competitive bidding mandates is not entitled to deference. The City is bound by its Charter, and courts require "'strict adherence'" to competitive bidding standards. *Schram*, 187 Cal.App.4th at 1052 (citation omitted) (UC Regents bid award invalid); *accord Eel River*, 221 Cal.App.4th at 218-19, 226-39 (County Board of Supervisors bid award invalid).

Even *Mike Moore's 24-Hour Towing v. City of San Diego* ("*Mike Moore's*") (1996) 45 Cal.App.4th 1294, the main case relied upon by Respondents, recognizes that review of competitive bidding mandates under Code of Civil Procedure ("CCP") Section 1085 includes judicial inquiry into whether a bid award is "contrary to established public policy or unlawful or procedurally unfair." *See id.* at 1303. *Mike Moore's* held that determining a public agency's compliance with competitive bidding requirements raises primarily legal questions, and that regardless of how the test is formulated, the "'ultimate questions … are essentially questions of law." 45 Cal.App.4th at 1303 (quotation marks omitted). The courts exercise independent judgment on questions of law. *See Family Health Centers of San Diego v. State Dept. of Health Care Services* (2023) 15 Cal.5th 1, 10.

Accordingly, contrary to Respondents' suggestion (RB 47-48), the City does not have discretion to violate the City Charter by ignoring competitive bidding requirements. *Domar*, 9 Cal.4th at 171 ("Any act that is violative of or not in compliance with the charter is void."); AR:2510 (City Attorney Memorandum quoting same). In *DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1424, for example, the Court found that whether an agency "has discretion to waive a material deviation from the information for bids … does not constitute a question of fact for which the agency is entitled to deference." Rather, the agency "abused its discretion" as a matter of law by "waiving a material defect" in a submitted bid. *Id.* Similarly here,

determining whether the terms of the bid failed to provide a level playing field and whether the City changed "material" terms of the ITBs after bidding closed does not involve factual determinations entitled to deference, but constitutes a question of law about the "legal significance" of the City's actions. *See id.* at 1420-21 (whether bid was responsive is a "question of law" where parties do not dispute differences in bids "but only whether that difference was legally significant").

Schram likewise recognized that courts "exercise independent judgment" when determining whether an agency's actions violate applicable law, and that "the letting of public contracts universally receives close judicial scrutiny" because of the "'potential for abuse arising from deviations from strict adherence'" to competitive bidding standards. *Schram*, 187 Cal.App.4th at 1052 (citations omitted). *Eel River* similarly emphasized that courts must closely scrutinize public contracts, apply independent judgment to questions of law, and construe public bidding requirements to serve their purposes of inviting competition and avoiding favoritism and fraud, and with sole reference to the public interest. 221 Cal.App.4th at 224-225, 232.

PCF is a public interest organization that represents the interests of San Diego ratepayers in advocating for clean and affordable energy (*see* JA1:10), and has shown that the City violated fundamental competitive bidding mandates before approving the Franchises. *See* AOB 32-45; *see also* Section II.C., D, *infra.* PCF is not required to further "demonstrate" that the bid process "would have played out differently" if Respondents had complied with the law. *See* RB 69.

To the contrary, bid processes are invalid where they may "influence potential bidders to refrain from bidding" or give the successful bidder an "unfair competitive advantage" advantage. *Konica*, 206 Cal.App.3d at 455; *accord Advanced Real Estate Services, Inc. v. Superior Court* (2011) 196

Cal.App.4th 338, 352-53 (agencies must "ensure that a bidding process is not only honest, but [is] *seen to be honest*" and "the mere *ability* to manipulate the process" may improperly create "an 'appearance of favoritism'") (citation omitted) (emphasis in original); AOB at 37-38. Courts set aside contracts that were awarded without strict compliance with competitive bidding mandates as a "preventative approach" that "is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money." *Konica*, 206 Cal.App.3d at 456. PCF is entitled to mandamus relief. *See Eel River*, 221 Cal.App.4th at 236-37 (plaintiffs entitled to writ where challenged agency failed to follow proper competitive bidding procedures).

B. The Court should reject Respondents' new theory that the City Charter did not require competitive bidding.

Respondents admitted below, and in undertaking the bid process for the Franchises, that the City Charter required competitive bidding of the Franchises. This Court should reject their 11th hour claim to the contrary in their brief on appeal.

City Charter Section 103 mandates that grants of franchises shall be made "only after … an opportunity for free and open competition." *See* Charter Section 103. Respondents now argue that Section 103 was satisfied as long as the City did not award the franchise entirely behind closed doors or expressly forbid other entities from competing. RB 54 (arguing PCF "never contends (let alone attempts to prove) that the Franchise Agreements were awarded through a *closed process* or that other interested entities were *precluded* from competing to obtain the gas and electric franchises").

Respondents' assertions mischaracterize and misconstrue Section 103's requirements and cite nothing suggesting that the Charter's requirement for "free and open competition" does not require competitive bidding. To the contrary, as the City Attorney confirmed, under Charter

Section 103, the ITBs were required to be "sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard *and must be free of any restrictions tending to stifle competition.*" AR:2509; *see also* AR:2512 (City's Attorney: "The essence of free and open competition requires that all bidders are on an equal footing, under the same objective rules.").

The one case to which Respondents cite (RB 54-55), *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, is entirely inapt. It held that a proposition that *removed* restrictions on state hiring of contractors for architectural and engineering services while mandating a "fair, competitive selection process" did not require Caltrans to undertake competitive bidding. *Id.* at 1023-24, 1027, 1037, 1049-50, 1058. As the Court noted, the ballot materials for the proposition expressly informed voters that neither the initiative nor existing law "require[d] competitive bidding in awarding engineering and architectural contracts." *Id.* at 1026, 1055, 1058. Nothing in *Professional Engineers* remotely suggests that competitive bidding was not required here.

The City, in approving the Franchises, was required to undertake a competitive bidding process that complied with established hallmarks of fairness—including "that all bidders are on an equal footing, under the same objective rules"—as the City has long recognized Charter Section 103 requires. AOB 16-17; AR:2512.

Although this Court could grant PCF's appeal based solely on the City's violations of Charter Section 103, other Charter sections also mandated competitive bidding before the City approved the Franchises.

City Charter Section 94 requires that contracts for the construction or reconstruction of "streets, utilities and other public works" and the "provision of good or services" shall be "competitively bid." Respondents

insist that Charter 94 is inapplicable. RB 55-56. But Respondents *admitted* that Section 94 applies to the Franchises in their brief below:

> San Diego's City Charter generally requires that public contracts and franchises be competitively bid and awarded without favoritism. Article VII, Section 94 of the Charter requires that "[c]ontracts . . . for the provision of goods or services," *inter alia*, "shall be competitively bid pursuant to rules established by ordinance of the City Council."

JA1:0273. The trial court appropriately rejected Respondents' belated attempt to reverse course and claim Section 94 was *not* applicable:

> At the hearing, the City argued Charter section 94 is inapplicable because it only applies to public works contracts. However, the language in section 94 includes more than that: "Contracts for the construction, reconstruction or repair of public buildings, streets, utilities and other public works, for the provision of goods or services ... shall be competitively bid." Charter § 94.

JA3:1334. As the trial court recognized, Charter Section 94 expressly applies to contracts for "utilities and other public works" and for the provision of services.

While Respondents assert that PCF never identified the specific City regulations the bid process violated (RB 56), PCF's argument rests on fundamental principles of "the provisions of statutes, charters and ordinances requiring competitive bidding." *Domar*, 9 Cal.4th at 173; *see* Section II.A. These principles are also reflected in the City Code sections to which Respondents themselves cite, which require invitations to bid to "include specifications that describe the public works, material, supplies, equipment, services, consultants, or insurance with sufficient particularity to allow for competitive bidding and evaluation." S.D. Mun. Code, § 22.3008(a); *id.* § 22.3014 (permitting waiver of defects only when "in the best interests of the City"); *see* RB 61, 65 (citing these provisions).

City Charter Section 100, as Respondents concede, prohibits the City from "favor[ing] one bidder over another" through "giving or withholding information." *See* Charter Section 100; RB 56. The City's actions here, which required all bidders other than SDG&E to bid on a "black box," violated this provision. *See* AOB 36-37; Section II.C, *infra*.

In interpreting the provisions of Charter Sections 103, 94 and 100, this Court is not working in a vacuum. Longstanding precedent governs the interpretation of city charter provisions requiring competitive bidding.

In *Domar*, for example, the Supreme Court held that judicial review of the City of Los Angeles's compliance with competitive bidding requirements in its own charter "'must be ascertained with reference to the purposes of competitive bidding'" to invite competition and guard against favoritism. 9 Cal.4th at 173. Likewise, in *Baldwin-Lima*, the court applied basic principles of competitive bidding to conclude that, under the San Francisco charter, bid invitations must "be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition." *Baldwin-Lima-Hamilton Corp. v. Superior Court In and For City and County of San Francisco* ("*Baldwin-Lima*") (1962) 208 Cal.App.2d 803, 821-23 (award of public contract that fails "to provide for full and fair competitive bidding" is "an abuse of discretion"). These same principles apply here.

C. The bid process was anti-competitive because bidders did not compete on a level playing field.

As PCF has shown, the City violated competitive bidding laws because potential bidders did not "compete on a level playing field." *Eel River*, 221 Cal.App.4th at 238. The bids favored SDG&E, failed to provide a common standard, and lacked the specificity necessary for a non-SDG&E bidder to reasonably prepare a responsive bid.

1. The two-tier bid process precluded bidding on a common standard.

The ITB required all bidders *other* than SDG&E to proceed under paragraph (c)(2). *See* AOB 33-35. Although Respondents argue that bidders could choose to proceed under paragraph (c)(1) *or* (c)(2) (RB 51-52), no non-SDG&E bidder could obtain "all necessary governmental approvals" within 30 days, as was required to proceed under paragraph (c)(1). AOB 33 (citing to admission by SDG&E (AR:8425) that the necessary approvals under Public Utilities Code section 851 could not be accomplished in 30 days). Non-SDG&E bidders were thus *required* to proceed under the untenable paragraph (c)(2).

Under paragraph (c)(2)(B) ("Paragraph B"), bidders were required to agree to: acquire undefined property necessary to provide electricity or gas; pay and indemnify the City for all acquisition costs; and give the City an unspecified amount for acquisition costs (to be determined *after* the bids were submitted). *See* AR:5785-86, 5913-14. Paragraph (c)(2)(C) further required that bidders give up any right of recourse if the facilities were not acquired within three years and the City rescinded the franchise award. *See* AR:5896, 5914.

Respondents concede that Paragraph B informed non-SDG&E bidders that they would be required to acquire SDG&E's facilities. RB 52. But Respondents do not address that Paragraph B, on its face, required bidders to enter into an agreement with the City on terms that were entirely unspecified and whose approval was entirely subject to City discretion. *See* AR:5786, 5914 (agreement must be "acceptable to the City").

Under Paragraph B, the City and SDG&E—not the bidder—would ultimately determine (at some later date) what property and facilities must be acquired, the acquisition costs for which the bidder must pay and

indemnify the City, and what additional ancillary costs (attorneys' fees, appraisal fees, etc.) were included. AR:5786, 5914.

If the unspecified facilities were not acquired within three years, the terms provided that "the City, in its sole discretion, may rescind the award of the franchise and the Person shall have no recourse." AR:5786, 5914. And any final resolution of disputes over acquisition within three years was made to appear highly unlikely given that SDG&E claimed rights to an archaic "constitutional franchise" and had already threatened that any attempt to supplant its monopoly would be complex and litigious. *See* AOB 33-35; AR:8415 (threatening that if SDG&E did not continue the franchise, other options would "potentially saddle San Diego taxpayers with years of expensive litigation").

Because SDG&E would largely control any competitor's ability to comply with the terms of Paragraph B, and because SDG&E was not required to agree to any terms remotely comparable to the other bidders' requirements, bidders did not compete on "a level playing field." *Eel River*, 221 Cal.App.4th at 238.

2. The two-tier bid process required only bidders other than SDG&E to bid on a black box.

Second, the bid terms show that the City failed to provide bid invitations that were sufficiently detailed and definite "to provide a basis for full and fair competitive bidding upon a common standard." *Baldwin-Lima*, 208 Cal.App.2d at 821. *Baldwin-Lima* recognizes that bidding is not actually competitive where bidders are not provided with a clear blueprint so that bids can be meaningfully submitted and compared. Thus, a bid process is invalid where bidders must "search out, examine and construe various public documents" (*id.*) or spend substantial sums to "ferret out" the information necessary to prepare a competitive bid (*Gamewell Co. v. City of Phoenix* (9th Cir. 1954) 216 F.2d 928, 936-39).

Here, the facilities to be acquired and the costs of acquisition for non-SDG&E bidders were entirely unspecified, as even SDG&E acknowledged. AR:6181 (SDG&E noting, in response to 2020 ITB, that Paragraph B "does not specify which properties the new franchisee must acquire for operating the franchises or how much it will cost to acquire these properties"). Indeed, while bidders requested more details during the initial bid process, they got nothing. *See* AOB 35; AR:6151. The City merely noted that "estimated acquisition costs must be deposited with the City as they are determined by the City Manager" and "would be estimated by working cooperatively and in good faith with Grantee and the incumbent utility, and following the appropriate legal procedure." AR:6157; *see also* AR:6158 (facilities to be acquired determined through consultation with incumbent utility). The City continued to post this information during the 2021 bid process, and the reissued bids contained the identical Paragraph B, *Compare* AR:5786 (2021 ITB) *with* AR:6191-92 (2020 ITB).

Respondents assert that the cases cited by PCF do not address the situation here, where there are two starkly different paths identified in the ITBs. RB at 55. But the two-tiered process employed by the City made the bid process even *more* unfair than the processes discussed in these cases. In *Baldwin-Lima*, for example, San Francisco established one standard (that bid materials be American-made) and then upheld the bid of the party that ignored the standard, after the city decided the standard was legally invalid. 208 Cal.App.2d at 807-08. The court found the bid process improper because making this determination of invalidity would have required *all* bidders to "search out, examine and construe various public documents" and act as a lawyer, judge and "in no small way a clairvoyant." *Id.* at 822-23. Requiring a bidder to "determine for himself what has to be read into" a bid proposal violates the "long and well-established rule that where municipal contracts are required to be let upon public bidding," the

invitation to bids must be "sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition." *Id.* at 821.

Given the holding that applying uncertain contract terms to *all* bidders is anti-competitive, applying uncertain contract terms to only *some* bidders is more so. Here, the City applied terms that were far more uncertain than the buy-American clause at issue in *Baldwin-Lima*—the Paragraph B black box—to only one set of potential bidders, while exempting SDG&E from these uncertain terms.

Gamewell presented a similar situation. Contrary to Respondents claim (RB 58), the key problem in that case was not that the city concealed details; rather, the court expressly found there was no "bad faith." *Gamewell*, 216 F.2d 937. The court found that invitations to bid for a city-wide fire alarm system were "so drawn that no one but the [winning bidder] could enter a competitive bid." *Id.* at 930. In *Gamewell*, the winning bidder was the manufacturer of the "existing fire alarm system which the new installation was to improve and expand" and had access to extensive city maps. *Id.* at 935. The bid specifications "described the type and kind of fire alarm system which the city officials desired but did not have sufficient detail in and of themselves to permit preparation and submission of a bid." *Id.* To "make an intelligent bid, a person would have to make a complete lay-out of the system," which would require a great deal of time and money. *Id.* at 936-38; *id.* at 939 (testimony that bids were notable for their "tremendous lack of information" and when potential bidder requested additional information "he was given none"). The court found the bid process was invalid, explaining that "'to make competition effective," the bid request must clearly describe "the nature of the work." *Id.* at 933. The city's bid process violated these requirements because the city's

"specifications were not clear or definite, and, certainly, were not identical as to all the bidders." *Id.* at 940.

Leading treatises continue to support *Gamewell's* holding. *See* 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"); 64 C.J.S. Municipal Corporations § 1343 (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").

Here, SDG&E, like the winning bidder in *Gamewell*, had an overwhelming advantage that deterred non-SDG&E prospective bidders from bidding. The City, like the city in *Gamewell*, failed to provide clear and definite specifications that would have allowed potential competitors to submit an intelligent bid. No bidder on the gas and electric franchises could even begin to estimate what type of "agreement" it would be required to enter into under Paragraph B, what facilities it would have to acquire, or what undisclosed cost it would have to pay. This rendered the bid process fundamentally anti-competitive.

3. PCF does not have the "burden" of redesigning the City's bid terms; the City maintains the burden to provide a fair and equal bid process.

Rather than defending terms that were draconian and unfair on their face, Respondents make the odd claim that PCF somehow failed to meet its "burden" of showing "it could have designed better ITB terms." RB 53. Respondents cite nothing to support this made-up burden. It remains the *City's duty* to comply with the competitive mandates of its Charter. *See Baldwin-Lima*, 208 Cal.App.2d at 823, 825 (awarding a contract in violation of public official's duty to provide for full and fair competitive bidding constitutes an abuse of discretion subject to writ of mandate). The

City was required to ensure that potential bidders could compete on a level playing field, and its failure to do so warrants this Court's intervention. *Eel River*, 221 Cal.App.4th at 238-239.

Neither PCF nor this Court may direct the City *how* to meet its competitive bidding mandates (*Baldwin-Lima*, 208 Cal.App.2d at 817), but PCF has outlined several suggestions about how the City could have leveled the playing field to avoid violating its Charter. AOB 34-35.

The City could have presented the same terms to all bidders by simply requiring all bidders to provide and operate facilities necessary to provide gas and electricity to San Diego, without requiring that non-SDG&E bidders acquire unspecified property from and pay for any litigation involving SDG&E. Bidders could then have proposed different facilities using new systems and technologies to focus on providing affordable renewable energy. No need exists to acquire SDG&E's antiquated, fossil fuel-based infrastructure. AR:2253, 2264 (Consultant explaining "circumstances were radically different" when the City granted the 1970s franchises; advances in technology allow renewable energy to compete with fossil fuel and "solar energy is typically generated from much smaller generators").

If the City did want its franchisee to use particular equipment or property, it could determine and specify what property interests—if any—a competitor franchisee would have to acquire. And the City could lay to rest SDG&E's baseless claim that it possesses any "constitutional franchise" to provide City residents with light.[6] *See* Cal. Const. former art. XI, § 19

[6] Respondents do not refute that no evidence of a constitutional franchise exists in the record. AOB 34-35. No evidence shows that *any* company accepted or transferred a constitutional franchise offer that ended more than a century ago. *See* Charter Section 103 ("No franchises shall be transferable except with the approval of the Council expressed by ordinance…Absent

(1885 constitutional offer to lay pipes in streets to supply light was subject to city's general regulations and "right to regulate the charges thereof"); *compare* AR:861, 1563 (Councilmembers acknowledging they cannot set rates).

The City could also eliminate the one-sided requirement that non-SDG&E bidders indemnify the City for all litigation against SDG&E and inform bidders of *SDG&E's* indemnification responsibilities. AOB 34.

Instead, in violation of its own Charter, the City forced non-SDG&E potential bidders to bid to agree to acquire unknown property with unknown costs, to bear the *entire* burden of resolving within three years disputes with SDG&E over acquisition of property, and to give up any recourse if these proceedings failed—a bid process that no reasonable bidder could agree to. AOB 36-37.

D. The City's post-bid changes to material terms of the ITBs violated competitive bidding mandates.

The City also violated competitive bidding requirements in accepting SDG&E's bid, which was contingent on future negotiations, and then modifying the material terms of the ITBs during post-bid, behind-closed-door negotiations. *See* AOB 38-45; *see Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1440 (internal quotation marks omitted) ("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."); AR:5728-5731, 5750-5753.

SDG&E's bids were expressly made "subject to further discussions to negotiate acceptable language in the franchise agreement" about the critical bid term structure and "negotiations with [the City] regarding the specific language in the draft franchise ordinance," and outlined areas of

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Council approval, the franchise shall not be deemed to have been transferred to the new entity...").

disagreement, including "payment of the Bid Amount." AR:5730-31, 57525; AR:1013 (City Attorney noting same). The post-bid negotiations SDG&E demanded involved numerous changes to the material terms of the ITB that were reflected in the Franchises and in extensively redlined changes[7] to the ITBs exchanged during the post-bid negotiations. *See* JA1:309 (attaching multiple "redlined" versions of Energy Cooperation Agreement and Franchises); JA1:0313-0678 (attaching hundreds of pages of redlined documents).

Respondents themselves argued in the trial court that the "record plainly demonstrates" that, after accepting SDG&E's bid, the City and SDG&E renegotiated "the **most sensitive and material terms** of the Franchise Agreements." JA1:0278 (emphasis added); *see also* JA1:0248, 0289-90 (Respondents explaining "in-depth negotiations" addressing "key issues"). Respondents now argue the opposite: that the changes did *not* "alter the material terms of the ITBs." RB 67. But the record refutes Respondents' assertions, showing that the City and SDG&E changed material terms of the ITBs in four key areas *after* the bids were submitted.

1. Respondents admitted that the City and SDG&E changed "the most material provisions" of the ITBs: term and cost.

First, as Respondents admitted in the trial court, the City and SDG&E modified the "**most material provisions** of the Franchise

[7] PCF in its Opening Brief inadvertently cited to SDG&E's 2020 bid responses (AR:2028-2055, 2082-2119), which were redlined. AOB at 38. The then-Mayor determined those 2020 redlined bids to be "unresponsive based on the exceptions contained to the material terms of the advertised franchises." AR:6028. Accordingly, when SDG&E submitted its 2021 bids, SDG&E did not submit redlines with its bids but declined to accept the provisions it had previously redlined and demanded future negotiations regarding the same terms that SDG&E's 2020 bid redlined. AR:5730-32, 5752-53.

Agreements—**term and cost**." JA1:0278 (emphasis added). The ITBs specified that payment of the Bid Amount "shall be" either in full or in "nine (9) interest-bearing promissory notes." AR:5783, 5911; *see also* 5798-99, 5924-25 (attached proposed ordinance requiring nine promissory note installments). The ordinances attached to the ITBs also specified that if the City terminated the Franchise in order to acquire the distribution system, "the City shall not be required to refund any amounts of the Bid Amount already paid" and that termination for breach would result in payments being "immediately due and payable to the City." AR:5799 (paragraphs 6 & 7 of Electric Franchise); *see also* AR: 5926 (same for Gas Franchise).

The new terms, however, extended payment for the Gas Franchise over *20 years* (AR:24), thus cutting in half the "minimum" $10 million bid if the terms were not extended after 10 years. AR:1016 (City Attorney explanation); AOB 39-40. The new terms expanded the payments for the Electric Franchise over *11 years* in 7 payments (AR:68) and, unlike the ordinances attached to the ITBs, "require[d] the City to refund portions of the Bid Amount even if Grantee breaches the Franchise or Energy Cooperation Agreement" (AR:69-71). AR 1016; AOB 39-40. And they provided that future promissory notes not yet due would be "void" if the Franchise was not in effect "for any reason." AR:25, 69; *compare also* AR:5827-28, 7948-49 (liquidated damages of $6,000 or $15,000 per day in original ordinances) *with* AR:100-01, 50-51 (liquidated damages of $1,500 per day in adopted ordinances).

The adopted changes to the minimum bid payment, termination provisions, payment and refund requirements are clearly material, as even Respondents recognize. *See* RB 61 (deviation from bid specifications requires bid to be set aside where it is "likely to affect the amount of bids or the response of potential bidders") (citation omitted); *see also Konica*, 206

Cal.App.3d at 454 (bid can be accepted as responsive only where variance from ITB "*cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders*") (emphasis in original); *Schram*, 187 Cal.App.4th at 1060-61 (noting bid deviation is invalid where it is "likely to affect the amount of bids" or how bids are calculated). Given that the new terms extended or eliminated potential payment and added terms requiring the City to refund payments, Respondents' suggestion that they benefitted the City (RB 67) must be rejected.[8]

Moreover, the $30 million that Respondents claim they agreed to "pay the City" (RB 22) in fact consists of (1) a $20 million payment to the City that does not commence until 2037 (AR:71) and thus acts as another financial penalty to the City if it elects to terminate the Electric Franchise after the first ten-year term; and (2) a $10 million donation to a non-profit of SDG&E's choosing that will not actually be obliged to expend all of the donated funds in any given year. AR:124 (contemplating that unused funds from a given year will be made available for use in future years).

2. The changes excused SDG&E from complying with all of the City's climate change mitigation and energy policies.

Second, the Franchises eliminated the ITBs' requirement that SDG&E comply with anticipated updates to strengthen the City's Climate Action Plan, as well as the requirement to reduce greenhouse gas emissions to the "fullest" extent practical. AOB 40-41. While Respondents downplay

[8] Respondents cite Mr. Baker's declaration to support their claim that the parties engaged in "arms-length" negotiations. RB 47 (citing JA1:289-90). In the trial court, however, PCF objected that Mr. Baker's claims that the negotiated terms were favorable to the City were entirely lacking in foundation and the trial court sustained this objection. JA1:1226-29 (PCF objections to paragraphs 3-8, 10, 12 and 13); JA3:1332 (sustaining Objection 2). Because Respondents did not appeal this ruling, their reliance on Mr. Baker's declaration should be rejected.

these changes as trivial, SDG&E obviously found the requirements troublesome enough to demand their elimination. AR:5794, 5816, 5921, 5938 (language in ITBs including "fullest" and "any revised or successive plan"); AR:21, 38, 65, 88 (language in Franchises eliminating "fullest" and adding "dated December 2015"); AR:1024 (City Attorney explaining changes); JA1:493, 593 (redline of changes).

Respondents' claim that the Franchises contain "revised language regarding support for net energy metering" (RB 68, fn. 13) is incorrect. The terms in the ITBs specifically requiring SDG&E not to oppose expansion of net energy metering and feed-in tariffs were eliminated. AR:5817, 5938-39 (ITBs requiring Grantee not to "unreasonably oppose or obstruct" the City's support for "net energy metering" and "feed-in tariffs"); AR:38-39, 89 (quoted language eliminated in Franchises). Net energy metering and feed-in-tariffs allow customers to self-generate clean energy by installing rooftop solar systems locally and have long been championed by the City as necessary to mitigate significant climate change impacts that the City anticipates. *See e.g.*, AR:7020 (City requiring itself as mitigation for its General Plan Update to employ "self-generation of energy using renewable energy sources"); AR:4111, 4121 (City's Climate Action Plan: "City aims to facilitate installation of renewable energy locally" and to "facilitate and promote siting of new onsite photovoltaic energy generation).

Related language requiring the franchisee to "permit distributed energy resources to deliver all practical excess amounts of electric energy" to Community Choice Aggregator (CCA) customers and others (AR:5817, 5938)—which would have reduced greenhouse gas emissions by allowing customers to provide extra renewable energy generated from rooftop solar to CCA customers using available technology like virtual power plants—was also deleted. AR:38-39; *see also* AR:89.

SDG&E also refused to agree not to obstruct those City policies that were not deleted entirely. AR:5938-39, AR:5817 (ITBs requiring that Grantee "will not unreasonably oppose or obstruct" the City's efforts); AR:38-39, 89 (Franchises deleting previously quoted language and limiting SDG&E's obligation to "cooperate…in an Energy Cooperation Agreement").

And contrary to Respondents' claim that the Energy Cooperation Agreement was negotiated more favorably to the City (RB 67), the Energy Cooperation Agreement allowed SDG&E to avoid any real commitment to implementing the City's renewable energy policies. AOB 41. Although the ITBs stated that any bids should include a "detailed narrative proposal" for the Energy Cooperation Agreement that included "terms and commitments" outlining how the bidder would help the City achieve its energy goals (AR:5784, 5912, 6025-26), the adopted Energy Cooperation Agreement contained no enforceable commitments: the parties merely agreed to agree to a *future* "Implementation Plan" outlining "roles, processes, responsibilities, timelines, program, and development pathways," all of which would be developed only *after* the City Council approved the Franchises. AR:120.

3. The City abdicated its plenary power over use of the streets.

Third, the City eliminated the requirement in the ITB that SDG&E relocate infrastructure for future City public projects at its own expense. AOB 41-42.

In changing this requirement, the parties were not simply agreeing to be bound by "applicable law." RB 68. Rather, the change *departed* from applicable law and frustrated the City's attempt to set the terms of new franchise ordinances that would clarify the franchisee's obligation to relocate its property at its own expense. *See* AR:1019; *see also* Charter

Section 105 ("Plenary control over all primary and secondary uses of its streets and other public places is vested in the City…"). The ordinance attached to the ITB stated that that "without any exception …, the cost of relocating or removing Grantee's facilities shall be at Grantee's sole expense" and that it is "the express intent of Section 8 that no exceptions shall be available to the duty of Grantee to pay all costs, and to promptly … perform relocation or removal of its facilities that conflict with the City's primary reserved rights to the uses of Streets." AR:5805-06, 5931-32; In the negotiations, however, SDG&E demanded that the City eliminate these provisions (and ultimately lost its battle in this Court regarding two particular projects). *See* AR:1019; AR:32, 77-78 (final terms stating that "City and Grantee agree that they will abide by the final determination of the California courts or settlement thereof and Section 8(a) shall not supersede any such determination or settlement"); *City of San Diego v. San Diego Gas & Elec. Co.* (Cal. Ct. App. July 29, 2024, , D081883) 2024 WL 3561768 [not reported].)

4. The City allowed SDG&E to dictate the terms of subsequent agreements.

Finally, the City allowed SDG&E to dictate the terms of subsequent agreements. In addition to deferring commitments that were required to be included in the Energy Cooperation Agreement to an Implementation Plan that had yet to be negotiated (*see* Section II.D.2), Respondents changed the ITB requirements regarding the Administrative MOU, which was supposed to be "the bread and butter of how the utility protects our assets, our streets, our sidewalks, our bike lanes." AR:1566.

Contrary to Respondents' suggestion that the Administrative MOU was not an ITB specification (RB 69, fn. 68), the Administrative MOU was attached to the ITBs. AR:5933-34, 5895-5907 (Gas ITB); 5806-5807, 6009-6021 (Electric ITB). The City changed the terms laid out in the ITB to what

the City Attorney described as a "bilaterally negotiated instrument." AR:1019; AR:5807, 5934 (ITBs: "The Administrative MOU shall comply with the general terms attached as Attachment 2, and any *additional terms established by the City Manager*.") (emphasis added); AR:33, 79 (Franchises: "The Administrative MOU shall include any additional *terms agreed upon by the City and Grantee*.") (emphasis added).

Requirements for competitive bidding are violated where a public agency changes the material terms after bidding has been closed or accepts a bid that does not conform to the original specifications. *Eel River*, 221 Cal.App.4th at 238; *Konica*, 206 Cal.App.3d at 455-57 (allowing deviations from material bid specifications "provides a competitive advantage not available to a bidder who strictly held to … advertised specifications"); AOB 43-45. Here, the numerous post-bid changes to the material terms of the ITBs violated these established principles.

5. Respondents cannot excuse themselves from fundamental competitive bidding principles prohibiting changed specifications after the bidding is closed.

Respondents' untenable excuses for changing the specifications to the bids after the close of the bidding must be rejected. Respondents' claim that competitive bidding requirements somehow do not apply because the City negotiated with the winning bidder *after* bids were opened contradicts fundamental competitive bidding practices. 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). The fact that changes are undertaken in behind-closed-door negotiations, rather than in awarding the bids, does not make a post-bid modification somehow less unfair. *See DeSilva*, 242 Cal.App.4th at 1424 (allowing the bidder to belatedly cure defect where bid was nonresponsive would give it an "unfair advantage"); AOB 44.

Nor can the City excuse itself from complying with competitive bidding requirements merely by stating beforehand its intent to do so, as Respondents appear to assert. RB 65-66.

The City code provision permitting negotiation of contract terms for "requests for proposals" (RB 65) does not apply here.[9] Moreover, although Respondents cite to Municipal Code Section 22.3014, Respondents stop short of claiming that the City waived any "defects" or "technicalities" in SDG&E's bids as "in the best interests of the City," or that the City made any findings about the defects in the bids at all. RB 61. Rather, the record establishes that the City did not attempt to waive any defects. AR:883 ("The Mayor determined the bids were responsive and then entered into negotiations with SDG&E on the terms of the agreement…").

While the City might be permitted to waive minor defects and technicalities, the City cannot lawfully modify the material terms of the ITBs as it did here. *Valley Crest*, 41 Cal.App.4th at 1443 (city cannot waive material defects in bid). A City ordinance cannot be read to conflict with the City Charter's competitive bidding mandates by allowing deviations from *material* terms of the invitation to bid. *Domar*, 9 Cal.4th at 171 ("Any act that is violative of or not in compliance with the charter is void.")

Respondents' claim that the *bidder* can reserve material issues for "future negotiation" is even more untenable, and the sole case they rely on, *Transdyn/Cresci JV v. City and County of San Francisco ("Transdyn")* (1999) 72 Cal.App.4th 746 (RB 66-67), holds nothing of the sort. In *Transdyn*, the court held that the city could not reject the bid after the general manager had accepted it because "[o]nce the contract was awarded,

[9] Rather, bids, like those here, that are based on an "invitation to bid" based on bid amount are addressed in paragraph (a). *See* S.D. Mun. Code, § 22.3008(a).

the City was not free to revoke the contract." *Id.* at 758. Although the facts here are distinguishable because the Mayor—who alone determined SDG&E's bids were responsive (AR:883)—lacked any authority to award the Franchises under the City's Charter (Charter Sections 103, 103.1), *Transdyn* provides yet another example of a court prohibiting changes to the material terms of bids after the bids have been accepted and thus does not support Respondents' claim. *See* 72 Cal.App.4th at 798; *Eel River*, 221 Cal.App.4th ("A contract must be set aside where specifications are changed after the bidding has been closed.") (quotation omitted)).

E. PCF adequately raised its competitive bidding claims below.

Respondents erroneously assert, in a footnote, that PCF failed to raise its claims about the uncertain and unequal terms in the ITBs in the trial court. RB 58, fn. 9. Respondents' argument conflicts with the record which shows that PCF repeatedly argued that the two-tier system and the "black box" bid requirements imposed solely on non-SDG&E bidders violated competitive bidding requirements. PCF's opening brief argued: "given that other potential bidders were required to acquire the facilities and indemnify the City with respect to disputes with SDG&E, the invitations to bid plainly favored SDG&E and discouraged any entity other than SDG&E to bid on the Franchises." JA1:0220. These claims are detailed throughout the opening brief and reiterated on reply. *See* JA1:0187-89 (describing "uncertain" and "onerous" requirements, "unknown costs" and "expensive and uncertain disputes with SDG&E"); JA1:0217-18 (two-tier system "virtually guaranteed SDG&E would be the only bidder" and required uncertain acquisition costs); JA1:0219 (non-SDG&E bidders faced unknown "costs of acquisition" and a potential "quagmire"); JA3:1206 (unfair bidding lacked a common standard); JA3:1207 (by applying "one set of requirements to SDG&E, and another

set of requirements to all other bidders, the invitations to bid deterred potential bidders and impermissibly skewed the bidding process").

Respondents also erroneously assert that PCF "failed to timely" argue that "the City and SDG&E negotiated certain terms of the Franchise Agreements after the City accepted SDG&E's bids." RB 63. In fact, PCF has focused on this issue since the inception of this case. JA1:28 (PCF Verified Petition for Writ of Mandate) (alleging "the terms of the ordinances changed the criteria after the bids were unsealed from the terms of the ordinances attached as exhibits to the ITBs" and citing *Eel River*). PCF's opening brief below set forth pages of evidence detailing how the City "materially changed terms of the ordinances attached to the invitations to bid" in presenting them to the City Council on a wide range of issues, thereby "allowing SDG&E to turn the Franchises into something very different than was presented to all other potential bidders." JA1:0193-98. PCF's reply brief raised the same claims. *See* JA3:1197-98 ("City agree[d] to material, unfavorable changes to the terms of the franchise ordinances," including on terms extensions and refund amounts); JA3:1207 ("changes made *after* SDG&E submitted its bids … violate basic fair competitive bidding requirements" because "potential bidders could not have known that City would allow bidders to veto material terms of the draft ordinances"). Indeed, the trial court characterized one of PCF's arguments as a claim that the bid process "violated public bidding requirements because the City changed the criteria in the ordinance terms after the bids were unsealed." JA3:1399.

Additionally, Respondents mischaracterize PCF's claim that the bids were non-conforming as a new theory. RB 59. PCF has consistently argued that the City violated competitive bidding mandates by failing to provide a level playing field, favoring SDG&E, and changing the specifications after the bid was closed. But even a change in theory can be presented on appeal

where facts appearing in the record present a legal question. *Ward v. Taggart* (1959) 51 Cal.2d 736, 742. Here, SDG&E's bids and what they state are indisputably part of the record. AR:5728-71. And SDG&E was explicit that its bids were conditioned on negotiations of the franchise terms. AR:5730 (SDG&E: bid term "subject to further discussion to negotiate acceptable language"); 5731 ("we look forward to negotiations with you regarding the specific language in the draft franchise ordinance"); 5752-53 (same for gas bid).

To the extent PCF has refined the issues on appeal, this Court has discretion to consider such refinements, particularly where the facts are not in dispute and matters of public interest are at stake. *See Grabowski v. Kaiser Foundation Health Plan, Inc.* (2021) 64 Cal.App.5th 67, 75, fn.3 (finding that "[t]o the extent this reframing constitutes a new theory," court would allow it where material facts were undisputed and issues were predominantly legal); *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1459; *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 750-51.

Here the facts were fully briefed, and the case is based on an administrative record. Thus, case law cited by Respondents (RB 59, 63-64), where courts declined to exercise their discretion to address new "evidence" on summary judgment (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316), or assert a new legal theory not apparent from the parties' contract (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12), is inapt. So is Respondents' repeated quotation to *unpublished* language in *Greisman v. FCA US, LLC* (2024) 103 Cal.App.5th 1310 (RB 58, fn. 9, 59, 64), which is not citable and also involved "highly factual questions." The two other cases cited by Respondents stand for a very different point: that arguments not made in the opening brief *on appeal* are forfeited. *Golden Door*

Properties, LLC v. County of San Diego (2020) 50 Cal.App.5th 467, 559 (noting "'[f]airness militates against allowing an appellant to raise an issue for the first time in a reply brief'") (citation omitted); *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387 (same).

Moreover, given that Respondents not only had ample opportunity to address the competitive bidding claims based on the administrative record certified by the City, but even submitted extra-record evidence on this very issue over PCF's objection (JA3:1332, 1224-33, 1268), they can hardly claim any denial of due process. *See* RB 63.

III. The City's failure to undertake any environmental review of the Approvals violated CEQA as a matter of law.

Respondents' arguments that the Approvals are not subject to CEQA are based on a series of meritless claims. They insist that the Approvals, which authorize SDG&E to provide electricity and gas to the City for the next two decades and set new energy policy, can have no environmental impacts. This claim must be rejected given the City's failure to conduct any CEQA review and the undisputed evidence that powering San Diego for the next 20 years will require expanded infrastructure and, if left unmitigated, generate millions of tons of greenhouse gases.

Respondents also make the absurd arguments that the City did not "commit" to a definite course of action when the City formally adopted the final Franchise Ordinances and the Energy Cooperation Agreement; that the Approvals constitute a mere "funding mechanism"; and that the Court should shoehorn the project into a CEQA exemption that applies only to "existing facilities." Respondents' claims are contrary to established law. Indeed, many were expressly rejected by the California Supreme Court in *UMMP*, which recognized that CEQA sets a low bar for determining whether an activity qualifies as a "project." *UMMP*, 7 Cal.5th at 1198. As the trial court correctly found, the City's Approvals here clearly meet this

low bar and constitute a "project" as a matter of law. Moreover, because neither franchise grants nor energy agreements are "facilities," they fall outside the scope of the CEQA exemption for "existing facilities" as a matter of law. Respondents' attempt to shoehorn the Approvals into the existing facilities exemption errs in ignoring the project as a whole.

An environmental analysis prepared under CEQA is "'a document of accountability,'" such that if "'CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and … can respond accordingly to action with which it disagrees.'" *See Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 (citation omitted). Here, the City informed the public repeatedly that adopting new franchises would have enormous environmental consequences, but failed to actually consider those consequences before adopting the Approvals. The City's failure to comply with CEQA deprived the public of critical information necessary to evaluate these consequences, as well as the opportunity to hold the City accountable for failing to meet its stated environmental goals.

A. The City's approval of the Franchise Ordinances and Energy Cooperation Agreement was a "project" subject to CEQA.

1. Determining whether the Approvals constituted a "project" under CEQA constitutes a question of law for the Court to review de novo.

In determining whether an activity is a project, the question "is not whether the activity will affect the environment, or what those effects might be, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA." *UMMP*, 7 Cal.5th at 1198. The "project" determination is a "question of law," not a factual determination subject to substantial evidence review. *Ibid*. Here the trial court correctly determined

that the City's approval of the Franchise ordinances "has the potential to cause environmental change and thus require the City to treat it as a project." JA3:1290; *see also UMMP*, 7 Cal.5th at 1198 (approval must be "deemed a project" if it is the "sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment"). Neither the record nor the case law they rely on support Respondents' claim that the Approvals do not constitute a "project."

2. The Approvals meet the definition of a project under CEQA.

The City's adoption of the Franchise ordinances and associated agreements ("Approvals") constitute a "project" subject to CEQA. AR:16-108, 120-30. CEQA's definition of "project" "encompasses a wide spectrum" of discretionary governmental policy approvals for plans, ordinances, and policies. *See Sierra Club v. County Of Sonoma* ("*Sonoma*") (1992) 6 Cal.App.4th 1307, 1315; Pub. Res. Code § 21065(a), § 21080 (CEQA applies to discretionary projects approved by public agencies), § 21094 (provision for tiering from EIR for "program, plan, policy or ordinance"); Guidelines § 15378(a)(1); *UMMP*, 7 Cal.5th at 1199 (zoning ordinance adoption); *Golden Door*, 50 Cal.App.5th at 483 (climate action plan). A "project" also includes a private activity supported "through contracts" from a public agency or involving the agency's issuance of a license or "other entitlement for use." Pub. Resources Code § 21065(b), (c); Guidelines § 15378(a)(2), (3).

Under the Guidelines, an approval subject to CEQA means a "decision by a public agency which commits the agency to a definite course of action," or, involves "the earliest commitment to or the issuance by the public agency of a discretionary contract … or other entitlement." Guidelines § 15352. A "project" under CEQA "means the whole of an action" which could potentially change the environment, and it does not

refer to each separate governmental approval to which the project may be subject. *Id.* § 15378(a), (c). The City's adoption of the Approvals entitles SDG&E to use City streets to supply and distribute gas and electricity to a growing population in the City (and beyond), and sets energy policy for decades. The Approvals thus fall squarely within CEQA's broad definition of a "project" approval.

a. The Approvals commit the City to a definite course of action.

Ignoring these fundamental CEQA definitions, Respondents make the remarkable claim that the Approvals are not a "project" because the City has not committed to a "particular" or "definite" course of action. RB at 73-74, 76-77. But clearly it has: the City has approved final, binding ordinances granting Franchises to SDG&E that will shape energy use in the City for decades. AR:58, 108 (ordinance approvals final); AR:119 (resolution adopting Energy Cooperation Agreement final); AR:2221 (staff report emphasizing that "the City's energy policies have an outsized impact on our region" because San Diego is the largest city in California that franchises its gas and electric services); AR:2281. These binding approvals are the very definition of the discretionary approvals that constitute a "project" under CEQA. *See* Guidelines § 15352; Pub. Res. Code § 21065; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 129 ("Legislative action in regard to a project often constitutes approval.").

CEQA "defines 'approval' as occurring when the agency *first* exercises its discretion to execute a contract" and environmental review must be "done early enough to serve, realistically, as a meaningful contribution to public decisions." *Save Tara,* 45 Cal.4th at 134-35; *see also* Guidelines § 15352(b). By avoiding or postponing CEQA review "until after a binding agreement" was reached, the City "undermine[d] CEQA's

goal of transparency in environmental decisionmaking." *Save Tara*, 45 Cal.4th at 136.

Accordingly, in *Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 380, 392, 405, the court held that the granting of a 20-foot easement for a water pipe was the approval of an entitlement for use and thus involved a "project" under the "plain meaning" of Section 21065. Likewise, in *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, the court held that the county's adoption of an ordinance requiring heightened treatment standards for application of sewage sludge was a project subject to CEQA and that the county's "commitment to the project became final when it adopted [the] ordinance." *Id.* at 1601-02. The county's failure to undertake environmental review *before* ordinance approval violated the letter and spirit of CEQA: "By avoiding the preparation of an EIR, County committed to a particular approach and completed its project without the benefit of the environmental analysis and information an EIR would have contained." *Id.* at 1602.

The same is true here. The City's "commitment to" the Approvals became final when the City adopted them. And by doing so without CEQA review, the City deprived decisionmakers—and the public—of environmental analysis that would have informed its decision and ensured that the impacts of the Approvals were mitigated to the extent feasible. *See* Pub. Res. Code § 21002.1.

The cases cited by Respondents (RB 73, 76) are entirely inapt. *Bridges v. Mt. San Jacinto Community College District* held that a mere purchase agreement was not subject to CEQA because "no funds [had] been committed," there was no developer "in the picture yet," and CEQA compliance would occur "before the sale can be finalized." (2017) 14 Cal.App.5th 104, 111, 122-24. Here the multi-billion dollar Approvals were

awarded to SDG&E—and given final approval by the City Council—with no environmental review.

California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist. ("*California Unions*") (2009) 178 Cal.App.4th 1225, also fails to support Respondents. There, the air district made the same argument the City makes here, claiming that the impacts of future road paving offsets permitted by the challenged air quality rule were "speculative" and would "be subject to environmental review if and when applicants seek them." *Id.* at 1230. But the Court of Appeal found that adopting the rule was a project under CEQA because it was "'reasonably foreseeable'" that environmental impacts would ultimately result and was "'the first discretionary approval'" the district undertook. *Id.* at 1242-47 (citation omitted). Here, too, the Approvals are the City's first discretionary approval, they authorize construction and the delivery of gas and electric energy under the adopted terms, and CEQA review was required.

Later in their brief, Respondents try to distinguish *California Unions* by claiming that the District in that case had "committed itself" to the proposed rule and "lost the opportunity to consider possible alternatives and mitigation measures." RB 84, fn.17 (quoting *California Unions*, 178 Cal.App.4th at 1247). But the same is true here. The City "committed itself" to the specific terms of the Franchises and "lost the opportunity to consider" other energy service providers, mitigation measures, alternatives, or different terms, that would have been environmentally superior. *See e.g.* AR:7288, 7296, 7298-99 (Councilmembers describing desired terms to mitigate climate change impacts and to allow for consideration of public power alternatives); AR:1561; AR:2259 (SDG&E's parent company "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"); AR:1572 (Councilmember: SDG&E "not [] a good partner in

transitioning off the fossil fuels and methane gas that are poisoning communities and accelerating climate change").

b. The necessary causal connection exists because the Approvals are an "essential step" leading to potential environmental impacts.

Respondents also erroneously argue that the Approvals are not a "project" because no "causal link" exists between the Approvals and potential environmental impacts. RB 73-75. But the Supreme Court rejected the City of San Diego's attempt to make the identical argument in *UMMP*. There, the City argued that its adoption of an ordinance regulating the location of medical marijuana dispensaries "did not constitute a project for purposes of CEQA" because "too little is known about the environmental impact of the Ordinance to permit effective environmental review at this stage." *UUMP*, 7 Cal.5th at 1180, 1200. Indeed, the City's findings regarding the dispensary ordinance closely track the statements made here with regard to the Approvals. In both cases, the City concluded that its approvals were not subject to CEQA because they would not result in direct or indirect physical changes and would be subject to future discretionary approvals. *See id.* at 1182 (quoting City's finding); RB 77 (quoting City staff here).

The Supreme Court rejected the City's arguments as a matter of law. *UMMP* found there was a "necessary causal connection" between the City's ordinance and potential environmental impacts because the ordinance was "'an essential step culminating in action … which may affect the environment.'" *Id.* at 1199 (quotation marks omitted). Specifically, the ordinance authorized new dispensaries not previously permitted in the City, a policy change that "could foreseeably result in new retail construction" and that could cause citywide traffic changes. *Id.*.

In concluding an adequate causal connection existed, the Court relied on earlier Supreme Court precedent, *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 784-85, 795-96, which held that adoption of a school reorganization plan was a project subject to CEQA because it was an "essential step" leading to potential environmental impacts. *Fullerton* explained that the plan was a project even though "further decisions must be made before schools are actually constructed, bus routes changed, and pupils reassigned" and "[s]pecific plans [had] not yet been formulated" for these changes. *Id.* at 794-95, 797. The mere "possibility of a significant impact" due to traffic changes or construction was "sufficient to require at least an initial study" under CEQA. *Id.* at 794; *see also UUMP*, 7 Cal.5th at 1199-1200 (citing analysis with approval).

UMMP also flatly rejected the City's arguments that the environmental impacts of the ordinance at issue were "speculative" and that CEQA review "would be more appropriate" when future discretionary permits were issued. *See id.* at 1199-1200. These arguments improperly "put the cart before the horse" and "conflate" the question of whether the action is a "project" under CEQA with the level of CEQA review that is required. *Id.*

The Court emphasized that an agency "cannot argue that approval of a regulation is not a project merely because further decisions must be made before the activities directly causing environmental change will occur." *Id.* at 1200 (quotation marks omitted). Respondents' identical argument here—that the impacts of the Approvals are speculative and future activities under the Franchises "may be subject to CEQA review" and permitting (RB 72, 76-79)—must be likewise rejected. The City cannot claim a lack of evidence of foreseeable impacts where it has not taken even the most preliminary analysis under CEQA. *See UUMP*, 7 Cal.5th at 1199-2000.

The Approvals authorize SDG&E to supply and distribute gas and electricity to San Diego through the year 2041, and thus comprise an "essential step" culminating in actions that will generate greenhouse gas emissions and require construction of new gas and electric infrastructure with obvious environmental consequences. The Approvals authorize SDG&E to supply and deliver gas and electricity to a growing population of more than a million residents and businesses through the year 2041, activities expected to add *millions* of tons of greenhouse gas emissions each year if left unmitigated. *See* AOB 57. These impacts alone are admittedly significant. AR:7020-21 (recognizing need to "mitigate the cumulatively significant global warming impacts of the General Plan"); *see, e.g.*, *IBC*, 88 Cal.App.5th at 133-35 (GHG emissions of over 5,000 tons showed a reasonable possibility the project would have a significant environmental impact necessitating CEQA review); *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176, 1207 ("*NRDC*") (GHG impacts of Port operation significant where "GHG emissions will exceed …10,000 metric tons" per year); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 91, 93 (898,000 tons of GHG emissions significant); *McCann v. City of San Diego ("McCann")* (2021) 70 Cal.App.5th 51, 92 (900 tons of GHG emissions or more significant).

The Approvals also constitutes the "sort" of activity (*see* Section III.A.2.c.) that could have environmental impacts because they set City policy involving a broad range of environmental issues. *See* AOB 48-49; AR:5781, 5784-85 (ITB stating Franchises would address energy efficiency, renewable energy, rooftop solar, investment in electric transportation infrastructure, and pollution reduction); *see also* Section II.D.2.

In addition, the Approvals expressly contemplate construction and major new infrastructure. AOB 53-54. As the trial court found, it is "reasonably foreseeable that the ordinances could result in new construction" to distribute gas and electricity. JA3:1291. Respondents do not dispute that providing this energy will require new infrastructure for the delivery and storage of energy. *See* AOB 57.

c. The environmental impacts involved are far more than theoretical.

The parameters of the environmental impacts do not need to be specified in detail to qualify as a CEQA project. Indeed, Respondents mischaracterize *UMMP* in asserting that PCF has somehow failed to carry its burden of proof. Petitioners in *UMMP* did not "successfully demonstrate[]" a connection between the challenged ordinance and citywide changes in traffic patterns, as Respondents assert. RB 79-80. Rather, the Supreme Court held that an activity must be considered a project under CEQA as a *matter of law* where its "theoretical" impacts are "sufficiently plausible to raise the possibility" that it could result in "'foreseeable, indirect physical changes in the environment.'" *UMMP*, 7 Cal.5th at 1199 (quoting Pub. Resources Code § 21065). Contrary to Respondents claim that the "substantial evidence" test should apply (RB 79-80), the challenged ordinance in *UMMP* was held to be a project despite "the absence of *any* evidence to support [the] occurrence" of potential physical changes. *UMMP*, 7 Cal.5th at 1199 (emphasis added).

UMMP held that an approval is a project if it is the "sort that is capable of causing direct or reasonably foreseeable indirect effects," recognizing that "at this stage of the CEQA process virtually any postulated indirect environmental effect will be 'speculative' in a legal sense — that is, unsupported by evidence in the record … because little or no factual record will have been developed." *Id.* at 1199--1200. Accordingly, an

agency cannot allege a lack of record support for potential impacts where it has failed to build a record by proceeding to the next steps of CEQA analysis. *Id.*; *accord* JA3:1290-91 (trial court ruling).

The environmental impacts of authorizing SDG&E to use the City's streets to deliver gas and electricity in the City and beyond for the next two decades are real, not "theoretical," and are more than enough "to justify the further inquiry into [their] actual effect." *UUMP*, 7 Cal.5th at 1198-99. In making the critical environmental decision of whether to award these Franchises and on what terms, the City was required to comply with CEQA by undertaking "further inquiry" into the "actual" environmental effects of the Approvals. *UUMP*, 7 Cal.5th at 1198.

Yet the City failed to even quantify the greenhouse gas emissions involved with the Approvals, much less consider the effect of those emissions on the dire existing conditions. AR:1437 (PCF citing to scientific studies regarding 2020 record increase in atmospheric methane and need for methane reduction to mitigate impacts). The day before the June 8, 2021 hearing, scientists reported that concentrations of atmospheric carbon dioxide set records as the highest tally for any month since records began. *See e.g.* AR:844.

Contrary to Respondents' claim, comparing the impacts of the Approvals to the existing "baseline" is hardly "impossible." RB 71. Rather, such computations are expressly required under CEQA, as the City well knows. *McCann*, 70 Cal.App.5th at 95-97 (detailing requirements of section 15064.4 and describing relationship with section 15183.5 of the Guidelines); *see also Golden Door*, 50 Cal.App.5th at 484 (quotation marks omitted) ("The Legislature has emphatically established as state policy the achievement of a substantial reduction in the emission of gases contributing to global warming" and "[t]his policy is implemented in CEQA."); *see also Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62

Cal.4th 204, 229-31 (agency must calculate "what level of *reduction from business as usual*" is required to reduce GHG emissions enough to meet climate goals) (emphasis added).

The City knows how to quantify greenhouse gas emissions, and has done so when considering other projects, including its 2010 General Plan Update and its 2015 Climate Action Plan. The City concluded each time that major greenhouse gas emission reductions are needed to mitigate foreseeable adverse climate change impacts. *See* AOB 57-58; AR:4108-09; AR:3435 ("GHG emissions in the City need to be reduced below existing levels while additional emissions are generated by growth through 2020 and 2035."); *see also* AR:4111 ("Clean, renewable energy is essential to achieving the GHG reduction targets."); AR:6997-7000 (adopting policies to reduce the City's "carbon footprint," maximize "self generation of energy using renewable technologies," "[c]ollaborate with climate science experts," "design new or expanded public utilities and associated facilities…to maximize environmental and community benefits," and "[u]se small, decentralized…energy efficient power generation facilities to the extent feasible").

The City's failure to conduct environmental review for the project here meant that the public was left in the dark about the environmental impacts of the Approvals, the extent to which the Approvals will exacerbate climate change impacts, or what alternatives or mitigation would ensure compliance with the City's goals like achieving 100% renewable electricity by 2035, promoting solar energy generation and storage systems, reducing "demand for imported energy" and generating clean energy locally, and reducing greenhouse emissions "with quantifiable data and benchmarks for success." AR:4111, 4121, 4098, 4100.

3. The Approvals are not a mere "funding mechanism."

The primary case Respondents rely on to argue that the Approvals are not a "project" is an inapt funding mechanism case. RB at 73-76, 80, 84. Respondents argue that because the Franchises involve payments to the City, they are mere "fiscal activities" not subject to CEQA. RB 73, 75 (quoting Guidelines § 15378(b)(4)). But the mere fact that the City's Approvals have "economic terms" (RB 75) does not exempt them from CEQA. If this were true, all major government projects would be exempt from CEQA because they necessarily involve substantial payments to or from local governments.

Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School District, the primary case to which Respondents cite, held that the formation of a school funding mechanism—a community facilities district—was not subject to CEQA where it merely ensured the school district would have funds for future actions. (1992) 9 Cal.App.4th 464, 474. The court concluded that the "only foreseeable impact" was that when the District took future actions to acquire school sites or classrooms, "it will have some of the funds necessary to do so." *Id.*. Here, the Approvals cannot plausibly be characterized as constituting *only* a funding mechanism. 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.

The other case law cited by Respondents also does not support their position that the Approvals are a mere funding mechanism. *Chung v. City of Monterey Park* (RB 76), held that a ballot measure that required trash service franchises to be awarded through a competitive bid process was not subject to CEQA because establishing the bidding procedures constituted a "fiscal activity." (2012) 210 Cal.App.4th 394, 399, 402. The court found it

was "was unknowable which companies may bid on the solid waste franchise … or what significant impacts the City's choice of service provider(s) may have," and that the "appropriate time" for the petitioner to raise "environmental concerns would be *when a new contract or contracts are under consideration*." *Id.* at 406 (emphasis added). Here, the City did not merely adopt bidding *procedures*, it approved the Franchises themselves. PCF complied with *Chung* by filing its CEQA claim at the "appropriate time"—after the City approved the Franchises with no environmental review. As *Chung* recognizes, the actual Approvals raise environmental concerns that must be analyzed under CEQA.

B. The Approvals are not exempt from CEQA review.

1. The Approvals are not exempt from CEQA per se.

Respondents also claim no precedent exists to apply CEQA to utility franchise agreements. RB 71. The lack of published appellate decisions could simply mean that other agencies approving franchises did not give rise to a dispute. But it is hardly surprising that CEQA cases involving utility franchises are not common. Many gas and electric franchises are either perpetual, or have very long terms, like the City's prior 50-year franchise. *See* RB 16; AR:2250 (SDG&E's request for a "perpetual franchise" rejected by the City in 1970), 2264 ("many utility franchises in California are perpetual" and "[f]or that reason, only a few new utility franchises have been issued in the last two decades"), 2265 ("Many franchises were issued 50 to 70 years ago. Most cities were ill-informed on utility matters and incapable of understanding the issues and/or unable to resist pressure by well-funded utilities.").

CEQA compliance was crucial here because, as the Mayor noted, new franchises presented a "once-in-a-generation opportunity" for San Diego residents to renegotiate the terms of gas and electricity delivery and

achieve its policy and environmental goals. AR:6028; *see also* AR:7298 (Councilmember recognizing same). Far from undermining the provision of utility services (RB 71), requiring the City to comply with CEQA would give the City and its residents a "once-in-a-generation" opportunity to ensure that the long-term environmental consequences of delivering power to more than a million residents are fully considered and mitigated.

2. The Approvals are not categorically exempt from CEQA review.

Respondents erroneously claim that, even if the Approvals are a "project" under CEQA, they fall within the exemption in Guidelines Section 15301 for the operation and maintenance of "[e]xisting facilities" for the provision of gas and electricity. RB 82 (quoting Guidelines § 15301). The Approvals grant profitable 20-year electric and gas Franchises, allow new construction and expanded uses, and establish City energy policy, and thus fall outside the scope of the exemption as a matter of law.

Determining the scope of a categorical exemption is a "matter of law" for the court. *California Farm Bureau Federation v. California Wildlife Conservation Bd.* ("*Farm Bureau*") (2006) 143 Cal.App.4th 173, 185. Because an exempt project "may be implemented without any CEQA compliance whatsoever," CEQA "exemptions are construed narrowly and will not be unreasonably expanded beyond their terms." *Id.* at 187 (citation omitted). Here, Respondents cannot, and do not, show that substantial evidence supports the City's conclusion that the exemption applies, because Respondents did not consider the project as whole. *See id.* at 184-85 (lead agency has burden to demonstrate substantial evidence supports factual finding that activities fall within the exemption).

Contrary to Respondents' claim that CEQA review of the Franchise "would effectively read the 'existing facilities' exemption out of existence" (RB 84-85), applying CEQA to the Approvals will do nothing to change its

applicability to projects that are limited to the use of existing utility facilities like poles and pipes, and it will continue to exempt from environmental review the use of existing facilities involving negligible or no expansion of use.

a. The Approvals are not exempt under Guideline Section 15301 because they are not limited to SDG&E's use of existing infrastructure.

Respondents' exemption argument erroneously focuses exclusively on one particular component of the Approvals: that they authorize SDG&E to maintain existing infrastructure. RB 81-86. Respondents' exemption analysis improperly ignores other myriad components of the Approvals and does not address the project as a whole. Guideline § 15378(c). Respondents' failure to consider the project as a whole constitutes legal error. Where an exemption "does not cover the whole of the action that constitutes the project," it does not excuse the agency from CEQA compliance. *See Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 640; *Farm Bureau*, 143 Cal.App.4th at 188-92 (acquisition of farmland for conversion to wetland habitat not exempt where only portions fell squarely within CEQA exemption).

The whole of the action constituting the Approvals involves authorizing SDG&E to supply and distribute gas and electricity to a growing million-plus residents and businesses in the City of San Diego (and beyond) with increasing energy demand through the year 2041, allowing the construction and major new infrastructure necessary to do so, and setting City energy policy related to climate change and energy use. *See* Section III.B.2.b-c, *supra.* The City's Approvals cannot reasonably be construed as merely the operation or maintenance of existing "facilities" under Section 15301, and thus the Approvals were not exempt from CEQA.

Los Angeles Dept. of Water & Power v. County of Inyo (2021) 67 Cal.App.5th 1018, 1024, 1030-31, 1039-41 (continued operation of existing landfills was not exempt under Section 15301 because a landfill did not unambiguously qualify as a "facility").

If the Approvals were, as Respondents mistakenly suggest, nothing more than a repeat authorization of the City's 1970s franchises, still no categorical exemption could be lawfully applied. The "cumulative impact" exception instructs that categorical exemptions "are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." Guidelines § 15300.2(b). The City has long acknowledged that the cumulative greenhouse gas emissions of providing gas and electric service under business-as-usual scenarios must be dramatically reduced to avoid significant adverse impacts. AOB 57-58; *see* Section III.A.2, *supra.* Because the Approvals are not limited to existing infrastructure, however, neither the cumulative impact exception to the existing facilities exemption, nor the unusual circumstances exception discussed in Section III.B.2.e., need be addressed.

Characterizing the Approvals as if they did nothing more than allow SDG&E to use "existing facilities" contradicts CEQA's mandate that a "project" comprises the "whole of the action" that is being approved and must be rejected. Because the "existing facilities" exemption "does not cover the whole of the action that constitutes the project," it does not excuse the City from CEQA compliance. *See Association for a Cleaner Environment,* 116 Cal.App.4th at 640. As the Mayor admitted when he introduced the Approvals: "franchise agreements for gas and electricity transmission…are more than just poles and wires." AR:1506.

b. The Approvals are not exempt under Guideline Section 15301 because they authorize new construction and the expansion of existing uses.

The key consideration in determining whether Section 15301 applies to the use of "existing facilities" is "whether the project involves negligible or no expansion of use." Guidelines § 15301; AOB 48, 52-53; RB 82. The Guideline expressly refers to "the project," not to a single aspect of a project. Guidelines § 15301. Respondents do not dispute that the Franchises expressly contemplate construction of and new infrastructure within City streets. Indeed, the express purpose of the Franchises is to allow SDG&E to "use" and "construct" all pipes and infrastructure "which are now or may hereafter be lawfully placed" on City street necessary for gas and electrical transmission. AR:20, 64. The Approvals detail new construction and expanded service necessary to serve the City's substantial planned growth over the next decades. *See* AOB 53. The Electric Franchise also explicitly authorizes an expanded undergrounding program. *See* AR:87 (undergrounding program intended to emphasize communities of concern and high fire threat areas and to calculate costs "using the 'miles installed' methodology). The ITBs made clear the City sought a franchisee that would "accelerate/improve clean energy infrastructure in lower income communities," and "[i]nvest in electric infrastructure," and "[c]limate proof the electric grid." AR:5784-85, 5912-13.

The Approvals also expressly require the preparation of a regular "Two-Year Plan" that identifies "major repairs or construction," and a biannual presentation of "planned major energy and gas projects" (AR:125, 75298), terms that Respondents simply ignore. To call such "major" infrastructure projects "negligible" is inconsistent with the "plain meaning" of Section 15301. *Sunflower Alliance v. Department of Conservation* (2024) 105 Cal.App.5th 771, 784, *review granted*, ___ Cal.3d __ ("plain

meaning of 'negligible' is small, unimportant, or inconsequential"). SDG&E's massive 50-mile gas pipeline construction though San Diego County, which was contingent on SDG&E holding the underlying franchise rights, provides just one example of the type of infrastructure the City knew the Approvals would allow to go forward. *See* AR:6446, JA2:0992 (showing new pipeline route on Pomerado Road in yellow); AR:1567 (Councilmember acknowledging "Pomerado Road excavations that we know are coming up"); JA1:0694 (noting that new pipeline would be installed "pursuant to franchise agreements"); JA1:0919 (new pipeline route proposed in the City's streets using "franchise rights").

Because the Approvals expressly anticipate and authorize new construction and expanded service, the cases upon which Respondents rely are inapt. *See* RB 82-83. In *North Coast Rivers Alliance v. Westlands Water Dist.*, the Court found that the interim renewal of contracts to continue the existing terms for water delivery "*without any changes*" was exempt from CEQA. (2014) 227 Cal.App.4th 832, 868, 872. The interim contract extension was adopted because the water districts were awaiting the U.S. Bureau of Reclamation's completion of an environmental impact statement under the National Environmental Policy Act (NEPA) for the execution of "new, [] 25-year renewal contracts." *Id.* at 838, 844-45, 847. *North Coast Rivers* fails to support Respondents' claim that the 20-year Franchises here are exempt from CEQA.

World Business Academy v. California State Lands Com. similarly held that a lease extension that would "not expand" existing uses but was merely designed to maintain the "status quo" during the interim period between the end of the long-term lease and the plant's planned shutdown, was exempt from CEQA. (2018) 24 Cal.App.5th 476, 484, 497, 503-04 (concluding extension "maintains rather than expands" existing plant capacity); *see also San Diegans for Open Government v. City of San Diego*

(2018) 31 Cal.App.5th 349, 371 (finding a restated lease for a park was not subject to CEQA where "all of the structures at issue were already completed" at time of CEQA determination).

Respondents insist that it does not matter that the approvals anticipate expanded service and new infrastructure because new facilities will require future "discretionary approvals." RB 23, 77, 83 (citing conclusory statements in City staff reports (AR: 112, 297). In fact, the Franchises required that an Administrative MOU be prepared that would "prescribe the categories of work that Grantee may perform without additional specific permits." AR:78. And the subsequently executed Undergrounding MOU that was required by the Franchise (AR:85) contemplates that the City and SDG&E will work towards a different process than requiring City permits. AR:75263 ("Parties shall endeavor to work towards an alternate construction authorization method."). But even if future discretionary approvals were required in many instances, the courts have recognized that "nothing in the definition of [the applicable] exemption turns on whether there will be a subsequent opportunity for environmental review." *California Unions*, 178 Cal.App.4th at 1246 (rejecting argument that CEQA exemption applies because there will be "further environmental review" following rule implementation); *accord UMMP*, 7 Cal.5th at 1200 (approval not exempt from CEQA "'merely because further decisions must be made' before the activities directly causing environmental change will occur'") (citation omitted).

To come within a categorical exemption, there must be substantial evidence that the project itself *precludes* expanded use. In *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, for example, the court found that the approval of a water credit for a future development was not subject to a comparable exemption under Guideline section 15302 for replacement of existing facilities.

Because the future development had not yet been established, the district could not show the new structure would be comparable to the existing structure. *Id.* at 697-700; *see also Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 326 (no exemption under Section 15301 where project involved installation of new refinery equipment and increased operations); AOB 52-53. Here, the record does not show that the Approvals will *not* allow new construction and expanded use, but the opposite. The exemption is therefore inapplicable under its plain language.

c. The Approvals are not exempt under Guideline Section 15301 because they establish new environmental policy.

The Section 15301 exemption is also inapplicable because the project approved by the City is far more than a contract to use and maintain existing infrastructure; the Approvals involve greenhouse gas emissions and set City-wide policy for energy. As the ITBs explained, the City sought a franchisee to help achieve the "climate goals outlined in the City's Climate Action Plan," including "its emission reduction goals," and to "develop a just transition to the green economy," "[c]limate-proof the electric grid," "[a]llow for more and easier access to rooftop solar, energy storage, and other local distributed energy resources to make the City's electric system climate resilient," and "increase accessibility to clean energy resources." AR:5781, 5784, 5909, 5912; *see also* AR:2512 (City Attorney noting the "Council will be considering significant policy objectives in connection with the proposed franchises"); AR:2281 (City consultant: "Utility operations can have a significant impact, for better or worse, on City policy objectives, such as implementation of the City's Climate Action Plan.").

The express purpose of the Franchises includes providing for the franchisee's commitment to issues like the "reduction of greenhouse gas emissions," "increased use of renewable sources of electric generation, wider deployment of local distributed energy resources, and advancing the electrification of transportation." AR:21, 38-39 (terms address climate action and local energy); 40-41 (Energy Cooperation Agreement to address a wide range of energy policies); *see also* AR 64-55, 88-91 (comparable terms for Electric Franchise). The Approvals therefore fall outside the scope of the Section 15301 exemption as a matter of law. *See Farm Bureau*, 143 Cal.App.4th at 185.

Respondents' argument that the Approvals did *not* involve new terms for the use and source supply (RB 84) is incorrect. The City's 1970s franchises said nothing about climate or energy policies. AR:7111-7125 (Gas), 7129-7155 (Electric). The City assured the public that new franchises would be different. AR:6025-26. The Mayor promised that new franchises were critical to helping the City "achieve its climate goals," "prioritize environmental protection," "set San Diego on a path to a greener future," and "transition[] away from natural gas." AR:5909, 5781, 6025-26.

Because the City failed to conduct any environmental review, however, the adopted terms consist largely of empty promises for future action, not real commitments to achieve City energy goals. *See* Section II.D.2, *supra*. For example, rather than requiring SDG&E to commit to specific renewable energy mandates, the Energy Cooperation Agreement merely requires the parties to "seek mutually agreed upon opportunities to deliver clean energy to San Diego residents." AR:121. Rather than a specific commitment to greenhouse gas emission reductions, the parties merely agreed to "study areas where electrification can be accelerated towards the achievement of the City's climate action goals." AR:122.

Had the City complied with CEQA, it could not have relied on the vague future promises it adopted here. *See* Section III.C., *infra.* Rather it would have been required to adopt "fully enforceable" measures for mitigating the enormous energy impacts of serving over a million users with gas and electricity over the 20-year life of the Franchises. *See* Guidelines §§15091(d), 15183.5(b)(2); *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612, 642 (conc. & dis. opn. of Cantil-Sakauye, C. J.) (mitigation must be adopted "as legally enforceable features or conditions of the project").

In *NRDC*, for example, the Fourth District found that the City of Los Angeles violated CEQA in approving the "continued operation" of a container terminal where, rather than adopting a greenhouse gas offset measure as an "*enforceable* mitigation measure" and analyzing its impact in lowering emissions, the city simply adopted a nonbinding measure requiring contribution to a greenhouse gas fund. 98 Cal.App.5th at 1190, 1207-113; *see also id.* at 1231-32, 1202 ("Because of the critical importance of mitigation measures in reducing environmental impacts, an agency generally may not defer formulation of mitigation measures to the future."). Likewise, in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, the Fourth District set aside an EIR for a transportation plan as legally inadequate. "Missing from the EIR is what CEQA requires: a discussion of mitigation alternatives that could both substantially lessen the [] plan's significant greenhouse gas emissions impacts and feasibly be implemented." *Id.* at 433. The Court concluded that this error was "prejudicial because it precluded informed public participation and decisionmaking." *Id.* at 434.

Here, of course, the City did not prepare an EIR or even an initial study. *See* Section III.C., *infra.* Rather, it simply adopted vague and nonbinding provisions which required SDG&E to make no real

commitment to achieving the City's environmental goals and which were weakened in behind-closed-door negotiations. *See* Section II.D, *supra*. The City's lack of CEQA review deprived the public of the opportunity to hold the City accountable for failing to meet its stated goals. *See Sierra Club*, 6 Cal.5th at 512 (EIR is a "'document of accountability'"); *POET*, 218 Cal.App.4th at 739-40 (agency violated CEQA where it lacked "objective performance criteria for measuring whether the stated goal will be achieved").

d. No other categorical exemptions apply.

Respondents suggest that the Approvals are subject to exemptions set forth in Guidelines sections 15302 and 15303. RB 85, fn.18. Because these arguments are made solely in a footnote, they are waived.[10] *West v. Solar Mosaic LLC* (2024) 105 Cal.App.5th 985, 996 (footnotes are "'not the appropriate vehicle for stating contentions on appeal'") (citation omitted); Cal. Rules of Court, rule 204(a)(1)(B) (points on appeal must be stated under a separate heading summarizing the point); *cf.* AR:13 (City's Notice of Exemption referring only to section 15301(b) exemption).

e. Guideline § 15300.2 also precludes application of any categorical exemption.

The Court need not address the exceptions to the categorical exemptions because the Approvals do not fall within the scope of any categorical exemption. But the unusual circumstances exception under Guidelines Section 15300.2 provides additional reasons why the City cannot lawfully apply a categorial exemption. Respondents' abbreviated

[10] Although Respondents' argument should not be addressed because Respondents failed to raise it appropriately, their claim fails on its merits. The approvals clearly go far beyond the undergrounding of facilities on the "same site" (§15302) or small utility extensions for single parcels (§15303). Respondents do not seriously suggest otherwise.

arguments to the contrary (RB 86-88) are unavailing and suffer from the same flaw as their arguments that the "existing facilities" exemption applies in the first instance: Respondents ignore the whole of the action which constitutes the "project" under CEQA.

As an initial matter, Respondents mischaracterize the burden of proof that applies when courts consider the unusual circumstances exemption in cases where, as here, the City made no express finding that no "unusual circumstances" exist. *See* AR:13. In such cases, the court must assume the City made an implicit finding that unusual circumstances do exist. *See IBC Business Owners for Sensible Development v. City of Irvine* ("*IBC*") (2023) 88 Cal.App.5th 100 (invocation of categorical exemption "constitutes an implied finding that no exceptions exist"). In other words, "the court must **assume** that the entity found that the project involved unusual circumstances." *Id.* at 133 (emphasis added; citation omitted). To uphold the agency's exemption determination, the court must "then conclude that the record contains no substantial evidence to support either (1) a finding that any unusual circumstances exist [] or (2) a fair argument of a reasonable possibility that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment." *Id.* (citation omitted).

Here, ample substantial evidence supports the City's implied finding that the Approvals are not typical of the types of activities that Section 15301 is intended to cover. *Id.* The City has long admitted that "unusual circumstances" are involved: the Approvals constituted what the City characterized as a "once-in-a-generation opportunity" to set terms on renewable energy—an "unusual circumstance" by definition. AR:6028; AR:2265 ("[m]any franchises were issued 50 to 70 years ago"). As City staff explained, the expiration of the 1970 franchises presented the City with "the unique opportunity to reshape its franchises for electric and gas

services to better align to the goals of the City and ratepayers." AR:2221. This opportunity was "unique" because "most cities with regulated utilities have perpetual terms" and because with "an annual power load of over 8,000 GWhs, the City's energy policies have an outsized impact on our region." *Id.* And as the City well knows, "circumstances were radically different" when the City granted the 1970s franchises, and advances in technology have allowed renewable energy to compete with fossil fuel and be produced from "much smaller generators." AR:2253, 2264.

Where, as here, a project is far more massive than the typical exempt project, the exemption does not apply. *IBC*, 88 Cal.App.5th at133-35 (size of development constituted "unusual circumstance"); *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1109 (scale of water to be conveyed distinguished project "from the type of projects" contemplated by the exemption for small structures). The once-in-a-generation approval of energy policies in "the largest city in California that franchises its gas and electric services" (AR:2221) cannot reasonably be construed as the equivalent of typical permit for the use and maintenance of existing "facilities." Guidelines §15301(a)-(p) (providing examples). Thus, the Approvals go beyond the scope of the exemption and are subject to CEQA. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1189, 1207-09 (unusual circumstances exception applied where landfill was not a typical "facility").

Moreover, the record shows more than a "reasonable possibility" of environmental impacts. *Westside Los Angeles Neighbors Network v. City of Los Angeles* (2024) 104 Cal.App.5th 223, 242 (exception to exemption applies where petitioner either shows that a "project *will have* a significant environmental effect," or shows both a "*reasonable possibility* of a significant effect" and an unusual circumstance) (quotation marks omitted). The City anticipates that providing gas and electricity to a growing San

Diego will require the construction of new infrastructure for the delivery and storage of energy and will exacerbate climate change impacts under business as usual scenarios. *See* Section III.A, *supra*. The City recognizes that utility operations can have a significant impact on the City's policy objectives, including the climate action necessary to mitigate "the cumulatively significant global warming impacts" of expected City growth and development. AR:4102, 7020; *see also* AR:2281. Because there is far more than a "fair argument" that the Approvals may involve significant environmental impacts, CEQA review was required. *See IBC*, 88 Cal.App.5th at 132.

C. The City failed to proceed in the manner required by section 21094 and failed to mitigate or avoid cumulative greenhouse gas emissions and other environmental impacts before approving the Approvals as CEQA requires.

In their opposition brief, Respondents inconsistently argue both that the City did **not** determine the Program EIR ("PEIR") for the 2015 Climate Action Plan ("CAP") covered the Approvals, and that it did. *See* RB 90-91 (citing to staff statements while insisting PCF's argument that the City "relied on the EIR as a program EIR that covered the Franchises" "misstates the record" because "[t]hat is not what the City determined"). Either way, the City failed to proceed in the manner required by CEQA by failing to consider the concept of tiering and by failing to properly consider a relationship between the CAP PEIR and the Approvals. *Sonoma*, 6 Cal.App.4th at 1318 ("CEQA directs agencies to "tier" EIR's wherever feasible); *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* ("*San Mateo Gardens*") (2016) 1 Cal.5th 937, 960; Pub. Resources Code, § § 21093, 21094(c).

As *San Mateo Gardens* explains, whether or not the Approvals were consistent with the CAP, an initial study was necessary:

> For project EIRs, of course, a subsequent or supplemental impact report is required in the event there are substantial changes to the project or its circumstances, or in the event of material new and previously unavailable information. [Citation.] In contrast, **when a tiered EIR has been prepared, review of a subsequent project proposal is more searching**. **If the subsequent project is consistent with the program or plan for which the EIR was certified, then "CEQA requires a lead agency to prepare an initial study** to determine if the later project may cause significant environmental effects not examined in the first tier EIR." [Citation.] **If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed** in a project—or another tiered EIR if it may have a significant effect on the environment.

San Mateo Gardens, 1 Cal.5th at 960 (citations and quotation marks omitted, emphasis added); *accord Save Our Access v. City of San Diego* (2023) 92 Cal.App.5th 819, 845. Here, it is undisputed that Respondents did not prepare any initial study.

The California Supreme Court in *San Mateo Gardens* rejected Respondents' erroneous argument that a "deferential standard" of review under Public Resources section 21166 should apply to the City's determination that no further CEQA review was required. RB 89. Contrary to Respondents' claims, environmental review of a project after an EIR has been prepared for a program is "not governed by section 21166's deferential substantial evidence standard." 1 Cal.5th at 960. Instead, the agency must apply the "more exacting standard" under section 21094 to evaluate whether the later project's impacts were "fully examined in the initial program EIR." *Id.*

As this Court recently confirmed, "section 21166 controls only when the question is whether more than one EIR must be prepared for what is essentially the same project." *Save Our Access*, 92 Cal.App.5th at 844 (quotation marks and citation omitted). Here, the Approvals and the City's

CAP are not the same project, and Respondents do not contend to the contrary. *See* AR:3 (City's Notice of Determination (NOD) for Approvals: "Project Title: Actions Related to the Award of Gas and Electric Franchises and Cooperation Agreement with [SDG&E]"); *compare* AR:7 (City's NOD for CAP PEIR: "Project Title: "Climate Action Plan"), 3287 (City's NOD for addendum to CAP PEIR: "Project Title: Climate Action Plan Consistency Checklist and CEQA GHG Emissions Significance Threshold"). The Approvals in no way purport to be the same project as the CAP, just as they do not purport to be the same project as the City's General Plan Update or any other plan or project. *See Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1171-72 (county violated CEQA where, rather than analyzing the environmental effects its CAP, "the County made an erroneous assumption that the CAP and Thresholds project was the same project as the general plan update" and improperly proceeded under section 21166). Because the Approvals are not the same project as the CAP, nor do they "revise" or "modify" the CAP (RB 89-91), section 21166 does not apply as a matter of law.

The City failed to comply with section 21094 because it failed to prepare an initial study to determine the relationship, if any, between the Approvals and the CAP PEIR. And the City failed to comply with Guidelines section 15064.4 because it failed to determine the significance of the greenhouse gas emissions impacts resulting from the Approvals. *See* RB 71 (arguing that comparing project impacts to the existing "baseline" is "impossible").

As a result, the City failed to identify any requirements in the CAP that apply to the Approvals, or to incorporate mitigation measures as required by CEQA. *See* Guidelines §§ 15183.5(b)(2) ("An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that

apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigations measures applicable to the project."); 15091(d) (mitigation measures must be fully enforceable). Any CAP applicable requirements would need to be incorporated directly in the project as mitigation measures. *See McCann*, 70 Cal.App.5th at 95-96 ("The Checklist expressly states that it does not apply to projects that do not require certificates of occupancy...").

Without any assessment of the greenhouse gas emissions involved with the Approvals, much less of their environmental impact, decision-makers and the public had no way to assess the extent of the significant climate change impacts involved or the extent to which the Approvals will fail to meet the City's climate goals. AOB 57-58.

The City failed to adhere to CEQA's mandatory requirements for relying on the PEIR and entirely failed to consider the greenhouse gas emissions and other environmental impacts of the Approvals. Because the City adopted the Approvals with no environmental review whatsoever, the Approvals violate CEQA and must be set aside.

IV. Respondents' request for a limited remedy should be denied.

Respondents argue that "[e]ven if this Court were to find that the City did not fully comply with its obligations under CEQA," it should order an unspecified "lesser remedy" instead of voiding the Franchise Ordinances. RB 91-92. Respondents cite no support for the claim that voiding the Franchises would be "inequitable, inefficient, and disproportionate," other than the vague suggestion that voiding the ordinances would somehow "disrupt" the provision of gas and electricity. RB 92. But, voiding the Franchises would not relieve SDG&E of its obligation to serve the public, as Respondents well know. AR:52431-33 (City Attorney confirming SDG&E's continuing obligation to serve); Pub. Util. Code, § 451 (SDG&E required to maintain service as "necessary to

promote the safety, health, comfort, and convenience of … the public"); Cal. Const. art. XII, § 3 (private utility corporations serving the public "are public utilities subject to control by the Legislature").

A. The Court possesses broad equitable powers to enforce CEQA.

While it is unclear exactly what remedy Respondents are requesting, it is clear that, under CEQA, "a trial court retains all of its traditional equitable powers to remedy violations of the law." *NRDC*, 98 Cal.App.5th at 1236. Thus, in *NRDC*, the Fourth District found that, where the city violated CEQA in adopting a lease for continued port operations, the trial court could do more than simply direct the city to revise its CEQA review. *Id.* As the Court emphasized, such a limited remedy "permits the Port to violate CEQA without any real consequence. CEQA does not countenance such a result." *Id.* The Court described various remedies the trial court could require upon remand, including setting "a strict timeline" for CEQA compliance, and found that the trial court should exercise its discretion ensure that the port complies with CEQA's mandates. *Id.* at 1238-39.

Here, SDG&E will remain legally obliged to continue providing gas and electric service if the Franchise Ordinances are void. AR:52431 (City Attorney explaining that "if the current gas and electric franchises expire without extension, amendment, or new franchises in place, the incumbent gas and electric corporation has a duty to continue service"). Voiding the Franchises Ordinances and associated approvals and directing the City to cure its legal violations will not change SDG&E's fundamental legal obligation to serve its customers. *Ibid.*

This Court can require SDG&E to continue providing gas and electric service (pursuant to its statutory mandates) under the terms of the City's expired franchises on an interim basis, which is the approach that the City took after the 1970s franchises expired and before the City granted the

Franchises. AR:1816-24; *see POET,* 218 Cal.App.4th at 699 (setting aside approval of low carbon fuel standard regulations while allowing regulations to remain in effect in the interim); *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 423 (courts "rely on traditional equitable principles in deciding" the proper CEQA remedy); *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455-56 (ordering city to void approval of prison expansion project and decertify EIR while allowing continued operation of the existing prison). The Court could also order a "strict timeline" for CEQA compliance. *NRDC,* 98 Cal.App.5th at 1238.

B. This Court should set aside the Approvals to ensure the City complies with its competitive bidding mandates and Proposition 26.

Courts also have wide discretion to fashion equitable remedies where a public agency awards a contract in violation of competitive bidding laws. In such circumstances, the California Supreme Court has held that "setting aside the contract" is "the most effective enforcement of the competitive bidding law." *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* (2000) 23 Cal.4th 305, 313, fn. 1; *see also Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1412 (directing agency to set aside wrongfully awarded contract and rejecting claim that relief may be denied "based on the balance of hardships"). In *Eel River,* 221 Cal.App.4th at 240, fn. 13, for example, the court found that the proper remedy, two years into a 10-year solid waste disposal franchise that had been awarded in violation of competitive bidding laws, was to (1) set aside the award; (2) order the agency to re-bid; (3) while the bidding process is underway, order the entity initially awarded the contract to continue providing services; and (4) order the agency to pay for those services on a per diem basis. The Court here has

similarly broad discretion to set aside the Approvals and fashion a remedy, without any risk of interrupting utility service.

The remedy for violations of the California Constitution's voter approval laws for new fees and taxes are also subject to the court's broad equitable authority. In *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1437-40, 1451, for example, the water agency adopted an increase in wholesale water rates that violated Proposition 26. The appellate court upheld the trial court's remedy: ordering the agency to rescind its new higher rates, "to revert to the rates previously in effect until the adoption of new lawful rates," and to refund to plaintiff the overcharge. *Id*. at 1440, 1451-52; *see also Monterey Peninsula Taxpayers Assn. v. County of Monterey* (1992) 8 Cal.App.4th 1520, 1541-42 (rejecting agency's argument that invalidation of unconstitutional tax would cause unfair hardship, holding that Proposition 13 requires "supermajority approval of new special taxes *regardless* of how badly the revenues [are] needed"); *Coziahr v. Otay Water Dist.* (2024) 103 Cal.App.5th 785, 823-26 (holding that refund to ratepayers was appropriate remedy for rates imposed in violation of Proposition 218).

This Court, or the trial court, could also order further briefing on the appropriate remedy necessary to provide to provide relief once the merits of the case are decided.

V. This Court should uphold the trial court's finding that the City violated the Charter by requiring a two-thirds vote for Franchise termination.

The trial court correctly held that "the City's decision to impose a two-thirds voting requirement on franchise termination violates the express terms of Charter section 15." JA3:1333-34. Charter Section 15 provides that, "Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt

any ordinance, resolution, order or vote.…" The Franchises, however, provide that the City may terminate the Franchises at any time for breach, or at the end of the first 10-year term for any reason, only upon a "two-thirds vote of the members of the City Council." AR:47 (Gas Franchise, Section 13(c) & (d)); AR:97 (Electric Franchise, Section 15(c) & (d)). Because these provisions are inconsistent with the plain language of the City Charter, the trial court's order must be upheld.

A. The Franchise provisions requiring a two-thirds vote for Franchise termination conflict with the City Charter's express language providing for City Council action by majority vote and are therefore void.

The Charter provides that decision-making by the City Council proceeds by majority vote unless the Charter expressly provides otherwise. Charter Section 15. One of the limited circumstances when City Council action requires a two-thirds—rather than a majority—vote is when the Council adopts an ordinance granting a franchise or "renewals, extensions and amendments thereof":

> The Council shall have power to grant to any person, firm or corporation, franchises, and all renewals, extensions and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants shall be made by ordinance adopted by vote of two-thirds (2/3) of the members of the Council….

Charter Section 103. The Charter does not exempt franchise *terminations* from the majority vote requirement in Charter Section 15.

Accordingly, the trial court correctly determined that the ordinance language imposing a two-thirds voting requirement on franchise termination violated the express terms of the Charter by restricting the authority of the City Council to act by majority vote. "A charter city may not act in conflict with its charter." *Howard Jarvis Taxpayers Assn. v. City*

of Roseville ("*Roseville*") (2003) 106 Cal.App.4th 1178, 1186 (citation omitted).

Respondents argue that Charter Section 15 provides a "floor" not a "ceiling"—that the majority vote requirement is merely a "minimum vote threshold" and that the Council is free to adopt "higher vote thresholds" in its discretion. RB 95 (emphasis omitted). But nearly identical arguments were rejected by this Court in *Howard Jarvis*.

Howard Jarvis struck down two competing local ballot propositions to amend the City Charter because both attempted to impose supermajority voting requirements where only a majority vote was required. The Court first held that Proposition F, which required a supermajority vote of the City's electorate for certain Charter amendments, was invalid because it conflicted with the constitutional provision that a city "'may'" amend a charter "'by majority vote of its electors.'" *Howard Jarvis*, 120 Cal.App.4th at 378, 385 (quoting Cal. Const., art. XI, § 3 (a)).

Just as it does here, the City argued that the majority voting requirement was a floor not a ceiling. The City claimed that the constitutional provision stating that charter amendments "*may* be amended" by majority vote "*permits* a charter city to amend its charter by majority vote" but does not "*prohibit*[] such a city from requiring that charter amendments be approved by a supermajority (two-thirds) vote." *Id.* at 385 (emphasis added by court). The *Howard Jarvis* Court "reject[ed] these assertions," noting that "if we were to allow Proposition F to take effect, San Diego voters would no longer be permitted to approve all proposed amendments of the charter by majority vote even though article XI, section 3(a) expressly provides that they may do so." *Id.* at 385-86. Because the supermajority vote requirement was "in conflict with" the constitutional provision stating that a city "may" amend its charter by majority vote, it could not be enforced and was required to be severed. *Id.* at 386, 379.

Howard Jarvis invalidated the other ballot measure, Proposition E, on similar grounds. Proposition 218 provides that no general tax may be imposed unless "approved by a *majority vote*" of the electorate. *Id*. at 391 (quoting Art. XIII C §2(b)) (emphasis added by court). Proposition E, however, amended the Charter to require taxes to be approved by a *two-thirds* vote of the electorate. In defending Proposition E, the ballot proponent also argued this provision was a floor, not a ceiling. *Id.* at 392. It claimed that Proposition 218 merely required "*at least* majority approval" and that since a "a tax receiving two-thirds of the vote necessarily also receives majority approval," Proposition E did not conflict with the constitutional "majority vote rule." *Id*. This Court again disagreed, holding that a supermajority voting requirement plainly conflicted with the mandates of Proposition 218:

> [Proposition 18] states that "[n]o local government may impose ... or increase any general tax unless and until that tax is submitted to the electorate and approved by a *majority vote.* ..." (Italics added.) This constitutional language clearly and unambiguously means that approval of a local government's imposition or increase of any general tax requires only a majority vote, and a two-thirds vote cannot be required for such approval. Had the drafters … intended the term "majority vote" to mean "*at least* a majority vote" or a "majority vote, *including a two-thirds vote at the election of the electorate*," they easily could have done so.

Id. at 392-93. The Court also found that, because Proposition 218 expressly distinguishes taxes requiring a majority vote from those requiring a two-thirds vote, the term "majority vote" was not intended "to expansively include a supermajority vote." *Id.* at 393. Rather, the initiative's "plain language" indicated that "majority vote" and "two-thirds vote" were intended to "be treated as separate and distinct voting requirements." *Id.* Finally, the Court found that, to the extent Proposition E would require a

two-thirds vote to amend the Charter to impose a general tax, it would also violate Article XI Section 3 of the Constitution just as Proposition F did. *Id.* at 394-95.

Numerous courts have since set aside supermajority voting requirements that conflict with provisions that authorize majority votes. *See Alliance San Diego v. City of San Diego* (2023) 94 Cal.App.5th 419, 436-37 (City ordinance stating that tax measure required two-thirds vote of electorate to pass was erroneous and "could not supplant the governing law" allowing approval by majority vote); *Howard Jarvis Taxpayers Association v. City and County of San Francisco* (2021) 60 Cal.App.5th 227, 231-34 (two-thirds vote not required where general rule was that initiatives could be adopted by majority vote).

The termination provisions in the Franchises invalidly preclude the City Council from terminating the Franchises by majority vote even though the Charter "expressly provides that they may do so." *Howard Jarvis*, 120 Cal.App.4th at 386; *compare* AR:47 (Gas Franchise, Section 13(c)& (d)); AR:97 (Electric Franchise, Section 15(c)& (d)) *with* Charter Section 15 (Council may act by "affirmative vote of a majority" "[e]xcept as otherwise provided"). The City Charter, like Proposition 218, clearly distinguishes approvals that require a two-thirds Council vote from those subject to the general majority vote rule. Thus, Charter Section 15's "plain language" shows an intent "that 'majority vote' and 'two-thirds vote' be treated as separate and distinct voting requirements." *See Howard Jarvis,* 120 Cal.App.4th at 392. Requiring a two-thirds vote to terminate the Franchises makes a majority vote ineffective, and conflicts with the Charter's applicable majority vote requirement.

Respondents mistakenly insist that their own interpretation of Section 15 is "entitled to great weight and deference." RB 94 (citing cases involving interpretations of city ordinances). But construing a city charter is

a legal issue that the courts "review de novo." *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 789. On purely legal questions, the courts "exercise independent judgment and a decision must be reversed if based on erroneous conclusions of law." *Family Health Centers of San Diego,* 15 Cal.5th at 10 (quotation marks omitted) (quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109).

Here, Respondents' erroneous interpretation of its Charter would allow any sitting City Council to adopt ordinances, contracts or other agreements by majority vote and then provide that their actions could be undone by future Councils only with a supermajority—or even a unanimous—vote. Such a supermajority voting requirement would flatly conflict with the Charter's unambiguous language that the Council may act by majority vote "[e]xcept as otherwise provided" in the Charter. Charter Section15; *Domar*, 9 Cal.4th at 171-72 (holding a city has no authority to take any action that conflicts with its Charter and courts "look first to the language of the charter, giving effect to its plain meaning").

Allowing this Council to impose a supermajority voting requirement for franchise termination improperly divests future City Councils of their authority to legislate. *Cf. City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929 (legislative bodies may not divest future bodies of the power to legislate); *Alliance San Diego*, 94 Cal.App.5th at 431 (noting concerns that two-thirds voting requirements are "fundamentally undemocratic" and must be "strictly construed") (quotation marks omitted). Supermajority voting requirements cannot be imposed, where, as here, the controlling authority allows approvals to proceed by majority vote. The trial court therefore properly rejected the City's interpretation, and this Court should as well.

B. The Charter's two-thirds vote requirement for amending a franchise does not apply to terminating a franchise.

Respondents also note that certain Charter provisions, like Section 103, *do* require a two-thirds vote. RB 95. Petitioner agrees. *See* Charter Section 103 (requiring two-thirds vote for Council decision to grant a franchise and "all renewals, extensions and amendments thereof"). But the City's Charter does *not* require a two-thirds vote to terminate a franchise. "'Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.'" *City of Torrance v. Southern California Edison Company* (2021) 61 Cal.App.5th 1071, 1088 (where ordinance includes three "limited exclusions" from general rule, the court may not rewrite it to "'make it conform to a presumed intention which is not expressed'") (citations omitted). This canon of statutory interpretation requires that courts infer that a listing of items to which a law applies is complete. *See In re Lerke* (2024) 328 Cal.Rptr.3d 494, 505-06.

Here, the Charter expressly identifies when a two-thirds vote—instead of generally applicable majority rule—applies. Terminating a franchise is not included in the enumerated list that requires a two-thirds vote in Charter Section 103, and the Court cannot simply declare otherwise. *See California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 584 (role of court is "to simply ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted or omit what has been included") (quotation marks omitted); *see also San Diegans for Open Government*, 63 Cal.App.5th at 174 ("Where the words of the charter are clear, [the Court] may not add to or alter them to accomplish a purpose that does not appear on the face of the charter….").

Respondents' request that this Court interpret the term "amendments" to include "termination" (RB 95-96) is equally unsupportable. Courts have long recognized the difference between contract "amendment" or "extension" and contract "termination." "A contract that is terminated ceases to bind the parties." *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1189. In contrast, an extension is the "'continuation of the same contract for a specified period'" and a modification or amendment is an "alteration" to an existing agreement. *Id.* (quotation marks omitted); *see also Grant v. Aerodraulics Co.* (1949) 91 Cal.App.2d 68, 74–75 (a "well-recognized distinction in meaning exists between the alteration and the termination of a contract": an alteration "introduces new elements into the details of the contract" while leaving the "general purpose and effect undisturbed" while a termination abrogates it, "thereby doing away with the existing agreement") (quotation marks omitted).

To terminate the Franchises here there would be no need to amend their provisions. AR:21-22, 65-66. Respondents cite nothing supporting their claim that "amendment" means "termination," and their assertion remains contrary to the plain language and the meaning of the words contained in Section 103.

C. Unrelated City ordinances have no bearing on the invalidity of the termination provisions.

Respondents next assert that a standard procedural requirement—a code provision requiring the City Attorney to advise whether a supermajority vote is required for an ordinance to pass—somehow gives the City Council the authority to require a supermajority vote for any action. RB 96 (citing S.D. Mun. Code, § 22.0101). But an ordinance that simply requires the City Council to be informed about *whether* a supermajority vote is required provides no basis to allow the City to create

new supermajority vote requirements that conflict with the Charter's express voting specifications.

That the City's code "contemplates that a supermajority vote *may* be required" for certain ordinances to pass (RB 96) does not suggest a two-thirds vote may be required for terminating a franchise. Section 103, as discussed above, requires a supermajority vote for franchise approvals. Other Charter provisions require a two-thirds vote in other circumstances. *See, e.g.*, Section 11.2 (certain memorandums of understanding); Section 90.1 (authorization of revenue bonds); Section 91.1 (use of emergency reserves). But Respondents cannot use inapplicable municipal ordinances to trump the Charter. *See Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 392 ("An ordinance can no more change or limit the effect of a charter than a statute can modify a provision of the State Constitution."). The trial court properly rejected Respondents' argument as irrelevant. JA3:1334.

Respondents also argue that miscellaneous other City ordinances provide for a two-thirds Council vote. RB 96-97 (referencing ordinances related to City Council meeting procedure, emergency decision-making, and overruling the Airport Land Use Commission). All the ordinances relied on by Respondents involve other laws and Charter provisions that are not relevant here.[11] The validity of these ordinances, and their consistency with the Charter, are not at issue. Respondents fail to connect the random City ordinances to which they cite to the legality of the two-thirds termination vote at issue. The trial court properly rejected the City's arguments, and this Court should as well.

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[11] Charter Section 295(e), for example, requires a two-thirds City Council vote to pass an emergency ordinance, and thus could constitute the authority for requiring a supermajority to authorize "emergency awards" for public works contracts and "interim emergency zoning ordinances." *See* RB 97.

D. Terminating a franchise does not require a resolution of necessity.

Respondents argue that State law requires condemnation proceedings to be initiated by a resolution of necessity requiring a two-thirds vote, and that the Council "recognized" this in adopting the two-thirds requirement. RB 98 (quoting CCP, § 1245.240); *see also id.* , § 1245.220. This argument is wrong. A vote to terminate a franchise cannot be conflated with a decision to adopt a resolution of necessity.

As the trial court concluded, the Charter mandates that "all decision-making by the City Council proceed by majority vote unless expressly excepted from the majority vote requirement." JA3:1333. While a decision to terminate a franchise *could* be made in circumstances that might ultimately lead to the City adopting a resolution of necessity, the two decisions are separate and distinct. State law requires agencies to *avoid* assuming condemnation procedures are necessary, and mandates voluntary negotiations as a prerequisite to any resolution of necessity. CCP, § 1245.230; Gov. Code, §7267.2; *accord* Charter Section 104 (City Council has right to terminate a franchise "by ordinance whenever the City shall determine to acquire by condemnation *or otherwise* the property of any utility necessary for the welfare of the City") (emphasis added). Thus, even the "acquisition of at least some of SDG&E's equipment and facilities" (RB 98) would not necessarily require a resolution of necessity as a matter of law (*id.*).

But no basis exists to assume that terminating the Franchises pursuant to their terms would necessitate the acquisition and condemnation of SDG&E's equipment and facilities as Respondents assert without any citation. RB 98. A franchisee's rights depend upon the terms of a franchise grant. *SoCalGasCo. v. City of Los Angeles* (1958) 50 Cal.2d 713, 716. The terms of the Franchises do not require the City to purchase any of

SDG&E's equipment or facilities upon termination. The Franchises, once terminated, would cease to exist except as expressly stated therein. AR:54, 101 (severability provisions).

To provide power to its constituents absent the Franchises, the City could start anew with modern technology and system designs instead of acquiring SDG&E's antiquated, fossil fuel-based system. Nonetheless, to the extent that the City (or a potential franchisee) *elected* to acquire any of the facilities or equipment that SDG&E has dedicated to public use, voluntary negotiations would necessarily occur before any condemnation proceeding could be initiated. CCP, § 1245.230; Gov. Code, §7267.2. CCP section 1245.240 applies exclusively when a public agency adopts a resolution of necessity in initiating condemnation proceedings, not to a City's separate decision to terminate a franchise.

In sum, the trial court properly recognized that the provisions of the Ordinances requiring a two-thirds vote to terminate the Franchises conflict with the Charter and are void. *Roseville*, 106 Cal.App.4th at 1186 ("Any act that is violative of or not in compliance with the charter is void."). This Court should uphold the trial court's determination.

E. The trial court's minute order should be corrected to reference the correct termination provisions.

As PCF argued in its opening brief (AOB 45-46), after correctly holding that the City's decision to impose a two-thirds voting requirement on franchise termination violates the express terms of Charter Sction 15 (JA3:1333), the trial court made two apparently inadvertent errors. First, the trial court cited to 13(c) and (d) of the Gas Franchise but omitted the identical provisions in the Electric Franchise: sections 15(c) and (d). AR:47 (Gas Franchise section 13(c) & (d)); AR:97 (Electric Franchise section 15(c) & (d)); JA3:1333-34. Second, the trial court referred to a two-thirds

vote requirement in Gas Franchise section 13(e) that does not exist and thus was not, and could not have been, litigated. JA3:1334.

The two-thirds vote provisions that were challenged by PCF apply where the City Council is terminating for breach or to void the automatic renewal of the second term. *See* AR:47 (Gas Franchise, Section 13(c)& (d)); AR:97 (Electric Franchise, Section 15(c)& (d)). Respondents recognize and do not dispute that these provisions are the "relevant provisions." RB 93.

In contrast, Sections 13(e) and 15(e) of the franchise ordinances, which address termination for municipalization, do not contain a two-thirds vote requirement at all. *See* AR:48 (Gas Franchise, Section 13(e); AR: 98 (Electric Franchise, Section 15(e)). Nor do the constitutional and charter provisions that authorize the City to municipalize its utility services. *See* Cal. Const. art. XI, § 9 ("A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, [] power, heat…"); Charter Sections 1, 2 (City "may own and operate public utility systems," including those for "electrical power," and may exercise constitutional powers); Charter § 26.1 (City may provide services "as may be desired, under such terms and conditions as may be authorized by the Council by ordinance"). Thus, no "two-thirds vote termination requirement in section 13(e)" (JA3:1334) exists or could have been litigated. JA3:1344-45, 1432-33.

PCF therefore requests this Court uphold the trial court's conclusion that the two-thirds termination provisions violate Charter Section 15. PCF further requests that this Court correct the trial court's ruling so that this Court's opinion (1) references the actual two-thirds termination provisions that are at issue (13(c)&(d), 15(c)&(d)), and (2) clarifies that section 13(e) of the gas franchise does not contain a two-thirds vote requirement and thus was not at issue in this case.

CONCLUSION

For the reasons set forth above, this Court should hold that the Charges are taxes imposed without a vote of the people, in violation of Proposition 26, and set aside the Approvals because they were adopted in violation of competitive bidding principles and CEQA. The Court should uphold the trial court's judgment that the two-thirds terminations provisions in the Franchises violate the City Charter.

DATED: February 14, 2025

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CERTIFICATE OF WORD COUNT

The text of this Appellant and Cross-Respondent's Brief consists of 27,998 words, not including the certificate of interested parties, tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: February 14, 2025

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