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FOR IMMEDIATE RELEASE
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Modesto Irrigation District successful in defending its rates in court

Judge praises MID experts and robust analysis in favorable Hobbs vs. MID lawsuit ruling

MODESTO, Calif. – Last week, the Modesto Irrigation District (MID) received a favorable ruling from the Stanislaus County Superior Court (see attached) in the remedies phase of a challenge to the District's electric rates. While the court designated the plaintiffs – Andrew Hobbs and David Thomas, et. all – as the prevailing party, the court found that the plaintiff class is not entitled any refunds as MID's 2018 Cost of Service Analysis proved that the 2016 rates in question were below the cost of service.

MID will be evaluating next steps to formally conclude this case.

"We presented a strong record of evidence in support of our rate-making practices," said MID General Manager Ed Franciosa. "Ultimately, the court adopted our reasoning, quoted our findings throughout the ruling and deemed our experts more credible."

In the spirit of transparency and openness, the District engaged with independent, third-party industry experts to review its rate making practices. These experts performed a 2018 Electric Cost of Service and Revenue Allocation Study as part of a broader analysis of the cost of service for all of MID's lines of business – electricity, irrigation and domestic water.

This independent review provided valuable analysis including more than 100 pages of reports, spreadsheets and background to confirm MID's electric rates.

"The court's ruling upholds MID's local rate-making methods and reinforces our mission of providing the highest level of service at the lowest possible cost," said MID Board President Larry Byrd. "The Board is elected by the customers we serve, and we will continue to preserve fair and balanced rates for all."

MID's rates, budgets and audited financial statements are available at mid.org.

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About the Modesto Irrigation District (MID)

The Modesto Irrigation District, established in 1887, is a vertically integrated public utility located in California's Central Valley. MID provides irrigation water to more than 2,300 agricultural accounts irrigating close to 60,000 acres and electricity to more than 131,000 residential, commercial and agricultural accounts in Modesto, Empire, Salida, Waterford and Mountain House as well as parts of Escalon, Oakdale, Ripon and Riverbank. MID also treats, delivers and wholesales up to 67,000 acre-feet of drinking water per year to the City of Modesto. For more information about MID visit www.mid.org or follow MID on Facebook (@modestoirrigationdistrict) and Twitter (@mod_irrigation).

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

ANDREW HOBBS and DAVID THOMAS, on behalf of themselves, and all others similarly situated, Petitioners and Plaintiffs, v. MODESTO IRRIGATION DISTRICT; and DOES 1 through 100, Respondents and Defendants.	CASE NO. 2019186 **TENTATIVE RULING AND PROPOSED STATEMENT OF DECISION**

This matter came on calendar for oral arguments on November 23, 2022. Upon conclusion of the hearing, the Court took the matter under submission. After due consideration, the Court renders its tentative ruling and proposed statement of decision.[1]

[1] Parties objecting under CRC 3.1590(g) should be familiar with the authorities that describe the limited purposes of objections. See e.g. *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380; *Yield Dynamics, Inc. v. TEA Sys. Corp* (2007) 154 Cal.App.4th 547, 560; *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292 ("The main purpose of an objection to a proposed statement of decision is not to reargue the merits, but to bring to the Court's attention inconsistencies between the Court's ruling and the document that is supposed to embody and explain that ruling.")

I. SUMMARY OF CASE

In this class action petition for writ of mandate and complaint for injunctive and declaratory relief, Petitioners Andrew Hobbs and David Thomas, on behalf of themselves and a class of some 10,000 + electric ratepayers, challenge the electric rates Respondent Modesto Irrigation District (MID) adopted on November 17, 2015, which became effective on January 1, 2016.[2] Petitioners complain that MID's 2016 electric rates were set at an amount higher than the "reasonable cost" of providing electric services and therefore constituted an improper tax under Proposition 26 and Proposition 218.[3]

In Phase One of this matter – which was bifurcated to explore the question of liability first - the Honorable Roger M. Beauchesne (Retired) determined MID's 2016 Rates were not justified, but did not specifically conclude by what amount the 2016 Rates exceeded MID's reasonable cost to provide electric services to its electric customers. The question of "how much" the 2016 Rates exceeded MID's "reasonable costs" to provide electric service was left to this Court, for resolution in this phase of the litigation - Phase Two, the remedies phase.

II. PROCEDURAL POSTURE

On March 15, 2016, Petitioner Andrew Hobbs, on behalf of himself, and all others similarly situated, filed a Class Action, Verified Petition for Writ of Mandate and Complaint for

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[2] The challenged rates were adopted in Resolution No. 2015-110. The Court will refer to them herein as the "2016 Rates".

[3] Allegedly MID's electricity rates are so far above its reasonable costs for providing electric services because MID "favor[s] a powerful special interest group (irrigators) over its politically powerless retail electric customers." See Petitioners' Opening Brief [Remedies Phase], page 7.

Injunctive and Declaratory Relief and Refund of Illegal Tax against Respondent and Defendant Modesto Irrigation District (hereafter "Respondent" and/or "MID").

On March 29, 2016, Petitioner David Thomas, individually and on behalf of all others similarly situated, filed a similar complaint (Stanislaus County Superior Court Case No. 9000005) against Respondent MID.[4]

On or about August 19, 2016, the Court[5] determined Thomas' action – Case No. 9000005 - was filed more than 120 days after the effective date of the MID resolution in which the challenged electric rates were established and granted MID's motion for judgment on the pleadings in that action ***without leave to amend***. Thereafter, the parties stipulated to allow Hobbs to file an amended pleading solely to name Thomas as a co-plaintiff in this action.[6]

On October 3, 2016, Andrew Hobbs and David Thomas, "on behalf of themselves and all other similarly situated" (hereafter "Petitioners") filed a Class Action, First Amended Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief and Refund of Illegal Tax. Respondent MID answered the first amended petition on November 4, 2016.

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[4] The *Hobbs* and *Thomas* actions were *effectively identical* - each was a putative class action on behalf of MID electric customers alleging that MID "imposes and collects illegal taxes." Specifically, each action alleged that MID charges electric customers an amount that exceeds the true costs of providing electric service because the electric fees and charges imposed over and above the cost of providing electric service are used to subsidize MID's irrigation water customers. Each action alleged that to the extent the electric fees and charges imposed exceeded MID's costs to provide electric services, they were illegal taxes under Proposition 26's expanded definition of a "tax". Additionally, each action claimed the "taxes" had been imposed without voter approval in violation of Proposition 218 (Cal.Const. art. XIII C, § 2) Each of the actions sought refunds on behalf of the putative class.

[5] Honorable William A. Mayhew (Retired) presiding.

[6] See Stipulation re: Timeliness of Action and Amended Pleading; Order Thereon – Filed September 9, 2016. Thomas agreed not to appeal the Court's decision in Case No. 9000005 - and MID was granted judgment in that case.

Then, pursuant to a stipulation filed August 29, 2017[7], the parties agreed Petitioners would file a Second Amended Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief and Refund of Illegal Tax. Petitioners filed the second amended petition on September 13, 2017; Respondent answered on October 12, 2017.

In the same August 2017 stipulation, the parties agreed to suspend proceedings in this case while the California Supreme Court considered the case of *Citizens for Fair REU Rates v. City of Redding* (*Redding*) (2018) 6 Cal.5th 1, acknowledging the "*Redding* decision may affect the determination of certain issues raised in this case and it is in the interest of justice and judicial economy to stay the writ hearing (and briefing thereon) until the opinion in *Redding* is issued; ... ." The parties also stipulated to the definition of the class as comprising:

> All customers of the Modesto Irrigation District whom MID billed for electric utility service from ***November 17, 2015 through the date on which the Court orders class notice to be sent***, excluding (a) MID irrigation water customers; (b) persons who make a timely election to be excluded from the Class, and (c) the judge(s) to whom this case is assigned and any immediate family members thereof.[8]

The stay occasioned by the California Supreme Court's consideration of *Redding* was in effect until September 24, 2018. Thereafter, the parties agreed to bifurcate the matter into two phases "with the first phase addressing Respondent's liability, if any, and, if necessary, a second phase addressing class-wide remedies and all other remaining issues, including but not limited to the adjudication of Petitioners' request for a class-wide 'Refund of Illegal Taxes.' "

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[7] See Stipulation re: Amending Complaint, Staying Action and Class Certification, filed August, 29, 2017.

[8] Due to the fact MID repealed the 2016 Rates effective January 1, 2019, and the 2016 Rates were not effective until January 1, 2016, the parties acknowledge the class period is properly defined as "from January 1, 2016 to and including December 31, 2018".

Pursuant to a stipulated briefing schedule, Petitioners filed their Phase One opening brief on April 22, 2019; Respondent filed its opposition brief on May 22, 2019; and Petitioners replied on June 6, 2019. Respondent lodged a massive administrative record (almost 18,000 pages – 11 boxes of binders) on May 7, 2019. The parties agreed the hearing on Phase One would take place on June 20, 2019.

On April 22, 2019 – the same date they filed their opening brief - Petitioners also moved to augment the administrative record Respondent had (as of that date) proposed to provide. Petitioners set the motion to augment for hearing on June 20, 2019.

On June 20, 2019, the Honorable Roger M. Beauchesne (Retired)[9] ***partially granted*** the Petitioners' motion to augment the administrative record, finding that two of Petitioners' additional proposed exhibits – Exhibits 2 and 3 described as "presentations by MID Staff regarding its irrigation rates and the cost to provide irrigation services" – should be part of the record.[10] Also, importantly, Judge Beauchesne ***denied*** Petitioners' requests to include three Municipal Securities Rulemaking Board (MSRB) documents in the administrative record. Exhibits 4, 5 and 6 – which MID described as "backward looking documents MID is required to submit to bond regulators, who have nothing to do with setting or reviewing electricity or water rates, which rely on forward-looking projections" – were expressly ***not included in the admissible evidence*** related to Phase One. Judge Beauchesne also continued the hearing on the petition for writ of mandate to September

[9] Hereafter "Judge Beauchesne".

[10] Petitioners sought to add seven (7) total documents to the administrative record. MID did not oppose adding these two documents - Exhibits 2 and 3. It did oppose adding Exhibits 1 and 4-7. Judge Beauchesne essentially agreed with MID's position on the motion to augment the administrative record.

27, 2019, on his own motion, indicating he "require[d] more time to review the extensive written materials".

Judge Beauchesne heard oral argument on Phase One on September 27, 2019, and again (at the request of counsel for both parties) on December 5, 2019. Judge Beauchesne issued his Phase One decision on December 31, 2019 (his last day in office). Judge Beauchesne found in favor of Petitioners and concluded "MID's [2016 Rates] are taxes" and therefore that MID "(is) liable." In primary support of his findings, Judge Beauchesne cited the ***"ubiquitous absence of actual costs throughout MID's arguments"*** made in opposition to the Petitioners' claims. He also explicitly quoted figures set forth in the excluded MSRB documents (at pp. 9-10 of his decision) in support of his conclusion MID's electric rates were taxes and stated "there is little to no foundation to explain what specific costs were attributable primarily to the utility ***transfers*** (sic)."[11]

Although Judge Beauchesne recognized the Court must next try the remedies phase, his decision does not speak to the mechanics of doing so, and, as MID has noted, Judge Beauchesne's decision left open the extent of writ relief and other remedial issues available in Phase Two. (See MID's Supplemental Brief on Scope of Remedy Phase, filed on September 16, 2022, at p.2.)

The case was reassigned to this Court on February 19, 2020. The parties (perhaps acknowledging the limitations of Judge Beauchesne's Phase One decision) stipulated Respondent would bring a motion to determine the appropriate scope of evidence the Court could consider in Phase Two.[12]

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[11] As far as this Court is aware there is only one "utility transfer" at issue in the 2016 Rates - the $7,663,219 "Inter-Utility" transfer identified in the 2016 COSA.

[12] The parties also agreed there was no utility in briefing whether relief should issue on the declaratory relief claim or the Code of Civil

Because it sets the stage for several of the Court's findings herein, the Court quotes its entire ruling on the Respondent's motion regarding the appropriate scope of evidence in Phase Two:

> Based on the moving and opposing arguments and the matters subject to judicial notice herein, the Court finds that Respondent has demonstrated that the proffered evidence (specifically, the Cost of Study Analysis underlying the 2018 rate resolution and the supporting documents thereto) is relevant and admissible with regard to the issues to be determined in the remedy phase of the trial of this matter. ***Having specifically found that the evidence presented on the administrative record during the liability phase of the trial was insufficient to demonstrate Respondent's costs associated with providing the subject service, the exclusion of the proffered extra-record evidence would render it impossible for the Court to reasonably determine the amount of monetary damages (in the form of refunds) owed by Respondent herein.***

In addition to the extra-record evidence admissible as a result of the Court's ruling on MID's motion to admit extra-record evidence, the parties have also conducted a significant amount of discovery related to Phase Two, including a number of expert depositions. Thus, the Court has before it ample evidence to complete its Phase Two task.[13]

On April 19, 2022, the parties stipulated to a briefing schedule for Phase Two based on a hearing date of August 9, 2022. Their briefs were filed as follows:

1. Petitioners' Opening Brief [Remedies Phase] – June 10, 2022.
2. Respondent and Defendant MID's Opening Brief on Remedy Issues – June 10, 2022.
3. Petitioners' Responsive Brief [Remedies Phase] – July 22, 2022.
4. Respondent and Defendant MID's Opposition Brief on Remedy Issues – July 22, 2022.

Procedure section 526a claim. The Court agrees that whether or not a monetary remedy is warranted, prospective writ relief may be appropriate which would be duplicative of any declaratory or injunctive relief.

[13] At this juncture the Court notes it has reviewed all of the parties' numerous objections to evidence and concludes none shall be sustained. The Court believes all of the evidence submitted by the parties is relevant and admissible. The objections focused upon weight, not admissibility.

After review of the briefing in anticipation of the August 9, 2022 hearing date, the Court sought clarification from the parties as to ***what was and what was not decided*** in Judge Beauchesne's December 31, 2019, ruling. The Court ordered the parties to provide supplemental briefing on that issue and continued the hearing on the petition to October 24, 2022. Petitioners' Supplemental Brief [Remedies Phase] and Respondent and Defendant MID's Supplemental Brief on Scope of Remedy Phase were both filed on September 16, 2022.

After two additional brief continuances (one initiated by the Court and one by the parties) argument on the petition occurred on November 23, 2022, and the matter was submitted as of that date.

III. STATEMENT OF PERTINENT FOUNDATIONAL FACTS.

Respondent and Defendant Modesto Irrigation District is a non-regulated special district located in the City of Modesto, California. MID was formed in 1887 pursuant to the California Irrigation District Law (Water Code § 20500 et seq.). While it was originally formed to provide irrigation services only, MID now provides three distinct services under one large umbrella: electric[14], irrigation and wholesale potable (domestic) water[15]:

- MID "generates, transmits, and distributes electricity to portions of Stanislaus, San Joaquin, Tuolumne, and Contra Costa counties. It has over 122,000 electric accounts and generates hydroelectric power at the Don Pedro Dam using water rights acquired by its irrigation utility years before it entered the power business;

[14] Added in 1923.
[15] Added in 1995.

- Using those same water rights, MID provides irrigation water to approximately 3,100 farmers who irrigate approximately 58,000 acres of farm land, typically between mid-March and mid-October of each calendar year;
- MID also treats and delivers approximately 67,000 acre-feet of water per year to the City of Modesto for use as drinking water. [16]

IV. STATEMENT OF LAW.

Article XIII C of the California Constitution prohibits local governments from imposing, increasing, or extending any tax without voter approval. The scope and application of article XIII C was exhaustively covered in *Redding*, and especially considering the parties' reliance on that decision, the Court finds it useful to include relevant portions of the *Redding* Court's discussion here:

> California voters have, over the past four decades, adopted a series of initiatives designed to limit the authority of state and local governments to impose taxes without voter approval. ...
>
> The first of these initiatives was Proposition 13, adopted in 1978. It added article XIII A to the state Constitution "to assure effective real property tax relief by means of an 'interlocking "package" ' " of four provisions. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872 ... (*Sinclair Paint*).) The first provision capped the ad valorem real property tax rate at one percent (art. XIII A, § 1); the second limited annual increases in real property assessments to two percent (art. XIII A, § 2); the third required that any increase in statewide taxes be approved by two-thirds of both houses of the Legislature (art. XIII A, § 3); and the fourth required that ***any special tax imposed by a local government entity be approved by two-thirds of the qualified electors*** (art. XIII A, § 4). Thus, with its first two provisions, Proposition 13 limited local government authority to increase property taxes. Further, "since any tax savings resulting from the operation of [the first two provisions] could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions

[16] Respondent and Defendant Modesto Irrigation District's Opening Brief on Remedy Issues, June 10, 2022, p. 6.

upon the imposition of such taxes." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231, ...)

In 1996, the voters adopted Proposition 218, known as the " 'Right to Vote on Taxes Act.' " ... It added articles XIII C and XIII D to the state Constitution. Article XIII D, like the first two provisions of article XIII A, limits the authority of local governments to assess taxes and other charges on real property. ... Article XIII C buttresses article XIII D by limiting the other methods by which local governments can exact revenue using fees and taxes not based on real property value or ownership. As enacted, article XIII C provided that "[a]ll taxes imposed by any local government shall be deemed to be either general taxes or special taxes." (Art. XIII C, § 2, subd. (a).) Local governments may not impose, increase, or extend: (1) any general tax, unless approved by a majority vote at a general election; or (2) any special tax, unless approved by a two-thirds vote. (Art. XIII C, § 2, subds. (b), (d).)

Significantly, ***Proposition 218 did not define the term "tax."*** That definition was provided 14 years later, with the passage of Proposition 26 in November 2010. Proposition 26's findings stated that, despite the adoption of Propositions 13 and 218, "California taxes have continued to escalate." (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, subd. (c), p. 114.) The findings also took note of a "recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by [the] constitutional voting requirements." (*Id.*, subd. (e) unenumerated par.)

To ensure the effectiveness of Propositions 13 and 218, ***Proposition 26 made two changes to article XIII C. First, it specifically defined " 'tax,' " and did so broadly, to include "any levy, charge, or exaction of any kind imposed by a local government."*** (Art. XIII C, § 1, subd. (e).) However, the new definition has seven exceptions. A charge that satisfies an exception is, by definition, not a tax. The relevant exception here[17] involves charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Art. XIII C, § 1, subd. (e)(2).)

Second, ***Proposition 26 requires the local government to prove "by a preponderance of the evidence that ... [an] exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that***

[17] Of course, the same exception is the key in the case before this Court.

the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Art. XIII C, § 1, subd. (e).)

Citizens for Fair REU Rates v. City of Redding (2018) 6 Cal. 5th 1, 10–11(some citations omitted; ***emphasis*** added by the Court).

V. JUDGE BEAUCHESNE'S DECEMBER 2019 PHASE ONE DECISION AND ITS IMPACT ON PHASE TWO.

As noted above, proceedings in this matter were bifurcated into two phases – a liability phase and a remedies phase – pursuant to the parties' December 2018 stipulation. Thus, the liability phase of this proceeding was tried in front of Judge Beauchesne in late 2019, and Judge Beauchesne issued his liability decision on December 31, 2019, his last day in office.

A neutral review of the December 31, 2019, decision permits some uncertainty as to just what impact the decision should have here.

In this Court's view, Judge Beauchesne's factual findings were ***limited*** to the following:

> Based upon consideration of the evidence and the exhaustive briefing, the Court finds in favor of the Petitioners and concludes MID's electric rates are taxes and therefore liable (sic). Furthermore, MID failed to meet their burden of proof by a preponderance of the evidence.
>
> ***The primary basis for the Court's decision is the ubiquitous absence of actual costs throughout MID's arguments.*** Although the Court understands MID's argument regarding the projection issue to set rates, ***there is little to no foundation to explain what specific costs were attributable primarily to the utility transfers.***

For example, Petitioners proffer in their Reply Conclusion, in part, as follows and ***with which the Court agrees:***

> The record in this case reveals a massive multi-million dollar hole in MID's irrigation budget, with a corresponding electric utility profit … . It (MID) ***utterly failed to justify its $2.6 million profit and $7.6 million Inter-Utility Transfer,***

> instead hastily pointing to is policies and procedures, but ***never tying these explicit subsidies to any actual costs.***
>
> In sum, MID failed to meet its burden under Proposition 26 to prove that it set electric rates in an amount that does not exceed its costs incurred to provide electric service. (***Emphasis*** this Court's.)

Notably, despite an earlier June 2019 determination to exclude extra-record evidence in the form of the MSRB statements (Exhibits 4, 5 and 6 as set forth in Petitioners' Motion to Augment the Administrative Record in Phase One, see discussion above), Judge Beauchesne cites to Petitioners' "persuasive" arguments that ***the MSRB filings*** "show (MID's) actual costs are consistently tens of millions of dollars less than its projected costs use to set rates." (Emphasis in original.)

Given the limitations of Judge Beauchesne's Phase One decision, the Court agrees with Respondent MID that in this phase of the trial it is required "to determine ***the amount of the tax*** ... Respondent ... imposed on the Petitioner and Plaintiff class in the form of electricity rates in excess of service cost." The amount of the tax is not "the whole rate class members paid – Proposition 26 (Cal. Const., art. XIII C, § 1 subd.(e)) does not require MID to provide electric service for free – but only ***any portion which exceeds MID's reasonable cost to provide electric service.***"[18] Basically, ***the Court is now tasked with determining the amount the class "should" have paid.*** This requires the Court to determine MID's actual, "reasonable" cost to provide power which is "a complex, fact-intensive determination."

In this regard, the Court notes its task is the "same" as the one the parties actually agree the Court should perform in Phase Two – although stated a slightly different way. The

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[18] Respondent's Motion to Determine Scope of Evidence for Trial on Remedies, filed April 20, 2020, p. 6.

parties agree that the "remedy" in this case is the "*difference* between [the power rate] actually paid and that which properly should have been exacted." [19] *Water Replenishment District of Southern California v. City of Cerritos* (*Cerritos*) (2013) 220 Cal.App.4th 1450, 1464. The 2016 Rates – the rates actually paid - are in evidence and are not disputed – so the remedial calculation turns on "that which properly should have been enacted" – i.e. the lawful rate for MID's electric service. Put another way, the Court must decide at what level MID's rates do not "offend" Proposition 26. In order to do this, the Court must calculate what Judge Beauchesne did not calculate – the ***difference*** between MID's "reasonable costs" of providing electric service from 2016 – 2018 (which is by definition the "lawful" rate) and what MID actually charged the class members.

This measure of damages, derived from tax cases, is specifically designed to make MID's electric ratepayers whole, not to provide them with a windfall. *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, 1455-56 [limiting refund to ***discriminatory portion*** of tax; reversing full refund as conferring windfall].

VI. WHICH PARTY HAS THE BURDEN OF PROOF IN PHASE TWO?

The question then becomes: Who has the burden of demonstrating *the difference* between the electric rate actually paid and the rate that properly should have been exacted?

The Court concludes Respondent MID maintains the burden of proof in Phase Two.

In a "typical" case, the Court concedes, *Petitioners* would be required to prove entitlement to the amount of relief they seek and prove that amount "with reasonable certainty."

[19] Respondent's Opposition Brief on Remedy Issues, filed July 22, 2022, p. 10.

Carpenter Foundation v. Oakes (1972) 26 Cal.App.3d 784, 799 ["It is elementary that a party claiming damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty."]

However, this is not a "typical" case. Of course, case law dealing with Proposition 26 establishes "that the government must show in the *liability phase of trial* [that] rates do not exceed costs and are fairly apportioned." (Petitioners' Responsive Brief [Remedies Phase] at p. 24.) But we are no longer in the liability phase of the trial.

As is set forth elsewhere in this decision, however, the question the Court must answer to resolve the remedies phase, and which the parties agree it must answer to resolve Phase Two, is as follows: *What is the difference* between the "unlawful"[20] 2016 Rates MID charged its electric ratepayers and the rates MID could have lawfully charged?

In the Court's opinion Proposition 26 clearly places the burden on MID to not only prove its electric rates are not taxes (in Phase One), but also to address its costs of service relative to it rates in order to establish the "difference" here. Article XIII C, Section 1, subdivision (e) states:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Petitioners claim "MID charged an amount that is more than necessary to cover MID's reasonable costs to provide electric service." In Phase One Judge Beauchesne agreed with

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[20] As also discussed herein, Phase One established MID's 2016 Rates were an unlawful tax. But it did not establish at what amount MID's rates should have been set so that they would be lawful. The only way to calculate damages is to figure out that difference.

that argument. Now in Phase Two, MID must prove "by a preponderance of the evidence (what) ... amount is no more than necessary to cover the reasonable costs of the governmental activity." (See Petitioners' Responsive Brief [Remedies Phase], pg. 8). It is only by establishing this amount that the Court can determine the "difference" both it and the parties have identified as being the "measure of damages" in this case.

VII. THE COURT INTENDS TO RELY UPON THE 2018 COSS TO DETERMINE WHAT AMOUNT CONSTITUTES THE "DIFFERENCE".[21]

When MID adopted the 2016 Rates it did so on the basis of an "in house" cost of service analysis – what the parties have designated the "2016 COSA".[22] The 2016 COSA, which supported MID's first rate increase since January 2012, was not intended to increase MID's total revenue (the 2016 COSA was "revenue neutral"). Rather, the purpose of the 2016 COSA was to "better allocate costs among customers in proportion to the cost to serve each customer class." (Respondent and Defendant MID's Opening Brief on Remedy Issues, pg. 7.)

After this lawsuit was filed, MID retained consultants to prepare a new cost of service study using a more sophisticated ratemaking methodology. The 2018 Cost of Service Study (COSS) was prepared by Bartle Wells Associates (Bartle Wells) and MRW & Associates (MRW), and led MID to adopt Resolution No. 2018-74 on December 4, 2018, to repeal the 2016 Rates, ***adopt electric rates in the exact same amount as the 2016 Rates***, and re-allocate costs and discretionary

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[21] Indeed, as the Court has expressed before, it sees no other way to calculate this amount.

[22] The 2016 COSA is part of the almost 18,000-page Administrative Record in this case - submitted in Phase One. There is so much evidence in this case the Court has chosen not to cite to the Administrative Record and trusts the parties are fully cognizant of the provisions of the 2016 COSA without pinpoint citation. Pinpoint citations to the 2016 COSA will not be necessary at any rate as the Court concludes the only way it can accomplish its task is to focus on the information set forth in the 2018 COSS.

revenues between MID's lines of service/customer classes.[23] (Joint Appendix on Phase Two, Exhibits 9 & 11 [2018 COSS and 2018 Rate Resolution].)

Petitioners argue that the 2018 COSS – including the rate study and financial projections therein – are not "relevant to the refund owed for the 2016 electric rates." See Petitioner's Opening Brief [Remedies Phase] at p. 27.

Additionally, Petitioners assert that Judge Beauchesne's December 31, 2019, decision prevents this Court from relying on the 2018 COSS because Judge Beauchesne found it "did nothing to address whether the 2016 electric rates are valid, given that it is based on financial projections that post-dated MID's establishment of the 2016 Electric Rates by several years." (Petitioners' Opening Brief [Remedies Phase], p. 13.)

To be clear, this Court does not believe Judge Beauchesne made any binding decisions with regard to the 2018 COSS, as well as the 2018 Rates. Judge Beauchesne's decision focused on the 2016 Rates and the 2016 COSA – which he found insufficiently justified the 2016 Rates. To the extent he discussed the 2018 COSS and 2018 Rates at all his comments appear to this Court to be neutral:

> After this lawsuit was filed, MID retained new independent consultants to prepare a comprehensive cost-of-service analysis of both the electric and irrigation rates, to further analyze the allocation of revenues and expenses between its irrigation and electric division. The resulting studies led MID to adopt Resolution No. 2018-74 on December 4, 2018 to repeal the 2016 rates and to adopt electric rates in the same amounts and to reallocate costs and discretionary revenues between MID's utilities and among its customer classes. The electric rate consultant concluded that MID's electric rates are reasonable and that the rate revenue collected by the electric division is less than MID's costs of electric service.[24]

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[23] The parties prepared a "Joint Appendix of Evidence" in support of their briefs submitted for this phase of trial. The pages of the Joint Appendix are sequentially numbered at the bottom left of each document. Where the Court has a page citation it will include it when referencing the Joint Appendix.

[24] Judge Beauchesne's December 31, 2019, Decision at p. 6.

Petitioners believe the 2018 COSS cannot be used as a "replacement" for the 2016 COSA. As part of the discovery they conducted in Phase Two, Petitioners engaged the services of David P. Vondle, a management consultant with some specialty consulting with utilities, who states:

> [I]t is preposterous to suggest that a study in 2018, two years later, can ***replace*** the actual study use to set rates in 2016. The 2016 COSA is what it is. The 2016 rates were based on that study. The 2018 [COSS] cannot be ***retroactively applied as a substitute*** for the actual 2016 COSA used to set the actual 2016 rates. The 2018 [COSS] was used by the Board to set the rates for 2018. The MID ***Board did not travel back in time to set the 2016 rates based on the 2018 [COSS]***. (Vondle Declaration In Support of Petitioners' Opening Brief, filed 6/10/22, ¶ 22. ***Emphasis*** is the Court's.)[25]

Respondent notes the consultants who developed the 2018 COSS concluded MID's 2018 electric rates (which were set at the ***same exact rate as the repealed 2016 rates***) "are 'reasonable' and MID's electric rates produce less than the cost of service, with the gap funded by other revenues." (Joint Appendix, Exh. 9 at p. 1091.)

Thus, in general, Petitioners' expert questions the 2018 COSS' effort to categorize and allocate costs between MID's utilities, although MID's multiple ratemaking experts conclude that MID ***must*** do so. Additionally, Petitioners' contend, based in part on their expert's analysis, that MID does not have any discretionary revenue that might be used to cover costs other than the reasonable costs of service the Constitution allows MID to recover from electric rates.

If there is one thing the Court and the parties can all agree on, it would likely be that utility ratemaking is not a simple process. Ratemaking review – which is essentially what the

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[25] The Court notes that it agrees with this statement in the following respect: It does not intend to "replace" the justification of the 2016 Rates with MID's justification of the 2018 Rates. Nor does it believe the 2018 COSS can be retroactively applied as a substitute justification for the actual 2016 Rates. However, it does appear to the Court that the 2018 COSS is persuasive evidence of MID's "reasonable costs of service" to provide electricity. Therefore, the Court may rely upon the 2018 COSS to help it determine what "difference" is at issue here.

Court must do here – is slightly easier, if only because the Court may rely on experts to inform its review. Here, the Court found MID's experts – those experts who actually prepared the 2018 COSS – more credible. Their hands-on experience with public utility ratemaking in particular stood out to this Court.

Because the 2018 COSS resulted in MID setting its rates at exactly the same level as they were set in 2016 based on the 2016 COSA, the Court finds the 2018 COSS highly relevant and helpful. The fact that MID set the 2018 rates at exactly the same levels as they were set in 2016 after conducting the "more fulsome" 2018 COSS is persuasive evidence that the factors considered in the 2018 COSS may be analyzed to determine what rate MID could reasonably charge for electricity, and thus the difference between that rate and the 2016 Rates, i.e. the level of refund (if any) due to Petitioners.

VIII. MID's 2018 COSS Controls the Definition of the "Difference" Here.

Petitioners take issue with the methodology and a number of the provisions in the 2018 COSS. The Court will discuss them below.

A. Does MID's 2018 COSS Properly Assess Various "Interfunctional Values" as "Reasonable Costs" of Service?

The 2018 COSS describes a number of "costs" as "interfunctional values" – i.e. benefits being enjoyed by the electric utility at the "expense" of the irrigation utility (and vice versa). These

include – as most pertinent here – the value of "hydro-water" and the value of electric transmission along irrigation canals.[26]

Many utilities, including MID, provide more than one type of utility service. MID provides electricity, irrigation, and domestic water. "Each utility service may utilize separate assets to provide specific services but may also jointly use other assets; in the latter situation, these assets are in common to the various types of utility services. Such common costs must first be attributed to the types of utility service before they can be attributed to the various classes of customers taking each service." [27]

"The 2018 COSS reviewed cost allocations to fairly allocate assets, liabilities, revenues and expenses among MID's 'lines of service' i.e. its irrigation, domestic water, and electrical services. That study recognized that MID's electric utility should reimburse the irrigation utility for such inputs to its power generation and distribution as use of water resources for hydropower generation ("water as fuel" or "falling water"), administrative and general ("A&G") costs shared by the two utilities, and use of irrigation rights of way for power lines, among others." (Joint Appendix, Exh. 9, at p. 1091.)

As MID notes in its Opening Brief on Remedy Issues at page 8: "[MID lines of business] have no duty to provide such assets, or to bear such costs, without reimbursement." (Citing *Redding, supra*, 6 Cal.5th at p. 17.)

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[26] See the Joint Appendix at Exhibit 9 [Bates 1124-1125] "Interfunctional Value" Section of 2018 COSS.

[27] See Declaration of Catherine E. Yap, Page 8, Exhibit A, "Expert Report of Catherine E. Yap" - citing to American Gas Association, Gas Rate Fundamentals, Fourth Edition, at 132: "If each dollar of expense and investment could be specifically assigned to a single customer group, there would be no need for the allocation process of a cost of service study. Most utility investments, however, serve many different groups of customers. Thus, it is virtually impossible for a utility to attribute specific cost responsibility for these "common costs"."

MID's expert Catherine E. Yap testified during her deposition:

I see the cost of service ***having to be allocated.*** I mean, that is consistent with matters that I've dealt with for a variety of different entities. So, it's not --- you don't go to interdepartmental charges; you allocate. You separate, you allocate. You functionalize, you classify, you allocate. So, I advised [MID] based on that knowledge, that that is what I thought was the best approach." (Deposition of Catherine E. Yap, pg. 31, lies 4-11; See Exhibit 4 to Matthew C. Slentz's Declaration In Support of Respondent and Defendant MID's Opening Brief on Remedy Issues.) "The hydrowater charge is an expression of a cost separation process. And, as such, ***I evaluated whether the cost separation process conformed to industry standards and concluded that it does.***" (Deposition of Yap, pg. 68, lines 14-18.) The costs being separated are: MID, as an entity, provides three types of services. It provides electricity services, it provides irrigation services, and it provides ... processed water on a wholesale basis." (Deposition of Yap pg. 68, lines 20-23.) "***The costs (for each service) have to be separated*** ... among the various services in a meaningful fashion, and one that conforms with industry standards. And, as such, they have gone through that separation process, and there are costs that are common. For example, Don Pedro is common to both providing water and providing electricity." (Declaration of Yap, p. 69 lines 1-7.)

As noted by MID, one of the major issues in this case is whether it is appropriate to allocate a "cost" to MID's electric customers, but not to its irrigation customers – given that MID incurs the costs "as a whole". In terms of analyzing that question the Court keeps in mind the following: MID's irrigation customers are charged rates for water delivery, and the irrigation unit delivers water *only to MID customers*. However, MID's electric unit can sell its power outside of the "district". So, it is "fair" to establish an indirect benefit to the electric unit from the irrigation

unit, since the opposite is not true.[28] Within MID, electric receives a benefit from the irrigation facilities and therefore should "pay" a reasonable cost for that benefit. However, irrigation does not receive a benefit from electric. MID could sell the power generated by Don Pedro to third parties and earn revenue (for irrigation) but chooses instead to provide the power to its electricity unit. "It's more of an opportunity. Opportunity revenue that's lost by not selling that power to others is a revenue – potential revenue loss to the irrigation (division)." So that is the basis for allocation of this interfunctional value/cost to electric.

After engaging in the assessment of interfunctional values in the 2018 COSS, Bartle Wells and MRW concluded that MID's rates did not generate enough revenue for MID to transfer any amount to irrigation. And rates set at levels *below* the reasonable cost to provide the service do not run afoul of the provisions of Proposition 26 and Proposition 218.

Given MID, as one entity, provides three different "services" to its customers – the crucial question in this case is whether the use of an asset owned by MID by one service may legitimately be determined to be a "cost" to the service utilizing the asset. The Court is persuaded that MID may properly consider these inter-utility uses as costs attributable to the service using the asset. This treatment makes sense to the Court and, as discussed by one of MID's experts – such treatment is "indifferent" so long as the ratepayers' pay "equivalent" costs. (In other words, the accepted cost of providing a service – whether or not it was provided within MID or without.)

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[28] This summary is paraphrased from the April 25, 2022, Deposition of Douglas R. Dove, page 40, lines 3-13. (See Exhibit 2 to the Declaration of Matthew C. Slentz filed in support of Respondent and Defendant MID's Opening Brief on Remedy Issues filed on July 22, 2022.)

The Court found Ms. Yap's declaration filed in support of MID's Opening Brief on Remedy Issues[29] persuasive evidence of the validity of MID's approach to determining its "reasonable" costs of service. For instance, Ms. Yap demonstrates that MID's division of "Don Pedro" between the irrigation utility portion and the electric utility portion is "essential because the Don Pedro facility provides both water and electricity for (MID) customers":

> In apportioning costs between electric and water services, it is reasonable that the electric utility pay for the electricity generated at Don Pedro dam based on the prevailing price for energy that is generated by Don Pedro during each hour it is generated for the entire year. It is also reasonable that the electricity utility pays separately for the capacity that Don Pedro provides at the prevailing price of capacity for the applicable year .... The (operation and maintenance) costs that are attributed to the electric utility through the accounting system, such as the cost of relicensing Don Pedro, are appropriately deducted from the charges calculated based on the prevailing cost of capacity and energy. Thus, ***the irrigation ratepayers and the electric ratepayers are appropriately left indifferent under this cost separation because the costs that the electric ratepayers pay are equivalent to those costs that the electric ratepayers would have paid by purchasing another source of electricity and capacity*** ... instead of power from Don Pedro. Similarly, the offset to the irrigation costs of service is equivalent to the revenues that would have been procured if the output from Don Pedro had been sold into the ... market.[30]

B. Does MID's 2018 COSS Properly Account for Use of Non-Rate Revenues?

Because MID is a special irrigation district and does not have a general fund or provide general government services, Petitioners contend Proposition 26 restricts MID's discretion to use non-rate revenues to "cover" irrigation "losses".[31] Additionally, Petitioners contend the Court rejected MID's "argument" that it could utilize non-rate revenues to "cover" its $7,663,219 transfer to irrigation in the 2016 COSA.

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[29] Ms. Yap's declaration was filed along with Respondent and Defendant's opening brief on June 10, 2022.

[30] Declaration of Catherine E. Yap, filed June 10, 2022, Exhibit A, page 9.

[31] The Court notes that here it is discussing "gross" non-rate revenues only. If the use of gross non-rate revenue is discretionary, as MID contends, there is no need to discuss the use of "net" non-rate revenue.

MID points out that, taken to extreme, Petitioners arguments would mean ***all*** irrigation costs must be recovered from irrigation rates, rather than discretionary revenues, effectively forcing irrigation to subsidize electric rates by allowing uncompensated use of irrigation assets. But that is not the law. (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 371 [when a cost is incurred for the ***joint benefit of different divisions*** within a ... local government, those costs may be allocated]; and *Redding, supra*, 6 Cal.5th at p. 17 [public agencies need not subsidize utility service with non-rate revenues].)

MID argues the 2018 COSS "demonstrates electric customers did not fund" the 2016 Inter-Utility transfer of $7.66 million because the transfer is more than covered by MID's non-rate revenue – whether the $16 million of non-rate revenue included in the 2018 COSS or the approximately $40 million of non-rate revenue budgeted in 2016.

The Court considers only the $16 million of non-rate revenue identified in the 2018 COSS and concludes this discretionary revenue may be used for any lawful purpose, including lowering the rates of irrigation customers as held in *Redding* and *American Microsystems, Inc. v. City of Santa Clara* (1982) 137 Cal.App.3d 1037.

Even if the Court didn't find MID's arguments related to the 2018 COSS allocations persuasive evidence that there is no reasonable "difference" between MID's 2016 Rates and a "lawful" rate (and thus Petitioners have suffered no damages as a result of MID's adopting the 2016 Rates), MID's argument that it had sufficient non-rate revenue to compensate for the "inter-utility transfers" to irrigation would provide an alternative reason to rule that there are no cognizable damages here.

The Court agrees with MID that this case is ***controlled by the California Supreme Court's decision in Redding***.[32] Appendix A of that decision – in which the California Supreme Court details REU's three sources of operating revenue – identifies "Retail Electric Sales" (annotated "***rate revenues***" by the Supreme Court), "Wholesale Electric Sales" and "Miscellaneous Income". The appendix separately lists "Operating Expenses" as "Power Supply" and "Operations & Maintenance" costs. The cost to generate the power being sold at wholesale is reflected *there* and *not deducted* from the non-retail revenues the Supreme Court ruled *Redding* could use to fund its budgetary transfer. Thus, this Court concludes the California Supreme Court in *Redding* treated the gross receipts from wholesale proceeds as discretionary income. This treatment allows MID the discretion to use wholesale proceeds to cover any necessary inter-utility transfer without offending Proposition 26.

Where a "budgetary transfer (is) not paid out of *rate revenues*, it (is) not part of a charge imposed on ratepayers." (Emphasis added.) *Redding, supra*, 6 Cal.5th at p. 17. Additionally, *Redding* determined that "[i]f the agency has sources of revenue other than the rates it imposes, then the total rates charged may actually be *lower* than the reasonable costs of providing the service." (*Ibid.*) There, because "[t]he total revenue realized from rate payments was insufficient to cover [Redding Electric Utility's] other operating expenses" (*id.* at p. 18), the "budgetary transfer was not paid out of rate revenues, [and] it was not part of a charge imposed on ratepayers" (*id.* at p. 19). The Court also held "Article XIII C does not compel a local government utility to use other non-rate revenues to *lower* its customers' rates" and that "subsidization of rates with non-rate revenue … is not *required* by California law." (*id.* at p. 18)

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[32] The Court notes this discussion is paraphrased from a memo appended to Ms. Yap's declaration filed in support of Respondent and Defendant MID's Opening Brief on Remedy Issues, filed on June 10, 2022.

Petitioners contend that Judge Beauchesne already rejected MID's arguments in this regard. However, there is no objective evidence that he did and this Court cannot presume so. Even if Judge Beauchesne considered and rejected MID's arguments in this regard, this Court must consider them *again* in the context of Phase Two. It would be impossible for the Court to do otherwise given the measure of damages the parties agree to here: the "difference" between the 2016 Rates and a "lawful" (or maybe the better word would be "reasonable") rate. The Court cannot determine a "reasonable" rate without considering the 2018 COSS and the information related to MID's costs therein. It has to determine a reasonable rate in order to compare that rate to the 2016 Rates. What's more, this Court finds the California Supreme Court's decision in *Redding* – mentioned only a few times in passing in the Phase One decision – highly instructive and persuasive with regard to the how the Court should answer the questions presented in Phase Two.

With regard to MID's non-rate revenue – Petitioners contend that MID must determine what percentage of the non-rate revenue is "attributable" to it different business lines and may only use that percentage to offset losses in that line of business. For instance, Petitioners argue if MID "earns" $2.6 million in penalties due to late payments, and $2.2 million of those penalties are related to late payments from electricity customers, MID may only use $400,000 of those non-rate revenues to offset its irrigation losses.

Petitioners make this same argument with regard to a number of other non-rate revenue sources, including interest MID earns on deposits/investments, rent payable to MID related to the provision of fiber-optic lines and district property, income earned from warehouse sales, etc.

However, *Redding* makes it clear that MID's non-rate revenue may be used at its discretion.

C. Does MID's 2018 COSS Properly Account for MID's Debt Defeasance?

For MID "debt defeasance" (basically the repayment of debt) involves the substitution of other collateral for the cash flows that MID would otherwise be required to produce over time (via rates charged to its customers) to pay off the bonds issued to finance ongoing capital improvement projects. Instead of producing the cash flow needed to pay off the bonds over a series of years, in years where it generates excess revenue due to ***costs being lower than projected***, MID purchases U.S. government securities in sufficient amount to guarantee the repayment of the bonds that are subject to defeasance and places those securities (as well as the outstanding bonds) into an irrevocable trust to be managed by an escrow agent. Once this occurs, the (bond) debt is removed from MID's accounts and financial reports. The notes to MID's 2018 financial statements, which cover years 2017 and 2018 ..., report that cash defeasance of debt ***took place*** in late 2018 and late 2017.[33]

Although their own expert concluded that "valid and actual planned debt defeasance may be a legitimate component of the revenue requirement" [34], Petitioners spend a significant amount of time alleging MID nefariously calculated the amount of debt defeasance it would execute in its 2018 COSS at exactly the "right amount" to justify its electric rates. In other words, MID looked at all other "reasonable costs" supporting its electric rates, determined what

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[33] MID's 2018 Report to MSRB at pages 49-50; see Exhibit A to the Declaration of Catherine E. Yap, filed on June 10, 2022, at p. 16, fn. 34.

[34] See Vondle Decl. ¶ 45, and discussion of debt defeasance at Petitioners' Opening Brief [Remedies Phase] at pg. 19-20.

number it needed to add to its costs so they would "equal" the rates it ***wanted*** to charge, and decided to pay off debt at that exact level so that its electric rates would not exceed its "reasonable costs".

Petitioners argue that debt defeasance was "utterly absent" from the 2016 COSA, yet MID included $24.5 million in projected debt defeasance in the 2018 COSS. It is worth noting here that Petitioners do not, and cannot, dispute that debt defeasance is an accepted "reasonable cost" of service. However, they allege MID fabricated this cost: "Defeasance of debt and other debt service payments are valid costs of service, but a local government cannot simply fabricate a cost it has no good faith intention of paying just to evade the constitutional mandates in Proposition 26." (Petitioners' Opening Brief [Remedies Phase], p. 19.)

Petitioners concede that debt defeasance is a "valid cost of service" and MID's 2018 COSS, which included $24.5 million in debt defeasance, *set rates at exactly the same amount* as the 2016 Rates. As MID notes[35] Petitioners offer no rationale why insights available to MID in 2018 – when it determined that lower than projected generation costs would result in savings it could apply to pay down debt – may not be used to show rates MID adopted in 2016 *did not* exceed its costs of service. "The question is whether customers paid too much, not whether they paid the right amount for (what Petitioners apparently believe are) the wrong reasons."

The Court agrees. The only way it can determine whether there are any damages here is to compare a "lawful" rate with the 2016 Rates. The 2018 COSS, which set the 2018 Rates at the exact same level as the 2016 Rates, is persuasive evidence of a "lawful" rate – even though it is based on different numbers/allocations of costs/projections etc.

MID explains its 2016 COSA revenue requirement projected higher costs for power generation and purchases than its 2018 COSS – even though the two ratemaking procedures

[35] MID's Opposition Brief on Remedy Issues, p. 11.

produced the very same rates. Simply, MID took advantage of the lower costs of power generation (based on "historically low natural gas rates) to pay off debt. While Petitioners seem to believe MID ***should have lowered 2018 rates instead***, MID's decision not to do so was ***within the range of reasonableness*** – especially considering that debt defeasance is a completely "valid cost of service":

> There is nothing nefarious about MID deciding to lower debt, thereby minimizing its interest obligations and avoiding the price shock that results from raising and lowering rates too frequently. ... Our Constitution allows ratemakers flexibility and demands only reason and fairness, not clairvoyance or blind adherence to earlier predictions (since) proven wrong."[36]

D. A Comment on the 2018 COSS Compared to MID's Report to the MSRB.

Since they were apparently meaningful to Judge Beauchesne, the Court will include a brief discussion of MID's reports to the Municipal Securities Rulemaking Board (MSRB). Whether in the 2016 COSA or the 2018 COSS – the methods employed by MID to report its financial information to the MSRB are based strictly on general accounting principles with zero recognition of ratemaking principles.

Petitioners make much of the differences between the two types of reports, but according to MID's expert Catherine E. Yap, the differences are "entirely unsurprising":

> The MSRB filing is based on the initial accounting of the expenditures ***after they are made and reflects audited confirmation that such expenditures have in fact been made.*** Similarly, the audited accounting of the receipt of revenues are presented in the MSRB report based on that initial accounting.
>
> In contrast, the COSS is based on ***projections of cost and revenues.*** Those costs and revenues are in turn separated using ratemaking principles which resulted in recommended rates that were adopted by the Board on December 4, 2018. However, the 2018 COSS served to demonstrate that the rates in existence on January 1, 2018, through December 3, 2018, were correct and equal to the rates adopted on December 4, 2018. Thus, rates recommended by the 2018 COSS were

[36] Respondent MID's Opposition Brief on Remedy Issues, pg. 12.

in effect during the entirety of 2018 and those rates produced the 2018 revenues that were recorded in MID's accounting records and reported to the MSRB.

Further, the functionalization of the costs and revenues that occurs in the COSS represented a refinement of the financial accounting categorization. ***It is very common that there is significant deviation between the initial financial accounting and the ratemaking categorization of costs and revenues."***[37]

IX. ARE THE $7.6 MILLION INTER-UTILITY TRANSFER OR THE $2.6 MILLION "PROFIT" REFERENCED IN JUDGE BEAUCHESNE'S PHASE ONE DECISION THE "DIFFERENCE" BETWEEN THE MID'S 2016 RATES AND A "LAWFUL" RATE?

The short answer is no.

Based on the evidence before the Court in Phase Two, both the Inter-Utility Transfer and the "Profit" set forth in the 2016 COSA would be more than "covered" by the various amounts MID has demonstrated (in the 2018 COSS) were "costs" flowing from electricity to irrigation. As set forth above, the 2018 COSS and the other admissible evidence discovered by the parties since the Court's December 31, 2019, Phase One decision, establish that MID's 2018 Rates were "lawful" rates – rates that did not exceed MID's reasonable costs of service. And because those rates were set ***at the same exact amount as the 2016 rates*** it is impossible for the Court to find any "difference" to award Petitioners as damages.

Put another way – the difference between the 2016 Rates and the legally justified and supported rate MID adopted in 2018 is zero. The Court is convinced on this record that an award of damages would be in error.

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[37] See Declaration of Catherine E. Yap, filed June 10, 2022, Exhibit A at p. 22.

X. FINDINGS AND CONCLUSION.

For all of the above reasons, the Court finds and concludes as follows:

1. In Phase One of this matter, the Honorable Roger M. Beauchesne (Retired) concluded the 2016 Rates set forth in the 2016 COSA and adopted by Respondent and Defendant Modesto Irrigation District in Resolution No. 2015-110 on November 17, 2015 (effective on January 1, 2016) were insufficiently justified *at the time they were adopted* and therefore constituted an improper "tax" pursuant to Proposition 26, Proposition 218 and Cal. Const. Article XIII C;
2. In 2018, while this matter was pending, MID conducted a cost of service study (the 2018 COSS) pursuant to which it *repealed* the 2016 Rates and *adopted the exact same rates* based on a detailed analysis of MID's revenue and reasonable costs contained in the 2018 COSS;
3. The 2018 Rates, this Court concludes, were sufficiently justified *at the time they were adopted* and were therefore not a "tax" pursuant to Proposition 26, Proposition 218 and Cal. Const. Article XIII C;
4. The parties agree that the "measure of damages" in this phase - Phase Two - of this matter is the "difference" between the 2016 Rates and what MID should have lawfully charged (i.e. the 2016 rate should have been no higher than MID's "reasonable costs" to provide electric service);
5. The Court concludes because the 2018 COSS reasonably and justifiably set the electric rates ***at exactly the same level they were set in 2016***, there can be no "difference" between the 2016 Rates and what MID should have lawfully charged, thus there are no damages to award in this matter. Put another way – while the 2018 COSS does not

"replace" the 2016 COSA, because it concluded the exact same rates were a reflection of MID's reasonable costs of service, the Court is persuaded that MID's electric ratepayers suffered no damages.

Although the Court has reached the conclusion that there are no damages to award the class under the ***very particular circumstances*** of this case, Petitioners did achieve a portion of their goals. As a result of the petition, Respondent and Defendant MID repealed the challenged rates and was required to properly explain and justify its ratemaking activity. Petitioners put processes which had previously been opaque in the spotlight creating much needed transparency. Petitioners' success in this regard should be acknowledged – they prevailed, if not in whole, at least in significant part.

Thus, the Court concludes that in addition to the proscriptive relief Judge Beauchesne previously ordered in Phase One, Petitioners shall be awarded their costs of suit, including attorneys' fees, in Phase Two.

XI. ORDER

This Tentative Decision/Proposed Statement of Decision will become the Statement of Decision unless, within 10 days after service of this Tentative Decision/ Proposed Statement of Decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. California Rules of Court, rule 3.1590(c)(4).

DATED: February 21, 2023

SONNY S. SANDHU,
JUDGE OF THE SUPERIOR COURT

PROOF OF SERVICE BY MAIL
[1013a(3) C.C.P.]

STATE OF CALIFORNIA)
) SS
COUNTY OF STANISLAUS)

I am over the age of 18 years and employed by the Superior Court of the State of California, County of Stanislaus, and not a party to the within action. I certify that I served a copy of the attached **TENTATIVE RULING AND PROPOSED STATEMENT OF DECISION DATED 02-21-2023** by placing said copy in an envelope addressed to the following:

MATTHEW SLENTZ, Esq.
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Paid envelope was then sealed and postage thereon fully prepaid, and thereafter was on February 21, 2023 deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

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

Executed on February 21, 2023 at Modesto, California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF STANISLAUS

By _____
Angela Castigliano, Deputy Clerk