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 Commission on
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File Number 8000103

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Ms. Heather Halsey
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Dear Ms. Halsey:

Subject: Rebuttal to California Department of Finance Response and Objection to Premature Issuance of Proposed Decision to Test Claim 19-TC-03

The San Diego Association of Governments (SANDAG) hereby objects to consideration of the California Department of Finance's Response to Test Claim 19-TC-03, as the matter was untimely filed. Commission on State Mandates Regulation 1183.2 mandates strict timelines for filing comments on Test Claims: "Written comments concerning the test claim shall be certified, filed, and served within 30 days from the date the test claim or amendment is issued for comment and in accordance with section 1181.3 of these regulations." In its order dated April 29, 2020, the Commission set forth the deadline for comments on SANDAG's Test Claim, with a May 29, 2020, filing deadline.

Allowance is made for the Commission to grant an extension to deadlines, including the deadline to file comments on a Test Claim. Commission Regulation 1187.9 states in part: "Any party or interested party to a matter may request an extension of time by filing a request with the executive director before the date set for filing of comments or rebuttals with Commission staff on that matter. The request shall fully explain the reasons for the extension, propose a new date for filing, and be certified, filed, and served in accordance with section 1181.3 of these regulations. If representations of fact are made, they shall be supported by 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 other good reason for denial, the request shall be approved." (Emphasis added.)

On June 3, 2020 – five days after expiration of period within which it could permissibly seek relief from the filing deadline – The California Department of Finance filed a request for extension of time to file comments on the SANDAG Test Claim. The request for extension contained representations of fact regarding workload impacts, yet these factual assertions were not certified in accordance regulation 1181.3 (requiring signature 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) nor were they supported by documentary or testimonial evidence, all as required by Regulation 1187.9. While section 1187.9 grants the Commission wide latitude to consider the merits of an application for relief, it limits exercise of that discretion to timely requests with properly supported factual bases. Fifteen other interested parties were able to timely submit comments – all in favor of granting the Test Claim, the Department of Finance alone was unable to meet the stated deadline. Because the Department of Finance's June 3 request for extension was both untimely and unsupported by any factual basis that could be properly submitted, the Commission was without discretion to grant it. As such, the Department's comments must be stricken. Holding the Department to a different standard than all other commenters would be prejudicial error.

Notwithstanding the procedural issues surrounding the Department's comments, the substance of the Department's comments are also mistaken as a matter of law. The Department states that "The Claimant is a joint powers agency established pursuant to the Joint Exercise of Powers Act, Government Code sections 6500-6536 and is therefore not an eligible claimant under Article XIII B, section 6 of the California Constitution because it does not have independent taxation authority." While SANDAG was initially organized as a joint powers authority, it was vested with taxing authority pursuant to the San Diego Regional Transportation Consolidation Act (Consolidation Act"), Public Utilities Code (PUC) section 132350 et seq. PUC Section 132350.2 defines the "consolidated entity" as "the authority resulting from the consolidation of SANDAG and the transit boards' responsibilities as set forth herein." As such, the Consolidation Act transformed what was a JPA into a new statutorily-created public entity with expanded powers, including the power to levy taxes. While the name has remained unchanged, the nature of SANDAG post- Consolidation Act is wholly changed.

PUC section 132360.6 provides the "consolidated agency" SANDAG with its taxing authority: "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." Sections 132301 and 132302 are both part of the San Diego County Regional Transportation Commission Act (Commission Act) (PUC Section 132000 et seq.). Under the Commission Act, "The Board of Directors of the San Diego Association of Governments shall serve as the San Diego County Regional Transportation Commission." (PUC 132051) PUC Sections 132301 and 132302 authorize the Commission to impose a transactions and use tax within specified parameters, and PUC 132360.6 vests that same authority in the "consolidated agency" SANDAG.

The Department of Finance interprets SANDAG's authority as only "an indirect recipient of tax revenue." Section 132360.6 does not state that SANDAG may use the proceeds from the transactions and use tax – it states that SANDAG may use the authority for the transactions and use tax. This is a critical distinction, and one that is misinterpreted by the Department of Finance.

In regard to the Department of Finance claim that the increased cost that has or will result due to the mandate is overstated and includes cost that are not mandated, including other miscellaneous cost associated with training and development and professional licensing. Further, the Department of Finance claim that the statute only calls for a singular independent performance auditor. SANDAG disagrees with the Department of Finance for the following reasons:

1. The statute does not only call for a singular independent performance auditor. Chapter 658, Statutes of 2017, specially states the following:

The enactment of Chapter 658, Statutes of 2017, specifically relating to amended SEC. 15.

Section 132354.1 (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."

The enactment of Chapter 658, Statutes of 2017, specifically relating to amended SEC. 15. Section 132354.1(b)(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."

2. Miscellaneous Cost – the activity cost identified in the test claim include cost associated with audit positions that are required as a government auditor and under Generally Accepted Government Auditing Standards that SANDAG is required to follow according to AB805 and have or will be incurred as a result of the this mandate. If the state mandated activity was not required, the positions would not be required, and the cost associated with the positions would not exist. Therefore, that the associated activity cost is increased cost as a direct result of the activity cost required to accommodate the state mandated statutes, acts, sections, and subsections.

Chapter 658, Statutes of 2017, specifically relating to amended SEC. 15. Section 132354.1(b) (2) states "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..."

In addition to the rebuttal to the Department of Finance's Untimely comments, Claimant SANDAG also lodges its objection against the premature filing of the Commission's Proposed Order in this matter before allowing Claimant or any other interested party to file rebuttals to the Department's untimely comments, as well as to the prejudicial bias demonstrated in the impermissible allowances granted to the Department and due process rights denied Claimant and other interested parties. This predeterminational bias will serve to dissuade interested parties from rebutting the Department's flawed arguments.

Commission Regulation 1183.6 provides in part, "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." According to this regulation, and pursuant to the requirements of due process, the proposed decision is to be based upon comments that have been received, including the rebuttal to those comments. 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. 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.

Sincerely,

A handwritten signature in black ink, appearing to read "John Kirk". The signature is fluid and cursive, with the first name "John" and last name "Kirk" clearly distinguishable.

JOHN KIRK
General Counsel

JKI/mmo

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On July 20, 2020, I served the:

- **Claimant's Rebuttal Comments and Comments on the Draft Proposed Decision, filed July 20, 2020**

SANDAG: Independent Performance Auditor, 19-TC-03
Public Utilities Code Section 132354.1 (b)(1), (2), (3), (4)
San Diego Association of Government (SANDAG), Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 20, 2020 at Sacramento, California.



Jill L. Magee
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/15/20

Claim Number: 19-TC-03

Matter: SANDAG: Independent Performance Auditor

Claimant: San Diego Association of Government (SANDAG)

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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