

# MINUTES

## COMMISSION ON STATE MANDATES

State Capitol, Room 126  
Sacramento, California  
December 6, 2007

Present: Member Tom Sheehy, Chairperson  
Representative of the Director of the Department of Finance  
Member Francisco Lujano, Vice Chairperson  
Representative of the State Treasurer  
Member Richard Chivaro  
Representative of the State Controller  
Member Cynthia Bryant  
Director of the Office of Planning and Research  
Member J. Steven Worthley  
County Supervisor  
Member Sarah Olsen  
Public Member  
Member Paul Glaab  
City Council Member

### CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 9:45 a.m.

### CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (action)

#### PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
2. *County of San Bernardino v. Commission on State Mandates, et al.*, Los Angeles County Superior Court, Case No. BS106052; San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMS)*]
3. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700; [AB 138; *Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II*]

4. *Department of Finance v. Commission on State Mandates*, Sacramento County Superior Court, Case No. 07CS00079, CSM 06-L-02, [*Peace Officer Procedural Bill of Rights*]
5. *Department of Finance and California Integrated Waste Management Board v. Commission on State Mandates, Santa Monica Community College District, and Lake Tahoe Community College District*, Sacramento County Superior Court, Case No. 07CS00355, CSM 06-L-03 [*Integrated Waste Management*]
6. *San Diego Unified School District v. Commission on State Mandates and California Department of Finance*, San Diego County Superior Court, Case No. 37-2007-00064077-CU-PT-CTL, CSM 06-04 [*Emergency Procedures: Earthquake Procedures and Disasters*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda.

#### **REPORT FROM CLOSED EXECUTIVE SESSION**

In open session, Chairperson Sheehy reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda. The chairperson recessed the meeting until 10:00 a.m.

#### **RECONVENE IN OPEN SESSION**

At 10:02 a.m., Chairperson Sheehy reconvened the meeting.

#### **APPROVAL OF MINUTES**

Item 1            September 27, 2007

The September 27, 2007 hearing minutes were adopted 7-0.

#### **APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)**

Item 2            Staff Report (if necessary)

There were no appeals to consider.

## PROPOSED CONSENT CALENDAR

### INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (ACTION)

#### PARAMETERS AND GUIDELINES

- Item 13 *Pupil Safety Notices (02-TC-13)*  
Education Code Sections 32242, 32243, 32245, 46010.1; 48904, 48904.3, 48987; As Added and Amended by Statutes 1983, Chapter 498 (SB 813); Statutes 1984, Chapter 482 (AB 3757); Statutes 1984, Chapter 948 (AB 2549); Statutes 1986, Chapter 196 (AB 1541); Statutes 1986, Chapter 332 (AB 2824); Statutes 1992, Chapter 445 (AB 3257); Statutes 1992, Chapter 1317 (AB 1659); Statutes 1993, Chapter 589 (AB 2211); Statutes 1994, Chapter 1172 (AB 2971); Statutes 1996, Chapter 1023 (SB 1497); Statutes 2002, Chapter 492 (AB 1859)  
California Code of Regulations, Title 5, Section 11523  
San Jose Unified School District, Claimant

#### ADOPTION OF COMMISSION ORDER TO INITIATE RULEMAKING

- Item 16 Implementation of AB 1222 (Stats. 2007, ch. 329)  
Proposed Amendments to California Code of Regulations, Title 2, Chapter 2.5, Article 1. General, Article 3. Test Claims, Article 7. Hearings

Member Olsen made a motion to adopt items 13 and 16 on the consent calendar. With a second by Member Worthley, the items were unanimously adopted.

### **HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559) (action)**

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

#### TEST CLAIMS

- Item 3 *Interagency Child Abuse and Neglect (ICAN) Investigation Reports, 00-TC-22*  
Penal Code Sections 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.12, 11166, 11166.2, 11166.9, 11168 (Including Former Penal Code Section 11161.7), 11169, and 11170; Statutes 1977, Chapter 958 (AB 1058); Statutes 1980, Chapter 1071 (SB781); Statutes 1981, Chapter 435 (AB 518); Statutes 1982, Chapters 162 (AB 2303) and 905 (SB 1848); Statutes 1984, Chapters 1423 (SB 1899) and 1613 (AB 2709); Statutes 1985, Chapter 1598 (AB 505); Statutes 1986, Chapters 1289 (AB 1981) and 1496 (AB 3608); Statutes 1987, Chapters 82 (AB 3608), 531 (AB 1632) and 1459 (SB 1219); Statutes 1988, Chapters 269 (AB 3022), 1497 (SB 2457) and 1580 (AB 4585); Statutes 1989, Chapter 153 (AB 627); Statutes 1990, Chapters 650 (SB 2423), 1330 (SB 2788), 1363 (AB 3532) and 1603 (SB 2669); Statutes 1991, Chapter 132 (AB 1133); Statutes 1992, Chapters 163 (AB 2641), 459 (SB 1695) and 1338 (SB 1184); Statutes 1993, Chapters

219 (AB 1500), 346 (AB 331) and 510 (SB 665); Statutes 1996, Chapters 1080 (AB 295) and 1081 (AB 3354); Statutes 1997, Chapters 842 (SB 644), 843 (AB 753) and 844 (AB 1065); Statutes 1999, Chapters 475 (SB 654) and 1012 (SB 525); Statutes 2000, Chapters 287 (SB 1955) and 916 (AB 1241)

California Code of Regulations, Title 11, Sections 901, 902, and 903;  
Department of Justice Forms SS 8572 and SS 8583

County of Los Angeles, Claimant

**CITIES/COUNTIES ONLY**

Ms. Higashi clarified that on December 5, the Commission received a request from Department of Finance to postpone the hearing and determinations of those portions of Item 3 related to the pending court case: *Department of Finance v. Commission on State Mandates*, (POBOR) currently pending in the California Court of Appeal, case number C056833. This request was approved. Therefore, only those portions of Item 3 that relate to cities and counties were heard. The remainder of Item 3 that may apply to other types of local governmental entities were severed and consolidated with another pending test claim, *Child Abuse and Neglect Reporting*, 01-TC-21, which was Item 5. Ms. Higashi stated that since these claims were being consolidated, the hearing on Item 5 would be postponed until final adjudication of the *Department of Finance v. Commission on State Mandates* case. Ms. Higashi stated that all parties involved in these two test claims were in agreement with this action, and stated that Item 3 would be presented by Commission Counsel Katherine Tokarski.

Ms. Tokarski indicated that the County of Los Angeles filed the claim in 2001, alleging amendments to California's mandatory child abuse reporting laws since 1975, including changes to the Penal Code, impose a reimbursable state-mandated program on law enforcement agencies and other county departments. Ms. Tokarski stated that both the Department of Finance and Department of Social Services opposed the test claim because the claim alleged duties of law enforcement and child protective services that were required by prior law. Where the state agencies acknowledged that some new duties may have been imposed, they contend that adequate funding was already provided to counties as part of the joint federal, state, local funding scheme for child welfare.

Ms. Tokarski stated that there was no evidence in the record to demonstrate that the mandated activities had been fully offset or funded by the state or federal government in an amount sufficient to fund the costs of the program, and that the test claim statutes and executive orders created numerous new local duties for reporting child abuse to the state that were not required by prior law, and thus mandate a new program or higher level of service. Therefore, Ms. Tokarski recommended that the Commission adopt the staff analysis to partially approve the test claim for counties and cities.

Parties were represented as follows: Leonard Kaye, County of Los Angeles, Sergeant Daniel Scott, Los Angeles Sheriff's Department, Susan Geanacou and Carla Castaneda, with the Department of Finance.

Mr. Kaye concurred with the staff analysis and urged the Commission to adopt staff's recommended position, but cautioned that there is a tremendous amount of work to be done to

complete the subsequent parameters and guidelines. Sergeant Scott explained that the program was extremely important because it provided perspective on child abuse and child safety from both law enforcement and the Department of Children and Family Services.

Ms. Castaneda stated no objections to the staff analysis and indicated Finance would work with all parties to develop the parameters and guidelines. Ms. Geanacou had nothing further to add.

Member Worthley made a motion to adopt the staff recommendation. With a second by Member Glaab, the motion carried unanimously.

- Item 4 Proposed Statement of Decision  
*Interagency Child Abuse and Neglect (ICAN) Investigation Reports,*  
00-TC-22  
See Above

Commission Counsel Katherine Tokarski presented this item. She recommended that Commission adopt the proposed Statement of Decision with modifications reflecting today's hearing testimony, and also limiting the analysis and conclusions to cities and counties only. She noted that staff will make such changes and circulate the document to the parties before issuing the final Statement of Decision.

Member Glaab made a motion to adopt the proposed Statement of Decision. With a second by Member Worthley, the motion carried unanimously.

- Item 5 *Child Abuse and Neglect Reporting; 01-TC-21*  
Penal Code Sections 273a, 11164, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.14, 11166, 11166.5, 11168, 11174.3, Including Former Penal Code Sections 11161.5, 11161.6, 11161.7; Statutes 1975, Chapter 226 (AB 1063); Statutes 1976, Chapters 242 (AB 2641) and 1139 (SB 42); Statutes 1977, Chapter 958 (AB 1058); Statutes 1978, Chapter 136 (AB 2238); Statutes 1979, Chapter 373 (SB 925); Statutes 1980, Chapters 855 (AB 2497), 1071 (SB 781) and 1117 (SB 1877); Statutes 1981, Chapters 29 (SB 322) and 435 (AB 518); Statutes 1982, Chapter 905 (SB 1848); Statutes 1984, Chapters 1170 (AB 2702), 1391 (SB 1124), 1423 (SB 1899), 1613 (AB 2709), and 1718 (AB 2710); Statutes 1985, Chapters 189 (AB 701), 464 (SB 254), 1068 (AB 366), 1420 (AB 442), 1528 (SB 1306), 1572 (SB 1358) and 1598 (AB 505); Statutes 1986, Chapters 248 (SB 2451) and 1289 (AB 1981); Statutes 1987, Chapters 640 (AB 285), 1020 (SB 691), 1418 (AB 1359), 1444 (SB 646) and 1459 (SB 1219); Statutes 1988, Chapters 39 (AB 1241), 269 (AB 3022) and 1580 (AB 4585); Statutes 1990, Chapters 931 (AB 3521) and 1603 (SB 2669); Statutes 1991, Chapters 132 (AB 1133) and 1102 (AB 2232); Statutes 1992, Chapter 459 (SB 1695); Statutes 1993, Chapters 346 (AB 331), 510 (SB 665) and 1253 (AB 897); Statutes 1994, Chapter 1263 (AB 1328); Statutes 1996, Chapters 1080 (AB 295), 1081 (AB 3354) and 1090 (AB 3215); Statutes 1997, Chapters 83 (AB 327) and 134 (AB 273); Statutes 1998, Chapter 311 (SB 933); Statutes 2000, Chapters 287 (SB 1955) and 916 (AB 1241); Statutes 2001, Chapters 133 (AB 102) and 754 (AB 1697)  
San Bernardino Community College District, Claimant

- Item 6 Proposed Statement of Decision  
*Child Abuse and Neglect Reporting*; 01-TC-21  
See Above

Items 5 and 6 were postponed.

- Item 7 *Academic Performance Index*, 01-TC-22  
Education Code Sections 44650, 44654, 52050, 52055.51, 52056-52057,  
52058  
California Code of Regulations, Title 5, Sections 1031-1039  
Statutes 1999-2000x1 Chapter 3 (SBx11); Statutes 1999, Chapter 52  
(AB 1114); Statutes 2000, Chapters 71 (SB 1667), 190 (AB 2162) and  
695 (SB 1552); Statutes 2001, Chapters 159 (SB 662), 745 (SB 1991),  
749 (AB 961), and 887 (SB 1295)  
San Juan Unified School District, Claimant

- Item 8 *Academic Performance Index*, 01-TC-22  
Proposed Statement of Decision  
See Above

Items 7 and 8 were postponed.

- Item 9 *Prevailing Wages*, 03-TC-13  
Labor Code Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742,  
1770, 1771, 1771.5, 1771.6, and 1773.5  
Statutes 1976, Ch. 1084 (SB 2010); Statutes 1976, Ch. 1174 (AB 3365);  
Statutes 1980, Ch. 992 (AB 3165); Statutes 1983, Ch. 142 (AB 1390);  
Statutes 1983, Ch. 143 (AB 1949); Statutes 1989, Ch. 278 (AB 2483);  
Statutes 1989, Ch. 1224 (AB 114); Statutes 1992, Ch. 913 (AB 1077);  
Statutes 1992, Ch. 1342 (SB 222); Statutes 1999, Ch. 83 (SB 966);  
Statutes 1999, Ch. 220 (AB 302); Statutes 2000, Ch. 881 (SB 1999);  
Statutes 2000, Ch. 954 (AB 1646); Statutes 2001, Ch. 938 (SB 975);  
Statutes 2002, Ch. 1048 (SB 972)  
Title 8, California Code of Regulations, Sections 16000-16802  
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register  
77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06;  
Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register  
90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13;  
Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register  
99, No. 41; Register 00, No. 03; Register 00, No. 18)  
City of Newport Beach, Claimant

Senior Commission Counsel Deborah Borzelleri presented this item. The test claim addressed changes to the California prevailing wage law, which were designed to enforce prevailing wage standards on projects funded in whole or in part with public funds. Private contractors in public

works projects are required to pay local prevailing wages to construction workers on any projects that exceed \$1,000. This requirement does not apply to work carried out by a public agency with its own forces.

Ms. Borzelleri explained that the test claim statutes and regulations modified several provisions of the prevailing wage law that affect local agencies that contract out their public works projects. However, in order to determine whether those new Labor Code requirements are truly mandated by the state, case law requires the analysis to focus on the nature of the claimant's participation in the underlying program, and whether the decision to participate triggers the new requirements. If the test claim statutes or other law require the underlying activity that constitutes legal compulsion. Absent legal compulsion, the courts have found practical compulsion exists. Under the *Kern High School District* case, practical compulsion exists under narrow circumstances where a local agency could face penalties so severe, such as double taxation or other severe consequences, leaving no reasonable alternative but to participate in the underlying activity.

Ms. Borzelleri indicated that public works projects include a broad variety of projects from construction to repair of buildings to installing carpet. And, the decision to undertake a public works project could be driven by any number of reasons, from a local decision to a ballot initiative. There is nothing in the test claim or elsewhere in law to indicate such projects are legally compelled by the state, and claimant provided no evidence in the record to demonstrate that public works are practically compelled. Therefore, staff recommended the Commission adopt the staff analysis to deny the test claim.

The parties were represented as follows: Juliana Gmur, representing the City of Newport Beach, Tony Brine and Glenn Everroad with the City of Newport Beach; Anthony Mischel and Gary O'Mara with Department of Industrial Relations, and Carla Castaneda and Susan Geanacou with Department of Finance.

Ms. Gmur stated that prior to the *Kern* case, there was the *City of Merced* case where once a local government makes a decision, i.e., building a building versus acquiring a building through eminent domain, they are forced to comply with the law that relates to their decision. Ms. Gmur went on to ask if a local decision is actually discretionary if it involves health, safety, and welfare of the public.

Mr. Brine explained that the City contracts with a private contractor to maintain the City's 112 traffic signals. He stated that this type of work is mandated work because it is maintaining traffic safety for the public.

Mr. Everroad added that the test claim statutes added maintenance to the definition of a public works project thereby now requiring the City to increase its costs to pay prevailing wage rates to its contractors.

Member Bryant asked if there was anything that prevented the City from training a city employee to perform maintenance of the signals. Mr. Brine responded that since the City only has two staff responsible for the traffic signals, adding annual maintenance to existing duties may not be reasonable. Member Bryant stated that the City is making a choice to contract out to maintain the signals. Chairperson Sheehy asked for clarification, and Mr. Brine responded that the City has contracted out for this project for 30 years because it is cost efficient.

Mr. Everroad clarified that for general law cities, there is a threshold under which cities are required to contract out, and the cost of signal maintenance exceeds that threshold, thus requiring the City to contract out for the service.

Mr. Mischel clarified that the *City of Merced* case was decided early in the history of mandates law and on that case is built a whole analysis about what is discretionary that really culminates in the *Kern* case, which is extremely clear about what is a mandate.

Mr. O'Hara stated that maintenance was added to the definition public works in 1974, so it is not a new requirement. Mr. Mischel added that therefore, the traffic signal would not be subject to subvention.

Mr. Mischel also discussed the fact that cities perform less work now than they did prior to 1976. The state has taken over responsibilities for setting the prevailing wage rate, enforcing the prevailing wage rate, and adjudicating the prevailing wage. Local governments merely have to make sure that everybody knows to check Industrial Relation's website. The real problem is that the cost of construction has increased since 1976. But the bulk of that cost is imposed on private contractors because it's on the payment of the prevailing wage side. And that is not subject to this test claim.

Ms. Geanacou stated that Finance generally supports the staff analysis and urges its adoption. She noted that the issue regarding traffic signal maintenance was not raised before today, so Finance would need more information in order to address it.

Ms. Gmur added that they used signal maintenance as an example that everyone is familiar with. She also noted regarding the *Merced* case, that although counsel from Industrial Relations raises some excellent points, regarding the application of the Labor Code and what exactly all of this means, there is a threshold issue and that issue is the application of the *Merced* case and the concept of voluntary. Ms. Gmur noted that counsel pointed out that the case came about in 1984, but overlooked the fact the Commission was preceded by the Board of Control. So although it was an early decision, it was not an early decision for this Commission. Ms. Gmur stated that Mr. Mischel also pointed to the *Finance* case and the issue of practical compulsion. But there is also the *San Diego* case where the Supreme Court refers to the *Merced* case. You must look at the intent of the Legislature or the voters and see if the application of *Merced* defeats that intent. The Supreme Court cited the *Carmel Valley* case which is the fire protection safety program. The court pointed out that you could control your costs under the *Merced* case by simply not hiring firefighters, but that is an inappropriate way to apply *Merced*.

Member Worthley asked about an argument that Mr. Mischel made which he understood to mean this issue is long standing law which is not really before the Commission today.

Mr. Mischel explained that the maintenance provision in the Labor Code preexists the operative date that triggers whether or not a change in the Labor Code creates a mandate.

Member Lujano asked staff about both issues of the traffic signal contract. Ms. Borzelleri responded that at a certain threshold, the city is required to contract out, but the rules apply differently depending on the size of the city and whether it is a charter city or general law city.

Regarding the *Merced* case, Ms. Borzelleri reiterated that it is on point for this test claim as far as the voluntary nature of the project absent any evidence to the contrary in the record.

Chief Legal Counsel Camille Shelton added that the claimant is asking for both administrative activities and any increased costs for paying prevailing wage rates. She agreed with Mr. Mischel that the test claim is very broad and encompasses many layers of decision making with respect to the different laws that apply to different types of entities. She also agreed that today is the first time Vehicle Code requirements have been discussed. Ms. Shelton stated that staff has thoroughly researched this issue and there are many provisions that have impact on this law. The



staff analysis before the Commission addresses the record before us until today, and just the first threshold issue of whether there's a state-mandated program based on the test claim statutes that were pled. The test claim statutes on their face do not require them to take on any public works projects, and they do not require claimants to contract out. And nothing has been placed in the record to show claimants are practically compelled by the state to make those decisions, at least until today. Ms. Shelton explained that the Commission could direct staff to take a look at some of the issues discussed today and request additional briefing from claimants and state agencies. But at this point, the record is so broad and there is no evidence in the record suggesting any type of practical compulsion.

Member Worthley discussed the statute of limitations of the 1974 addition of maintenance, and asked if practical compulsion, particularly regarding maintenance, was before the Commission today. Ms. Shelton stated that it was, but there is no evidence in the record to support the practical compulsion argument.

Ms. Shelton also responded that regarding the statute of limitation on maintenance, staff did not analyze that issue, because we have not done a new program, higher level of service analysis. The claimants alleged statutes and regulations after 1975. The Commission has jurisdiction over those laws, but this analysis has not gone that far. Also, if you're specifically talking about transportation, there is also funding to consider: transportation funds, and state and federal funds that pay for maintenance schedules of traffic signals. Staff has not done that analysis either.

Ms. Geanacou asked the claimants if the traffic signal issue is an example of the types of activities for which the claimant would be seeking reimbursement or a limitation on what they are seeking in their test claim. Ms. Gmur responded that it was an example. She described the problem as being that as the definition of public works expanded, activities that the claimant didn't have to do under prevailing wage before, it has to do now. She agreed that the test claim is a "bare bones" pleading that was filed some time ago under previous Commission rules. Ms. Gmur also agreed that this issue is extremely broad, and explained that they used the example of traffic signal maintenance to show that public works is not limited to erecting a building. She stated that she would be happy to provide the Commission with additional briefing.

Ms. Higashi clarified that the staff analysis is what was before the Commission. The Commission can vote on the staff analysis, modify it, or return it to staff and ask for more briefing based on today's testimony. There were different issues raised today, such as traffic signal maintenance, but they are not in the record before the Commission.

Member Bryant asked if the Commission adopted the staff analysis today, can the claimants come back with a second test claim. Ms. Shelton responded that they could not.

Chairperson Sheehy asked when this test claim was filed. Ms. Borzelleri responded September 26, 2003.

Members Lujano and Glaab stated that they were not prepared to vote today and that additional briefing should occur. Mr. Glaab stated that as a city council member, he is sensitive to traffic signal issues and overall maintenance.

Member Bryant stated that the issue before the Commission is very narrow, but there may be an issue or practical compulsion as it relates to the Public Contract Code. She stated that she would not approve a mandate for this program unless it was very narrow.

Members Olsen and Chivaro stated that they were prepared to vote on the test claim today. Member Chivaro stated his concern that the test claim has been active since 2003 and new issues were only being brought up today. Chairperson Sheehy agreed with Member Chivaro and also stated that it was likely that the state already subvented hundreds of million dollars to cities and counties specifically for the purposes of maintaining local streets and roads.

Member Lujano asked if we had previously held items over because additional information was presented at the hearing. Ms. Higashi stated that we had. Member Worthley stated that if the issue before the Commission is the *Merced* case and practical compulsion, he was prepared to vote on that issue today. He stated that there are things that are discretionary and things that are not, however, you have to fix roofs, maintain roads and surfaces, and that some of these issues could be addressed in the parameters and guidelines. Ms. Shelton clarified that these are not issues for parameters and guidelines. They must be decided at the test claim phase because the question whether a statute imposes a mandated activity and the scope of the mandate are questions of law.

Mr. Mischel added that the *Kern* case is about practical compulsion mandated by the state. He agreed that local government must ensure the health and safety and protection of its populace, but that does not create a state mandate. Ms. Shelton added that this is an unsettled area of law. While that is true about the *Kern* case, a year later the Supreme Court decided the *San Diego Unified School District* case. That decision dealt with a school district's discretionary decision to expel a student for possession of drugs, explosives, or assault and battery. There, the court looked at the constitutional provision that requires schools to have a safe environment for pupils and employees. The schools were trying to get reimbursement for the downstream due-process requirements that were required by the state once they took on that discretionary decision. There must be evidence in the record or in the law. The Commission cannot just make the finding that there's practical compulsion.

Ms. Bryant asked about exceptions in the Public Contract Code, particular regarding emergency situations, and stated that generally governing bodies have discretion in those situations. Ms. Borzelleri agreed.

Member Lujano asked if under the Public Contract Code, claimants had no discretion to fire more staff, but had to contract out. Ms. Borzelleri stated that each situation can differ, but generally, cities are required to contract out if the project is going to exceed \$5,000, but again, there are many exceptions where they can use their own employees. Member Lujano asked if claimants do not have discretion that would constitute legal compulsion. Ms. Borzelleri stated that it would if there were no exceptions. Ms. Shelton stated that there is still another decision to make: the decision to engage in the public works project. Member Lujano stated that he still had questions on this issue.

Chairperson Sheehy stated that it is a matter of record here that two members of the Commission have asked this item to be put over. However, there are a majority of members who are prepared to vote on the item today. Mr. Lujano asked for a ten minute recess prior to voting.

Member Glaab stated that comments made by Members Olsen and Bryant resonated with him, but suggested that the claimant could return with a narrower claim.

The Commission took a ten-minute recess. Chairperson Sheehy then asked Ms. Higashi to clarify several points. Ms. Higashi reiterated that the claimant had opportunity prior to the hearing to amend the claim; that at other hearings the Commission has taken testimony at the

hearing and changed the staff analysis. But when that occurs, it is typically based on factual information of costs and funding. It has not necessarily been because additional statutes were mentioned that had not been pled, and were not before the Commission.

Chairperson Sheehy asked Ms. Gmur is she was aware of the process for amending a test claim. She responded that she was, but she was not certain that it should be amended.

Member Olsen moved adoption of the staff analysis. With a second by Member Chivaro, the item was approved by a vote of 6-1, with Member Worthley voting no.

Item 10     *Prevailing Wages*, 03-TC-13  
Proposed Statement of Decision  
See Above

Ms. Borzelleri also presented this item. She noted that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the motion carried unanimously.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (ACTION)

PARAMETERS AND GUIDELINES

Item 11     *Mentally Disordered Offenders: Treatment as a Condition of Parole* -  
00-TC-28, 05-TC-06  
Penal Code Section 2966  
Statutes 1985, Chapter 1419(SB 1296); Statutes 1986, Chapter 858  
(SB 1845); Statutes 1987, Chapter 687 (SB 425); Statutes 1988, Chapter  
658 (SB 538); Statutes 1989, Chapter 228 (SB 1625); Statutes 1994,  
Chapter 706 (SB 1918)  
County of San Bernardino, Claimant

This item was postponed.

**STAFF REPORTS**

Item 17     Chief Legal Counsel's Report (info)  
Recent Decisions, Litigation Calendar

Ms. Shelton stated that she had nothing further to add to her written report, unless there were any questions.

Item 18     Executive Director's Report (info/action)  
Workload, Budget, Legislation, and Next Hearing

Ms. Higashi reported that her report included the State Controller's recent report to the Legislature and Department of Finance on pending mandate reimbursement claims, and a tentative agenda for the Commission's January 31, 2008 hearing. Ms. Higashi also noted that staff would be providing information on AB 1222 implementation at the January hearing.

**PUBLIC COMMENT**

There was no public comment.

**ADJOURNMENT**

Hearing no further business, and with a motion by Member Glaab and second by Member Worthley, Chairperson Sheehy adjourned the meeting at 11:23 a.m.

  
PAULA HIGASHI  
Executive Director

**PUBLIC HEARING**  
**COMMISSION ON STATE MANDATES**



TIME: 9:39 a.m.  
DATE: Thursday, December 6, 2007  
PLACE: State Capitol, Room 126  
Sacramento, California



**REPORTER'S TRANSCRIPT OF PROCEEDINGS**



**ORIGINAL**

Reported by:  
Daniel P. Feldhaus  
California Certified Shorthand Reporter #6949  
Registered Diplomate Reporter, Certified Realtime Reporter

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A P P E A R A N C E S

COMMISSIONERS PRESENT

TOM SHEEHY  
(Commission Chair)  
Director, State Department of Finance

CYNTHIA BRYANT  
Director  
State Office of Planning and Research

RICHARD CHIVARO  
Representative for JOHN CHIANG  
State Controller

PAUL GLAAB  
City Council Member  
City of Laguna Niguel

FRANCISCO LUJANO  
Representative for PHILIP ANGELIDES  
State Treasurer

SARAH OLSEN  
Public Member

J. STEVEN WORTHLEY  
Supervisor and Chairman of the Board  
County of Tulare



A P P E A R A N C E S

COMMISSION STAFF PRESENT

PAULA HIGASHI  
Executive Director  
(Item 18)

NANCY PATTON  
Assistant Executive Director  
(Item 2)

CAMILLE SHELTON  
Chief Legal Counsel  
(Item 17)

DEBORAH BORZELLERI  
Commission Counsel  
(Items 9 and 10)

KATHERINE TOKARSKI  
Commission Counsel  
(Items 3 and 4)



PUBLIC TESTIMONY

**Appearing Re Item 3:**

For the County of Los Angeles:

LEONARD KAYE, ESQ.  
County of Los Angeles  
Department of Auditor-Controller  
500 West Temple Street, Suite 603  
Los Angeles, California 90012

DAN SCOTT (Sergeant)  
Special Victims Bureau  
County of Los Angeles  
Sheriff's Department  
11515 S. Colima Road, D106  
Whittier, California 90604

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 3:** *continued*

For Department of Finance:

SUSAN GEANACOU  
Senior Staff Attorney  
Department of Finance  
915 L Street  
Sacramento, California 95814

CARLA CASTAÑEDA  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, California 95814

**Appearing re Item 9:**

For Claimant City of Newport Beach:

JULIANA F. GMUR  
Manager, Cost Services  
MAXIMUS  
4320 Auburn Boulevard, Suite 2000  
Sacramento, California 95841

For Claimant City of Newport Beach: *continued*

GLEN EVERROAD  
Revenue Manager  
City of Newport Beach  
3300 Newport Boulevard  
Newport Beach, California 95658

ANTONY BRINE, P.E.  
Transportation Engineer  
Public Works Department  
City of Newport Beach  
3300 Newport Boulevard  
Newport Beach, California 95658



A P P E A R A N C E S

PUBLIC TESTIMONY

*continued*

**Appearing re Item 9:** *continued*

For Department of Industrial Relations:

GARY J. O'MARA  
Attorney  
Department of Industrial Relations  
Office of the Director - Legal Unit  
2424 Arden Way, Suite 130  
Sacramento, California 95825

ANTHONY MISCHEL  
Staff Counsel  
Department of Industrial Relations  
Office of the Director - Legal Unit  
320 West Fourth Street, Room 600  
Los Angeles, California 90013

For Department of Finance:

SUSAN GEANACOU  
Senior Staff Attorney  
Department of Finance

CARLA CASTAÑEDA  
Principal Program Budget Analyst  
Department of Finance





I N D E X

<u>Proceedings</u>	<u>Page</u>
I. Call to Order and Roll Call . . . . .	11
II. Closed Executive Session . . . . .	11
III. Report from Closed Executive Session . . . . .	12
IV. Personnel . . . . .	Postponed
V. Approval of Minutes	
Item 1    September 27, 2007 . . . . .	13
VI. Appeal of Executive Director Decisions Pursuant to California Code of Regulations Title 2, Section 1181(c)	
Item 2    Staff Report (None) . . . . .	--
VII. Proposed Consent Calendar	
(Item 13 and Item 16) . . . . .	14
VIII. Hearings and Decisions on Claims Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
A. Test Claims:	
Item 3 <i>Interagency Child Abuse and Neglect (ICAN) Investigation Reports, 00-TC-22 County of Los Angeles</i> . . . . .	19

I N D E X

Proceedings

Page

VIII. Hearings and Decisions on Claims Pursuant to  
California Code of Regulations, Title 2,  
Chapter 2.5, Article 7

A. Test Claims: *continued*

Item 4	Proposed Statement of Decision <i>Interagency Child Abuse and Neglect (ICAN) Investigation Reports, (See Item 3)</i> . . . . .	24
Item 5	<i>Child Abuse and Neglect Reporting, 01-TC-21 San Bernardino Community College District</i> . . . . .	Postponed
Item 6	Proposed Statement of Decision <i>Child Abuse and Neglect Reporting, 01-TC-21 (See Item 5 above)</i> . . . . .	Postponed
Item 7	<i>Academic Performance Index 01-TC-022 San Juan Unified School District</i> . . . . .	Postponed
Item 8	Proposed Statement of Decision <i>Academic Performance Index 01-TC-022 (See Item 7 above)</i> . . . . .	Postponed
Item 9	<i>Prevailing Wages 03-TC-13 City of Newport Beach</i> . . . . .	25
Item 10	Proposed Statement of Decision <i>Prevailing Wages 03-TC-13 (See Item 9 above)</i> . . . . .	73

I N D E X

Proceedings

Page

IX. Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8

A. Parameters and Guidelines

Item 11 *Mentally Disordered Offenders: Treatment as Condition of Parole, 00TC-28, 05-TC-06, County of San Bernardino . Postponed*

Item 12 *In-Home Supportive Services II, 00-TC-23 County of San Bernardino . Postponed*

Item 13\* *Pupil Safety Notice 02-TC-13 San Jose Unified School District (Consent calendar item) . . . . 14*

Item 14 *Local Recreational Areas: Background Screenings 01-TC-11 City of Los Angeles Department Of Recreation and Parks . Postponed*

B. Adoption of Statewide Cost Estimate

Item 15 *Enrollment Fee Collection and Waivers, 99-TC-13 & 00-TC-15 Los Rios and Glendale Community College . . . . . Postponed*

C. Adoption of Commission Order to Initiate Rulemaking

Item 16\* *Implementation of AB 1222 (Consent calendar item) . . . . 14*

I N D E X

<u>Proceedings</u>	<u>Page</u>
X. Staff Reports	
Item 17 Chief Legal Counsel's Report . . .	75
Item 18 Executive Director's Report . . .	75
XI. Public Comment . . . . .	None
Adjournment . . . . .	78
Reporter's Certificate . . . . .	79

**Commission on State Mandates – December 6, 2007**

1 BE IT REMEMBERED that on Thursday, December 6,  
2 2007, commencing at the hour of 9:45 a.m., thereof, at  
3 the State Capitol, Room 126, Sacramento, California,  
4 before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR,  
5 the following proceedings were held:

6 --oOo--

7 CHAIR SHEEHY: The Commission on State Mandates  
8 will come to order the meeting this morning will come to  
9 order.

10 Paula, will you please call the roll?

11 MS. HIGASHI: Ms. Bryant?

12 MEMBER BRYANT: Here.

13 MS. HIGASHI: Mr. Chivaro?

14 MEMBER CHIVARO: Here.

15 MS. HIGASHI: Mr. Glaab?

16 MEMBER GLAAB: Here.

17 MS. HIGASHI: Mr. Lujano?

18 MEMBER LUJANO: Here.

19 MS. HIGASHI: Ms. Olsen?

20 MEMBER OLSEN: Here.

21 MS. HIGASHI: Mr. Worthley?

22 MEMBER WORTHLEY: Here.

23 MS. HIGASHI: And Mr. Sheehy?

24 CHAIR SHEEHY: Here.

25 The Commission will meet in closed executive

**Commission on State Mandates – December 6, 2007**

1 session pursuant to Government Code section 11126,  
2 subdivision (e), in order to confer with and receive  
3 advice from our legal counsel for consideration and  
4 action, as necessary and appropriate, upon the pending  
5 litigation listed on the published notice and agenda and  
6 also in order to confer with and receive advice from  
7 legal counsel regarding additional potential litigation.

8 We will reconvene in open session at the same  
9 location in approximately 15 minutes.

10 Thank you.

11 *(Closed executive session from 9:45 a.m.*  
12 *to 9:52 a.m.)*

13 CHAIR SHEEHY: The Commission met in closed  
14 executive session pursuant to Government Code section  
15 11126, subdivision (e), in order to confer with and  
16 receive advice from our legal counsel for consideration  
17 and action, as necessary and appropriate, upon pending  
18 litigation listed on the published notice and agenda and  
19 potential litigation.

20 The Commission will now reconvene in open  
21 session, and we will recess until ten o'clock this  
22 morning.

23 Thank you.

24 *(Recess from 9:53 a.m. to 10:02 a.m.)*

25 CHAIR SHEEHY: The Commission on State Mandates



Commission on State Mandates – December 6 , 2007

1 meeting will come to order.

2 We've already had a roll call, established a  
3 quorum, and taken care of some preliminary business.

4 So having said that, I'd like to ask the  
5 members of the Commission if there are any objections or  
6 corrections to the September 27th minutes?

7 *(No response)*

8 CHAIR SHEEHY: Hearing none, is there a motion  
9 to adopt the minutes from September 27th?

10 MEMBER LUJANO: Moved.

11 MEMBER GLAAB: Second.

12 CHAIR SHEEHY: Thank you.

13 Paula, please call the roll.

14 MS. HIGASHI: Ms. Bryant?

15 MEMBER BRYANT: Aye.

16 MS. HIGASHI: Mr. Chivaro?

17 MEMBER CHIVARO: Aye.

18 MS. HIGASHI: Mr. Glaab?

19 MEMBER GLAAB: Aye.

20 MS. HIGASHI: Mr. Lujano?

21 MEMBER LUJANO: Aye.

22 MS. HIGASHI: Ms. Olsen?

23 MEMBER OLSEN: Aye.

24 MS. HIGASHI: Mr. Worthley?

25 MEMBER WORTHLEY: Aye.

Commission on State Mandates – December 6 , 2007

1 MS. HIGASHI: And Mr. Sheehy?

2 CHAIR SHEEHY: Aye.

3 Okay, so the minutes have been approved.

4 MS. HIGASHI: There are no appeals to consider  
5 today under Item 2.

6 And this brings us to the proposed consent  
7 calendar.

8 Ms. Patton, do you want to present the consent  
9 calendar?

10 MS. PATTON: I just wanted to let you know that  
11 I just found out from San Bernardino County that they are  
12 requesting that Item 11, *Mentally Disordered Offenders*,  
13 be postponed. So it's coming off calendar today.

14 MEMBER WORTHLEY: Does that require a motion?

15 MS. PATTON: No.

16 So that leaves Item 13, *Pupil Safety Notices*  
17 Parameters and Guidelines, and Item 16, the  
18 implementation of AB 1222 regulations.

19 CHAIR SHEEHY: Okay, so the consent calendar is  
20 as presented in the agenda, minus Item Number 11; is that  
21 correct, Ms. Patton?

22 MS. PATTON: Right.

23 CHAIR SHEEHY: Do we have a motion to approve  
24 the consent calendar?

25 MEMBER OLSEN: So moved.

Commission on State Mandates – December 6 , 2007

1 CHAIR SHEEHY: Can I have a second, please?  
2 MEMBER WORTHLEY: Second.  
3 Mr. Chairman, just a point of clarification  
4 because the agenda did indicate initially that 14 and 15  
5 were also going to be consent items, they are being  
6 postponed. So the consent calendar would be, as I  
7 understand it, Items 13 and 16?  
8 MS. HIGASHI: That's correct.  
9 CHAIR SHEEHY: Is that accurate, Paula?  
10 MS. HIGASHI: Yes, that's correct.  
11 CHAIR SHEEHY: Let the record show that the  
12 consent calendar is amended as per Mr. Worthley.  
13 MS. HIGASHI: All of you should have a blue  
14 sheet of paper. On the back of it, it indicates the  
15 postponed items that were initially on the consent  
16 calendar. So if you would just mentally move Item 11 to  
17 the back of the page, then we'll have a current list.  
18 CHAIR SHEEHY: Oh, I see. It's on the front  
19 side and you want to have it on the back.  
20 MS. HIGASHI: And then just move Item 11 to the  
21 back.  
22 We were just made aware of this issue this  
23 morning.  
24 CHAIR SHEEHY: I hope too many people didn't  
25 fly in from out of town for that one item.

Commission on State Mandates – December 6 , 2007

1           Okay, Paula, is the motion still in order? Do  
2 we have to --

3           MS. HIGASHI: Let me clarify -

4           CHAIR SHEEHY: Does the motion need to be  
5 remade?

6           MS. HIGASHI: Let me clarify the motion --

7           CHAIR SHEEHY: Can you clarify what the motion  
8 is, please?

9           MS. HIGASHI: Okay. It was my understanding  
10 that the motion that was made was to adopt the proposed  
11 consent calendar. And as Ms. Patton indicated, it  
12 consisted of Items 13 and 16.

13           CHAIR SHEEHY: Okay, so that's the motion.  
14 Paula, could you please call the roll?

15           MS. HIGASHI: Certainly.

16           Mr. Chivaro?

17           MEMBER CHIVARO: Aye.

18           MS. HIGASHI: Mr. Glaab?

19           MEMBER GLAAB: Aye.

20           MS. HIGASHI: Mr. Lujano?

21           MEMBER LUJANO: Aye.

22           MS. HIGASHI: Ms. Olsen?

23           MEMBER OLSEN: Aye.

24           MS. HIGASHI: Mr. Worthley?

25           MEMBER WORTHLEY: Aye.

Commission on State Mandates – December 6 , 2007

1 MS. HIGASHI: Ms. Bryant?

2 MEMBER BRYANT: Aye.

3 MS. HIGASHI: And Mr. Sheehy?

4 CHAIR SHEEHY: Aye.

5 MS. HIGASHI: The motion carries.

6 This brings us to the hearing portion of our  
7 meeting.

8 First, I'd like to ask all of the parties and  
9 witnesses who are here to testify on one of the  
10 test-claim items to please stand.

11 *(Parties and witnesses were sworn or affirmed.)*

12 MS. HIGASHI: Thank you very much.

13 Our first test claim today is Item Number 3.

14 And there have been some changes regarding how this item  
15 is being presented today.

16 And I would just like to briefly read into the  
17 record a statement regarding Items 3, 4, 5 and 6,  
18 essentially. And a copy of a letter that I issued  
19 yesterday is available for all the parties, and was  
20 mailed to all the parties on this test claim.

21 On December 5th, the Commission received a  
22 request from the Department of Finance to postpone the  
23 hearing and determinations of those portions of the  
24 analysis of Item 3 that are related to the adjudication  
25 of the following case: *Department of Finance vs.*

1        *Commission on State Mandates*, currently pending in the  
2        California Court of Appeal, Case Number C056833. And  
3        this is known as the POBOR case.

4                This request was approved. Therefore, today's  
5        Commission hearing on Item 3 will be limited to the  
6        analysis of the test-claim statutes and executive orders  
7        for cities and counties.

8                The test-claim statutes and executive orders  
9        pled by the County in Item 3, as they may apply to other  
10       types of local governmental entities, are hereby severed  
11       and consolidated with another pending test claim, *Child*  
12       *Abuse and Neglect Reporting*, 01-TC-21, which is on this  
13       agenda as Item 5. This test claim was filed by the  
14       San Bernardino Community College District.

15                By this consolidation, the Commission is also  
16        postponing the December 6th hearing on Item 5, for  
17        01-TC-21. The consolidated test claim comprised of  
18        00-TC-22 and 01-TC-21 will be set for hearing within  
19        60 days after the final adjudication of the *Department of*  
20        *Finance vs. Commission on State Mandates* case. At that  
21        time, a new draft staff analysis will be issued for  
22        review and comment.

23                And it's my understanding that all of the  
24        parties that are involved in these two test claims are in  
25        agreement with this action that's been taken.

1 Are there any questions?

2 CHAIR SHEEHY: Do we have any questions or  
3 comments from members of the Commission?

4 *(No response)*

5 MS. HIGASHI: Item 3 will be presented by  
6 Commission Counsel Katherine Tokarski.

7 MS. TOKARSKI: Good morning. The County of  
8 Los Angeles filed a test claim on June 29th, 2001,  
9 alleging that amendments to California's mandatory child  
10 abuse reporting laws since 1975 impose a reimbursable  
11 state-mandated program on law enforcement agencies and  
12 other county departments. A number of changes to the  
13 Penal Code are claimed, including a reenactment in 1980,  
14 and substantive amendments in 1997 and 2000.

15 In initial comments filed, the Department of  
16 Finance and the Department of Social Services both oppose  
17 the test claim, arguing that the claim alleges duties of  
18 law enforcement and child protective services that were  
19 required by prior law.

20 Where the state agencies acknowledge that some  
21 new duties may have been imposed, they contend that  
22 adequate funding has already been provided to counties as  
23 part of the joint federal, state, local funding scheme  
24 for child welfare.

25 At this time, there is no evidence in the

1 record to demonstrate that the mandated activities have  
2 been fully offset or funded by the state or federal  
3 government in a manner and amount sufficient to fund the  
4 cost of the state mandate.

5 Staff finds that the test-claim statutes and  
6 executive orders have created numerous new local duties  
7 for reporting child abuse to the state that were not  
8 required by prior law, thus mandating a new program or  
9 higher level of service.

10 Such activities include distributing the  
11 suspected child-abuse report form, cross-reporting  
12 suspected child abuse and neglect by telephone and in  
13 writing between local departments, completing the  
14 investigation needed to prepare and submit the state  
15 child-abuse investigation report to DOJ, as well as  
16 related record-keeping and notification activities.

17 Staff recommends the Commission adopt the staff  
18 analysis to partially approve this test claim for  
19 counties and cities.

20 Will the parties and witnesses please state  
21 your names for the record?

22 MR. KAYE: Leonard Kaye, County of Los Angeles.

23 SERGEANT SCOTT: Daniel Scott.

24 CHAIR SHEEHY: Mr. Kaye, do you have some  
25 testimony for us this morning on this item?



1 MR. KAYE: Very brief.

2 CHAIR SHEEHY: Okay, please precede.

3 MR. KAYE: We concur completely with Commission  
4 staff's analysis and urge you to adopt their recommended  
5 position on this in developing this test claim, which I  
6 think we did it six and a half years ago.

7 We feel it's important to update the  
8 Commissioners, should they have questions at this point  
9 in time. And Sergeant Dan Scott, who is a POST-certified  
10 trainer in this area and also has substantial experience  
11 in this area, is prepared to answer any questions you may  
12 have in that regard.

13 However, we feel that there is a tremendous  
14 amount of work to be done in the subsequent parameters  
15 and guidelines phase to follow. And this might take, of  
16 course, work with many, many jurisdictions over some  
17 period of time. But we like the endorsement, the green  
18 light to start this long-delayed reimbursement program  
19 this morning.

20 Thank you.

21 CHAIR SHEEHY: Thank you.

22 Mr. Scott?

23 SERGEANT SCOTT: Good morning. My name is Dan  
24 Scott. I'm a sergeant with the Los Angeles Sheriff's  
25 Department, Special Victims Bureau. I have been with the

1 department 28 years, and have spent 20 years in the field  
2 of child abuse -- 13 as a detective and seven as a  
3 sergeant.

4 And the magnitude of this bill is extremely  
5 important in that law enforcement get out to take a look  
6 at these cases, something that is required to have by  
7 law, and also to have a perspective from law enforcement,  
8 not just the Department of Children and Family Services.

9 It's important that both entities take a look  
10 at the protection of children from their respective  
11 expertise. And law enforcement is unique in that we look  
12 at these cases from a different perspective, as far as  
13 the safety of the children, and to determine what should  
14 proceed as far as if it's criminal or not.

15 About 30 percent of our cases actually go to  
16 criminal. But the majority of them are dealt with in a  
17 manner that protects the children first.

18 CHAIR SHEEHY: Thank you, Mr. Scott.

19 The Department of Finance, would you like to  
20 comment on this item?

21 MS. CASTAÑEDA: Carla Castañeda, Department of  
22 Finance.

23 We have no objections to the staff analysis  
24 with the exception of the education components. And we  
25 also will work with local agencies and Commission staff

1 in developing the parameters and guidelines to  
2 appropriately address the offsets as we asserted during  
3 the staff analysis. The funding is provided through  
4 social services.

5 CHAIR SHEEHY: Thank you, Carla.

6 Ms. Geanacou, did you have anything to add?

7 MS. GEANACOU: No, I don't.

8 Susan Geanacou, Department of Finance.

9 CHAIR SHEEHY: Are there any questions from the  
10 members of the Commission or any further discussion on  
11 this item that's desired at this time with the members?

12 *(No response)*

13 CHAIR SHEEHY: Very well. Do we have a motion?

14 MEMBER WORTHLEY: Mr. Chairman, I'd be glad to  
15 move approval of the staff analysis.

16 MEMBER GLAAB: Second.

17 CHAIR SHEEHY: Thank you.

18 Paula, could you please call the roll?

19 MS. HIGASHI: Mr. Glaab?

20 MEMBER GLAAB: Aye.

21 MS. HIGASHI: Mr. Lujano?

22 MR. LUJANO: Aye.

23 MS. HIGASHI: Ms. Olsen?

24 MEMBER OLSEN: Aye.

25 MS. HIGASHI: Mr. Worthley?

Commission on State Mandates – December 6, 2007

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MEMBER WORTHLEY: Aye.

MS. HIGASHI: Ms. Bryant?

MEMBER BRYANT: Aye.

MS. HIGASHI: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HIGASHI: And Mr. Sheehy?

CHAIR SHEEHY: Aye.

MS. HIGASHI: The motion is carried.

MR. KAYE: Thank you very much.

CHAIR SHEEHY: Ms. Tokarski will introduce  
Item 4, the proposed Statement of Decision.

MS. TOKARSKI: The staff recommends the  
Commission adopt the proposed Statement of Decision with  
modifications reflecting today's hearing testimony, and  
also limiting the analysis and conclusions to cities and  
counties only. Staff will make such changes and  
circulate the document to the parties before issuing the  
final Statement of Decision.

CHAIR SHEEHY: Thank you, Katherine.

Is there a motion on Item Number 4?

MEMBER GLAAB: So moved.

MEMBER WORTHLEY: Second.

CHAIR SHEEHY: Thank you.

Please call the roll.

MS. HIGASHI: Mr. Lujano?

Commission on State Mandates – December 6 , 2007

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MEMBER LUJANO: Aye.

MS. HIGASHI: Ms. Olsen?

MEMBER OLSEN: Aye.

MS. HIGASHI: Mr. Worthley?

MEMBER WORTHLEY: Aye.

MS. HIGASHI: Ms. Bryant?

MEMBER BRYANT: Aye.

MS. HIGASHI: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HIGASHI: Mr. Glaab?

MEMBER GLAAB: Aye.

MS. HIGASHI: Mr. Sheehy?

CHAIR SHEEHY: Aye.

MS. HIGASHI: The motion is carried.

Now, you'll have to shift binders at this point.

Items 5 and 6 are postponed.

Items 7 and 8 are postponed.

And this brings us now to the test claim, Item Number 9, Senior Commission Counsel Deborah Borzelleri will present Item 9, which is the *Prevailing Wages* test claim.

MS. BORZELLERI: Thank you.

This test claim addresses changes to the California prevailing-wage law, which was designed to

1 enforce prevailing-wage standards on projects funded in  
2 whole or in part with public funds.

3 Private contractors in public works projects  
4 are required to pay local prevailing wages to  
5 construction workers on any projects that exceed \$1,000.  
6 The requirement to pay prevailing wages does not apply to  
7 work carried out by a public agency with its own forces.

8 The test-claim statutes and regulations  
9 modified several provisions of the prevailing wage law  
10 and local agencies that contract out for public works  
11 projects are affected by these changes. But in order to  
12 determine whether those new Labor Code requirements are  
13 truly mandated by the state, the case law requires the  
14 analysis to focus on the nature of the claimant's  
15 participation in the underlying program, and whether the  
16 decision to participate triggers the new requirements.

17 If the test-claim statutes or other law  
18 required the underlying activity, that constitutes legal  
19 compulsion. Absent legal compulsion in some very narrow  
20 circumstances, the courts have found practical compulsion  
21 exists.

22 The *Kern High School District* case sets forth  
23 these narrow circumstances, that is, where the local  
24 agency would face penalties such as double taxation other  
25 severe consequences, leaving no reasonable alternative

1 but to participate in the underlying activity.

2 Here, the significant underlying decision is  
3 whether to undertake a public works project in the first  
4 place.

5 Public works includes a broad variety of  
6 projects from such things as construction and repair of  
7 buildings, to installing carpet. And the decision to  
8 undertake a public works project could be driven by any  
9 number of reasons, from a local administrative decision  
10 to a ballot initiative.

11 There is nothing in the test claim or elsewhere  
12 in law to indicate such projects are legally compelled by  
13 the state. Moreover, claimant has put no evidence into  
14 the record to demonstrate that public works projects are  
15 practically compelled. It is the claimant that is  
16 required to meet the burden of demonstrating the  
17 circumstances under which it is practically compelled to  
18 engage in the underlying activity. And here, that burden  
19 has not been met. Therefore, staff recommends the  
20 Commission adopt this analysis to deny the test claim.

21 Will the parties and witnesses please state  
22 your names for the record?

23 MS. GMUR: Juliana Gmur on behalf of the City  
24 of Newport Beach.

25 MR. BRINE: Tony Brine, City traffic engineer,

1 Newport Beach.

2 MR. EVERROAD: Glenn Everroad, City of Newport  
3 Beach.

4 MR. MISCHER: Anthony Mischel, Department of  
5 Industrial Relations.

6 MR. O'MARA: Gary O'Mara with the Department of  
7 Industrial Relations.

8 MS. GEANACOU: Susan Geanacou, Department of  
9 Finance.

10 MS. CASTAÑEDA: Carla Castañeda, Department of  
11 Finance.

12 CHAIR SHEEHY: Thank you.

13 Ms. Gmur, would you like to open up with your  
14 testimony?

15 MS. GMUR: Yes, I would. Thank you very much.

16 Good morning, Commissioners. This test claim  
17 is regarding the expansion of the prevailing wage law.  
18 We appreciate staff's thoughtful analysis on this matter,  
19 and staff points to the decision that local governments  
20 engage in to start a public works project as a voluntary  
21 discretionary decision.

22 This is in line with the case law that we've  
23 seen from the Department of Finance. But initially, the  
24 first case was the *City of Merced*.

25 In the *City of Merced* case, we have a similar



1 fact pattern. The City of Merced opted, instead of in  
2 this case to, say, perhaps build a building, they opted  
3 to acquire a building by eminent domain. And in so  
4 doing, they put themselves into the position of having to  
5 comply with the mandate.

6 The theory behind the *City of Merced* is that if  
7 you don't make the decision -- that is, if you choose to  
8 go into a particular direction -- and you run into the  
9 statutes that create the mandate, you could have avoided  
10 it; therefore, it is not a mandate.

11 Staff says that it's a voluntary, discretionary  
12 decision. But is it? When it comes to erecting a  
13 building, perhaps that is the case. But when it concerns  
14 health, safety, and welfare of the public, is it truly a  
15 discretionary decision?

16 We have here today from the City of Newport  
17 Beach, Tony Brine, and he's going to talk to you about a  
18 situation that the City is facing with regards to  
19 maintenance of traffic signals.

20 CHAIR SHEEHY: Thank you.

21 Mr. Brine?

22 MR. BRINE: Good morning. We have a contract  
23 with a private contractor to do our annual maintenance of  
24 traffic signals in Newport Beach. We have 112 traffic  
25 signals in the city. And we pay that contractor wages to

1 do maintenance on a per-signal location.

2 We feel -- and I'm going to move ahead -- that  
3 this is a mandated type of maintenance work, because it's  
4 the type of work we need to do on a regular basis to make  
5 sure the signals are functional; that there are no safety  
6 issues related to, as an example, red light is no longer  
7 functioning or the traffic-signal controller is no longer  
8 functioning. If those issues arise, then it puts the  
9 traffic signal into a condition where it could be unsafe  
10 for the drivers. And there have been situations where  
11 there have been accidents related to poorly maintained  
12 traffic signals.

13 So we have to, and we have a responsibility to  
14 the residents and the drivers to maintain the traffic  
15 signals and to keep them functioning. And so for that  
16 purpose, then we believe this is not a discretionary  
17 action but, rather, it's a necessary, mandatory-type  
18 action.

19 CHAIR SHEEHY: Thank you.

20 Mr. Everroad, do you -- does that conclude your  
21 testimony, Mr. Brine?

22 MR. BRINE: Yes.

23 CHAIR SHEEHY: Mr. Everroad -- maybe you could  
24 surrender your seat so Mr. Everroad could sit up. I  
25 think he would like to --

1 MR. EVERROAD: Actually, I would like to thank  
2 staff for their analysis, and would argue that, as  
3 Juliana has related, that we do have discretion in some  
4 situations. However, there's a legal compulsion and  
5 there's a practical compulsion as it relates to  
6 maintaining traffic signals, an activity that, prior to  
7 the statutes, may not have constituted or been defined as  
8 a public works project. These statutes redefine public  
9 works projects to include maintenance.

10 And in this particular agreement, our  
11 contractor, the cost increased threefold as a result, in  
12 part, due to the prevailing-wage requirements associated  
13 with the statutes.

14 So we don't have discretion as it relates to  
15 traffic signals. We have a practical and -- I believe  
16 the California Vehicle Code also points to a legal  
17 requirement to maintain traffic signals. So I would just  
18 like to ask for your understanding about the differences  
19 between a practical compulsion and this discretionary  
20 act.

21 We don't have discretion as it relates to  
22 maintaining traffic signals, not practically and not  
23 lawfully.

24 Thank you.

25 MS. GMUR: And as a point in fact, Mr. Everroad

1 was referring to Vehicle Code 21351, which states that  
2 local authorities shall place and maintain or cause to be  
3 placed and maintain, such traffic lights, signals, and  
4 other traffic-control devices upon streets and highways  
5 as required hereunder.

6 CHAIR SHEEHY: Ms. Bryant?

7 MEMBER BRYANT: Is there anything that  
8 precludes -- I mean, I agree with you, you clearly have  
9 to have functioning traffic lights in Newport Beach. But  
10 is there anything that prevents you from training a city  
11 employee to perform that task and to maintain the  
12 streetlights for you?

13 MR. BRINE: I would say probably.

14 In our case, we have one traffic signal  
15 technician and one engineer as part of our staff. And  
16 they are responsible for the entire 112 signals, and  
17 reviewing that, and making sure they're operational on a  
18 daily basis.

19 So to add to their tasks, in addition, their  
20 regular maintenance and going in and actually, physically  
21 doing work on the intersections to maintain them, I think  
22 that goes beyond what we can do within the City in terms  
23 of going past operational issues to then include  
24 maintenance.

25 MEMBER BRYANT: So the City is making a choice

1 to have a contract to maintain the stoplights as opposed  
2 to expanding City staff to perform that task?

3 MR. BRINE: We have in over a 30-year period  
4 had contracts with consultants to do the work. And I  
5 think it's worked in the best fashion for the City to do  
6 that from a staffing standpoint and also from a cost  
7 standpoint for the City to contract.

8 CHAIR SHEEHY: I'm sorry, I just want to make  
9 sure I understand. So you think it's more cost-effective  
10 for you to contract the work out than having City staff  
11 do the work?

12 MR. BRINE: I personally do believe that.

13 CHAIR SHEEHY: I see.

14 MR. EVERROAD: If I might speak to the  
15 Commissioner's question, with regards to whether or not  
16 we decide to do this ourselves or contract out for that,  
17 state law directs at least general law cities as to  
18 whether or not they are obligated to contract out for  
19 services after certain threshold amounts have been met.  
20 Our traffic signal maintenance agreement annually is  
21 \$210,000, well beyond what the statutory requirements are  
22 for contracting this out. So we don't have the  
23 discretion as it relates to maintaining traffic signals  
24 with using City staff.

25 MS. GMUR: And Mr. Everroad was referring to

1 the Public Contracts Code, which I believe was cited in  
2 our comments to the draft staff analysis.

3 CHAIR SHEEHY: The Department of Finance -- I'm  
4 sorry, the Department of Industrial Relations is here  
5 this morning.

6 Did you have comments on this item?

7 MR. MISCHEL: Yes, we do.

8 CHAIR SHEEHY: Please proceed.

9 MR. MISCHEL: Yes, I would like to start -- I'm  
10 sorry, again, my name is Anthony Mischel.

11 CHAIR SHEEHY: Thank you, Mr. Mischel.

12 MR. MISCHEL: I'd like to start with going back  
13 to the comment about what the *City of Merced* case really  
14 says.

15 If you look at *Merced*, it does talk about the  
16 fact that the City makes a decision first to take  
17 property, and then it decides it's going to proceed by  
18 eminent domain. And the Court just addressed the  
19 question of whether the decision to proceed by eminent  
20 domain was a discretionary act. But the Court  
21 specifically said it was not addressing any of the other  
22 issues that were actually unspecified because of the  
23 result. And there's no indication in the record that the  
24 *Merced* court thought that looking at the second  
25 discretionary act as opposed to the first discretionary

1 act was of any significance.

2 It's also really important to see *Merced* in the  
3 context of the development of the law around state  
4 mandates. Remember, *Merced* was decided in 1984, very  
5 shortly after the Commission is, in fact, created. It's  
6 not the first case; it's one of the first cases.

7 And on *Merced* is then built a whole analysis  
8 about what is a discretionary act that really culminates  
9 in *Kern County*, the Kern School District case, in which  
10 the Court was extremely clear about what a mandate was.

11 So I think it's disingenuous to somehow parse  
12 *Merced* as carefully as the City has parsed it.

13 What you're looking at, I think after *Kern*, is  
14 whether or not there is state law requiring certain  
15 activities; and if not, whether state law creates such  
16 Draconian consequences that a city actually has no  
17 choice.

18 So the only example so far before you is the  
19 relatively small question of traffic signal maintenance.  
20 Whether all other construction is sort of per force no  
21 longer in this test claim or not, I don't know. I don't  
22 know what is in and what is out. It has been a problem,  
23 I think, from the beginning, I think, for us to respond.

24 And having not been aware of, or had the chance  
25 to look at the Vehicle Code or the Public Contracts Code

1 insofar as it applies to maintenance as opposed to the  
2 more general questions of construction, I'm at a little  
3 bit of a loss in terms of the very specific responses.

4 Mr. O'Mara, who has been with the Department  
5 for decades and has been doing this work for virtually  
6 his entire career, does have some comments about when  
7 maintenance became - was considered to be a public work  
8 or subject to the payment of prevailing wages under 1771.

9 And I'd like to turn this over to him to talk  
10 about maintenance historically in terms of when it became  
11 a requirement.

12 CHAIR SHEEHY: Mr. O'Mara, you have a green  
13 light.

14 MR. O'MARA: Thank you, sir.

15 Maintenance was added to the statute in 1974,  
16 at the same time that the Legislature codified the *Bishop*  
17 decision from 1969, which excluded force account.  
18 Maintenance was added -- overruled *sub silentio*, a  
19 decision called *Franklin vs. County of Riverside* decided  
20 in 1962 by the California Supreme Court, which excluded  
21 maintenance from the statute.

22 So there has been a requirement for maintenance  
23 as enacted since 1974. It's not a new requirement  
24 post-Proposition 13.

25 MR. MISCHER: So what this would mean is that



1 this wouldn't be a mandate. This would not be subject to  
2 subvention because this has been required all along.

3 I would also like to, as a final comment, go  
4 back to the comments we originally made about the Labor  
5 Code amendments. And I will really try to get through  
6 this part quickly, so as I don't get a red light from the  
7 chair.

8 CHAIR SHEEHY: Please continue.

9 MR. MISCHEL: Thank you.

10 But if you look at the kind of work that cities  
11 had to do before 1976, and the work that cities have to  
12 do now, they do less. They do less.

13 We have taken over -- the State has taken over  
14 responsibilities for setting the prevailing wage rate,  
15 setting the requirements for prevailing wage, enforcing  
16 the prevailing wage, adjudicating the prevailing wage.  
17 And awarding bodies, local governments merely have to  
18 make sure that everybody knows to look to our Web site.  
19 That if somebody raises a violation, they can't shield  
20 their eyes. And if the State says, "Don't pay the money  
21 until this is adjudicated," to hold onto the money.  
22 And beyond that, there's not much left for the cities to  
23 do.

24 The real problem is, the cost of construction  
25 has gone up since 1976. But the bulk of the cost of that

1 increase is on private contractors, because it's on the  
2 payment of the prevailing wage side. And that's not  
3 subject to this test claim. What has resulted, they say,  
4 is a minor increase in the administration of prevailing  
5 wages.

6 And we put it to you that that is not subject  
7 to mandate for the variety of reasons from, maintenance  
8 has been in the code since before 1976, and the cities  
9 now do less in administering than they did before.

10 Thank you.

11 CHAIR SHEEHY: Thank you, Mr. Mischel.

12 The Department of Finance, do you have comments  
13 on this item?

14 MS. GEANACOU: Susan Geanacou, Department of  
15 Finance.

16 We generally support the staff analysis and  
17 urge its recommendation -- or its adoption, rather --  
18 today.

19 I will note that I don't believe there's any  
20 prior testimony or evidence in the record regarding the  
21 traffic-signal issue raised here, nor the specific  
22 Vehicle Code section that I think was raised generally by  
23 Mr. Everroad. So if we're asked to look at that  
24 particular issue, I think we'd need more specifics in  
25 order to address it.

1 CHAIR SHEEHY: Yes, Ms. Gmur?

2 MS. GMUR: Yes. We were trying to find some  
3 way to put something specific to this so that we could  
4 look at an example that everyone is familiar with. And  
5 the issues were raised generally in the comments. But  
6 it's too easy to look at the concept of erecting a  
7 building and saying, "Well, you don't have to do that."  
8 It's harder to look at things like traffic signals,  
9 repairing bridges, other things that are required under  
10 health and safety, welfare, police powers, those sorts of  
11 things that counties and cities exercise.

12 I would like to take a quick comment on the  
13 *City of Merced*. Although counsel has raised some  
14 excellent issues with regard to the application of the  
15 Labor Code sections and what exactly all of this means,  
16 we have a threshold issue, and that threshold issue is  
17 the application of *City of Merced* and this concept of  
18 voluntary. If we don't get over that threshold issue, it  
19 doesn't matter what the statutes say. If it's a  
20 voluntary decision, even if the application -- even if we  
21 have a much more complicated process, a much more costly  
22 process, it doesn't matter if it's still a process we  
23 walk into voluntarily.

24 Therefore, back on the *City of Merced* -- and I  
25 know I'm constantly in front of you talking about this.

1 You probably all sit around saying, "Oh, there she is,  
2 Ms. City-of-Merced."

3 But counsel pointed to the fact that the case  
4 came about early in the Commission's life in 1984. But  
5 counsel overlooks the fact that this Commission was  
6 preceded by the Board of Control. So although it is an  
7 early decision coming out of our appellate courts, it was  
8 not an early decision for this commission.

9 Counsel points to the Department of Finance  
10 case, which I'm certain you're all familiar with the  
11 language, we're looking at the issue of practical  
12 compulsion, are there draconian results -- that one seems  
13 to kind of crop up -- and double taxation, those are the  
14 terms that are used. But there's also another case out  
15 there, and that is the *San Diego Unified* case, which,  
16 again, I routinely bring up.

17 In that case, the Court, the California Supreme  
18 Court, went out of its way to make a point about the *City*  
19 *of Merced*. It is dicta, indeed. It is something that  
20 was not germane or relevant to the issue pending because  
21 it was not the basis upon which the decision was made.

22 However, I have seen it quoted by your staff in  
23 the past, and it is basically a caution, a caution as to  
24 how you apply the *City of Merced*.

25 You must look at the intent of the law, the

1 intent of the Legislature or the voters, and see if the  
2 application of *City of Merced* defeats that intent.

3 The case that was cited by the Court at the time was  
4 *Carmel Valley* which, as you all may recall, is the fire  
5 protection safety. The Court pointed to the fact that  
6 you could control your costs under the *City of Merced*  
7 analysis by simply not hiring any firefighters. If you  
8 don't hire firefighters, they don't need protective  
9 clothing, and so you have solved your problem.

10 And the Court has said that that's an  
11 inappropriate way to apply *City of Merced*.

12 So I just caution the Commission to look before  
13 they leap; to go through the analysis to see if *City of*  
14 *Merced* and its companion case, the *Department of Finance*,  
15 is the direction this Commission wants to go.

16 MEMBER WORTHLEY: Mr. Chairman, may I ask a  
17 question?

18 CHAIR SHEEHY: Please.

19 MEMBER WORTHLEY: Mr. Mischel presented an  
20 argument which I really didn't see presented in the staff  
21 analysis, which is basically a statute of limitations  
22 argument, I believe. As I understood his statement, this  
23 is long-standing law; therefore, it's not really before  
24 the Commission today to examine, if I understood you  
25 correctly.

1 MR. MISCHEL: Actually, what I was trying to --  
2 I'm sorry, I wasn't clear.

3 MEMBER WORTHLEY: You were very clear, but I  
4 probably just misunderstood it.

5 MR. MISCHEL: What I was trying to say is that  
6 the maintenance provision in the Labor Code, in 1771,  
7 preexists the operative date on which the -- the trigger  
8 date for whether or not a change in the Labor Code  
9 creates a mandate.

10 MEMBER WORTHLEY: So it is a statute of  
11 limitations issue?

12 MR. MISCHEL: It is in that sense, yes. I  
13 mean, there's all sorts of statute of limitations  
14 questions because -- but I think they're sort of down the  
15 line, if you go there, about how far back do you get to  
16 go. I mean, they're talking about changes in the Labor  
17 Code starting in 1977. And the claim is filed  
18 twenty-some years later or whatever. But that's a  
19 different question.

20 CHAIR SHEEHY: I'm sorry. Mr. Lujano, did you  
21 want to ask a question?

22 MEMBER LUJANO: Yes, I'd like to hear from our  
23 counsel on both issues of the contract.

24 MEMBER OLSEN: One of them is already done.

25 MS. BORZELLERI: Okay, the contracting issue

1 for the traffic-signal contract?

2 MEMBER LUJANO: Yes.

3 MS. BORZELLERI: Well, I think Ms. Geanacou put  
4 it very succinctly. I would need to go back and look at  
5 what that Vehicle Code section says and what the  
6 threshold limits are. But the Public Contract Code  
7 sections, as you may have seen in the analysis, are very  
8 convoluted. They say, "Up to this limit, you need to  
9 contract out, but then if you're a city of this size or  
10 if you're a charter city, different rules apply."

11 And then there also is a lot of discretion with regard to  
12 accepting bids and rejecting bids. And you can go all  
13 the way down the line.

14 So we haven't had any specific situations to  
15 look at. And so I would have a hard time answering your  
16 question today.

17 MR. MISCHEL: May I make one comment just on  
18 this point?

19 CHAIR SHEEHY: All right, well, why do we  
20 let -- Mr. Mischel, why don't we let Deborah finish on  
21 the second, and Mr. Lujano had two questions, and she  
22 answered the first.

23 MS. BORZELLERI: The second issue on the *City*  
24 *of Merced*?

25 MEMBER LUJANO: Yes.

1 MS. BORZELLERI: Well, it is our -- I mean, we  
2 have looked at the *San Diego* case and the caution  
3 language that's in it; but, again, it did not overrule  
4 the *City of Merced*. The cautionary discussion in  
5 *San Diego Unified* just says, "Well, you can't go quite  
6 that far," as to looking at how many firefighters to  
7 employ.

8 But we don't believe -- we believe that the  
9 *City of Merced* is directly on point for this case, as far  
10 as the voluntariness of the issue absent any other  
11 information brought into the record.

12 So does that answer your questions?

13 MEMBER LUJANO: Yes.

14 MS. BORZELLERI: Okay, thank you.

15 CHAIR SHEEHY: Mr. Mischel?

16 MR. MISCHEL: Thank you.

17 Early on in our comments back when we filed the  
18 initial ones, one of the points we tried to make was that  
19 the test claim was extremely unclear as to what  
20 activities -- what construction activities were being  
21 claimed raised subvention issues. And we're here now  
22 years later, and for the first time hearing about  
23 traffic-signal maintenance.

24 And I'm totally at a loss. I don't know  
25 anything about that, other than the little piece that



1 Mr. O'Mara commented on.

2 So if you were going to use that as the basis  
3 for saying there's a mandate, I think it would only be  
4 fair to everyone, including staff, if the City were  
5 required to list the actual acts of construction that are  
6 subject to the Public Contracts Code in their experience.

7 I mean, even though the City of Newport Beach  
8 is a chartered city, it can exempt itself from all of the  
9 Public Contracts Code. So it doesn't get traffic signal  
10 maintenance as a mandate in they could just ignore the  
11 Public Contracts Code requirements and choose to either  
12 contract it out or not.

13 But for the general-law cities which are also  
14 before you sort of as a class, there may be issues; but  
15 you ought to know what the scope is and so the staff  
16 could look at it and say, "Is this in? Is this out?  
17 Does this make a difference?" And if necessary, go on to  
18 the next steps.

19 But to do it here today, sort of without any  
20 ability for us to respond, I think is kind of unfair.  
21 I do believe that you don't have sufficient evidence to  
22 say there is a mandate to contract out. But if you were  
23 inclined to think that, you're going to have to take more  
24 time to look at it.

25 But I think the City should present something

1 more concrete.

2 CHAIR SHEEHY: Ms. Shelton, did you want to add  
3 something?

4 MS. SHELTON: I do want to add a few things.

5 One, if you take a look, beginning on page 14  
6 through I think about page 19 or 20, those are the list  
7 of activities that the claimant has requested  
8 reimbursement for. And they begin with activities of  
9 increased costs to pay the prevailing wages. They also  
10 ask for the increased cost of hauling refuse because the  
11 prevailing wages. So they're asking for not only the  
12 administrative activities to comply with any amendment  
13 made after '77, but also any increased costs in paying  
14 under their contract provisions for prevailing wage.

15 When we got this test claim, I agree with  
16 Mr. Mischel that this is -- it was a completely -- it's  
17 very broad. It asks for many things. It wasn't limited.  
18 There were no facts in this record, only conclusions that  
19 it should be reimbursable.

20 And as you can hear, there are many, many  
21 layers of decision-making, many, many layers of the type  
22 of entity and different laws applying with respect to  
23 different types of entities.

24 Today is the first time we've ever heard about  
25 the Vehicle Code.

1 I can tell you just from our review, we have  
2 pulled leg. history, we have pulled the Government Code,  
3 we've pulled the Constitution, the Public Contracts Code,  
4 the Labor Code. There are many provisions which have an  
5 impact on this law.

6 This analysis addresses the record that we had  
7 before us up until today. And this analysis addresses  
8 just the first threshold issue of whether there's a  
9 state-mandated program based on the test-claim statutes  
10 that were pled.

11 The test-claim statutes on their face do not  
12 require them to take on any public works projects.  
13 The test-claim statutes on their face do not require them  
14 to contract out. And nothing has been put into the  
15 record to show that they have been practically compelled  
16 by the State to make those decisions, at least up until  
17 this point today.

18 If you want staff to go back and maybe take a  
19 look at some of the issues, we would request additional  
20 briefing from the claimants, from DIR, from the  
21 Department of Finance, and another round, if you're  
22 wanting us to go farther. But at this point, this record  
23 is so broad, and there was no evidence in the record  
24 suggesting any type of practical compulsion.

25 MEMBER WORTHLEY: Mr. Chairman, may I ask

1 another question?

2 CHAIR SHEEHY: Please.

3 MEMBER WORTHLEY: My question really is related  
4 to more of a fundamental, broad question, and that is, I  
5 see a lot of focus here on the concepts of repairs and  
6 maintenance as being non-discretionary. And I'm very  
7 sympathetic with that, and I think Mr. Mischel has tried  
8 to point out, that's not really the issue before us  
9 today.

10 But I see a lot of our staff analysis which  
11 deals with that, and it doesn't really raise a statute of  
12 limitations argument.

13 But I think there's a good discussion that  
14 could be had about that particular issue, that of  
15 practical compulsion. I mean, it's one thing to say,  
16 "You decide whether or not you want to erect a building,"  
17 it's quite another to say, "You'd better fix your roof,  
18 or the roof is going to fall in." And so you have to do  
19 that. That is a practical compulsion.

20 Is that before this commission today?

21 MS. SHELTON: Yes, but there has been no  
22 evidence in the record; and as staff, we're not going to  
23 make the claimant's case for them. They have not put any  
24 evidence into the record, no suggestion of unwilling.

25 And let me just suggest, with maintenance

1 schedules, there has been no showing that the State has  
2 required a certain maintenance schedule.

3 We have a witness today that indicated that  
4 their maintenance schedule is decided by them on a  
5 contract basis. It's up to the local agency as just an  
6 owner of property to decide when to maintain their own  
7 property. You know, certainly there's common law  
8 principles of maintaining your own property; but they  
9 haven't pointed to any state legal requirement to  
10 maintain, except for maybe the Vehicle Code section,  
11 which we haven't looked at today.

12 MEMBER WORTHLEY: My argument -- I mean, my  
13 thought is not about compulsion in terms of maintenance,  
14 this talks about practical -- I mean, again, going to the  
15 concept of practical compulsion, practically speaking --  
16 because the argument is made, it's discretionary to  
17 determine whether you want to elect to do a project.  
18 And my thought would be, as a County Supervisor, I don't  
19 have an election to fix a roof that's leaking. I have to  
20 fix the roof. And if I have to spend \$100,000 to fix  
21 that, then I've got to spend \$100,000 to fix that.  
22 That's a practical compulsion.

23 Now, because I have to do that, suddenly I come  
24 under the requirement of having to pay prevailing wage.  
25 So in that situation, I mean, there could be a zillion

1 fact situations like that that could be presented.

2 MS. SHELTON: Right. And I'm not disagreeing  
3 with your statements, Mr. Worthley. I'm simply saying,  
4 nothing has been put into the record at all until maybe  
5 today. There's no factual allegation, nothing is in the  
6 record by the claimant. Counties, communities, cities,  
7 et cetera.

8 I did want to mention, you were mentioning the  
9 statute of limitations of the 1974 edition of maintenance  
10 and to prevailing wage. That may have a great impact on  
11 some of the activities requested by the claimants in  
12 their request.

13 We haven't done that analysis. It really is a  
14 new-program, higher-level-of-service analysis. You know,  
15 they have alleged statutes and regulations enacted after  
16 1975. So those the Commission would definitely have  
17 jurisdiction over to determine whether or not those  
18 amendments added or created a higher level of service to  
19 that existing maintenance provision. And this analysis  
20 has not gone that far.

21 You have to do an analysis if the Commission  
22 were wanting to approve the test claim.

23 MS. GEANACOU: I have a question of --

24 MS. SHELTON: I'm sorry, I forgot one thing.

25 If we're talking about transportation, there's

1 also a funding issue, too, in there is a transportation  
2 fund, and there probably are federal funds, state funds  
3 that do pay for maintenance schedules of traffic signals.  
4 We haven't done that analysis, either.

5 MS. GEANACOU: May I ask a question?

6 CHAIR SHEEHY: Ms. Geanacou?

7 MS. GEANACOU: Susan Geanacou, Department of  
8 Finance.

9 I was hoping for clarification from the  
10 claimants as to whether or not the traffic-signal issue  
11 is an example of the types of things that would  
12 precipitate your claim for reimbursement, or whether it's  
13 a limitation on what you're seeking in your test claim?

14 MS. GMUR: We were brought that as an example.

15 The problem with the prevailing wage -- here's  
16 the issue: The prevailing wage, the definition of public  
17 works got expanded, and the program as we see it -- I'm  
18 certain the Department will disagree -- but as we see it,  
19 it was expanded, bringing in more and more issues.  
20 Things that you didn't have to do prevailing wage before,  
21 you have to now.

22 At the time that this was filed, this was filed  
23 under the old commission rules, where a general  
24 allegation of a mandate existing was all that was  
25 necessary. This is before the new specific pleading. So

1 they are quite correct, this is a bare-bones pleading.

2 After the draft analysis, I did additional  
3 research and we found the Public Contracting Code. So  
4 now you've got the prevailing wage issues and their  
5 expansions and where they apply and where they don't; and  
6 that is further complicated by the Public Contract Code,  
7 which has a zillion limitations, and even more exceptions  
8 to the rule. So the Department here was quite correct,  
9 charter cities, they go into prevailing wage voluntarily.  
10 So a charter city may not be an appropriate claimant if  
11 this is found to be a mandate.

12 I'm sorry, to further complicate all of this,  
13 because the "*public works*" definition is so broad, we've  
14 got everything, as counsel aptly pointed out, from  
15 building a building to laying carpet. We've got  
16 everything in there. And so in order to try to look just  
17 at that initial issue of voluntariness -- because that's  
18 our first hurdle right out of the gate -- if we don't get  
19 over that, this is a denial -- to focus in on something  
20 we're more familiar with. Because up until this point,  
21 when you say "public work," everyone says, "Erect a  
22 building."

23 The Department of Finance even cited in their  
24 comments "Oh, building a building." Everyone's talking  
25 about building a building. And it's too easy to look at



1 building a building and say, "Oh, that's voluntary, you  
2 don't need to build a building."

3 But it's harder to look at things, as  
4 Commissioner Worthley said, "Fix the roof." The City had  
5 come up with it, the traffic signals. This is something.  
6 There are a myriad of things.

7 And as Ms. Shelton accurately pointed out,  
8 every time you're looking into one of these things,  
9 you've got Transportation Codes, there's health and  
10 safety codes, there's Vehicle Codes. There's everything  
11 out there that would impinge.

12 It is the Commission's pleasure as to whether  
13 they decide on the initial issue of voluntariness and  
14 practical compulsion or whether we bring this back for  
15 additional briefing, which I would be more than happy to  
16 do, to shed some light on this extremely complicated  
17 analysis on this.

18 CHAIR SHEEHY: Thank you, Ms. Gmur.

19 I'd like to hear from our executive director.

20 Do you have any recommendations at this point?

21 MS. HIGASHI: At this point, what is before you  
22 is the staff analysis. And certainly you've heard  
23 testimony, and there's been new information added to the  
24 record. It's entirely up to you to determine whether or  
25 not, one, you want to vote on the existing staff

1 analysis; two, you wish to modify it; or, three, if you  
2 wish to return it and to ask us to update it based on the  
3 testimony we've heard today; or, four, if you want to  
4 open it up completely and give everybody a chance to add  
5 more to the record.

6 Now, some of the issues that came up today seem  
7 to imply that perhaps there might be a need to add  
8 different test-claim statutes into the record. And I  
9 just state that as a caution because if the Commission  
10 acts today, based on the final staff analysis, then this  
11 matter would be completed as far as the Commission's work  
12 in terms of making a decision.

13 If the Commission keeps it open, then we have  
14 issues in terms of test-claim amendments and other things  
15 that could occur.

16 I don't know when that Vehicle Code statute on  
17 the traffic control signals was enacted. I've never seen  
18 a copy of it. I know the Commission has had traffic  
19 control signals before the Commission before.

20 And as Ms. Shelton pointed out, we know about  
21 the transportation fund and how that might apply.  
22 So different issues were raised today, but they were not  
23 in the record that the Commission has before it, nor were  
24 they in the record that the Commission staff analyzed.

25 CHAIR SHEEHY: Thank you, Paula.

1 Well, I am concerned that we have so much new  
2 information showing up today at the table, particularly  
3 on this traffic-signal issue. And it's unfortunate that  
4 this wasn't raised earlier so it could have been  
5 addressed in the staff analysis. So I'd like to just  
6 note for the record that I find that very concerning.

7 I'd like to hear from other members of the  
8 Commission, if they have any comments at this time on  
9 what is before us.

10 Ms. Bryant?

11 MEMBER BRYANT: I have a question.

12 So if we accept and adopt the staff analysis  
13 today, where does that leave future -- can people come  
14 back with a second test claim on it, or that's that for  
15 these statutes?

16 MS. SHELTON: No, that would be it for these  
17 statutes.

18 The test claim was the first filing, so that  
19 would be ending the Commission's jurisdiction on these  
20 statutes.

21 CHAIR SHEEHY: May I ask counsel, when was this  
22 test claim filed?

23 MS. HIGASHI: Look on page 3.

24 MS. BORZELLERI: September 26th, '03.

25 MS. HIGASHI: September 26th, '03.

**Commission on State Mandates – December 6 , 2007**

1 CHAIR SHEEHY: Okay, September 26th of '03.

2 MEMBER LUJANO: Mr. Chair?

3 CHAIR SHEEHY: Please.

4 MEMBER LUJANO: Based on the new information, I  
5 am really not prepared to vote on this item today. I  
6 think we should allow the claimants and the Department  
7 and our Commission staff to add more information to the  
8 record and to give us a complete briefing on it.

9 CHAIR SHEEHY: Thank you, Mr. Lujano.

10 Do I have any other comments from other members  
11 of the Commission?

12 MEMBER GLAAB: Yes, Mr. Chairman and Members, I  
13 concur with Mr. Lujano. I think in view of the  
14 additional information, I think that it would be good to  
15 have the claimant come forward with the additional  
16 information based upon the conversation, the testimony  
17 that we've had here.

18 You know, as a city councilperson, I'm  
19 sensitive to the issue of traffic lights functioning  
20 properly and having the latitude to get them fixed as  
21 early as possible. Because without that, the big issue  
22 is that on some of the labor compliance programs, you  
23 know, cities can avoid prevailing wage under certain  
24 conditions. So I do have a sensitivity with that. But I  
25 think we should come back, requesting more information.

1 Thank you.

2 MEMBER BRYANT: I just would add that I think  
3 that there's maybe some very narrow issues in here that  
4 because of the way the City pled this, that we don't have  
5 the information in front of us. But for the most part,  
6 if we're going to go back and let staff revisit it, we  
7 need somehow or another -- I don't know how to do that  
8 exactly -- but narrow these issues. Because a lot of  
9 this, I think we can get rid of early on. But there  
10 might be an issue of practical compulsion as it relates  
11 to the public contracting code.

12 It doesn't sound like the Vehicle Code itself  
13 gets you there. Just because the Vehicle Code requires  
14 you to maintain your traffic lights, it certainly doesn't  
15 say anything about how you get that done, whether it's  
16 with a city employee or a contract employee. It seems  
17 like the issue might be somewhere in this Public  
18 Contracts Code.

19 But it looks like you went for the whole  
20 enchilada instead of really focusing on where you have a  
21 practical compulsion. Because, to me, you're not  
22 required -- I view -- just on the basis that there's  
23 no -- you know, when you read the record, there's no,  
24 like, rule that says you have to contract out. And now  
25 you're here, saying that you're forced to, in many

1 circumstances. And I don't know what the circumstances  
2 are. But it needs to be -- I would never vote for this  
3 unless it was very, very narrow in terms of creating a  
4 mandate.

5 CHAIR SHEEHY: Thank you, Ms. Bryant.

6 Ms. Olsen?

7 MEMBER OLSEN: Well, I'm concerned because this  
8 was filed in 2003.

9 Up until what point could the claim have been  
10 amended?

11 MS. HIGASHI: Up until the hearing.

12 MEMBER OLSEN: Well, that gives me my answer.  
13 You know, I think I actually am prepared to vote on it  
14 today then, based on that.

15 CHAIR SHEEHY: We haven't heard from  
16 Mr. Chivaro.

17 Would you like to weigh in?

18 MS. HIGASHI: Typically, when an amendment is  
19 contemplated, there's a request to put over, postpone.  
20 And the claimants have been on notice that we've been  
21 working on this draft since spring.

22 CHAIR SHEEHY: I'm sorry, I don't mean to put  
23 Mr. Chivaro on the spot, but if you'd like to make any  
24 comments.

25 MEMBER CHIVARO: No, I agree with Ms. Olsen.

1 You know, this has been open for four years and it's kind  
2 of a last-minute request to ask us to reconsider or to  
3 take additional evidence on things that were not in the  
4 record, that they've had ample time to put into the  
5 record. So I'm also prepared to vote.

6 CHAIR SHEEHY: I want to just add my agreement  
7 to the comments Mr. Chivaro just made. I had already  
8 expressed that I'm concerned that this is all coming to  
9 us for the first time today, when it could have come in  
10 anytime in the last four years.

11 And I would also like to note that I think that  
12 if we were to go back and look at the different state  
13 funding streams for maintenance of local streets and  
14 roads, I'm quite convinced that the record would show  
15 that the state subvenes hundreds of millions of dollars  
16 to cities and counties and other local government  
17 jurisdictions specifically for the purpose maintaining  
18 local streets and roads. I've realized that research is  
19 not before us today, but I'm quite confident that that's  
20 what the record would show.

21 I am prepared to vote on this matter today.

22 So I'm wondering if we have a motion?

23 MEMBER LUJANO: One more question.

24 CHAIR SHEEHY: Yes, Mr. Lujano?

25 MEMBER LUJANO: I would direct this to counsel.

1 In the past, have we allowed additional  
2 informational to come during the hearing and held things  
3 over?

4 MS. HIGASHI: Yes, we have.

5 MEMBER LUJANO: And that's just my concern.  
6 It's just if we vote on this and there are questions, you  
7 know, how is it going to impact the claimants and if they  
8 do -- well, I'd just leave it at that.

9 CHAIR SHEEHY: Mr. Worthley?

10 MEMBER WORTHLEY: Mr. Chair, in listening to  
11 all the comments, as I look at it, the issue here has to  
12 do -- the heart of it really is this issue of the *Merced*  
13 case and whether or not we have a practical compulsion  
14 argument that would be made as it relates to maintenance  
15 and repairs.

16 The streetlights is an example of that. But  
17 there is a broad and generic question, and that was why  
18 I asked the question: Is that properly before us today?  
19 In the testimony I thought given by Mr. Mischel, I think  
20 he made the comment that it was not.

21 And if it is, I'm prepared to vote on that  
22 issue today.

23 The specific examples of how that plays itself  
24 out probably need to be worked out in the parameters and  
25 guidelines or something like that. But I use the



1 example -- I've thought of the example of, you know, is  
2 it discretionary to rebuild a jail that burns down? Is  
3 it discretionary to build a board of supervisors office  
4 that burn down?

5 Do you see what I'm saying? There are things  
6 that are discretionary. There are other things which are  
7 not really discretionary. They're discretionary in the  
8 fact that you have to get a building permit, you have to  
9 meet zoning requirements; but the fact of the matter is,  
10 from a practical standpoint, you have to do those things.  
11 You have to fix roofs. You have to maintain roads,  
12 surfaces. Those are things that you have to do. And  
13 they're practical.

14 So if that's before us today, I could vote on  
15 that.

16 And the other part of what's an example of that  
17 is another matter in my mind.

18 CHAIR SHEEHY: Ms. Shelton?

19 MS. SHELTON: Let me just say that those really  
20 are not issues for parameters and guidelines. They  
21 really would need to be decided at the test-claim phase  
22 because they are questions of law.

23 The Statement of Decision has to decide, if  
24 there is an approved position, what activities are  
25 reimbursable and under what scope. You've got to be able

1 to define it so that you can put it over to P's and G's  
2 because the only authority really that the Commission has  
3 to add activities to the parameters and guidelines are  
4 only those that are reasonably necessary to carry out the  
5 mandated activity.

6 So even if you wanted to go in that direction,  
7 we would still need to take it back and parse those out.

8 CHAIR SHEEHY: Mr. Mischel?

9 MR. MISCHEL: I might just make one point  
10 because I didn't think the practical compulsion issue was  
11 really going to come up.

12 But at least the way I read the *Kern School*  
13 *District* case, when the Supreme Court was talking about  
14 practical compulsion, it was really talking about a  
15 practical compulsion created and mandated by the State,  
16 that it still comes back to the State is telling you to  
17 do something.

18 And the City of Newport Beach in its comments  
19 to the staff analysis pointed out that local governments  
20 have to ensure the health and the safety and the  
21 protection of its populace. And I don't disagree. I  
22 mean, that is why government exists. But that doesn't  
23 create a state mandate, a state-mandated practical  
24 compulsion, which is I think what the *Kern* case was  
25 talking about. That is, it's either a state law or it is

1 something the State will do, which is so Draconian, that  
2 you really can't get out of complying with some policy.

3 And so the fact that, yes, if the roof is about  
4 to cave in, you have liability issues, you have  
5 responsibilities to your constituents, which you wouldn't  
6 be in government if you didn't want to fix it. But  
7 that's not the State telling you to fix it.

8 And I think that's the distinction you have to  
9 make when you get to the question of practical compulsion  
10 when it comes to maintenance, rebuilding, or whatever it  
11 may be.

12 CHAIR SHEEHY: Ms. Shelton, did you want to add  
13 something else?

14 MS. SHELTON: This is a very unsettled area of  
15 the law, and I know this is what Ms. Gmur is probably  
16 going to say, too.

17 That's true all about *Kern*, except that a year  
18 later the Supreme Court came out with the *San Diego*  
19 *Unified School District* decision. That decision was a  
20 little bit different in that it was dealing with --  
21 certain portions of it were dealing with a school  
22 District's discretionary decision to expel a student for  
23 offenses such as -- let's see, possession of drugs, other  
24 explosives, assault and battery, and those types of  
25 criminal offenses.

1           And there, the Court did not answer the  
2 question, but the Court did look at a constitutional  
3 provision that requires schools to have a safe  
4 environment for pupils and employees.

5           And a constitutional provision is -- that's all  
6 it says, you have to have a safe environment for pupils  
7 and their employees.

8           You know, the Court instructed -- not  
9 instructed, but advised that we really need to take a  
10 look at things like that.

11           Now, that constitutional provision is not  
12 something that was -- I don't remember if that was a  
13 legislative initiative.

14           MS. HIGASHI: It was the Victim's Bill of  
15 Rights, Prop. 8, many, many years ago.

16           MS. SHELTON: I don't right now remember if  
17 that was a legislative initiative or a voter initiative  
18 to put into the Constitution. That may make a difference  
19 with the argument. I don't remember at this point.

20           But what they were trying to get reimbursed for  
21 were the downstream due-process requirements that were  
22 required by the State once you took on that discretionary  
23 decision.

24           It is a complicated area of the law.

25           I do believe -- you have to have evidence in

1 the record or the law. You can't just make the finding  
2 that there's practical compulsion.

3 MEMBER BRYANT: May I ask one more question on  
4 that Public Contracts Code?

5 As I'm reading through the staff analysis, it  
6 appears to me that no matter -- you have to follow the  
7 Public Contracts Code and go through all these steps; but  
8 that at the end, the governing body of the city or county  
9 can vote by four-fifths vote and not -- and say  
10 something -- that they can do it a different way.

11 Am I reading that right?

12 MS. BORZELLERI: Yes, there are a lot of  
13 exceptions all the way through the Public Contract Code,  
14 depending on the type of agency that you're talking  
15 about. And each one would need to be looked at  
16 separately.

17 But, generally, for emergencies, which may take  
18 into account some of what Mr. Worthley is talking about,  
19 the governing body has a lot of discretion with regard to  
20 the Public Contract Code, because I think the state  
21 really was trying not to tie their hands when there was  
22 an emergency.

23 So we do show that in many instances, the  
24 Public Contract Code does not require them to contract  
25 out to do certain things.

1 So, yes, you're reading it correctly.

2 MEMBER LUJANO: I have a question.

3 CHAIR SHEEHY: Yes, Mr. Lujano?

4 MEMBER LUJANO: So when they talked about the  
5 Public Contract Code, they had no discretion to hire more  
6 staff, more public employees, they had to go out for  
7 contract.

8 Do you agree with that or you have to look at  
9 that?

10 MS. BORZELLERI: Well, I have to look at each  
11 situation, because there are so many exceptions as we go  
12 down the line, that we would need to know that.

13 Generally speaking, for cities, they are  
14 required to contract out if the project is going to be  
15 more than \$5,000. But then there are many exceptions  
16 down the road that say they can use their own employees  
17 if certain conditions are met and use a force account and  
18 that sort of thing.

19 Maybe DIR can help us on this issue.

20 MEMBER LUJANO: Well, do you think that if they  
21 don't have discretion, then that would compel them? That  
22 it would --

23 MS. BORZELLERI: That would constitute legal  
24 compulsion, yes. If, for a particular instance, the  
25 Public Contract Code covered it and they were required to

1 contract out by the Public Contract Code, and there  
2 wasn't an exception down the road that you could find,  
3 that would constitute legal compulsion.

4 MEMBER LUJANO: And that would change your  
5 recommendation?

6 MS. SHELTON: Well, that's legal compulsion to  
7 contract. But there's still another decision to make on  
8 whose decision is it to even engage in the public works  
9 project.

10 MS. BORZELLERI: Correct.

11 MS. SHELTON: So there's two aspects to it.

12 MEMBER LUJANO: So there's a questions again in  
13 the record.

14 MS. SHELTON: Yes.

15 MEMBER LUJANO: See, that's what I'm struggling  
16 with. There is still a question here.

17 Before, it was like, "Okay, if you're telling  
18 me there's nothing in the record, okay. You've brought  
19 it you up."

20 Now, there's a question -- I'm having  
21 questions.

22 CHAIR SHEEHY: I'd like to make a comment.

23 It's a matter of record here that two members of the  
24 Commission have asked that this item be put over.

25 However, I think we have a majority of the members of the

**Commission on State Mandates – December 6 , 2007**

1 Commission that are prepared to vote on this today.

2 And I reiterate that I'm very concerned that this issue,  
3 particularly the example that was used with the traffic  
4 signals, was brought to us literally at the last minute  
5 after the Commission meeting started. And that very much  
6 concerns me.

7 So while I want to extend all courtesies to the  
8 members of the Commission on putting an item over, I also  
9 think that we have a majority of members that are  
10 prepared to vote on this today. And that would be my  
11 inclination.

12 Mr. Lujano?

13 MEMBER LUJANO: Two questions -- or one, just  
14 to remind the Commissioners that we've allowed  
15 information to come in before. And two, if we are going  
16 to vote on this, I'd request maybe a ten-minute recess if  
17 possible.

18 CHAIR SHEEHY: Certainly.

19 Mr. Glaab?

20 MEMBER GLAAB: Thank you, Mr. Chairman and  
21 Members.

22 Commissioners Olsen and Bryant made some  
23 comments that resonate with me. The one that  
24 Commissioner Olsen said was that, you know, the claimant  
25 knew that this was coming along and that it had been



Commission on State Mandates – December 6, 2007

1 engaged in negotiations and discussions with staff. That  
2 clearly is the case here, and I see that.

3 Commissioner Bryant also made the point that  
4 this is extremely broad. I think the term used, it was  
5 the whole enchilada; and I concur with that.

6 My reasoning for suggesting or to be willing  
7 to put this over would be to allow the claimant to take  
8 those comments to heart; and possibly at that time come  
9 back with a reduced scope, possibly, and the additional  
10 information. And this is out of a sensitivity to the  
11 claimant, you know, Newport Beach, because they clearly  
12 feel they have a case.

13 But those are my comments, and I offer them  
14 only for the purposes of discussion.

15 Thank you.

16 CHAIR SHEEHY: Thank you, Mr. Glaab.

17 MEMBER BRYANT: I think we should take  
18 Mr. Lujano's suggestion of a ten-minute recess. I  
19 wouldn't mind having a minute to read this again.

20 CHAIR SHEEHY: I concur with the recommendation  
21 of my colleague.

22 The Commission on State Mandates will take a  
23 ten-minute recess.

24 *(A recess from 11:06 a.m. to 11:15 a.m.)*

25 CHAIR SHEEHY: Thank you, ladies and gentlemen.

1 The Commission on State Mandates meeting will come back  
2 to order.

3 I'd like to at this time ask our executive  
4 director to address several points that I just discussed  
5 with her.

6 Paula, could you please?

7 MS. HIGASHI: One of the questions that came up  
8 today is just the difference between testimony at the  
9 hearing and also amending a test claim and adding new  
10 statutes to a test claim filing. And what I just wanted  
11 to remind everyone of is the fact that you may recall at  
12 our last hearing, we had the test claim filed on LAFCO.  
13 And the week of the hearing, the claimants filed an  
14 amendment to that test claim, which I immediately severed  
15 from the pending test claim that was on the agenda, so we  
16 could proceed with that hearing.

17 And the claimants understood the regulations  
18 correctly. By filing it, they preserved their rights to  
19 be amending that old test claim and also to cover the  
20 issues that were related, that they felt were -- they  
21 realized at that time had not been addressed in that test  
22 claim filing.

23 And I just -- and Ms. Gmur and I had had  
24 discussions before that hearing so that she did get that  
25 filing in, preserved her filing date. And that amendment

1 was accepted.

2           There have been other hearings as well. And  
3 Mr. Lujano asked this question earlier, and I just wanted  
4 to expand that, yes, certainly we have taken testimony at  
5 hearings; yes, we have had to change staff analyses. But  
6 when that has occurred, typically, it's based on factual  
7 information of costs, information about funding. It's  
8 not necessarily been information where additional  
9 statutes are mentioned during the course of a hearing,  
10 statutes which are not pled, statutes which are not part  
11 of a record, and that are actually not before the  
12 Commission in terms of mandate determination, and the  
13 subject of the mandate determination.

14           Because if you just look at the face sheet for  
15 this test claim, it says, "Labor Code sections, and DIR  
16 regulations and executive orders." It doesn't say  
17 "Public Contracts Code," it doesn't say "Vehicle Code."  
18 But it's limited to the Labor Code and the prevailing  
19 wage statutes.

20           So the staff analysis before you addresses the  
21 Labor Code and what was actually pled.

22           And I just wanted to clarify that because I  
23 know there were some questions.

24           CHAIR SHEEHY: I just want to ask one question  
25 of Ms. Gmur.

1 MS. GMUR: Yes.

2 CHAIR SHEEHY: I just want to clarify you are  
3 aware of the process for amending a test claim?

4 MS. GMUR: You know, I am, but --

5 CHAIR SHEEHY: And you were also aware that  
6 before this meeting started, that clock had stopped  
7 running for you?

8 MS. GMUR: Yes, I am. And I'm not certain that  
9 we should amend it.

10 CHAIR SHEEHY: Okay, very good.

11 Do we have any comments from members of the  
12 Commission?

13 *(No response)*

14 CHAIR SHEEHY: Okay, the decision of the Chair  
15 is, I would like to entertain a motion on the analysis  
16 that's before us, that's dealing with Labor Code; it's  
17 not dealing with the Public Contracting Code or the  
18 Vehicle Code. If this test claim was to be amended, it  
19 would have needed to have happened before today, before  
20 this meeting was convened.

21 And since it didn't, the preference of the  
22 Chair would be to see if we can take action on this item  
23 today.

24 So having said that, do we have a motion from a  
25 member of the Commission?

Commission on State Mandates – December 6, 2007

1 MEMBER OLSEN: I'll move adoption of the staff  
2 analysis.  
3 CHAIR SHEEHY: Ms. Olsen moves adoption.  
4 MEMBER CHIVARO: Second.  
5 CHAIR SHEEHY: Mr. Chivaro is the second.  
6 Paula, please call the roll.  
7 MS. HIGASHI: Mr. Chivaro?  
8 MR. CHIVARO: Aye.  
9 MS. HIGASHI: Mr. Glaab?  
10 MR. GLAAB: Aye.  
11 MS. HIGASHI: Mr. Lujano?  
12 MEMBER LUJANO: Yes.  
13 MS. HIGASHI: Mr. Olsen?  
14 MEMBER OLSEN: Aye.  
15 MS. HIGASHI: Mr. Worthley?  
16 MEMBER WORTHLEY: No.  
17 MS. HIGASHI: Ms. Bryant?  
18 MEMBER BRYANT: Aye.  
19 MS. HIGASHI: Mr. Sheehy?  
20 CHAIR SHEEHY: Aye.  
21 MS. HIGASHI: The motion is adopted.  
22 CHAIR SHEEHY: Okay.  
23 MS. HIGASHI: Item 10, Proposed Statement of  
24 Decision.  
25 MS. BORZELLERI: The only issue before the

Commission on State Mandates – December 6 , 2007

1 Commission on this item is whether the Statement of  
2 Decision accurately reflects the Commission's decision on  
3 the previous item, Item 9.

4 Staff would make minor changes to the final  
5 Statement of Decision to reflect witnesses, testimony,  
6 and the vote count.

7 CHAIR SHEEHY: Thank you.

8 Do we have a motion?

9 MEMBER OLSEN: So moved.

10 MEMBER CHIVARO: Second.

11 CHAIR SHEEHY: Paula, please call the roll.

12 MS. HIGASHI: Ms. Bryant?

13 MEMBER BRYANT: Aye.

14 MS. HIGASHI: Mr. Chivaro?

15 MEMBER CHIVARO: Aye.

16 MS. HIGASHI: Mr. Glaab?

17 MEMBER GLAAB: Aye.

18 MS. HIGASHI: Mr. Lujano?

19 MEMBER LUJANO: Aye.

20 MS. HIGASHI: Ms. Olsen?

21 MEMBER OLSEN: Aye.

22 MS. HIGASHI: Mr. Worthley?

23 MEMBER WORTHLEY: Aye.

24 MS. HIGASHI: Mr. Sheehy?

25 CHAIR SHEEHY: Aye.

1 MS. HIGASHI: The motion is adopted.

2 MS. GMUR: Thank you, Commissioners.

3 MR. MISCHEL: Thank you.

4 CHAIR SHEEHY: Thank you.

5 MS. HIGASHI: This brings us to the very end of  
6 the binder, Item 17, Chief Counsel Camille Shelton's  
7 report.

8 MS. SHELTON: I have nothing further to add to  
9 this report, unless there are any questions.

10 CHAIR SHEEHY: Do we have any questions of  
11 Ms. Shelton?

12 *(No response)*

13 CHAIR SHEEHY: Paula?

14 MS. HIGASHI: Item 18 is my report, an update  
15 on the pending workload.

16 And I've given you a copy of the State  
17 Controller's recent report to the State Legislature and  
18 the Department of Finance on the accounts on mandate  
19 reimbursement claims that are pending.

20 I've also given you a tentative set of agenda  
21 items for the January and March hearings. And what --  
22 because of recent court dates that have been set, as well  
23 as briefing dates, all of these test claims that are  
24 currently listed are not going to be heard in January.  
25 We are going to have to change the date and move them

1 forward because we have so much other work that's  
2 competing for our attention at the same time. However,  
3 we will have other agenda items.

4 And another item that we're going to place on  
5 the agenda is going to be what we're going to term as a  
6 "workshop on AB 1222." So at that time, we will cover  
7 the changes in the Government Code and how this affects  
8 the Commission's decision-making and go over exactly what  
9 staff is doing in the way of implementation.

10 Today, you adopted the first step in developing  
11 regulations to implement AB 1222. And if there's public  
12 testimony -- if a public hearing is requested on that  
13 regulation packet at the same time, we can also have that  
14 public hearing on the regulations.

15 So our focus for the next month and a half,  
16 two months, is very seriously on making sure we properly  
17 implement AB 1222, since the law takes effect.

18 And we also have one agenda item that we have  
19 to have in January, which is another one of the  
20 legislatively directed actions to amend parameters and  
21 guidelines. And this is a result of legislation.

22 We also have a couple of statewide cost  
23 estimates planned for January. And we hope to get the  
24 test claims that we're having to move from January on the  
25 March agenda.



Commission on State Mandates – December 6, 2007

1           So your workload continues. And all of the  
2 coming agenda items, as you can see, we have prevailing  
3 wage, disabled students, notice to students, expulsions.  
4 They're all major agenda items in terms of complexity,  
5 issues covered, and just size and breadth, and enormity  
6 of the statutes that are being analyzed. So I just  
7 wanted to point that out.

8           Are there any questions about that?

9           *(No response)*

10          MS. HIGASHI: Then that's all I have to say, if  
11 you don't have any questions.

12          Ms. Patton, do you have any reminders about  
13 lunch or announcements?

14          MS. PATTON: For those of you that are  
15 attending our holiday lunch, it's at noon at Frank Fats  
16 upstairs.

17          CHAIR SHEEHY: Great. Thank you, Ms. Patton.

18          Do we have any additional public comment?  
19 Would anybody like to come forward and enter anything  
20 into the record at this time?

21          *(No response)*

22          CHAIR SHEEHY: Okay. With no further  
23 business to conduct today, I would entertain a motion to  
24 adjourn.

25          MEMBER GLAAB: So moved.

**Commission on State Mandates -- December 6, 2007**

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MEMBER WORTHLEY: Second.

CHAIR SHEEHY: Thank you.

The Commission on State Mandates meeting has  
adjourned.

*(The meeting concluded at 11:23 a.m.)-*

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**REPORTER'S CERTIFICATE**

I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand on December 20, 2007.



Daniel P. Feldhaus  
California CSR #6949  
Registered Diplomate Reporter  
Certified Realtime Reporter