

**ITEM 3**  
**TEST CLAIM**  
**PROPOSED DECISION**

Public Utilities Code Section 132354.1

Statutes 2017, Chapter 658 (AB 805)

*SANDAG: Independent Performance Auditor*

19-TC-03

San Diego Association of Governments, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Test Claim alleges reimbursable state-mandated activities and increased costs imposed on the San Diego Association of Governments (claimant/SANDAG) arising from Public Utilities Code section 132354.1(b)(2), (b)(3), (b)(4), (c), (d), and (e), enacted by Statutes 2017, chapter 658 (AB 805). The test claim statute requires SANDAG, as the San Diego County consolidated transportation agency, to appoint an independent performance auditor who is charged with specified powers and responsibilities, including the power to appoint and employ staff as deemed necessary. SANDAG also alleges that the test claim statute requires it to incur associated costs, such as for equipment and supplies, training and development, audit-related travel, and professional fees and licensing.

Staff finds that the claimant is not subject to the taxing and spending limitations of articles XIII A and XIII B and is therefore ineligible to claim mandate reimbursement under article XIII B, section 6. Alternatively, staff finds that even if SANDAG were an eligible claimant, it has fee authority sufficient to offset the costs associated with the new activities required by the test claim statute. Accordingly, staff recommends that the Commission on State Mandates (Commission) deny this Test Claim as specified herein.

**Procedural History**

The claimant filed the Test Claim on March 19, 2020.<sup>1</sup> The claimant filed comments on the Test Claim on May 21, 2020.<sup>2</sup> The City of Imperial Beach filed comments on the Test Claim on May 22, 2020.<sup>3</sup> Jim Desmond, San Diego County Supervisor, Fifth District filed comments on

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<sup>1</sup> Exhibit A, Test Claim.

<sup>2</sup> Exhibit B, Claimant's Comments on the Test Claim.

<sup>3</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim.



the Test Claim on May 26, 2020.<sup>4</sup> The City of Chula Vista filed comments on the Test Claim on May 27, 2020.<sup>5</sup> The City of El Cajon filed comments on the Test Claim on May 27, 2020.<sup>6</sup> Mr. Paul J. Dostart, a corporate tax attorney and SANDAG audit committee member, filed public comments on the Test Claim on May 27, 2020.<sup>7</sup> The City of La Mesa filed comments on the Test Claim on May 28, 2020.<sup>8</sup> The City of Lemon Grove filed comments on the Test Claim on May 28, 2020.<sup>9</sup> The City of National City filed comments on the Test Claim on May 28, 2020.<sup>10</sup> The City of Oceanside filed comments on the Test Claim on May 28, 2020.<sup>11</sup> The City of Vista filed comments on the Test Claim on May 28, 2020.<sup>12</sup> The City of Carlsbad filed comments on the Test Claim on May 29, 2020.<sup>13</sup> The City of Del Mar filed comments on the Test Claim on May 29, 2020.<sup>14</sup> The City of Encinitas filed comments on the Test Claim on May 29, 2020.<sup>15</sup> The City of Solana Beach filed comments on the Test Claim on May 29, 2020.<sup>16</sup> The Department of Finance (Finance) filed a request for extension of time on June 3, 2020.<sup>17</sup> Commission staff issued the Notice of Extension Request Approval on June 3, 2020.<sup>18</sup> Finance filed comments on the Test Claim on June 29, 2020.<sup>19</sup> Commission staff issued the Draft Proposed Decision on July 15, 2020.<sup>20</sup> The claimant filed rebuttal comments on the Test Claim

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<sup>4</sup> Exhibit D, Jim Desmond, San Diego County Supervisor, Fifth District's Comments on the Test Claim.

<sup>5</sup> Exhibit E, City of Chula Vista's Comments on the Test Claim.

<sup>6</sup> Exhibit F, City of El Cajon's Comments on the Test Claim.

<sup>7</sup> Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim. Note that it is unclear if Mr. Dostart remains a member of the audit committee as his appointment expired June 30, 2020 and there is nothing on the SANDAG website indicating whether he has been re-appointed.

<sup>8</sup> Exhibit H, City of La Mesa's Comments on the Test Claim.

<sup>9</sup> Exhibit I, City of Lemon Grove's Comments on the Test Claim.

<sup>10</sup> Exhibit J, City of National City's Comments on the Test Claim.

<sup>11</sup> Exhibit K, City of Oceanside's Comments on the Test Claim.

<sup>12</sup> Exhibit L, City of Vista's Comments on the Test Claim.

<sup>13</sup> Exhibit M, City of Carlsbad's Comments on the Test Claim.

<sup>14</sup> Exhibit N, City of Del Mar's Comments on the Test Claim.

<sup>15</sup> Exhibit O, City of Encinitas's Comments on the Test Claim.

<sup>16</sup> Exhibit P, City of Solana Beach's Comments on the Test Claim.

<sup>17</sup> Exhibit T, Finance's Request for Extension of Time.

<sup>18</sup> Exhibit T, Notice of Extension Request Approval.

<sup>19</sup> Exhibit Q, Finance's Comments on the Test Claim.

<sup>20</sup> Exhibit R, Draft Proposed Decision.



and comments on the Draft Proposed Decision on July 20, 2020.<sup>21</sup> Finance did not file comments on the Draft Proposed Decision.

### **Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>22</sup>

### **Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Was the Test Claim timely filed pursuant to Government Code section 17551?	Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”	<i>Timely Filed</i> – Costs were first incurred as a result of the test claim statute on April 2, 2019. The Test Claim was filed on March 19, 2020. Accordingly, the Test Claim was filed within 12 months of incurring increased costs as a result of the test claim statute, which is timely pursuant to the second prong of Government Code section 17551(c).
Is SANDAG eligible to seek reimbursement under article XIII B, section 6?	To be eligible to claim reimbursement under article XIII B, section 6, a claimant must be subject to the tax and spend provisions of articles XIII A and XIII B.	<i>Deny</i> – SANDAG is not subject to the taxing and spending limitations of articles XIII A and XIII B because it lacks the authority to impose taxes, does not expend local

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<sup>21</sup> Exhibit S, Claimant’s Rebuttal Comments and Comments on the Draft Proposed Decision.

<sup>22</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.



Issue	Description	Staff Recommendation
		proceeds of taxes, and does not have an appropriations limit. Thus, SANDAG is not eligible for subvention under article XIII B, section 6.
Has SANDAG incurred “costs mandated by the state”?	Government Code section 17556(d) provides that reimbursement under article XIII B, section 6 of the California Constitution is not required when a local agency has fee, service charge or assessment authority sufficient to pay for the mandated costs of the program.	<i>Deny</i> – SANDAG has not incurred “costs mandated by the state” because it has sufficient fee authority to pay for the new required activities imposed by the test claim statute pursuant to Government Code section 17556(d).
Did the Commission violate the claimant’s due process rights or commit prejudicial error or bias in favor of Finance in granting Finance’s request for an extension of time to file comments on the Test Claim or in issuing the Proposed Decision?	The protections of procedural due process apply to administrative proceedings, and administrative agencies must abide by the basic precepts of a fair hearing before a neutral or unbiased decision-maker. <sup>23</sup> A violation of due process on the basis of bias requires “concrete facts” showing “an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims.” <sup>24</sup>	<i>No</i> – While Finance did not strictly adhere to the Commission’s regulations in the timing and format of its extension request, the extension did not shorten the rebuttal period, exclude the parties’ rebuttal arguments from the Proposed Decision presented to the Commission, or cause the hearing to be postponed. The claimant’s rights to file written comments and testimony have been preserved. The “Proposed Decision” was not issued prior to the end of the rebuttal comment period; the claimant,

<sup>23</sup> *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 4; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-91. This basic principle is consistent with the California Law Revision Commission’s note on Government Code section 17533. Section 17533 provides that Chapter 4.5, beginning with section 11400 of the Administrative Procedures Act, does not apply to a hearing by the Commission. The note by the Law Revision Commission states that “Nothing in section 17533 excuses compliance with procedural protections required by due process of law.”

<sup>24</sup> *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, citing *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.



Issue	Description	Staff Recommendation
		<p>as well as any interested party, was given the full length of time allowed by the Commission's regulations and to file rebuttal comments and comments on the "Draft Proposed Decision" prior to issuance of the Proposed Decision or the presentation of any written decision to the Commission.</p> <p>The issues presented in this Test Claim are pure issues of law, subject to the Commission's de novo review.<sup>25</sup> The claimant and interested parties have been given a full opportunity to file written comments and provide testimony in support of the Test Claim. The claimant has not established that Commission staff, in granting Finance's request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision, would result in the Commission members acting with "an unacceptable probability of actual bias" in reaching their decision on the Test Claim.</p>

### **Staff Analysis**

#### **A. The Test Claim Was Timely Filed Pursuant to Government Code Section 17551.**

Government Code section 17551(c) requires that a test claim be filed "not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." The Test Claim

<sup>25</sup> *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 and 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281.



includes a declaration by the Andre Douzdzian, Chief Financial Officer for SANDAG, stating that SANDAG first incurred costs as a result of the test claim statute on April 2, 2019.<sup>26</sup> The Test Claim was filed on March 19, 2020. Accordingly, the Test Claim was filed within 12 months of first incurring increased costs as a result of the test claim statute, which is timely pursuant to the second prong of Government Code section 17551(c).

**B. SANDAG Is Not Eligible to Claim Reimbursement Under Article XIII B, Section 6, Because SANDAG Has No Authority to Impose Taxes and Is Not Subject to the Appropriations Limit of Article XIII B.**

Public Utilities Code section 132354.1, as amended by the test claim statute, requires SANDAG to perform the following activities:

- Appoint an independent performance auditor, who is charged with conducting performance audits of “all departments, offices, boards, activities, agencies, and programs of the consolidated agency”<sup>27</sup>; prepare an annual audit plan<sup>28</sup>; and appoint, employ and remove staff as necessary to carry out the duties of the office and prescribe the duties, scope of authority and qualifications of its staff.<sup>29</sup> The auditor is authorized to investigate claims of financial fraud, waste or impropriety within the consolidated agency and may conduct examinations under oath for that purpose.<sup>30</sup>
- Establish internal control guidelines to prevent and detect financial errors and fraud;<sup>31</sup> establish an administration policy pertaining to regularly conducting staff performance evaluations to ensure that staff are sufficiently qualified<sup>32</sup>; and make an annual report to member agencies at a public meeting that summarizes the consolidated agency’s activities, including “program developments, project updates, changes to voter-approved expenditure plans, and potential ballot measures.”<sup>33</sup>
- Fully cooperate with the auditor, including making a full disclosure of all pertinent information and granting the auditor unrestricted access to necessary employees, information, and records.<sup>34</sup>

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<sup>26</sup> Exhibit A, Test Claim, pages 21, 23.

<sup>27</sup> Public Utilities Code section 132354.1(b)(2).

<sup>28</sup> Public Utilities Code section 132354.1(b)(2).

<sup>29</sup> Public Utilities Code section 132354.1(b)(3).

<sup>30</sup> Public Utilities Code section 132354.1(b)(4).

<sup>31</sup> Public Utilities Code section 132354.1(c).

<sup>32</sup> Public Utilities Code section 132354.1(d).

<sup>33</sup> Public Utilities Code section 132354.1(e).

<sup>34</sup> Public Utilities Code section 132354.1(b)(2).



- Include, in all contracts with consultants, vendors, or agencies an audit provision allowing the auditor access to the entity's records as needed to verify compliance with the contract terms.<sup>35</sup>
- Make all audit results and reports publicly available.<sup>36</sup>

SANDAG seeks reimbursement for the costs of hiring an independent performance auditor and additional audit staff, and for associated costs, including equipment and supplies, training and professional development, travel, and professional dues and licensing.<sup>37</sup>

To be eligible for reimbursement under article XIII B, section 6, a local agency must be subject to the taxing and spending limitations of article XIII A and XIII B of the California Constitution. Here, reimbursement is not required because SANDAG has no authority to levy taxes subject to the appropriations limit of article XIII B and therefore is not eligible to claim mandate reimbursement under section 6.

Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of tax revenues which are subject to limitation.

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.<sup>38</sup>

SANDAG is a statutorily created consolidated transportation agency, comprised of the San Diego Association of Governments, a joint powers agency, and the San Diego Metropolitan and North San Diego County Transit Development Boards.<sup>39</sup> The consolidated agency is the successor agency to SANDAG and the two transit boards and is a statutorily created regional

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<sup>35</sup> Public Utilities Code section 132354.1(b)(4).

<sup>36</sup> Public Utilities Code section 132354.1(b)(4).

<sup>37</sup> Exhibit A, Test Claim, pages 11-14.

<sup>38</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

<sup>39</sup> Public Utilities Code section 132353.1.



transportation planning agency under Section 29532.1 of the Government Code.<sup>40</sup> Public Utilities Code section 132351.3 provides, in pertinent part:

As the successor to SANDAG, the consolidated agency succeeds to, continues, and maintains SANDAG's federal, state and local designations, including, but not limited to, designation as the Metropolitan Planning Organization, is the San Diego County Regional Transportation Commission pursuant to Section 132005, is the congestion management agency, and is the council of governments for the San Diego region.<sup>41</sup>

The consolidated agency's rights and powers are enumerated at Public Utilities Code section 132354, which authorizes the consolidated agency to "fix and collect fees for any services rendered by it," but does not authorize the consolidated agency to levy taxes.

Nevertheless, SANDAG argues it is authorized to levy a retail transactions and use tax in the incorporated and unincorporated territory of the county, and to initiate proceedings to establish a community facilities district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district.

**1. The Transportation Commission's taxation power is not imputed to SANDAG.**

Contrary to SANDAG's assertions in the Test Claim, SANDAG has no authority to impose a retail transactions and use tax. A local agency's authority to tax must come from statute.<sup>42</sup>

While SANDAG is statutorily authorized to generate revenue by issuing bonds and collecting fees, there are no statutes authorizing SANDAG to impose taxes.<sup>43</sup> SANDAG's primary fiscal authority is the allocation of funding from a wide variety of sources to transportation projects and programs, with federal and state government funds comprising the majority of SANDAG's revenues.<sup>44</sup>

The Transportation Commission's statutory authority to levy a transactions and use tax is not imputed to SANDAG. Rather, SANDAG and the Transportation Commission are separate legal entities, with SANDAG's board designated by statute to serve as the Transportation Commission,<sup>45</sup> and SANDAG's joint powers agreement, bylaws, and rules and regulations

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<sup>40</sup> Public Utilities Code section 132351.3.

<sup>41</sup> Public Utilities Code section 132351.3.

<sup>42</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 450 ["Taxes are levied by the Legislature, or by counties and municipalities under their delegated power, for the support of the state, county, or municipal government"].

<sup>43</sup> Public Utilities Code section 132354.

<sup>44</sup> Exhibit T, LAO, *SANDAG, An Assessment of Its Role in the San Diego Region* (March 30, 2006), <https://lao.ca.gov/Publications/Detail/1471> (accessed on June 19, 2020), page 14; Exhibit T, SANDAG, *Final FY 2020 Program Budget* (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), pages 1-14, 1-19.

<sup>45</sup> Public Utilities Code section 132051.



governing Transportation Commission proceedings and administration.<sup>46</sup> SANDAG's authority to administer the Transportation Commission's transactions and use tax and allocate the revenues in accordance with the tax ordinance does not equate to authority to levy the tax.

As part of the ballot proposition to obtain approval for the retail transactions and use tax, the Transportation Commission was required by statute to seek authorization to establish "the appropriations limit of the commission."<sup>47</sup> The Transportation Commission's transactions and use tax, known as TransNet, was initially approved for a twenty year period (1988-2008).<sup>48</sup> In 2004, San Diego County voters approved a 40-year extension of TransNet (2008-2048).<sup>49</sup> The TransNet Extension Ordinance sets forth the appropriations limit for the Transportation Commission and provides that all expenditures of the transactions and use tax are subject to the appropriations limit.<sup>50</sup>

As such, SANDAG's use of the retail transactions and use tax revenues, whether pursuant to section 132360.6 or as administrator of the TransNet program, does not alter the nature of the tax revenues as the Transportation Commission's "proceeds of taxes" and subject to the Transportation Commission's appropriations limit.

## **2. SANDAG's authority to create a community facilities district does not make SANDAG subject to an appropriations limit.**

Public Utilities Code section 132370.4 authorizes SANDAG, as the consolidated agency, to establish a community facilities district under the Mello-Roos Community Facilities Act.

A Mello-Roos community facilities district is a "legally constituted governmental entity established...for the sole purpose of financing facilities and services"<sup>51</sup> and does not itself

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<sup>46</sup> Public Utilities Code section 132100.

<sup>47</sup> Public Utilities Code section 132309(a).

<sup>48</sup> Exhibit T, TransNet Fact Sheet (April 2018), [https://www.sandag.org/uploads/publicationid/publicationid\\_1788\\_16614.pdf](https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf) (accessed on June 3, 2020), page 1.

<sup>49</sup> Exhibit T, TransNet Fact Sheet (April 2018), [https://www.sandag.org/uploads/publicationid/publicationid\\_1788\\_16614.pdf](https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf) (accessed on June 3, 2020), page 1.

<sup>50</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 16.

<sup>51</sup> Government Code section 53317(b).



provide public services.<sup>52</sup> Community facilities districts fund their services and facilities through levying and collecting special taxes on real property in the district.<sup>53</sup>

The Mello-Roos Community Facilities Act permits a local agency to establish the appropriations limit of a community facilities district, upon approval by the voters of the district.<sup>54</sup> Government Code section 53325.7 states in relevant part:

The legislative body may submit a proposition *to establish or change the appropriations limit*, as defined by subdivision (h) of Section 8 of Article XIII B of the California Constitution, *of a community facilities district* to the qualified electors of a proposed or established district. The proposition establishing or changing the appropriations limit shall become effective if approved by the qualified electors voting on the proposition...<sup>55</sup>

As the plain language of Government Code section 53325.7 makes clear, the appropriations limit under the Mello-Roos Community Facilities Act applies to the community facilities district itself, not the local agency that establishes the district.

While SANDAG, as the consolidated agency, is statutorily authorized to establish a community facilities district, it has presented no evidence to show that it has ever done so. Furthermore, even if the claimant had established a community facilities district, because a community facilities district is subject to its own appropriations limit, it would not receive the “proceeds of taxes” levied by the community facilities district and cannot claim eligibility for reimbursement on that basis.

**C. The Claimant Has Not Incurred “Costs Mandated by the State” Because It Has Sufficient Fee Authority to Pay for Such Costs.**

Even if the claimant were found to be an eligible claimant, it has not incurred increased costs mandated by the state because the agency has sufficient fee authority to cover the costs of the new required activities.

Government Code section 17556(d), provides that “[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”

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<sup>52</sup> Exhibit T, Senate Local Government Committee, *What’s So Special About Special Districts?* (Fourth Ed.) (October 2010), <https://sgf.senate.ca.gov/sites/sgf.senate.ca.gov/files/2010WSSASD4edition.pdf> (accessed on June 24, 2020), page 3.

<sup>53</sup> Government Code sections 53313, 53326.

<sup>54</sup> Government Code section 53325.7.

<sup>55</sup> Government Code section 53325.7, emphasis added.



If a local agency has “the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program,” reimbursement is not required.<sup>56</sup> Whether a local agency has the fee authority sufficient to pay for the costs of the program under Government Code section 17556 (d) is a pure question of law.<sup>57</sup> The application of Government Code section 17556(d) does not depend on the “practical ability [of charging fees] in light of surrounding economic circumstances,” but rather on the right or power to levy such fees.<sup>58</sup>

The claimant, SANDAG, as the consolidated agency, is authorized under Public Utilities Code section 132354(h) to “fix and collect fees for any services rendered by it.” The agency uses three forms of member agency assessments as part of its annual budget: (1) SANDAG member assessments, (2) Criminal Justice member assessments, and (3) Automated Regional Justice Information System (ARJIS) member assessments and use fees.<sup>59</sup> SANDAG’s bylaws provide for the manner in which the “portion of the budget for SANDAG, which is to be supplied by the Member Agencies, as adopted by the Board of Directors” is assessed.<sup>60</sup> General member assessments are based on population estimates for each member agency relative to the total regional population.<sup>61</sup>

The plain language of Public Utilities Code section 132354(h) gives SANDAG, as the consolidated agency, broad authority to levy fees on its member agencies to pay for “any services rendered by it.”

Accordingly, the claimant, SANDAG, as a consolidated agency, has the fee, service charge or assessment authority sufficient to pay for the new required activities imposed by the test claim statute. Therefore, reimbursement is not required under article XIII B, section 6 of the California Constitution.

**D. The Commission Has Not Violated the Claimant’s Due Process Rights or Committed Prejudicial Error or Bias in Favor of Finance, As Alleged, in Granting Finance’s Request for an Extension of Time to File Comments on the Test Claim or in Issuing the Proposed Decision.**

The claimant argues that the Commission erred in granting Finance an extension of time to file comments on the Test Claim because the request was untimely and failed to comply with the

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<sup>56</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>57</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 399.

<sup>58</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>59</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 10-1.

<sup>60</sup> Exhibit T, SANDAG Bylaws, article VI, section 2, as amended April 2020.

<sup>61</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 10-1.



Commission's regulations.<sup>62</sup> SANDAG also objects to the issuance of the Proposed Decision (calling it a "Proposed Order") prior to SANDAG or any other interested party having the opportunity to file a rebuttal to Finance's comments on the Test Claim.<sup>63</sup> SANDAG concludes by stating that these factors have violated SANDAG's due process rights.<sup>64</sup>

While the protections of procedural due process apply to administrative proceedings, administrative agencies have considerable leeway in how they structure their adjudicative functions.<sup>65</sup> Nonetheless, administrative agencies may not disregard certain basic precepts of a fair hearing before a neutral or unbiased decision-maker.<sup>66</sup> A violation of due process on the basis of bias requires "concrete facts" showing "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims."<sup>67</sup>

The Commission has not violated the claimant's due process rights or committed prejudicial error or bias in favor of Finance as alleged by the claimant. While Finance did not strictly adhere to the Commission's regulations in the timing and format of its extension request, the extension did not shorten the rebuttal period, exclude the parties' rebuttal arguments from the Proposed Decision presented to the Commission, or cause the hearing to be postponed. The claimant's rights to file written comments and testimony have been preserved. The Proposed Decision was not issued prior to the end of the rebuttal comment period; the claimant, as well as any interested party, was given the full length of time allowed by the Commission's regulations and to file rebuttal comments and comments on the Draft Proposed Decision prior to issuance of the Proposed Decision.

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<sup>62</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

<sup>63</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>64</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 3-4.

<sup>65</sup> *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 4.

<sup>66</sup> *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 4; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-91. This basic principle is consistent with the California Law Revision Commission's note on Government Code section 17533. Section 17533 provides that Chapter 4.5, beginning with section 11400 of the Administrative Procedures Act, does not apply to a hearing by the Commission. The note by the Law Revision Commission states that "Nothing in section 17533 excuses compliance with procedural protections required by due process of law."

<sup>67</sup> *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, citing *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.



The issues presented in this Test Claim are pure issues of law, subject to the Commission's de novo review,<sup>68</sup> and the claimant has been given a full opportunity to file written comments and provide testimony in support of the Test Claim. The claimant has not presented facts showing that Commission staff, in granting Finance's request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision and Proposed Decision, resulted in the Commission members acting with "an unacceptable probability of actual bias" in reaching their decision on the Test Claim.

Accordingly, staff finds that the Commission has not violated the claimant's due process rights or committed prejudicial error or bias in favor of Finance as alleged.

### **Conclusion**

Based on the forgoing analysis, staff finds that SANDAG is exempt from the taxing and spending restrictions of articles XIII A and B of the California Constitution and therefore ineligible to claim mandate reimbursement under article XIII B, section 6. Alternatively, even if SANDAG were found to be an eligible test claimant, staff finds that SANDAG has fee authority sufficient to pay for the costs associated with the new activities required by the test claim statute pursuant to Government Code section 17556(d) and therefore is not entitled to reimbursement.

### **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

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<sup>68</sup> *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 and 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281.



BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM	Case No.: 19-TC-03
Public Utilities Code Section 132354.1	<i>SANDAG: Independent Performance Auditor</i>
Statutes 2017, Chapter 658 (AB 805)	DECISION PURSUANT TO
Filed on March 19, 2020	GOVERNMENT CODE SECTION 17500
San Diego Association of Governments, Claimant	ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.
	<i>(Adopted September 25, 2020)</i>

**DECISION**

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 25, 2020. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the State Controller	



## **Summary of the Findings**

This Test Claim alleges that reimbursement is required for state-mandated activities arising from Statutes 2017, chapter 658 (AB 805), which amended Public Utilities Code section 132354.1 to require the San Diego Association of Governments (claimant/SANDAG) to appoint an independent performance auditor who is charged with specified powers and responsibilities, including the power to appoint and employ its own staff.

The Commission finds that SANDAG is not eligible to seek reimbursement pursuant to article XIII B, section 6, because it is not subject to the taxing and spending limitations of article XIII A and B of the California Constitution. SANDAG has authority to charge fees, but no authority to levy taxes. Moreover, the authority of the San Diego County Regional Transportation Commission to levy a transactions and use tax does not apply to SANDAG, a separate legal entity. Furthermore, SANDAG's authority to create a Mello-Roos community facilities district does not make SANDAG subject to the appropriations limit of the community facilities district.

Alternatively, even if SANDAG were found to be an eligible test claimant, SANDAG has not incurred "costs mandated by the state" and is therefore not entitled to reimbursement because SANDAG has fee authority sufficient to pay the costs associated with the new activities required by the test claim statute pursuant to Government Code section 17556(d).

The Commission further finds that the claimant has received a fair hearing under due process. The claimant has not presented facts showing that Commission staff, in granting Finance's request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision and Proposed Decision, resulted in the Commission members acting with "an unacceptable probability of actual bias" in reaching their decision on the Test Claim. The issues presented in this Test Claim are pure issues of law, subject to the Commission's de novo review, and the claimant has been given a full opportunity to file written comments and provide testimony in support of the Test Claim.

Accordingly, the Commission denies this Test Claim.

## **COMMISSION FINDINGS**

### **I. Chronology**

- 01/01/2018 Effective date of Statutes 2017, chapter 658, amending Public Utilities Code section 132354.1.
- 03/19/2020 The claimant filed the Test Claim.<sup>69</sup>
- 04/29/2020 Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.<sup>70</sup>
- 05/21/2020 The claimant filed comments on the Test Claim.<sup>71</sup>

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<sup>69</sup> Exhibit A, Test Claim.

<sup>70</sup> Exhibit T, Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.

<sup>71</sup> Exhibit B, Claimant's Comments on the Test Claim.



05/22/2020 The City of Imperial Beach filed comments on the Test Claim.<sup>72</sup>

05/26/2020 Jim Desmond, San Diego County Supervisor, Fifth District filed comments on the Test Claim.<sup>73</sup>

05/27/2020 The City of Chula Vista, the City of El Cajon, and Mr. Paul J. Dostart filed comments on the Test Claim.<sup>74</sup>

05/28/2020 The City of La Mesa, the City of Lemon Grove, the City of National City, the City of Oceanside, and the City of Vista filed comments on the Test Claim.<sup>75</sup>

05/29/2020 The City of Carlsbad, the City of Del Mar, the City of Encinitas, and the City of Solana Beach filed comments on the Test Claim.<sup>76</sup>

06/03/2020 The Department of Finance (Finance) filed a request for extension of time to file comments on the Test Claim.<sup>77</sup>

06/03/2020 Commission staff issued the Notice of Extension Request Approval.<sup>78</sup>

06/29/2020 Finance filed comments on the Test Claim.<sup>79</sup>

07/15/2020 Commission staff issued the Draft Proposed Decision.<sup>80</sup>

07/20/2020 The claimant filed rebuttal comments and comments on the Draft Proposed Decision.<sup>81</sup>

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<sup>72</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim.

<sup>73</sup> Exhibit D, Jim Desmond, San Diego County Supervisor, Fifth District's Comments on the Test Claim.

<sup>74</sup> Exhibit E, City of Chula Vista's Comments on the Test Claim; Exhibit F, City of El Cajon's Comments on the Test Claim; Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim.

<sup>75</sup> Exhibit H, City of La Mesa's Comments on the Test Claim; Exhibit I, City of Lemon Grove's Comments on the Test Claim; Exhibit J, City of National City's Comments on the Test Claim; Exhibit K, City of Oceanside's Comments on the Test Claim; Exhibit L, City of Vista's Comments on the Test Claim.

<sup>76</sup> Exhibit M, City of Carlsbad's Comments on the Test Claim; Exhibit N, City of Del Mar's Comments on the Test Claim; Exhibit O, City of Encinitas's Comments on the Test Claim; Exhibit P, City of Solana Beach's Comments on the Test Claim.

<sup>77</sup> Exhibit T, Finance's Request for Extension of Time.

<sup>78</sup> Exhibit T, Notice of Extension Request Approval.

<sup>79</sup> Exhibit Q, Finance's Comments on the Test Claim.

<sup>80</sup> Exhibit R, Draft Proposed Decision.

<sup>81</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision.



## II. Background

This Test Claim alleges that Statutes 2017, chapter 658, which amended Public Utilities Code section 132354.1, impose reimbursable state-mandated increased costs resulting from the activities required of the claimant, San Diego Association of Governments (SANDAG), in hiring an independent performance auditor and for related auditing services.

### A. SANDAG's Governance Structure

SANDAG was established in 1966 as the Comprehensive Planning Organization, a voluntary association of 18 incorporated cities in the San Diego region and the San Diego county government, operating under a joint powers agreement and responsible for long-range transportation and regional planning.<sup>82</sup> In 1970, it was designated a metropolitan planning organization and then in 1971 as a regional transportation planning agency.<sup>83</sup> In 1972, it became an independent joint powers agency and changed its name to the San Diego Association of Governments in 1980.<sup>84</sup> While state and federal law have given SANDAG additional powers and duties over the years, the agency continues to operate as a “council of governments” wherein local agencies appoint one or more elected officials to serve on the board of a regional governmental entity.<sup>85</sup>

#### 1. San Diego County Regional Transportation Commission

In 1986, the Legislature enacted the San Diego Regional Transportation Commission Act to provide “alternative methods of financing” for improvements to the County’s transportation system.<sup>86</sup> The Act defines SANDAG as a joint powers agency established under the Joint Exercise of Powers Act and as the transportation planning agency for the San Diego County region.<sup>87</sup>

SANDAG’s Board of Directors is designated as the San Diego County Regional Transportation Commission (Transportation Commission)<sup>88</sup> and the agency’s joint powers agreement, bylaws, and rules and regulations govern the Transportation Commission’s administration and

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<sup>82</sup> Exhibit T, LAO, SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), <https://lao.ca.gov/Publications/Detail/1471> (accessed on June 19, 2020), page 11.

<sup>83</sup> Exhibit T, About SANDAG, History, <https://www.sandag.org/index.asp?fuseaction=about.history> (accessed on June 2, 2020), page 9.

<sup>84</sup> Exhibit T, LAO, SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), <https://lao.ca.gov/Publications/Detail/1471> (accessed on June 19, 2020), page 11.

<sup>85</sup> Exhibit T, LAO, SANDAG, *An Assessment of Its Role in the San Diego Region* (March 30, 2006), <https://lao.ca.gov/Publications/Detail/1471> (accessed on June 19, 2020), page 14.

<sup>86</sup> Public Utilities Code section 132001.

<sup>87</sup> Public Utilities Code section 132005.

<sup>88</sup> Public Utilities Code sections 132000, 132051.



proceedings.<sup>89</sup> The Transportation Commission is authorized by statute to impose a retail transactions and use tax ordinance, subject to approval by two-thirds of the electors.<sup>90</sup> The tax must not exceed one percent, and must be levied in quarter-percent increments.<sup>91</sup> Tax revenues may be used for Transportation Commission administration and related legal action, construction, capital acquisition, maintenance, and operation of streets, roads, and highways, construction, maintenance, and operation of public transit systems, and planning, environmental reviews, engineering and design costs, related right-of-way acquisition, and for public transportation purposes consistent with regional transportation planning.<sup>92</sup>

## **2. TransNet sales tax**

In 1987, a majority of San Diego County voters approved a one-half percent countywide transportation sales tax measure proposed by the Transportation Commission, which established the TransNet program for a 20-year period to deliver transportation projects throughout the region.<sup>93</sup> In 2004, more than two-thirds of the County's voters approved a 40-year extension of TransNet, for the period of 2008 to 2048.<sup>94</sup> The TransNet Extension Ordinance and Expenditure Plan details the purposes for which the TransNet tax revenues may be used and sets the annual appropriations limit for the Transportation Commission.<sup>95</sup>

## **3. San Diego Consolidated Transportation Agency**

In 2003, the San Diego Regional Transportation Consolidation Act consolidated the transit planning and capital project responsibilities of the San Diego Metropolitan Transit Development Board and the North San Diego County Transit Development Board with all of the roles and responsibilities of SANDAG.<sup>96</sup> The consolidation formed a new public agency known as the consolidated agency, and became the successor agency to SANDAG and the two Transit Boards.<sup>97</sup> As the successor to SANDAG, it maintains SANDAG's designations, including but not limited to the San Diego County Regional Transportation Commission and the council of

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<sup>89</sup> Public Utilities Code section 132100.

<sup>90</sup> Public Utilities Code section 132301.

<sup>91</sup> Public Utilities Code section 132307.

<sup>92</sup> Public Utilities Code sections 132302, 132305.

<sup>93</sup> Exhibit T, TransNet Fact Sheet (April 2018), [https://www.sandag.org/uploads/publicationid/publicationid\\_1788\\_16614.pdf](https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf) (accessed on June 3, 2020), page 1.

<sup>94</sup> Exhibit T, TransNet Fact Sheet (April 2018), [https://www.sandag.org/uploads/publicationid/publicationid\\_1788\\_16614.pdf](https://www.sandag.org/uploads/publicationid/publicationid_1788_16614.pdf) (accessed on June 3, 2020), page 1.

<sup>95</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, pages 9-11, 16.

<sup>96</sup> Public Utilities Code section 132353.1; Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 2.

<sup>97</sup> Public Utilities Code section 132351.3.



governments for the San Diego Region.<sup>98</sup> The consolidated agency is also a regional transportation planning agency under Government Code section 29532.1.<sup>99</sup> It operates under the auspices of SANDAG.<sup>100</sup>

The Consolidation Act sets forth the consolidated agency's membership, voting procedures, and organizational structure. The agency's powers and responsibilities are carried out by a board of directors, composed of 21 members, consisting of one locally elected official selected by the governing body of each city in the county and a member of the county board of supervisors.<sup>101</sup> Voting is weighted and based on both membership and on the number of people who reside within each jurisdiction.<sup>102</sup>

Amongst the agency's powers are the right to sue and be sued, acquire property by any means, including eminent domain, appoint necessary employees, contract, fix and collect fees, adopt an annual budget, fix the compensation of staff and board members, establish and enforce rules and regulations for the administration, operation, and maintenance of facilities and services, enter joint powers arrangements, provide insurance, and issue bonds.<sup>103</sup> It can also use the Transportation Commission's transactions and use tax authority under Public Utilities Code sections 132301 and 132302 to fund infrastructure needs as identified in the regional comprehensive plan.<sup>104</sup>

## **B. The Test Claim Statute**

The test claim statute, Statutes 2017, chapter 658, became effective January 1, 2018, amending Public Utilities Code sections 120050.2, 120051.6, 120102.5, 125102, 132351.1, 132351.2, 132351.4, 132352.3, 132354.1, 132360.1, and 132362; adding sections 120221.5, 125222.5, 132354.7, Article 11 (commencing with Section 120480) to Chapter 4 of Division 11, Article 9 (commencing with Section 125480) to Chapter 4 of Division 11.5; and repealing Sections 120050.5 and 120051.1.

At issue here is the test claim statute's amendments to section 132354.1 of the Public Utilities Code.

### **1. Prior law**

Public Utilities Code section 132354.1 was originally enacted in 2003 following the passage of SB 1703, the San Diego Regional Transportation Consolidation Act. It falls under Article 5, pertaining to the consolidated agency's powers and functions. The statute originally consisted of

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<sup>98</sup> Public Utilities Code section 132351.3.

<sup>99</sup> Public Utilities Code section 132351.3.

<sup>100</sup> Public Utilities Code section 132353.1. Hereafter, the consolidated agency is referred to as either "the consolidated agency" or "SANDAG."

<sup>101</sup> Public Utilities Code section 132351.1.

<sup>102</sup> Public Utilities Code section 132351.2.

<sup>103</sup> Public Utilities Code section 132354.

<sup>104</sup> Public Utilities Code section 132360.6.



what is now subdivision (a) and read in its entirety as follows: “The board shall arrange for a post audit of the financial transactions and records of the consolidated agency to be made at least annually by a certified public accountant.”<sup>105</sup>

## **2. Public Utilities Code section 132354.1**

The test claim statute amended section 132354.1 of the Public Utilities Code to require the San Diego consolidated transportation agency to appoint an independent performance auditor with the power to appoint and employ staff as deemed necessary. Specifically, section 132354.1 was amended as follows:

- (a) The board shall arrange for a post audit of the financial transactions and records of the consolidated agency to be made at least annually by a certified public accountant.
- (b)
  - (1) The audit committee shall appoint an independent performance auditor, subject to approval by the board, who may only be removed for cause by a vote of at least two-thirds of the audit committee and the board.
  - (2) The independent performance auditor shall have authority to conduct or to cause to be conducted performance audits of all departments, offices, boards, activities, agencies, and programs of the consolidated agency. The auditor shall prepare annually an audit plan and conduct audits in accordance therewith and perform those other duties as may be required by ordinance or as provided by the California Constitution and general laws of the state. The auditor shall follow government auditing standards. All officers and employees of the consolidated agency shall furnish to the auditor unrestricted access to employees, information, and records, including electronic data, within their custody regarding powers, duties, activities, organization, property, financial transactions, contracts, and methods of business required to conduct an audit or otherwise perform audit duties. It is also the duty of any consolidated agency officer, employee, or agent to fully cooperate with the auditor, and to make full disclosure of all pertinent information.
  - (3) The auditor shall have the power to appoint, employ, and remove assistants, employees, and personnel as deemed necessary for the efficient and effective administration of the affairs of the office and to prescribe their duties, scope of authority, and qualifications.
  - (4) The auditor may investigate any material claim of financial fraud, waste, or impropriety within the consolidated agency and for that purpose may summon any officer, agent, or employee of the consolidated agency, any claimant, or other person, and examine him or her upon oath or affirmation relative thereto. All consolidated agency contracts with consultants, vendors, or agencies will be prepared with an adequate audit provision to allow the auditor access to the entity's records needed to

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<sup>105</sup> Public Utilities Code section 132354.1(a).



verify compliance with the terms specified in the contract. Results of all audits and reports shall be made available to the public in accordance with the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of the Title 1 of the Government Code).

(c) The board shall develop and adopt internal control guidelines to prevent and detect financial errors and fraud based on the internal control guidelines developed by the Controller pursuant to Section 12422.5 of the Government Code and the standards adopted by the American Institute of Certified Public Accountants.

(d) The board shall develop and adopt an administration policy that includes a process to conduct staff performance evaluations on a regular basis to determine if the knowledge, skills, and abilities of staff members are sufficient to perform their respective functions, and shall monitor the evaluation process on a regular basis.

(e) The board members shall make an annual report to their member agencies at a public meeting pursuant to Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, that includes a summary of activities by the consolidated agency including, but not limited to, program developments, project updates, changes to voter-approved expenditure plans, and potential ballot measures.

### **3. Impetus behind the test claim statute**

In 2016, SANDAG endorsed Measure A, a local ballot measure which proposed an additional half-percent retail sales tax for San Diego County.<sup>106</sup> Members of the agency's board of directors publicly represented that the additional sales tax would generate approximately \$18 billion in revenue for transportation development.<sup>107</sup> The proposal fell short of the two-thirds required for approval.<sup>108</sup> Soon thereafter, it was uncovered through local media attention that the projected tax revenues were inflated.<sup>109</sup> An independent examination report commissioned by

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<sup>106</sup> Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), [https://www.sandag.org/uploads/publicationid/publicationid\\_2126\\_22337.pdf](https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf) (accessed on June 19, 2020), page 1.

<sup>107</sup> Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July, 31 2017), [https://www.sandag.org/uploads/publicationid/publicationid\\_2126\\_22337.pdf](https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf) (accessed on June 19, 2020), page 1.

<sup>108</sup> Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 4.

<sup>109</sup> Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), [https://www.sandag.org/uploads/publicationid/publicationid\\_2126\\_22337.pdf](https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf) (accessed on June 19, 2020), page 3.



SANDAG found that SANDAG knew about the Measure A forecasting error but failed to correct it.<sup>110</sup> Amongst the agency's "lapses in judgment" were instructing employees to delete draft documents, to stop communicating by email, and to instead use phones or speak in person.<sup>111</sup> According to the author of the test claim statute, using the inflated projection that SANDAG was aware was incorrect for about a year prior to the election, allowed the agency to obscure an \$8.4 billion cost increase facing the projects until after the Measure A tax increase had failed.<sup>112</sup> Therefore, the author's intent in proposing the bill was to increase SANDAG's transparency and accountability as a consolidated agency by making changes to the agency's governance structure and finance authority.<sup>113</sup>

#### **4. SANDAG's audit activities under the test claim statute**

Prior to the passage of the test claim statute, SANDAG's audit authority was limited to a certified public accountant conducting an annual post-audit of its financial transactions and records.<sup>114</sup> The test claim statute created an independent auditor position and charged the position with specified powers and the performance of certain duties.<sup>115</sup> Additionally, it created an audit committee and tasked the committee with certain responsibilities, including appointing the independent performance auditor.<sup>116</sup> The committee consists of five voting members, including two board members and three public members appointed by the board.<sup>117</sup> In addition to appointing the independent performance auditor, the audit committee is responsible for recommending the contract of the firm conducting the annual financial statement audits and approving the annual audit plan.<sup>118</sup>

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<sup>110</sup> Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), [https://www.sandag.org/uploads/publicationid/publicationid\\_2126\\_22337.pdf](https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf) (accessed on June 19, 2020), pages 2-3.

<sup>111</sup> Exhibit T, John C. Hueston, Report on Independent Examination of Measure A Revenue Estimate Communications (July 31, 2017), [https://www.sandag.org/uploads/publicationid/publicationid\\_2126\\_22337.pdf](https://www.sandag.org/uploads/publicationid/publicationid_2126_22337.pdf) (accessed on June 19, 2020), pages 3, 33.

<sup>112</sup> Exhibit T, Assembly Committee on Local Government, Analysis of AB 805 (2017-2018 Reg. Sess.), as amended April 6, 2017, pages 1, 7.

<sup>113</sup> Exhibit T, Assembly Committee on Local Government, Analysis of AB 805 (2017-2018 Reg. Sess.), as amended April 6, 2017, pages 1, 7.

<sup>114</sup> Public Utilities Code section 132354.1(a); Exhibit A, Test Claim, page 10.

<sup>115</sup> Exhibit T, Senate Committee on Governance and Finance, Analysis of AB 805 (2017-2018 Reg. Sess.), June 30, 2017, page 4.

<sup>116</sup> Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).

<sup>117</sup> Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).

<sup>118</sup> Public Utilities Code Section 132354.1 (Stats. 2017, ch. 658).



The Regional Transportation Commission is also required to have a certified public accountant conduct an annual post-audit of its financial transactions, records, and revenue expenditures.<sup>119</sup> The Transportation Commission is required by statute to use SANDAG's staff in lieu of hiring its own and pays SANDAG for audit services through its transactions and use tax revenue.<sup>120</sup> Under the TransNet Extension Ordinance, an Independent Taxpayers Oversight Committee (ITOC) conducts an annual independent audit using the services of an independent fiscal auditor.<sup>121</sup> The purpose of the ITOC is to ensure that the TransNet Extension voter mandates are carried out as required.<sup>122</sup>

SANDAG's board policy pertaining to the audit committee and independent performance auditor requires that the independent performance auditor coordinate audit functions such that there is *no* duplication of effort between independent performance audits conducted pursuant to Public Utilities Code section 132354.1 and those undertaken by the ITOC.<sup>123</sup>

**5. New requirements under Public Utilities Code section 132354.1(b)(2), (b)(3), (b)(4), (c), (d), and (e).**

Under Public Utilities Code section 132354.1, as amended by the test claim statute, the independent performance auditor is charged with the following:

- Conducting performance audits of “all departments, offices, boards, activities, agencies, and programs of the consolidated agency”<sup>124</sup>;
- Preparing an annual audit plan<sup>125</sup>; and
- Appointing, employing and removing staff as necessary to carry out the duties of the office and prescribing the duties, scope of authority and qualifications of its staff.<sup>126</sup>

The auditor is authorized to investigate claims of financial fraud, waste or impropriety within the consolidated agency and may conduct examinations under oath for that purpose.<sup>127</sup>

The board is charged with the following:

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<sup>119</sup> Public Utilities Code section 132104 (Stats. 1985, ch. 1576).

<sup>120</sup> Public Utilities Code sections 132052, 132103 (Stats. 1985, ch. 1576).

<sup>121</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, pages 14-15, 47 (Statement of Understanding).

<sup>122</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 14.

<sup>123</sup> Exhibit T, SANDAG Board Policy No. 39, Audit Policy Advisory Committee and Audit Activities, paragraph 6.15, as amended September 2019.

<sup>124</sup> Public Utilities Code section 132354.1(b)(2).

<sup>125</sup> Public Utilities Code section 132354.1(b)(2).

<sup>126</sup> Public Utilities Code section 132354.1(b)(3).

<sup>127</sup> Public Utilities Code section 132354.1(b)(4).



- Establishing internal control guidelines to prevent and detect financial errors and fraud;<sup>128</sup>
- Establishing an administration policy pertaining to regularly conducting staff performance evaluations to ensure that staff are sufficiently qualified<sup>129</sup>; and
- Making an annual report to member agencies at a public meeting that summarizes the consolidated agency's activities, including "program developments, project updates, changes to voter-approved expenditure plans, and potential ballot measures."<sup>130</sup>

The consolidated agency's officers and employees are required to fully cooperate with the auditor, including making a full disclosure of all pertinent information and granting the auditor unrestricted access to necessary employees, information, and records.<sup>131</sup> All of the consolidated agency's contracts with consultants, vendors, or agencies must include an audit provision allowing the auditor access to the entity's records as needed to verify compliance with the contract terms.<sup>132</sup> All audit results and reports must be made publicly available.<sup>133</sup>

### **III. Positions of the Parties**

#### **A. Claimant, San Diego Association of Governments**

The claimant alleges that the test claim statute, as it amended Public Utilities Code section 132354.1(b)(2), (b)(3), (b)(4), (c), (d), and (e), imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. Specifically, the claimant alleges reimbursable costs for hiring an independent performance auditor and additional audit staff, and for associated costs, including equipment and supplies, training and professional development, travel, and professional dues and licensing.<sup>134</sup> The claimant alleges increased costs to comply with the mandate of \$76,030 for the 2018-2019 fiscal year and \$295,537.61 for the 2019-2020 fiscal year.<sup>135</sup> The claimant estimates \$134,621.15 in additional costs for the 2019-2020 fiscal year attributable to the mandate.<sup>136</sup> Although the claimant agrees it has fee authority through membership fees, those fees have not been sufficient to cover the cost of the alleged mandate as follows:

Though SANDAG has the ability to and has assessed membership assessment fees to board members that represent the county and cities around the San Diego

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<sup>128</sup> Public Utilities Code section 132354.1(c).

<sup>129</sup> Public Utilities Code section 132354.1(d).

<sup>130</sup> Public Utilities Code section 132354.1(e).

<sup>131</sup> Public Utilities Code section 132354.1(b)(2).

<sup>132</sup> Public Utilities Code section 132354.1(b)(4).

<sup>133</sup> Public Utilities Code section 132354.1(b)(4).

<sup>134</sup> Exhibit A, Test Claim, pages 11-14.

<sup>135</sup> Exhibit A, Test Claim, pages 11-12.

<sup>136</sup> Exhibit A, Test Claim, pages 11-12.



Region, the amounts collected are *not sufficient* to pay for the full mandated program increased cost. As a result of the state-imposed mandate, in 2019, SANDAG *doubled* membership assessments fees to help recover some of the increased cost that resulted from the state-imposed mandate. Since April of 2019, the assessments have and continue to be used to offset the cost mandated cost, but there are residuals cost associated with the state-imposed mandate. The amounts collected are *not sufficient and do result in cost incurred that are fully covered by offsets*, thus the remainder of the cost associated with the mandate-imposed actions and increased level of activity is what SANDAG is seeking through this test claim.<sup>137</sup>

The Test Claim includes a declaration summarizing these allegations by Andre Douzjdjian, Chief Financial Officer for SANDAG.<sup>138</sup>

In addition, the claimant alleges that it is a special district that is subject to the tax and spend limitations of articles XIII A and XIII B and, therefore, is eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.<sup>139</sup>

The claimant filed additional comments in support of the Test Claim that are substantially similar to the comments submitted by the City of Imperial Beach, summarized below.<sup>140</sup>

In its rebuttal comments and comments on the Draft Proposed Decision, the claimant alleges a violation of its due process rights based on its objection to Finance's comments as untimely.<sup>141</sup> The claimant alleges that Finance submitted a request for an extension to file comments on the Test Claim on June 3, 2020, five days after the filing deadline of May 29, 2020 and in violation of Commission regulations.<sup>142</sup> The claimant asserts that while the Commission is permitted to grant an extension to a filing deadline, section 1187.9 of the Commission's regulations requires that an extension request be filed before the filing date and must be certified.<sup>143</sup> Furthermore, Commission Regulation 1181.3 requires that any representations of fact be supported by documentary or testimonial evidence.<sup>144</sup> The claimant argues that not only was Finance's request untimely, it contained representations of fact regarding workload impacts but was not

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<sup>137</sup> Exhibit A, Test Claim, page 17, emphasis in original.

<sup>138</sup> Exhibit A, Test Claim, page 21-22.

<sup>139</sup> Exhibit A, Test Claim, pages 6-7.

<sup>140</sup> Exhibit B, Claimant's Comments on the Test Claim.

<sup>141</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

<sup>142</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

<sup>143</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

<sup>144</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.



certified nor supported by documentary or testimonial evidence.<sup>145</sup> While the Commission has broad discretion under Commission Regulation 1187.9 to consider the merits of an extension request, the claimant asserts that that discretion is limited to timely requests with proper supporting evidence.<sup>146</sup> The claimant argues that because Finance's request was both untimely and unsupported, the Commission lacked discretion to grant it and Finance's comments must be stricken and failure to do so is prejudicial error.<sup>147</sup>

The claimant also objects to what it describes as the "premature filing of the Commission's Proposed Order."<sup>148</sup> According to the claimant, the Commission issued a proposed decision before allowing the claimant or any other interested party to file a rebuttal to Finance's comments.<sup>149</sup> Section 1183.6 of the Commission's regulations and the basic principles of due process require that the proposed decision be based on a review of the filed comments, which must include rebuttal to those comments.<sup>150</sup> The claimant alleges that the Commission has exhibited prejudicial bias in this matter by improperly allowing Finance to untimely file comments and denying the claimant and other interested parties due process by prematurely issuing a proposed order.<sup>151</sup>

On the merits, the claimant challenges Finance's position that the claimant is a joint powers agency without independent taxation authority as incorrect as a matter of law.<sup>152</sup> Under the San Diego Regional Transportation Consolidation Act (Public Utilities Code section 132350 et seq.), the claimant, SANDAG, was transformed from a joint powers authority to a "new statutorily-created public entity with expanded powers, including the power to levy taxes."<sup>153</sup> Public Utilities Code sections 132301 and 132302 authorize the San Diego County Regional

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<sup>145</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

<sup>146</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>147</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>148</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>149</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>150</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>151</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 3-4.

<sup>152</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>153</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.



Transportation Commission to levy a retail transactions and use tax.<sup>154</sup> The claimant asserts that section 132360.6 vests that same authority in SANDAG as the consolidated agency, giving it independent taxing authority.<sup>155</sup>

The claimant challenges Finance's assertion that it has overstated the mandate costs and included costs that are not mandated, namely miscellaneous costs associated with professional licensing and staff training and development.<sup>156</sup> Furthermore, the claimant disagrees that the test claim statute calls for a single independent performance auditor, stating that section 132354.1(b)(3) states in pertinent part as follows: "The auditor shall have the power to appoint, employ, and remove assistants, employees, and personnel as deemed necessary for the efficient and effective administration of the affairs of the office..."<sup>157</sup> The miscellaneous costs identified in the Test Claim include the costs associated with the government auditor positions that the claimant has or will be forced to incur as a result of the mandate.<sup>158</sup>

## **B. Department of Finance**

Finance argues that the Test Claim should be denied because SANDAG is not an eligible claimant, and even if it were, it has fee authority to cover the cost of complying with the test claim statute.<sup>159</sup> Specifically, Finance argues, as a joint powers agency, SANDAG is not an eligible claimant under article XIII B, section 6 of the California Constitution because it does not have the power to levy taxes.<sup>160</sup> Finance states further that SANDAG's allegation that it has authority to levy a retail transactions and use tax in San Diego County is incorrect; under Public Utilities Code section 132301, the local entity authorized to impose that tax is the San Diego County Regional Transportation Commission.<sup>161</sup> The Transportation Commission transfers its tax revenue to SANDAG to pay for administrative costs, making SANDAG an indirect recipient of tax revenue with no independent authority to impose taxes.<sup>162</sup>

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<sup>154</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>155</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>156</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>157</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 2-3.

<sup>158</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>159</sup> Exhibit Q, Finance's Comments on the Test Claim, page 1.

<sup>160</sup> Exhibit Q, Finance's Comments on the Test Claim, page 1.

<sup>161</sup> Exhibit Q, Finance's Comments on the Test Claim, page 1.

<sup>162</sup> Exhibit Q, Finance's Comments on the Test Claim, page 1.



Even if SANDAG were an eligible claimant, Finance argues, it has fee authority to cover the cost of complying with the test claim statute.<sup>163</sup> Under Government Code section 17556(d), costs are not mandated by the state because SANDAG has the authority to assess membership fees to its board members.<sup>164</sup> SANDAG doubled its membership fees in 2019 but claims that the fees only partially offset the claimed costs.<sup>165</sup> Because there is no cap on SANDAG's fee authority, SANDAG could use fees to offset the full costs imposed by the test claim statute.<sup>166</sup>

Finance further argues that the costs claimed by SANDAG may be overstated.<sup>167</sup> Of the total claimed costs of \$430,159 for the 2019-2020 fiscal year, costs such as salaries and benefits for multiple audit positions are not reimbursable because the test claim statute only requires appointment of a single independent performance auditor.<sup>168</sup> SANDAG can carry out the required audit functions by contracting an auditor rather than hiring additional staff.<sup>169</sup> The costs for staff training and development and professional licensing are not specified in the test claim statute and are therefore not related to the alleged mandated activities.<sup>170</sup>

Finance did not file comments on the Draft Proposed Decision.

### **C. City of Imperial Beach**

The City of Imperial Beach filed comments as an interested party, arguing that the test claim statute imposes a reimbursable state mandate by requiring SANDAG to appoint an independent performance auditor, a position that did not exist prior to the passage of AB 805.<sup>171</sup> Imperial Beach argues that the test claim statute meets the definition of "program" under *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56: "(1) programs that carry out the governmental function of providing services to the public, or (2) laws which implement a state policy and impose unique requirements on local governments."<sup>172</sup> Imperial Beach further argues that under *County of Los Angeles v. Comm'n on State Mandates* (2003) 110 Cal.App.4th 1176, 1189, a program is "new" if the local agency was not previously required to institute it.<sup>173</sup>

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<sup>163</sup> Exhibit Q, Finance's Comments on the Test Claim, page 1.

<sup>164</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>165</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>166</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>167</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>168</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>169</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>170</sup> Exhibit Q, Finance's Comments on the Test Claim, page 2.

<sup>171</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

<sup>172</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

<sup>173</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.



Imperial Beach states that the legislative history of AB 805 shows that the Legislature anticipated that the test claim statute would impose a mandate on SANDAG.<sup>174</sup> In support, it cites both the Senate and Assembly Committees on Appropriations as finding that the bill potentially imposes a reimbursable mandate, but concedes that those comments are not binding on the Commission.<sup>175</sup> Imperial Beach also alleges that the Department of Finance opposed AB 805 because it appeared to create a reimbursable state mandate.<sup>176</sup>

Imperial Beach states that while SANDAG assesses membership fees, those fees are insufficient to cover the increased cost of the mandated program.<sup>177</sup> As a result of the mandate, SANDAG doubled its membership assessment fees in 2019 in an effort to recover some of the increased costs.<sup>178</sup> Imperial Beach further states that since April 2019, member assessments have been used to offset mandates costs, but that there are residual costs associated with the mandate.<sup>179</sup> Due to the current economic situation, Imperial Beach alleges that the amounts collected are insufficient and the member agencies are unable to further increase their member assessments.<sup>180</sup> The costs incurred that are not fully covered by offsets is what SANDAG seeks to have reimbursed through this Test Claim.<sup>181</sup>

#### **D. Jim Desmond, San Diego County Supervisor, Fifth District**

The comments of Jim Desmond, San Diego County Supervisor for the Fifth District, are in support of the Test Claim and are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>182</sup>

#### **E. City of Chula Vista**

The City of Chula Vista's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>183</sup>

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<sup>174</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 1.

<sup>175</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, pages 1-2.

<sup>176</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>177</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>178</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>179</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>180</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>181</sup> Exhibit C, City of Imperial Beach's Comments on the Test Claim, page 2.

<sup>182</sup> Exhibit D, Jim Desmond, San Diego County Supervisor, Fifth District's Comments on the Test Claim.

<sup>183</sup> Exhibit E, City of Chula Vista's Comments on the Test Claim.



#### **F. City of El Cajon**

The City of El Cajon's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>184</sup>

#### **G. Mr. Paul J. Dostart**

Mr. Paul J. Dostart, a corporate tax attorney and public member of the SANDAG audit committee, filed a public comment, arguing that AB 805 is an unfunded mandate.<sup>185</sup> Mr. Dostart states that Section 19 of AB 805 contemplates a determination by the Commission on State Mandates that the bill imposes an unfunded mandate.<sup>186</sup> According to Mr. Dostart, AB 805 clearly mandates a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution because Public Utilities Code section 132354.1 imposes only upon SANDAG a duty with an accompanying expense that does not otherwise exist under California law, namely the duty to appoint an independent performance auditor with expansive responsibility and authority.<sup>187</sup> Therefore, the costs of SANDAG's Office of the Independent Performance Auditor are reimbursable.<sup>188</sup>

#### **H. City of La Mesa**

The City of La Mesa's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above. The comments were submitted by Bill Baber, Deputy-Mayor of the City of La Mesa, SANDAG board member, and chair of the SANDAG Audit Committee.<sup>189</sup>

#### **I. City of Lemon Grove**

The City of Lemon Grove's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>190</sup>

#### **J. City of National City**

The City of National City's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>191</sup>

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<sup>184</sup> Exhibit F, City of El Cajon's Comments on the Test Claim.

<sup>185</sup> Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

<sup>186</sup> Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

<sup>187</sup> Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

<sup>188</sup> Exhibit G, Mr. Paul J. Dostart's Comments on the Test Claim, page 1.

<sup>189</sup> Exhibit H, City of La Mesa's Comments on the Test Claim.

<sup>190</sup> Exhibit I, City of Lemon Grove's Comments on the Test Claim.

<sup>191</sup> Exhibit J, City of National City's Comments on the Test Claim.



**K. City of Oceanside**

The City of Oceanside's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>192</sup>

**L. City of Vista**

The City of Vista's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>193</sup>

**M. City of Carlsbad**

The City of Carlsbad's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach.<sup>194</sup>

**N. City of Del Mar**

The City of Del Mar's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>195</sup>

**O. City of Encinitas**

The City of Encinitas' comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>196</sup>

**P. City of Solana Beach**

The City of Solana Beach's comments in support of the Test Claim are substantially similar to the comments submitted by the City of Imperial Beach, summarized above.<sup>197</sup>

**IV. Discussion**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service...

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that

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<sup>192</sup> Exhibit K, City of Oceanside's Comments on the Test Claim.

<sup>193</sup> Exhibit L, City of Vista's Comments on the Test Claim.

<sup>194</sup> Exhibit M, City of Carlsbad's Comments on the Test Claim.

<sup>195</sup> Exhibit N, City of Del Mar's Comments on the Test Claim.

<sup>196</sup> Exhibit O, City of Encinitas's Comments on the Test Claim.

<sup>197</sup> Exhibit P, City of Solana Beach's Comments on the Test Claim.



articles XIII A and XIII B impose.”<sup>198</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>199</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>200</sup>
2. The mandated activity constitutes a “program” that either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>201</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>202</sup>
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>203</sup>

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>204</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>205</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>206</sup>

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<sup>198</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>199</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>200</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>201</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 [reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56].

<sup>202</sup> *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

<sup>203</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

<sup>204</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>205</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>206</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].



**A. The Test Claim Was Timely Filed Pursuant to Government Code Section 17551.**

Government Code section 17551(c) requires that a test claim be filed “not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” The Test Claim includes a declaration by Andre Douzdzian, Chief Financial Officer for SANDAG, stating that SANDAG first incurred costs as a result of the test claim statute on April 2, 2019.<sup>207</sup> The Test Claim was filed on March 19, 2020. Accordingly, the Test Claim was filed within 12 months of incurring increased costs as a result of the test claim statute, which is timely pursuant to the second prong of Government Code section 17551(c).

**B. The Claimant Is Not Eligible to Claim Reimbursement Under Article XIII B, Section 6, Because it Has No Authority to Impose Taxes and Is Not Subject to the Appropriations Limit of Article XIII B.**

**1. Article XIII B, section 6 requires reimbursement only when the local government is subject to the tax and spend provisions of Articles XIII A and XIII B of the California Constitution.**

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. “Articles XIII A and XIII B work in tandem, together restricting California governments’ power both to levy and to spend taxes for public purposes.”<sup>208</sup>

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that “the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value” and that the one percent (1%) tax was to be collected by counties and “apportioned according to law to the districts within the counties...”<sup>209</sup> In addition to limiting property tax revenue, section 4 also restricts a local government’s ability to impose special taxes by requiring a two-thirds approval by voters.<sup>210</sup>

Article XIII B was adopted by the voters less than 18 months after the addition of article XIII A to the state Constitution, and was billed as “the next logical step to Proposition 13.”<sup>211</sup> While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, “the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the ‘proceeds of taxes.’”<sup>212</sup>

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<sup>207</sup> Exhibit A, Test Claim, pages 21, 23.

<sup>208</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486.

<sup>209</sup> California Constitution, article XIII A, section 1.

<sup>210</sup> California Constitution, article XIII A, section 1.

<sup>211</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

<sup>212</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.



Article XIII B established “an appropriations limit,” or spending limit for each “local government” beginning in fiscal year 1980-1981.<sup>213</sup> Specifically, the appropriations limit provides as follows:

The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided by this article.<sup>214</sup>

No “appropriations subject to limitation” may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.<sup>215</sup>

Article XIII B does not limit the ability to expend government funds collected from all sources; the appropriations limit is based on “appropriations subject to limitation,” which means, pursuant to article XIII B, section 8, “any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity.”<sup>216</sup> For local agencies, “proceeds of taxes” subject to the appropriations limit include all tax revenues; proceeds from regulatory charges and fees to the extent such proceeds exceed the costs reasonably borne by government in providing the product or service; the investment of tax revenue; and subventions received from the state (other than pursuant to section 6).<sup>217</sup>

No limitation is placed on the expenditure of those revenues that do not constitute “proceeds of taxes.”<sup>218</sup> For example, appropriations subject to limitation do not include “local agency loan funds or indebtedness funds, investment (or authorizations to invest) funds of the state, or of an entity of local government in accounts at banks or savings and loan associations or in liquid securities.”<sup>219</sup> With respect to special districts, article XIII B, section 9 provides a specific exclusion from the appropriations limit as follows:

Appropriations subject to limitation’ for each entity of government shall not include: [¶...¶] (c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per \$100 of assessed value; or the appropriations of any special district then existing or thereafter

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<sup>213</sup> California Constitution, article XIII B, section 8(h).

<sup>214</sup> California Constitution, article XIII B, section 1.

<sup>215</sup> California Constitution, article XIII B, section 2.

<sup>216</sup> California Constitution, article XIII B, section 8.

<sup>217</sup> California Constitution, article XIII B, section 8; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 448.

<sup>218</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 447.

<sup>219</sup> California Constitution, article XIII B, section 8(i).



created by a vote of the people, which is totally funded by other than the proceeds of taxes.<sup>220</sup>

Thus, a special district that existed in 1977-78 and did not share in ad valorem property taxes, or one that was created later and is funded entirely by “other than the proceeds of taxes,” is not subject to the appropriations limit.

Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of tax revenues which are subject to limitation. The California Supreme Court, in *County of Fresno v. State of California*,<sup>221</sup> explained:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.<sup>222</sup>

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Redevelopment Agency of San Marcos v. Commission on State Mandates*,<sup>223</sup> the Fourth District Court of Appeal held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B:

Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any “proceeds of taxes.” Nor do they raise, though tax increment financing, “*general revenues* for the local entity.” (*County of Placer v. Corin, supra*, 113 Cal.App.3d at p. 451, original italics.) The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is

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<sup>220</sup> California Constitution, article XIII B, section 9(c).

<sup>221</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

<sup>222</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

<sup>223</sup> *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.



therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner ...

For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limit also support denying reimbursement under section 6 ... [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.<sup>224</sup>

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates*, affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.<sup>225</sup>

As such, to be eligible for reimbursement under article XIII B, section 6, a local agency must be subject to the taxing and spending limitations of article XIII A and XIII B of the California Constitution and must be required to expend "appropriations subject to limitation." Article XIII B, section 6 was designed only to protect the tax revenues of local governments from state mandates that would require expenditure of tax revenues which are subject to limitation.

**2. The claimant has no authority to levy taxes, and its sources of revenue are not subject to the appropriations limit of article XIII B, section 6.**

The claimant, SANDAG, argues that it is an eligible claimant before the Commission as follows:

SANDAG is a special district subject to the types of constitutional taxing and spending limitations that article XIII B, section 6(a) of the California Constitution (Section 6) is designed to address... SANDAG is authorized to levy a retail transactions and use tax in the incorporated and unincorporated territory of the county. (Pub. Util. Code, §§ 132300, 132362.) Similar to special taxes, this tax is subject to approval by a supermajority of electors and is capped at 1%. (Pub. Util. Code, § 132307.) As part of the ballot proposition to approve imposition of the tax, an appropriations limit was also required to be established. (Pub. Util. Code, § 132309.) The consolidated agency is also authorized to initiate proceedings to establish a district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district, subject to approval by 2/3 of the votes cast. (Pub. Util. Code, § 132370.4.) These statutory limitations on the consolidated agency's taxing and spending authority align with the constitutional limitations on local government taxing and spending authority in articles XIII A, XIII B, and XIII C, which demonstrate that SANDAG should be considered a "local agency" subject to the tax and spend limitations of articles XIII A and B of

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<sup>224</sup> *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987.

<sup>225</sup> *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282.



the California Constitution, and thus eligible to seek a subvention of funds under Sec. 6.<sup>226</sup>

Statutory authorization for the creation and powers of SANDAG as a consolidated transportation agency is found in Chapter 3 of Division 12.7 of the Public Utilities Code, commencing with section 132350, which states that the Chapter [section 132350 to 132372.4, inclusive] may be cited as the San Diego Regional Transportation Consolidation Act. Section 132353.1 states in relevant part as follows:

Notwithstanding any other provision of law and except as provided in this chapter, the San Diego Association of Governments shall be consolidated into a public agency known as the consolidated agency. In addition... all public transit and other transportation planning and programming responsibilities...of the San Diego Metropolitan Transit Development Board (MTDB) and the North San Diego County Transit Development Board (NCTD), except as set forth in subdivision (c) of Section 132353.2 shall be consolidated into the consolidated agency.<sup>227</sup>

The consolidated agency is the successor agency to SANDAG and the two transit boards and is a statutorily created regional transportation planning agency under Section 29532.1 of the Government Code.<sup>228</sup> Section 132351.3 further provides:

As the successor to SANDAG, the consolidated agency succeeds to, continues, and maintains SANDAG's federal, state and local designations, including, but not limited to, designation as the Metropolitan Planning Organization, is the San Diego County Regional Transportation Commission pursuant to Section 132005, is the congestion management agency, and is the council of governments for the San Diego region.<sup>229</sup>

Section 132354 describes the rights and powers of the consolidated agency as follows:

The consolidated agency shall have and may exercise all rights and powers, expressed or implied, that are necessary to carry out the purposes and intent of this chapter, including, but not limited to, the power to do all of the following:

(a) Sue and be sued.

(b)(1) To acquire any property by any means, and to hold, manage, occupy, develop, jointly develop, dispose of, convey, or encumber property.

(2) To create a leasehold interest in property for the benefit of the consolidated agency.

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<sup>226</sup> Exhibit A, Test Claim, pages 6-7.

<sup>227</sup> Public Utilities Code section 132353.1.

<sup>228</sup> Public Utilities Code section 132351.3.

<sup>229</sup> Public Utilities Code section 132351.3.



- (c) To acquire, by eminent domain, any property necessary to carry out any of its powers or functions.
- (d) To merge or split parcels, adjust boundary lines, or take similar actions as part of the acquisition of land or as needed in order to carry out its functions.
- (e) To construct, acquire, develop, jointly develop, maintain, operate, lease, and dispose of work, property, rights-of-way, and facilities.
- (f) To appoint necessary employees, including counsel, and to define their qualifications and duties.
- (g) To enter into and perform all necessary contracts.
- (h) To fix and collect fees for any services rendered by it.
- (i) To adopt a seal and alter it at the consolidated agency's pleasure.
- (j) To adopt an annual budget and to fix the compensation of its officers, board members, and employees.
- (k) To establish and enforce rules and regulations for the administration, operation, and maintenance of facilities and services.
- (l) To enter joint powers arrangements with other entities.
- (m) To provide insurance.
- (n) To issue bonds.
- (o) To do any other things necessary to carry out the purposes of this chapter.

Section 132354(h) authorizes the consolidated agency to “fix and collect fees for any services rendered by it,” but does not authorize the consolidated agency to levy taxes.

Nevertheless, the claimant argues it is authorized to levy a retail transactions and use tax in the incorporated and unincorporated territory of the county, and to initiate proceedings to establish a community facilities district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district.

As described below, the Commission finds that the claimant is not eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.

a. The Transportation Commission’s taxation power is not imputed to the claimant.

Contrary to the claimant’s assertions in the Test Claim and its rebuttal comments and comments on the Draft Proposed Decision, the claimant has no authority to levy a retail transactions and use tax. The power of a local agency to tax is derived from the Constitution, upon the Legislature’s authorization.<sup>230</sup> “The Legislature may not impose taxes for local purposes but

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<sup>230</sup> *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1454.



may authorize local governments to impose them.”<sup>231</sup> As such, a local agency’s authority to tax must come from statute.<sup>232</sup>

The claimant’s primary fiscal function is to allocate revenues from a wide variety of federal, state and local sources to transportation projects and programs in the San Diego region.<sup>233</sup> Federal and state government funding make up the largest portion of the claimant’s revenues, totaling more than \$408 million for the 2020 fiscal year. While the claimant, SANDAG, is statutorily authorized to generate revenue by issuing bonds and collecting fees “for any services rendered by it,” there are no statutes authorizing the claimant to impose taxes.<sup>234</sup>

The Transportation Commission’s statutory authority to levy a transactions and use tax is not imputed to the claimant. Rather, SANDAG and the Transportation Commission are separate legal entities, with SANDAG’s board designated by statute to serve as the Transportation Commission,<sup>235</sup> and SANDAG’s joint powers agreement, bylaws, and rules and regulations governing Transportation Commission proceedings and administration.<sup>236</sup> The claimant’s authority to administer the Transportation Commission’s transactions and use tax and allocate the revenues in accordance with the tax ordinance does not equate to authority to levy the tax.

The claimant cites to Public Utilities Code sections 132300 and 132362 as authorizing the agency to levy a retail transactions and use tax. Sections 132300 through 132314, inclusive, form Article 5 of the San Diego County Regional Transportation Commission Act, pertaining to the Transportation Commission’s transactions and use tax. Section 132300 states as follows:

The Legislature, by the enactment of this article, intends the additional funds provided government agencies by this article to supplement existing local revenues being used for public transportation purposes. The government agencies are further encouraged to maintain their existing commitment of local funds for public transportation purposes.<sup>237</sup>

Section 132301 states in pertinent part:

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<sup>231</sup> California Constitution, article XIII, section 24(a).

<sup>232</sup> *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 450 [“Taxes are levied by the Legislature, or by counties and municipalities under their delegated power, for the support of the state, county, or municipal government”].

<sup>233</sup> Exhibit T, LAO, *SANDAG, An Assessment of Its Role in the San Diego Region*, (March 30, 2006), <https://lao.ca.gov/Publications/Detail/1471> (accessed on June 19, 2020), page 14; Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), pages 1-14, 1-19.

<sup>234</sup> Public Utilities Code section 132354.

<sup>235</sup> Public Utilities Code section 132051.

<sup>236</sup> Public Utilities Code section 132100.

<sup>237</sup> Public Utilities Code section 132300.



(a) A retail transactions and use tax ordinance applicable to the entirety of, or a portion of, the incorporated and unincorporated territory of the county shall be imposed by the commission in accordance with Section 132307 and the Transactions and Use Tax Law (Part 1.6 (commencing with Section 7251) of Division 2 of the Revenue and Taxation Code), if two-thirds of the electors voting on the measure within the portion of the county to which the tax would apply, vote to approve its imposition at a special election called for that purpose by the commission.

...

(g) As used in this section, “commission” shall refer to the consolidated agency if the tax is to be imposed by the consolidated agency pursuant to Section 132360.6.<sup>238</sup>

Neither section 132300 nor the more applicable section 132301 gives SANDAG independent authority to impose a retail transactions and use tax. The reference in section 132301(g) to “commission” to mean the consolidated agency pertains to the consolidated agency’s authority under section 132360.6 to allocate the Transportation Commission’s tax revenue more broadly than originally intended.

The claimant argues in its rebuttal comments and comments on the Draft Proposed Decision that section 132360.6 gives the consolidated agency the power to levy a transactions and use tax independent of the Transportation Commission’s taxation authority.<sup>239</sup> Section 132360.6 was added to the San Diego Regional Transportation Consolidation Act in 2008 as part of an effort to expand the purposes for which the Transportation Commission’s retail transactions and use tax revenues could be used, namely for broader regional programs beyond traditional transportation projects.<sup>240</sup> Section 132360.6 states as follows:

The consolidated agency may use the authority for the retail transactions and use tax provided under Sections 132301 and 132302 to fund and finance infrastructure needs identified in the regional comprehensive plan developed in accordance with this article. Development of the proposal and expenditure plan shall be conducted using a public collaborative planning process that is consistent with Section 132360.1.<sup>241</sup>

The plain language of section 132360.6 gives the consolidated agency the ability to more widely allocate the Transportation Commission’s retail transactions and use tax for regional planning purposes, but does not grant the consolidated agency the authority to impose such a tax on its own behalf.

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<sup>238</sup> Public Utilities Code section 132301(a), (g).

<sup>239</sup> Exhibit S, Claimant’s Rebuttal Comments and Comments on the Draft Proposed Decision, page 2.

<sup>240</sup> Exhibit T, Statutes 2008, chapter 83 (SB 1685), section 1 (2007-2008 Reg. Sess.).

<sup>241</sup> Public Utilities Code section 132360.6.



SANDAG's reliance on section 132362 as authorizing it to impose a retail transaction and use tax similarly fails. Section 132362 states in pertinent part:

(a) In addition to the authority set forth in Article 5 (commencing with Section 132300) and Article 6 (commencing with Section 132320) of Chapter 2 of Division 12.7, if the consolidated agency provides compensation to San Diego County for the cost of including an ordinance or measure on the ballot, the consolidated agency may call an election, including an advisory election, in San Diego County on any ordinance or measure regarding the governance of or matters related to the powers, privileges, or duties of the consolidated agency, including, but not limited to, merger or complete consolidation of the transit boards.<sup>242</sup>

Section 132362 gives the consolidated agency the ability to call an election pertaining to matters within its scope of authority, not to impose taxes. The section's reference to Articles 5 and 6 pertains to the Transportation Commission's authority to conduct an election to either impose a retail transactions and use tax ordinance<sup>243</sup> or an ordinance "expanding, extending, or increasing" a retail transactions and use tax.<sup>244</sup>

Moreover, Public Utilities Code section 132309 requires that the Transportation Commission seek authorization to establish "the appropriations limit of the commission" as part of the ballot proposition to obtain approval for the retail transactions and use tax.<sup>245</sup> The TransNet Extension Ordinance sets forth the appropriations limit for the Transportation Commission and provides that all expenditures of the transactions and use tax are subject to the appropriations limit.<sup>246</sup>

The maximum annual appropriations limit for the Commission shall be established as \$950 million for the 2004-05 fiscal year. The appropriations limit shall be subject to adjustment as provided by law. All expenditures of the transactions and use tax revenues imposed in Section 3 [pertaining to the TransNet Extension and any future authorized state or local transactions and use tax] are subject to the appropriations limit of the Commission.<sup>247</sup>

SANDAG's use of the retail transactions and use tax revenues, whether pursuant to section 132360.6 or as administrator of the TransNet program, does not alter the nature of the tax revenues as the Transportation Commission's "proceeds of taxes" and subject to the Transportation Commission's appropriations limit. Additionally, SANDAG has submitted no

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<sup>242</sup> Public Utilities Code section 132362.

<sup>243</sup> Public Utilities Code section 132300 et seq.

<sup>244</sup> Public Utilities Code section 132320 et seq.

<sup>245</sup> Public Utilities Code section 132309(a).

<sup>246</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 16.

<sup>247</sup> Exhibit T, San Diego County Regional Transportation Commission Ordinance No. 04-01, TransNet Extension Ordinance and Expenditure Plan, page 16.



evidence, and the Commission is aware of none, to show that it has ever reported an appropriations limit.<sup>248</sup>

- b. SANDAG's authority to create a community facilities district does not make SANDAG subject to an appropriations limit.

SANDAG alleges that it has the authority to impose a special tax under the Mello-Roos Community Facilities Act.

The consolidated agency is also authorized to initiate proceedings to establish a district pursuant to the Mello-Roos Community Facilities Act of 1982, and may impose a special tax within the district, subject to approval by 2/3 of the votes cast. (Pub. Util. Code, § 132370.4.)<sup>249</sup>

Public Utilities Code section 132370.4 provides as follows:

The consolidated agency shall be considered to be a “local agency” as defined in subdivision (h) of Section 53317 of the Government Code and the provisions of Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code [Mello-Roos Community Facilities Act of 1982] are applicable to the consolidated agency.

Government Code section 53317(h) defines “local agency” as “any city or county, whether general law or chartered, special district, school district, joint powers entity created pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1, redevelopment agency, or any other municipal corporation, district, or political subdivision of the state.” SANDAG as a consolidated agency is a “local agency” under the Mello-Roos Community Facilities Act of 1982, and has been authorized by Public Utilities Code section 132370.4 to establish a community facilities district.

*i. The Mello-Roos Community Facilities Act of 1982*

The Mello-Roos Community Facilities Act of 1982 was created in response to the passage of Proposition 13, which added article XIII A to the California Constitution and significantly limited the ability of local governments to raise money through property taxes.<sup>250</sup> The purpose of the Act is to provide local agencies with “an alternative method of financing certain public capital facilities and services, especially in developing areas and areas undergoing rehabilitation,” and enables the local agency and the developer making the improvements to avoid incurring any general obligation indebtedness to finance the needed improvements or services, because the cost is borne solely by residents of the benefited area.<sup>251</sup> A Mello-Roos community facilities district is a “legally constituted governmental entity established...for the

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<sup>248</sup> See generally Exhibit T, About SANDAG, Work Program & Budget, <https://www.sandag.org/index.asp?fuseaction=about.workprogram> (accessed on June 25, 2020).

<sup>249</sup> Exhibit A, Test Claim, page 7.

<sup>250</sup> *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 68.

<sup>251</sup> Government Code section 53311.5; *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 70.



sole purpose of financing facilities and services”<sup>252</sup> and does not itself provide public services.<sup>253</sup> The legislative body or governing board of the local agency establishing the district constitutes the legislative body of a community facilities district.<sup>254</sup> The Act specifies the services or facilities that may be financed through the establishment of a community facilities district, including but not limited to: police or fire protection services, library services, public school maintenance services, street and road maintenance, hazardous substance cleanup services, purchase, construction, or rehabilitation of real or other tangible property with an estimated useful life of five years or longer, and planning and design work directly related to such property.<sup>255</sup>

ii. *Formation of a Mello-Roos community facilities district*

Specific procedures must be followed before a local government agency may establish a community facilities district.<sup>256</sup> A local agency may institute proceedings to establish a district on its own or may be required to do so at the request of certain parties.<sup>257</sup> The local agency must institute proceedings when: (1) a written request is made by two members of the legislative body of the local agency; (2) a petition requesting that the agency institute proceedings, signed by a specified number of registered voters, is submitted; or (3) a petition requesting that the agency institute proceedings, signed by specified landowners, is submitted.<sup>258</sup> The local agency is then required to adopt a resolution of intention to establish a community facilities district, which must include specified terms describing the public facilities and services proposed to be financed by the community facilities district and state whether a special tax will be annually levied and secured by a lien on the real property within the district to fund the facilities or services.<sup>259</sup> If the legislative body determines to actually establish a district, it must then adopt a resolution of formation, which must contain all of the information required in the resolution of intention.<sup>260</sup> If a special tax is proposed and has not been eliminated through majority protest, the resolution must contain additional specified information pertaining to the proposed tax levy.<sup>261</sup> Following adoption of the resolution of formation, the local agency submits the proposal to levy any special

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<sup>252</sup> Government Code section 53317(b).

<sup>253</sup> Exhibit T, Senate Local Government Committee, *What’s So Special About Special Districts?* (Fourth Ed.) (October 2010), <https://sgf.senate.ca.gov/sites/sgf.senate.ca.gov/files/2010WSSASD4edition.pdf> (accessed on June 24, 2020), page 3.

<sup>254</sup> Government Code section 53317(g).

<sup>255</sup> Government Code sections 53313 and 53313.5.

<sup>256</sup> Government Code section 53318 et seq.

<sup>257</sup> Government Code section 53318.

<sup>258</sup> Government Code section 53318(a)-(c).

<sup>259</sup> Government Code sections 53320 and 53321.

<sup>260</sup> Government Code section 53325.1.

<sup>261</sup> Government Code section 53325.1(a).



taxes to the voters of the proposed district, which must be approved by two-thirds of the district's voters.<sup>262</sup>

After a community facilities district has been created and authorized to levy special taxes, the legislative body of the local agency adopts an ordinance to levy the special taxes at the rate and in the manner specified in the resolution and apportion the proceeds to the community facilities district.<sup>263</sup> Any tax imposed under the Act is considered a special tax, not a general tax, fee, or assessment.<sup>264</sup> The special tax is collected in the same manner as ad valorem property taxes and is subject to the same penalties, procedure, sale, and lien priority in the event of delinquency, unless another procedure is authorized in the resolution of formation.<sup>265</sup> Special tax revenues may only be used to fund public facilities, services, and incidental costs.<sup>266</sup>

iii. *There is no evidence that SANDAG has ever established a community facilities district.*

While the Mello-Roos Act authorizes SANDAG as the consolidated agency to establish a community facilities district, there is no evidence that SANDAG has ever done so or even taken any steps to initiate proceedings to establish a community facilities district. SANDAG did not file any documentation, nor is the Commission aware of any, showing that SANDAG has participated in creating a community facilities district, such as a resolution of intention as discussed in Government Code section 53320 and 53321, a resolution of formation as discussed in Government Code section 53325.1, or any community facilities district reports, some of which are required to be displayed on the local agency's website.<sup>267</sup> Without adoption of a resolution of formation, there can be no community facilities district and no election to approve the levy and apportionment of a special tax.

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<sup>262</sup> Government Code sections 53326(a), 53328.

<sup>263</sup> Government Code section 53340(a).

<sup>264</sup> Government Code section 53325.3 ["tax imposed pursuant to this chapter is a special tax and not a special assessment"]; *Riverside County Community Facilities Dist. No. 87-1 v. Bainbridge 17* (1999) 77 Cal.App.4th 644 [charges levied against properties by a community facilities district to pay off bonds were "special taxes", not "special assessments"; Mello-Roos Act refers repeatedly and unambiguously to the levying of a "special tax," not a "special assessment"]; *Building Industry Assn. of Bay Area v. City of San Ramon* (2016) 4 Cal.App.5th 62, 86-89 [special taxes imposed by a community facilities district are not general taxes].

<sup>265</sup> Government Code section 53340(e).

<sup>266</sup> Government Code section 53340(d).

<sup>267</sup> See Government Code section 53343.2.



- iv. *SANDAG is not subject to the appropriations limit of any established community facilities district.*

The Mello-Roos Community Facilities Act permits a local agency to establish an appropriations limit of a community facilities district upon approval by the voters of the district.<sup>268</sup> Government Code section 53325.7 states in relevant part:

The legislative body may submit a proposition *to establish* or change the *appropriations limit*, as defined by subdivision (h) of Section 8 of Article XIII B of the California Constitution, *of a community facilities district* to the qualified electors of a proposed or established district. The proposition establishing or changing the appropriations limit shall become effective if approved by the qualified electors voting on the proposition...<sup>269</sup>

The plain language of Government Code section 53325.7, however, makes clear that the appropriations limit under the Mello-Roos Community Facilities Act applies to the community facilities district itself, not the local agency that establishes the district. Such a reading is supported by the fact that the Act defines a community facilities district as a “legally constituted governmental entity”<sup>270</sup> and expressly authorizes a community facilities district to “levy specified special taxes.”<sup>271</sup> As such, the appropriations limit of a community facilities district is not imputed to the local agency that forms it.

SANDAG has filed no evidence to show that it has ever established a community facilities district. Furthermore, even if SANDAG had established a community facilities district, because a community facilities district is subject to its own appropriations limit, SANDAG does not receive the “proceeds of taxes” levied by the district and cannot claim eligibility for reimbursement on that basis. SANDAG’s authority to create a community facilities district does not subject it to the district’s appropriations limit.

Thus, based on the analysis above and contrary to its assertions in the Test Claim, SANDAG has no authority to levy taxes and is not subject to the appropriations limit of article XIII B. A local agency’s ability to impose a tax requires express authorization by the Legislature, and there is no statute granting SANDAG the authority to levy a tax. The Transportation Commission’s statutory authorization to impose a transactions and use tax and establish an appropriations limit is not imputed to SANDAG, a separate legal entity. Nor does SANDAG’s ability to create a community facilities district give the agency such authority: there is no evidence that SANDAG has ever created a community facilities district and even if it had, a community facilities district is subject to its own appropriations limit. Reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to

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<sup>268</sup> Government Code section 53325.7.

<sup>269</sup> Government Code section 53325.7, emphasis added.

<sup>270</sup> Government Code section 53317(b).

<sup>271</sup> Government Code section 53340(a).



incur “increased actual expenditures of limited *tax* proceeds that are counted against the local government’s spending limit.”<sup>272</sup>

Because SANDAG is without authority to levy taxes subject to the appropriations limit of article XIII B of the California Constitution, SANDAG is ineligible to claim mandate reimbursement under article XIII B, section 6.

**C. SANDAG Has Not Incurred “Costs Mandated by the State” Because It Has Sufficient Fee Authority to Pay for Such Costs.**

Even if SANDAG were found to be an eligible claimant, SANDAG has not incurred increased costs mandated by the state because it has sufficient fee authority to cover the costs of the new required activities.

Reimbursement under article XIII B, section 6 of the California Constitution is required only when a new program or higher level of service results in increased costs mandated by the state.<sup>273</sup> “Costs mandated by the state” are any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute or executive order enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of article XIII B, section 6 of the California Constitution.<sup>274</sup> Government Code section 17556(d), provides that “[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The California Supreme Court concluded that Government Code section 17556(d), is facially constitutional under article XIII B, section 6.<sup>275</sup>

SANDAG, as the consolidated agency, is authorized under Public Utilities Code section 132354(h) to “fix and collect fees for any services rendered by it.” The agency uses three forms of member agency assessments as part of its annual budget: (1) SANDAG member assessments, (2) Criminal Justice member assessments, and (3) Automated Regional Justice Information System (ARJIS) member assessments and use fees.<sup>276</sup> SANDAG’s bylaws provide for the manner in which the “portion of the budget for SANDAG, which is to be supplied by the Member Agencies, as adopted by the Board of Directors” is assessed.<sup>277</sup> General member

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<sup>272</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

<sup>273</sup> *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735-736; Government Code section 17514.

<sup>274</sup> Government Code section 17514.

<sup>275</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 489.

<sup>276</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 10-1.

<sup>277</sup> Exhibit T, SANDAG Bylaws, as amended April 2020, article VI, section 2.



assessments are based on population estimates for each member agency relative to the total regional population.<sup>278</sup>

SANDAG acknowledges having fee authority to offset costs, but claims that member assessments are insufficient to fully cover the costs resulting from the new activities required by the test claim statute.<sup>279</sup> SANDAG's final program budget for the 2020 fiscal year provides the following breakdown of revenues derived from general member assessments:<sup>280</sup>

- Criminal Justice Analysis and Monitoring – Substance Abuse Monitoring (\$18,750);
- Regional Shoreline Management Planning (\$95,501);
- Regional Energy/Climate Change Planning (\$23,177);
- Regional Sea-Level Rise Adaptation Guidance for Transportation Infrastructure (\$7,740); and
- Government relations (\$244,084).

Based on the information contained in the final program budget for the 2020 fiscal year, total revenues as derived from general member assessments are \$389,252. SANDAG increased general member assessments from \$547,426 (2019 fiscal year) to \$1,094,852 (2020 fiscal year) and added an annual increase going forward based on the Consumer Price Index.<sup>281</sup> The doubling of general membership fees was intended “to provide the agency with a sustainable source of funding necessary to support ongoing and future activities” due to “limited outside funding opportunities for personnel and planning efforts.”<sup>282</sup> SANDAG acknowledges in the Test Claim that it doubled membership fees in order to recover some of the costs arising from the test claim statute.<sup>283</sup>

In interpreting the exception to reimbursement under Government Code section 17556(d), the court in *Connell v. Superior Court* found that “the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees

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<sup>278</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 10-1.

<sup>279</sup> Exhibit A, Test Claim, page 17.

<sup>280</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 206.

<sup>281</sup> Exhibit T, SANDAG, Final FY 2020 Program Budget (July 1, 2019), <https://www.sandag.org/uploads/publicationid/Final-FY2020-SANDAG-Budget.pdf> (accessed on June 4, 2020), page 10-1.

<sup>282</sup> Exhibit T, SANDAG News: <https://www.sandag.org/index.asp?newsid=1124&fuseaction=news.detail> (accessed on June 4, 2020), page 3.

<sup>283</sup> Exhibit A, Test Claim, page 17.



sufficient to cover the costs of the state-mandated program.<sup>284</sup> Whether a local agency has the fee authority sufficient to pay for the costs of the program under Government Code section 17556 (d) is a pure question of law.<sup>285</sup> The application of Government Code section 17556(d) does not depend on the “practical ability [of charging fees] in light of surrounding economic circumstances,” but rather on the right or power to levy such fees.<sup>286</sup>

In *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, water and irrigation districts acknowledged their statutory authority to recover the costs necessary to comply with conservation goals imposed by the Water Conservation Act, but denied having the practical ability to impose such fees. The court held that the districts were not entitled to subvention, despite the existence of a power-sharing arrangement between districts and voters under which a majority of property owners could protest a fee imposed by districts and prevent its imposition.<sup>287</sup> The court said that the possibility of a protest did not divest districts of their authority to levy fees to pay for the costs of complying with the Water Conservation Act without prior voter approval.<sup>288</sup> Here, moreover, the fees charged to the member agencies are not subject to the procedural requirements at issue in *Paradise Irrigation District*.

Therefore, if SANDAG has “the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program,” reimbursement is not required.<sup>289</sup> The agency’s practical ability (or lack thereof) to assess fees sufficient to cover such costs is immaterial to the analysis. The plain language of Public Utilities Code section 132354(h) gives SANDAG, as the consolidated agency, broad authority to levy fees on its member agencies to pay for “any services rendered by it.” The consolidated agency is statutorily required to provide the services of an independent performance auditor.<sup>290</sup> There are no laws restricting SANDAG’s ability to “fix and collect fees for any services rendered by it.”<sup>291</sup> In fact, SANDAG recently doubled membership fees to more than \$1 million for the 2020 fiscal year, a decision it acknowledges making in order to pay for the cost of the new activities required under the test claim statute.

As such, SANDAG, as a consolidated agency, has the fee, service charge, or assessment authority sufficient to pay for the new required activities imposed by the test claim statute.

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<sup>284</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>285</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 399.

<sup>286</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>287</sup> *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, 194.

<sup>288</sup> *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources* (2019) 33 Cal.App.5th 174, 195.

<sup>289</sup> *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>290</sup> Public Utilities Code section 132354.1.

<sup>291</sup> Public Utilities Code section 132354(h).



Therefore, reimbursement is not required under article XIII B, section 6 of the California Constitution.

**D. The Commission Has Not Violated the Claimant's Due Process Rights or Committed Prejudicial Error or Bias in Favor of Finance, As Alleged, in Granting Finance's Request for an Extension of Time to File Comments on the Test Claim or in Issuing the Proposed Decision.**

The claimant argues that the Commission staff erred in granting Finance an extension of time to file comments on the Test Claim because the request was untimely and failed to comply with the Commission's regulations.<sup>292</sup>

The claimant also appears to be confused about the mandates process and objects to the issuance of the "Proposed Order" prior to the claimant or any other interested party having the opportunity to file a rebuttal to Finance's comments on the Test Claim.<sup>293</sup> However, the "Proposed Decision," which would be roughly equivalent to the "Proposed Order" indicated is not issued until approximately two-weeks prior to the hearing and after consideration of the claim, all comments on the claim including any rebuttal comments, and all comments on the Draft Proposed Decision. In this case, the transmittal for the "Draft Proposed Decision" clearly indicated that

Pursuant to Commission on State Mandates (Commission) regulations in section 1183.3, the rebuttal period for the comments filed on this matter by the Department of Finance (Finance) served on June 30, 2020 ends July 30, 2020. Rebuttal comments, if they are filed, will be reviewed and considered in the Proposed Decision. Please note that rebuttal comments and comments on the Draft Proposed Decision may be combined.<sup>294</sup>

The claimant, nonetheless, concludes by stating that the following factors have violated its due process rights:

The Commission's disregard of objective regulatory deadlines in allowing the Department of Finance to file untimely comments may be viewed independently as demonstrating prejudicial bias. Its issuance of a proposed decision mirroring the Department's comments before the Claimant's deadline to file a rebuttal to such comments not only violates the Commission's regulations, it firmly establishes the presence of a prejudicial bias for the Department of Finance and against both Claimant SANDAG as well as all other interested parties commenting in favor of the test claim. "Due process requires fair adjudicators in courts and administrative tribunals alike." *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1024, (2002). "In the administrative setting, a hearing must be conducted 'before a reasonably impartial, noninvolved reviewer,'" *Nasha L.L.C.*

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<sup>292</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

<sup>293</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>294</sup> Exhibit R, Draft Proposed Decision, page 1 (Transmittal).



*v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484. For a hearing to be deemed fair . . . biased decision makers are... impermissible and even the probability of unfairness is to be avoided...” *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170. In the present matter, the Commission staff has and continues to demonstrate an impermissible bias in favor of the Department of Finance and against Claimant SANDAG. Such bias will render any decision in favor of the Department of Finance’s position in this matter subject to future reversal.<sup>295</sup>

The claimant is correct that the protections of procedural due process apply to administrative proceedings, and while administrative agencies have considerable leeway in how they structure their adjudicative functions, agencies may not disregard certain basic precepts of a fair hearing before a neutral or unbiased decision-maker.<sup>296</sup> Just as in a judicial proceeding, due process in an administrative hearing demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication.<sup>297</sup> While procedural due process is a “flexible concept that does not establish universally applicable procedures,” at a minimum, due process requires notice, an opportunity to respond, and an impartial decision maker.<sup>298</sup>

To prevail on a claim of bias in violation of due process, the aggrieved party must present “concrete facts” showing “an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims.”<sup>299</sup>

When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*People v. Harris* (2005) 37 Cal.4th 310, 346; see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 [“When due process requires a hearing, the adjudicator must be impartial.”].) Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation “in which experience

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<sup>295</sup> Exhibit S, Claimant’s Rebuttal Comments and Comments on the Draft Proposed Decision, pages 3-4.

<sup>296</sup> *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 4; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90-91. This basic principle is consistent with the California Law Revision Commission’s note on Government Code section 17533. Section 17533 provides that Chapter 4.5, beginning with section 11400 of the Administrative Procedures Act, does not apply to a hearing by the Commission. The note by the Law Revision Commission states that “Nothing in section 17533 excuses compliance with procedural protections required by due process of law.”

<sup>297</sup> *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.

<sup>298</sup> *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320.

<sup>299</sup> *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, citing *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.



teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” (*Withrow v. Larkin*, supra, at p. 47.)<sup>300</sup>

In this case, the Commission has not violated the claimant’s due process rights or committed prejudicial error or bias in favor of Finance as alleged by SANDAG. The issues presented in this Test Claim are pure issues of law, subject to the Commission’s de novo review,<sup>301</sup> and the claimant has been given a full opportunity to file written comments and provide testimony in support of the Test Claim, in rebuttal to Finance’s comments, and in response to the Draft Proposed Decision, all of which have been considered in this Decision. The claimant has not presented facts showing that Commission staff, in granting Finance’s request for an extension of time to file comments on the Test Claim or in issuing the Draft Proposed Decision and Proposed Decision, resulted in the Commission members acting with “an unacceptable probability of actual bias” in reaching their decision on the Test Claim.

**1. The approval of Finance’s request for an extension of time to file comments on the Test Claim was proper and did not violate the claimant’s due process rights.**

The claimant argues that Commission staff erred in granting Finance an extension of time to file its comments on the Test Claim because the request was untimely and failed to comply with the Commission’s regulations.<sup>302</sup>

Section 1183.2 of the Commission’s regulations require written comments on a test claim to be certified, filed, and served within 30 days of issuance of the test claim.<sup>303</sup> Under section 1187.9, a request to extend the 30-day deadline must be filed “before the date set for filing of comments or rebuttals” and must “fully explain the reasons for the extension, propose a new date of filing, and be certified, filed, and served in accordance with section 1181.3 of these regulations.”<sup>304</sup> Section 1187.9 further states that “If representations of fact are made, they shall be supported with documentary or testimonial evidence in accordance with section 1187.5 of these regulations. So long as a postponement of a hearing would not be required, there is no prejudice to any party or interested party, and there is no good reason for a denial, the request shall be approved.”<sup>305</sup>

Here, the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued April 29, 2020 provided a deadline of May 29, 2020 for written comments

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<sup>300</sup> *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

<sup>301</sup> *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 and 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281.

<sup>302</sup> Exhibit S, Claimant’s Rebuttal Comments and Comments on the Draft Proposed Decision, page 1.

<sup>303</sup> California Code of Regulations, title 2, section 1183.2.

<sup>304</sup> California Code of Regulations, title 2, section 1187.9(a).

<sup>305</sup> California Code of Regulations, title 2, section 1187.9(a).



on the Test Claim.<sup>306</sup> Finance filed its request for an extension on June 3, 2020, three business days after the filing deadline.<sup>307</sup> The request states that more time is needed to review and respond to the Test Claim “[d]ue to the additional workload and logistical challenges with protective measures, such as teleworking, associated with the COVID-19 pandemic.”<sup>308</sup> The claimant argues that in addition to being late, Finance’s request is further invalid because it was not certified and the factual allegations contained therein were not supported by documentary or testimonial evidence as required by the Commission’s regulations.<sup>309</sup>

Certification under section 1181.3 requires that any new filing or written material filed with the Commission “be signed at the end of the document, under penalty of perjury, with the declaration that the filing is true and correct to the best of the declarant’s personal knowledge, information, or belief,” along with the date of signing and the declarant’s title and contact information.<sup>310</sup> Section 1187.5 requires that any written representation of fact “be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant’s personal knowledge, information, or belief.”<sup>311</sup> Here, Finance’s request for an extension is not signed under penalty of perjury, nor does it contain a declaration that the filing is based on the declarant’s personal knowledge, information or belief.

Section 1187.9(a) further provides that “[s]o long as a postponement of a hearing would not be required, there is no prejudice to any party or interested party, and there is no other good reason for denial, the request shall be approved.”<sup>312</sup> While Finance did not strictly adhere to the Commission’s regulations in the timing and format of its extension request, the claimant has failed to show that it suffered any harm or prejudice as a result of the approval of Finance’s request for an extension of time to file written comments on the Test Claim.

Section 1187.9 gives the Commission up to two business days to determine whether to grant an extension request and to give notice of that determination.<sup>313</sup> Finance’s request was filed three business days after the filing deadline, with the Commission issuing and serving a Notice of Extension Request Approval the same day.<sup>314</sup> No postponement of the scheduled hearing date of

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<sup>306</sup> Exhibit T, Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date, page 1.

<sup>307</sup> Exhibit T, Finance’s Request for Extension of Time, page 1.

<sup>308</sup> Exhibit T, Finance’s Request for Extension of Time, page 1.

<sup>309</sup> Exhibit S, Claimant’s Rebuttal Comments and Comments on the Draft Proposed Decision, pages 1-2.

<sup>310</sup> California Code of Regulations, title 2, section 1181.3(a).

<sup>311</sup> California Code of Regulations, title 2, section 1187.5(b).

<sup>312</sup> California Code of Regulations, title 2, section 1187.9(a).

<sup>313</sup> California Code of Regulations, title 2, section 1187.9(a).

<sup>314</sup> Exhibit T, Notice of Extension Request Approval, page 1.



September 25, 2020 was necessary, nor was the rebuttal period shortened.<sup>315</sup> The claimant's rights to file written comments, rebuttal, and testimony have been preserved. Accordingly, the claimant has not shown that the approval of Finance's request violated its due process right to a fair hearing.

**2. The Commission did not prematurely or otherwise improperly issue the Proposed Decision.**

The claimant objects to the Commission's issuance of the "Proposed Order" prior to the claimant or any other interested party having the opportunity to file a rebuttal to Finance's comments on the Test Claim.<sup>316</sup> The claimant confuses the Draft Proposed Decision with the Proposed Decision, the latter of which was not yet issued at the time of claimant's objection. Section 1183.6 of the Commission's regulations states in pertinent part as follows:

- (a) Before the hearing on the test claim, Commission staff shall prepare a proposed decision for the test claim, which shall include but not be limited to a review of the written comments filed...
- (b) At least eight weeks before the hearing, or at a time required by the executive director or stipulated to by the parties, Commission staff shall prepare a draft proposed decision and distribute it to the parties, interested parties, and those on the mailing list described in section 1181.3 of these regulations, and shall post it on the Commission's website.
- (c) Anyone may file written comments concerning the draft proposed decision. If representations of fact are made, they shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of these regulations. Written comments shall be certified, filed, and served in accordance with section 1181.3 of these regulations, by the date determined and noticed by the executive director. A three-week period for comments shall be given, subject to the executive director's authority to expedite all matters pursuant to Government Code section 17530. All written comments timely filed shall be reviewed by Commission staff and may be incorporated into the proposed decision for the test claim.<sup>317</sup>

Here, the Draft Proposed Decision was issued on July 15, 2020, which reiterated the deadlines for filing rebuttal comments to Finance's comments on the Test Claim (July 30, 2020) and comments on the Draft Proposed Decision (August 5, 2020).<sup>318</sup> As such, it was the *Draft* Proposed Decision, not the Proposed Decision, that was issued prior to the end of the rebuttal

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<sup>315</sup> See California Code of Regulations, title 2, section 1183.3(a) [written rebuttal period is 30 days from date of service of written comments on the test claim]. See also Exhibit R, page 1, stating the same.

<sup>316</sup> Exhibit S, Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, page 3.

<sup>317</sup> California Code of Regulations, title 2, section 1183.6(a)-(c).

<sup>318</sup> Exhibit R, Draft Proposed Decision, page 1 (Transmittal).



comment period. The notice enclosing the Draft Proposed Decision makes clear that rebuttal comments filed before the end of the rebuttal period will be reviewed and considered by the Commission in the Proposed Decision “and may be combined with comments on the Draft Proposed Decision.”<sup>319</sup> The claimant, as well as any interested party, was given the full length of time allowed by the Commission’s regulations and to file rebuttal comments and comments on the Draft Proposed Decision prior to issuance of the Proposed Decision. A proposed decision was not prematurely or otherwise improperly issued in this matter.

Accordingly, the Commission has not violated the claimant’s due process rights or committed prejudicial error or bias in favor of Finance as alleged.

## **V. Conclusion**

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the claimant is exempt from the taxing and spending restrictions of articles XIII A and B of the California Constitution and therefore ineligible to claim mandate reimbursement under article XIII B, section 6. Alternatively, even if the claimant were found to be an eligible test claimant, the Commission finds that it has fee authority sufficient to pay for the costs associated with the new activities required by the test claim statute pursuant to Government Code section 17556(d) and therefore is not entitled to reimbursement.

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<sup>319</sup> Exhibit R, Draft Proposed Decision, page 1 (Transmittal).