Nos. A146901 and A148266

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SAN DIEGO COUNTY WATER AUTHORITY,

Respondent and Cross-Appellant,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Appellant and Cross-Respondent.

Appeal From Judgments And Peremptory Writs of Mandate After Court Trials
Superior Court for the County of San Francisco
Nos. CFP-10-510830 and CFP-12-512466
The Honorable Richard A. Kramer and Curtis E.A. Karnow

SAN DIEGO COUNTY WATER AUTHORITY'S PETITION FOR REHEARING

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I. INTRODUCTION

Pursuant to California Rule of Court 8.268, the San Diego County Water Authority ("Water Authority") respectfully petitions this Court for rehearing in connection with this Court's June 21, 2017 Opinion in this case between the Water Authority and the Metropolitan Water District of Southern California ("Metropolitan"). The Water Authority respectfully draws the Court's attention to four fundamental errors in the Opinion, and several related omissions and misstatements.

First, the Opinion does not afford sufficient deference to the trial court's factual findings, does not "consider all relevant evidence," and does not "give due consideration to the purposes and policies" of the Wheeling Statutes. Wat. Code § 1813. The Opinion relies on *Metropolitan v. Imperial Irrigation District*, 80 Cal. App. 4th 1403 (2000) ("*Imperial Irrigation*"), but that case was remanded for precisely the findings the trial court made here, including as to whether Metropolitan's wheeling rates discourage wheeling. *See id.* at 1436. As Justice Siggins correctly emphasizes in his concurrence, the Wheeling Statutes "make clear that 'any determination made under this article' can be the subject of a judicial challenge in which 'the court shall consider all relevant evidence, and the court shall give due consideration to the purposes and policies of this article.'" Op., Siggins, J., concurring (quoting Wat. Code § 1813). That is what the trial court did in finding, among other things, that Metropolitan's

wheeling rates discourage wheeling. Yet the Opinion does not address that finding or the substantial evidence on which it was based.

Second, the Opinion erroneously holds, as a matter of law, that Metropolitan properly allocates to its own transportation rates the State Water Project costs identified by the California Department of Water Resources ("DWR") as the transportation component of DWR's charges for providing a water supply to Metropolitan ("DWR's water-supply-delivery charges").[1] As the trial court correctly found, those are costs of supplying water to Metropolitan, not Metropolitan's costs of transportation or wheeling. Indeed, Metropolitan itself previously categorized DWR's water-supply-delivery charges as Metropolitan's supply costs, consistent with industry practice, including that of other State Water Project contractors. As the trial court rightly found, moreover, Metropolitan's deviation from this established practice was not, as this Court's Opinion incorrectly assumes, driven by Metropolitan's need to recover its State Water Project costs, but instead was explicitly based on Metropolitan's unlawful decision to set a wheeling rate that would dissuade wheelers from purchasing water from sources other than Metropolitan. *See, e.g.*, 27-AA-7506-09; 5-AR2010-1234-35, 1244-54_01.

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[1] The Opinion states that DWR "bills for transportation costs separately from water supply." Op. at 22. But transportation is a component of DWR's "CHARGES FOR A WATER SUPPLY." 18-AA-5037. Citations here follow the format of the parties' appellate briefs. *See* AOB at 23 n.1.

As the court held in *Palmdale v. Palmdale Water District*, 198 Cal. App. 4th 926 (2011), the law prohibits public agencies from allocating costs in this manner to preserve "rate stability." *Id.* at 937-38. Indeed, "rate stability," in this context, is a euphemism for protectionism, which violates the constitutional, statutory, and common-law requirement that the costs of government services must be allocated to those who actually cause those costs to be incurred ("cost causation"). As the California Supreme Court stated on June 29, 2017—after this Court issued its Opinion—costs are properly allocated "to those who generate the costs," whereas if a "local governmental agency were allowed to impose charges in excess of the special benefit received by the payor or the cost associated with the payor's activities, the imposition of fees would become a vehicle for generating revenue independent of the purpose of the fees," in violation of Proposition 26 and its predecessors. *Jacks v. City of Santa Barbara*, — Cal. 4th —, No. S225589, 2017 WL 2805638, at *5 (June 29, 2017).

Further, the Wheeling Statutes not only require Metropolitan to set its wheeling rates based on cost causation, but also to "act in a reasonable manner consistent with the requirements of law to ***facilitate*** the voluntary sale, lease, or exchange of water," Wat. Code § 1813 (emphasis added), and "***encourage*** voluntary transfers of water and water rights," *id.* § 109 (emphasis added)—***especially transfers from agricultural areas***, *see* Stats. 1986, ch. 918, § 1(a)-(d). Yet Metropolitan explicitly designed its wheeling

rates to ***discourage*** "the largest agricultural-to-urban water transfer in United States history." *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 788 (2011) ("*QSA*"). Thus, Metropolitan violated the Wheeling Statutes, as the trial court rightly held, following *San Luis Coastal Unified School District v. City of Morro Bay*, 81 Cal. App. 4th 1044 (2000), among other authorities. *See* 27-AA-7506-09.

Third, the Opinion errs in holding, as a matter of law, that because State Water Project facilities are purportedly "available" for Metropolitan to use for wheeling, Metropolitan properly allocates ***100%*** of DWR's water-supply-delivery charges to Metropolitan's transportation rates. *See* Op. at 23. In fact, Metropolitan has no authority to use the State Water Project for wheeling. And even if it could, DWR's water-supply-delivery charges are incurred to supply Metropolitan with water, not for wheeling. Metropolitan certainly did not justify its allocation of ***100%*** of DWR's water-supply-delivery charges to transportation. This Court seems to have concluded otherwise based, in part, on a misunderstanding of the trial court's ruling. The Opinion repeatedly states that the trial court held that "no part" of DWR's water-supply-delivery charges may be included in Metropolitan's wheeling rates. *Id.*; *see also id.* at 2, 22. As Metropolitan itself emphasized on appeal, however, the trial court "held only that it was unreasonable to allocate ***all***" of DWR's water-supply-delivery charges to Metropolitan's transportation rates. AOB at 114 (emphasis in original)

(citing 27-AA-7516). The trial court was correct.

Fourth, if this Court does not affirm the trial court's invalidation of Metropolitan's wheeling rates—which it should—it should remand for a determination of the "reasonable credit" to which the Water Authority is entitled "for any offsetting benefits for the use of the conveyance system." Wat. Code § 1811(c). As DWR Director David Kennedy found pursuant to the Legislature's express direction, the Water Authority generates hundreds of millions of dollars in offsetting benefits—not only for Metropolitan, but for the entire State of California—by paying for conservation efforts in the Imperial Valley, which reduce demand on Metropolitan's water supplies imported from the Bay Delta. Metropolitan's wheeling rates fail to give ***any*** credit to the Water Authority for funding those vital conservation efforts, and the trial court should address this essential issue on remand.

For these and other reasons explained below, the Water Authority respectfully petitions for rehearing. ***At the very least***, the Court should (1) clarify that on remand the trial court must consider the "reasonable credit" to which the Water Authority is entitled under Water Code Section 1811(c) for funding the water conservation efforts that are the cornerstone of the QSA; and (2) clarify footnote 16 of the Opinion, which Metropolitan has misinterpreted as validating its Water Stewardship Rate.

II. ARGUMENT

Rehearing may be granted where the opinion misstates or omits a material fact or issue or contains legal errors. Jon B. Eisenberg, Cal. Practice Guide: Civil Appeals and Writs ¶¶ 12:16, 12:19 (2016). All of those grounds for rehearing apply here.

A. The Opinion misstates and misapplies the standards of review.

The Court's Opinion states: "Where, as here, a trial court's review is limited to examining the ***administrative record*** to determine if an agency's decision is supported by substantial evidence, the appellate court's function is identical to that of the superior court." Op. at 20-21 (emphasis in original) (citation and internal quotation marks omitted). But the Wheeling Statutes mandate that "the court shall consider ***all relevant evidence***." Wat. Code § 1813 (emphasis added). Contrary to this Court's assertion that the trial court's review was limited to the administrative record, Op. at 20, the trial court held that "all relevant evidence" is not so limited, and did not confine its review to the administrative record. *See* 7-AA-1800-01. ***Metropolitan did not appeal that ruling***. *See* AOB.

Accordingly, it is now beyond dispute that, in addition to reviewing the administrative record, the trial court properly reviewed extra-record documentary evidence, heard live testimony, and evaluated the credibility of witnesses in order to determine (among other things) whether Metropolitan acted "in a reasonable manner consistent with the

requirements of law to facilitate the voluntary sale, lease, or exchange of water." Wat. Code § 1813. That was not a question "where the facts [were] undisputed," but one where the facts were hotly disputed, which further required "the drawing of inferences from the presented facts." *Saathoff v. City of San Diego*, 35 Cal. App. 4th 697, 701 (1995). This Court, therefore, was required to "apply the substantial evidence test and give deference to the inferences" drawn by the trial court. *Id.*

Although the Opinion relies heavily on *Imperial Irrigation*, that case specifically identified the questions the trial court decided here—whether Metropolitan "properly included specific costs in its wheeling rate calculation or has adopted a rate that violates the statutory mandate to facilitate wheeling"—as questions for the trial court. *See* 80 Cal. App. 4th at 1436. Because the trial court here answered those questions based on disputed facts, its findings are entitled to deference. *See, e.g., Saathoff*, 35 Cal. App. 4th at 701. This Court should have at least considered the trial court's finding that Metropolitan's wheeling rates discourage wheeling, because the Legislature itself has identified that as a crucial issue of public policy. *See* Wat. Code § 1813; *id.* § 109; Stats. 1986, ch. 918, § 1.

Under Proposition 26, moreover, this Court was required to "review the [trial] court's factual findings under the substantial evidence standard." *Schmeer v. Cty. of Los Angeles*, 213 Cal. App. 4th 1310, 1316 (2013). Courts of Appeal only "review the ruling de novo to the extent that the

[trial] court decided questions of law concerning the construction of constitutional provisions and ***not turning on any disputed facts***." *Id.* (emphasis added). On the other hand, this Court should not have deferred to Metropolitan because under Proposition 26, like Proposition 218, "it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review." *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493, 1507 (2015). Yet this Court deferred to Metropolitan while giving no deference to the trial court, even though the trial court's findings turned on disputed facts and involved credibility determinations, which this Court should "not second-guess." *Lauderdale Assocs. v. Dep't of Health Servs.*, 67 Cal. App. 4th 117, 125 (1998).

The Opinion's lack of deference to the trial court is also contrary to *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421 (2011). In *Farm Bureau*, the California Supreme Court directed the trial court to "make detailed findings" about whether the costs at issue "were reasonably related to the fees assessed on the payors" and "reasonable" in amount; "whether the statutory scheme and its implementing regulations provide a fair, reasonable, and substantially proportionate assessment of all costs"; and whether the costs of a water project were allocated fairly based on the "beneficial interest" of those charged. *Id.* at 441-46. This Court failed to afford sufficient deference to

the trial court's detailed findings about essentially identical issues. *See id.*

And even if, as this Court asserts, its "function is identical to that of the superior court," Op. at 21, this Court has not fulfilled that function as defined by Section 1813. If the appellate and trial court functions are identical, then this Court "shall consider all relevant evidence," and "shall give due consideration to the purposes and policies of [the Wheeling Statutes]." Wat. Code § 1813. This Court has not done so, as explained further below, so rehearing is required.

B. The Opinion omits and misstates material facts and issues relating to Metropolitan's allocation of State Water Project costs and the setting of Metropolitan's wheeling rates.

The Opinion omits and misstates material facts and issues regarding Metropolitan's State Water Project costs, and errs in overturning the trial court's ruling that Metropolitan's allocation of those costs violates Proposition 26, the Wheeling Statutes, Government Code Section 54999.7(a), and the common law. The Opinion also omits and misstates material facts and issues relating to Metropolitan's rates and rate-setting process, and whether it "adopted a rate that violates the statutory mandate to facilitate wheeling." *Imperial Irrigation*, 80 Cal. App. 4th at 1436.

1. The Opinion omits and misstates material facts and issues relating to Resolution 8520 and *Morro Bay*.

Metropolitan's failure to "act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange

of water," Wat. Code § 1813, is clear from Metropolitan's Resolution 8520. Metropolitan relies on Resolution 8520 as its "written findings" required by Section 1813. *See* 26-AA-7157:3-12. As the trial court rightly found, however, Resolution 8520 contravenes the Wheeling Statutes, as interpreted in *Morro Bay*—which the Opinion does not mention. *See Morro Bay*, 81 Cal. App. 4th at 1050; 27-AA-7477-78, 7488-90, 7503-09.

The Opinion discusses Resolution 8520 briefly. *See* Op. at 25. Yet the Opinion omits the aspects of Resolution 8520 that are most relevant to whether Metropolitan complied with the constitutional and statutory mandates to "act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water," Wat. Code § 1813, and "encourage voluntary transfers of water and water rights," *id.* § 109—especially transfers from agricultural areas, *see* Stats. 1986, ch. 918, § 1(a)-(d); *see also* Cal. Const., art. X, § 6.[2]

The core of Resolution 8520 is Metropolitan's assertion that "pursuant to Sections 1810 and 1812 of the Water Code, the use of Metropolitan's water conveyance system is to be made without injuring any

[2] As Justice Siggins rightly notes in his concurrence, the California Constitution provides that Metropolitan cannot charge its rates "except by authority of and in the manner prescribed by law." Cal. Const., art. X, § 6. Accordingly, the statutory mandates for Metropolitan to "encourage voluntary transfers of water and water rights," Wat. Code § 109, and to "act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water," *id.* § 1813, are also constitutional mandates. *See* Cal. Const., art. X, § 6.

legal user of water from that system, ***including financial injury***." 9-AR2010-2447 (emphasis added); *cf.* Wat. Code § 1810(d) (providing that the use of a water conveyance facility is to be made "without injuring any legal user of water"). Based on Metropolitan's erroneous assumption that Section 1810(d) of the Wheeling Statutes allows Metropolitan to set a wheeling rate to avoid any rate increase for non-wheelers, Metropolitan went on to assert that including "unavoidable costs in the wheeling rate," including "costs attributable to Metropolitan's ***supply***," is "necessary in order to protect Metropolitan's member agencies from ***financial injury***." 9-AR2010-2449 (emphases added). But that rationale is ***precisely*** what the Court of Appeal rejected in *Morro Bay*. *See* 81 Cal. App. 4th at 1050.[3]

The defendant in *Morro Bay*, just like Metropolitan, asserted that "the rate increase it claims its other customers will have to bear if it loses the [wheeler] as a customer" was an "injury" under Section 1810(d). *Morro Bay*, 81 Cal. App. 4th at 1050. But the court rejected that assertion: "we do not believe the loss of income from a customer is the sort of injury to a legal user of water the Legislature had in mind." *Id.* That conclusion

[3] Note, moreover, that using Metropolitan's half-empty Colorado River Aqueduct to transport conserved Colorado River water does not "injure" Metropolitan or its other member agencies, or "destabilize" Metropolitan's rates in any non-protectionist sense. On the contrary, this transfer ***saves*** Metropolitan and its other member agencies hundreds of millions of dollars, because Metropolitan would otherwise be required to purchase this water from the Imperial Irrigation District ("IID"), as DWR's Director expressly found at the Legislature's direction. *See* Section II.D, *infra*.

is consistent with the legislative history, including Metropolitan's own unsuccessful effort to amend Section 1810(d) to prohibit rate increases for non-wheelers. *See* RB at 71-72 n.7; 11-AR2010-3095.

Rather than focus on Resolution 8520's fatal misinterpretation of Section 1810(d), or the fundamental conflict between Resolution 8520 and *Morro Bay*, the Opinion quotes Resolution 8520's assertion that the Wheeling Statutes define "fair compensation" to "include reasonable charges for the use of the entire conveyance system." Op. at 25 (internal quotation marks omitted). But there is nothing in the Wheeling Statutes about the "entire conveyance system." The Wheeling Statutes require a public agency to allow "the use of a water conveyance facility which has unused capacity, for the period of time for which that capacity is available, if fair compensation is paid for that use." Wat. Code § 1810. "Fair compensation" is defined as "the reasonable charges incurred by the ***owner*** of the conveyance system." *Id.* § 1811(c) (emphasis added). That definition is incompatible with Metropolitan's assertion, and this Court's conclusion, that Metropolitan's "conveyance system" includes State Water Project facilities that Metropolitan admitted it neither owns nor operates. *See id.*; 9-AA-2330-32.

Furthermore, when DWR's Director, David Kennedy, determined "fair compensation" for wheeling the Water Authority's conserved

Colorado River water, at the Legislature's direction,[4] his recommended wheeling rate of $80 per acre-foot (AF) accounted for "Metropolitan's fixed system costs," but it did ***not*** include DWR's water-supply-delivery charges. *See* 32-AA-9110-13 & n.4; 11-AR2010-2977; 1-RA-146-47 § 5.4. Thus, ***as a matter of fact determined by DWR's own Director***, contrary to this Court's unfounded legal conclusion, DWR's water-supply-delivery charges are ***not*** Metropolitan's "system costs." *See id.*

In any event, the statutory definition of "fair compensation" certainly does not support Metropolitan's allocation of ***100%*** of DWR's water-supply-delivery charges to Metropolitan's transportation rates. As the trial court rightly found, that misallocation—the purpose and effect of which is to subsidize the rates of non-wheelers—violates the constitutional and statutory mandates to set wheeling rates according to cost causation, and to facilitate wheeling and water transfers. *See* 27-AA-7506-09, 7516.[5]

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[4] Emergency legislation passed in 1997 expressly empowered Director Kennedy to "make those determinations prescribed by Section 1812." Wat. Code § 1812.5(c)(2) (expired); *see also* 1997 Cal. Legis. Serv. Ch. 874, S.B. 1082 (Oct. 12, 1997). Those determinations included "fair compensation," Wat. Code § 1812, which—as discussed further below—requires a finding as to the "reasonable credit for any offsetting benefits for the use of the conveyance system," *id.* § 1811(c); *see* Section II.D, *infra*.

[5] Note that 100% of DWR's water-supply-delivery charges corresponds to 74% of Metropolitan's total State Water Project costs for 2010, and 80% of Metropolitan's total State Water Project costs for 2012. *See* 40-AR2010-11481-91; 59-AR2012-16686-96, 16717.

2. The Opinion omits and misstates material facts and issues relating to the RMI and Raftelis reports and *Palmdale*.

The Opinion also omits and misstates material facts and issues relating to the *Palmdale* case, which—like *Morro Bay*—the Opinion never mentions. In *Palmdale*, the court held that the Palmdale Water District ("PWD") failed to satisfy its burden to establish that its water rates complied with the "proportionality requirement" of Proposition 218, which—like Proposition 26—provides that rates must not exceed the proportional cost of the service provided. *Palmdale*, 198 Cal. App. 4th at 928; *see also Newhall Cty. Water Dist. v. Castaic Lake Water Agency*, 243 Cal. App. 4th 1430, 1441-51 (2016) (discussing Proposition 26's similar "proportionality requirement"). PWD hired Raftelis Financial Consultants—the same expert on which Metropolitan relied—and Raftelis advised PWD on two potential rate structures. One would comply with the proportionality requirement but would result in greater revenue fluctuation with varying demand; the other would promote "rate stability." *Palmdale*, 198 Cal. App. 4th at 929. PWD chose "rate stability." *Id.* at 937-38. The court concluded that it "follows that PWD has failed to carry its burden to demonstrate compliance" with the proportionality requirement. *Id.* at 938.

Here, the December 1995 report by Metropolitan's experts at Resource Management International ("RMI") shows that Metropolitan made the same unlawful choice of "rate stability"—in other words,

protectionism—over proportionality and cost causation. The Opinion asserts that RMI's December 1995 report had "nothing to do with the functionalization of costs." Op. at 25 n.13. But that is incorrect. The December 1995 report is all about the allocation of costs to Metropolitan's wheeling rates, which is also what this case is all about. Indeed, the December 1995 report shows that Metropolitan not only unlawfully chose protectionism over cost causation, but also violated the constitutional and statutory mandates to encourage water transfers and wheeling. *See* Wat. Code § 1813; *id.* § 109; Cal. Const., art. X, § 6.

As RMI explained, "perhaps the single most important constraint on" Metropolitan's "pricing of wheeling services" is its so-called "hold harmless" requirement, adopted in Metropolitan's San Pedro Integrated Resources Plan Assembly Statement, which "explicitly requires that the use of Metropolitan's system for wheeling non-Metropolitan water '**must not negatively impact the rates or charges to any other Member Agencies**.'" 5-AR2010-1234 (emphasis in original); *see also* 27-AA-7506-08. Under Metropolitan's "volumetric rate design," its "hold harmless" requirement means that it must impose wheeling rates that will "not give Member Agencies an economic incentive to displace Metropolitan's sales under certain water market conditions." 5-AR2010-1254. To accomplish that goal, Metropolitan's wheeling rates are designed to ensure that "the delivered cost of non-Metropolitan water to a Member Agency" will

"***always*** be higher than Metropolitan's firm sales rate," by approximately the amount paid for the non-Metropolitan supplies, thereby reducing "the potential for revenue losses due to wheeling" by "removing any economic incentive to displace Metropolitan's sales." 5-AR2010-1245 (emphasis added); *see also* 5-AR2010-1245-1254_01.

Consider, for example, what the Water Authority paid in 2014. Most of the Water Authority's water in 2014 came from Metropolitan, and the Water Authority paid $593/AF for Metropolitan water. *See* 59-AR2012-16727. Pursuant to the QSA—the statewide effort to conserve Colorado River water and allow California to live within its federal entitlement—the Water Authority also paid IID $594/AF to enable farmers in the Imperial Valley to conserve water through fallowing and other extraordinary conservation measures. *See* 21-AA-5988.[6] Metropolitan charged the Water Authority $445/AF, including $261/AF in State Water Project costs, to deliver that conserved Colorado River water, bringing the delivered cost of that water up to ***$1,039/AF—nearly twice the cost of Metropolitan's water***. *See* 40-RT-2509:16-2510:7. Metropolitan did so even though the whole point of the QSA was to address the fact that, if not for the Water Authority's conserved water, the Colorado River Aqueduct

[6] Contrary to the Court's assertions that this is "excess" water, Op. at 8, it is conserved at great expense—expense borne by the Water Authority for the benefit of all of California, including Metropolitan. *See*, *e.g.*, 1-RA-123.

would be "over half empty." *QSA*, 201 Cal. App. 4th at 785.

The reason the Water Authority pays nearly twice the cost for conserved Colorado River water as compared to Metropolitan water has nothing to do with the relatively low cost of using Metropolitan's half-empty Colorado River aqueduct, and certainly does not comply with the constitutional and statutory mandates for Metropolitan to encourage and facilitate "the largest agricultural-to-urban water transfer in United States history." *Id.* at 788. Instead, as RMI made clear, Metropolitan's wheeling rates are based on its protectionist notion that "wheeling non-Metropolitan water '**must not negatively impact the rates or charges to any other Member Agencies**,'" which is why Metropolitan ***makes sure*** that the "delivered cost" of the Water Authority's conserved Colorado River water is ***far*** "higher than Metropolitan's firm sales rate." *See* 5-AR2010-1234, 1245 (emphasis in original). Metropolitan's stated goal in setting its wheeling rate was to remove "any economic incentive to displace Metropolitan's sales," contrary to the legal mandates to set wheeling rates according to cost causation, and to facilitate water transfers and wheeling. *See id.*; 7-AR2010-1750, 1757; 62-AR2012-17126_0078, 0111.

RMI explained to Metropolitan that it could fully recover its State Water Project costs through rates based on cost causation rather than protectionism. *See* 5-AR2010-1254-54_01. And RMI also explained that cost-causation-based rates would allow Metropolitan to comply with the

constitutional and statutory requirements to facilitate wheeling. *See id.* In particular, RMI explained that Metropolitan could recover its State Water Project costs through "a fixed monthly or annual demand charge," which would "provide more flexibility in pricing water wheeling services." *Id.* The Water Authority had long proposed the same thing because, contrary to this Court's apparent misimpression, the Water Authority has always been willing to pay its full fair share of State Water Project costs—it just objects, rightly, to paying State Water Project costs twice. *See, e.g.*, 1-RA-83. The alternatives proposed by RMI and the Water Authority would allow Metropolitan to recover all of its State Water Project costs while encouraging, rather than "***discourag[ing]*** the transfer of water from low value to high value uses." 5-AR2010-1249 (emphasis added).

As the trial court found, however, Metropolitan—***just like the defendant in Palmdale***—chose protectionist "rate stability" over cost causation. *See* 27-AA-7478-79, 7503, 7506-08; *Palmdale*, 198 Cal. App. 4th at 937-38. Worse still, Metropolitan chose protectionism over its constitutional and statutory duty to "act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." Wat. Code § 1813; *see also id.* § 109; Cal. Const., art. X, § 6. This Court erred by omitting substantive discussion of RMI's December 1995 report, and should grant this Petition to "give due consideration to the purposes and policies" of the Wheeling Statutes. Wat.

Code § 1813.

Instead of RMI's December 1995 report, the Opinion focuses on RMI's May 1996 report, but omits the fact that the May 1996 report is not in Metropolitan's 2010 administrative record. *See* Op. at 24-25; RB at 52. Although courts must consider all relevant evidence, Metropolitan was required to include its purported support for its rates in its administrative record. And, given that the premise of this Court's refusal to defer to the trial court is that review is limited to examining the administrative record, Op. at 20—though that is incorrect, as discussed above—the Opinion should account for the fact that the May 1996 report is not in the 2010 administrative record and thus, based on the Opinion's premise, cannot be substantial evidence for Metropolitan's 2011-2012 rates.

Moreover, contrary to this Court's Opinion, the May 1996 report confirms that the costs identified as Metropolitan's "Supply Costs" in RMI's December 1995 report, 5-AR2010-1234, include DWR's water-supply-delivery charges. *See* 62-AR2012-16288_1893. The Water Authority explained this at trial, *see* 32-RT-2002:3-2008:12, and the trial court found that the costs RMI characterized as "SWP supply costs" include the "costs for the SWP to transport the water," 27-AA-7485. This Court erred in disregarding that finding, which resolved disputed facts based on substantial evidence. *See, e.g.*, *Schmeer*, 213 Cal. App. 4th at 1316; *Saathoff*, 35 Cal. App. 4th at 701.

The Opinion also focuses on Metropolitan's 2002 report, which asserts that allocating 100% of DWR's water-supply-delivery charges to transportation is "consistent with the American Water Works Association (AWWA) rate setting guidelines," as well as the "National Association of Regulatory Commissioners (NARUC)" guidelines, and also "creates the opportunity for a fair and efficient water transfer market to develop." 24-AR-6518; *see also* Op. at 25-26. Each of those assertions is false, as shown not only by the December 1995 RMI report discussed above, but also by the trial testimony of Metropolitan's Budget Manager, June Skillman—the trial court's evaluation of which this Court should "not second-guess." *Lauderdale*, 67 Cal. App. 4th at 125; *see also* 27-AA-7506-09 (finding that Metropolitan's rates are based on protectionism, not on industry standards or cost causation, much less the mandate to facilitate water transfers).

Indeed, Ms. Skillman admitted on cross-examination that if Metropolitan followed AWWA and NARUC, as it claims, ***it would allocate its State Water Project costs to supply, including DWR's water-supply-delivery charges***. *See* 31-RT-1938:9-1941:6. Metropolitan's reason for deviating from the very standards it purports to follow is ***not*** simply its need to recover its State Water Project costs, as this Court concluded; on the contrary, as RMI explained, Metropolitan can fully and fairly recover those costs without discouraging wheeling. *See* 5-AR2010-1254-54_01. Instead, as the trial court found, Metropolitan allocates 100% of DWR's

water-supply-delivery charges to Metropolitan's transportation rates in order to subsidize non-wheelers, contrary to *Palmdale* and *Morro Bay*, among other authorities. *See* 27-AA-7506-09.

The contrary assertion in the 2010 Raftelis report, on which this Court relies, Op. at 26, is not substantial evidence, and does not justify disregarding the trial court's findings as though they were based only on undisputed evidence and did not require drawing inferences from disputed facts—which they did. *See*, *e.g.*, *Schmeer*, 213 Cal. App. 4th at 1316; *Saathoff*, 35 Cal. App. 4th at 701. The Opinion notes that Metropolitan executives—namely, Ms. Skillman—wrote the assertion that Metropolitan's allocation of 100% of DWR's water-supply-delivery charges to Metropolitan's transportation rates is "appropriate," but the Opinion states that "there is nothing to suggest the consultant did not freely embrace the characterization." Op. at 26 & n.15. Yet there was such evidence, including Ms. Skillman's live trial testimony. "As an appellate court limited to a paper record," this Court is "ill-equipped to decide this credibility issue independently." *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1395 (1991).

At trial, Ms. Skillman admitted that she wrote the language at issue with this litigation in mind. *See* 31-RT-1926:8-1927:3, 1930:11-1931:1, 1942:15-1943:5. Metropolitan's counsel, moreover, emphasized that Ms. Skillman's assertion about what is "appropriate" was not part of "Raftelis's

independent review," and put as much distance as possible between that assertion and Mr. Raftelis—far from suggesting that he freely embraced the assertion. *See* 28-RT-1324:24-1325:8; *cf.* Op. at 26 n.15. In any case, the trial court was not required to accept an admittedly litigation-driven statement that Raftelis apparently accepted "without any thought." *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335, 1346-47 (1993); *see also, e.g.*, *Farm Bureau*, 51 Cal. 4th at 447-48 (Moreno and Werdegar, JJ., concurring). Nor should this Court overturn the trial court's findings by second guessing its evaluation of trial testimony and reweighing other disputed evidence. *See, e.g.*, *Schmeer*, 213 Cal. App. 4th at 1316; *Saathoff*, 35 Cal. App. 4th at 701; *Beasley*, 235 Cal. App. 3d at 1395.

3. The Opinion omits and misstates material facts and issues relating to wheeling from Placer County in 2009.

The Opinion also omits and misstates material facts and issues regarding the wheeling of water from Placer County in 2009. The Opinion states that "evidence was presented at trial of a 2009 transaction in which Metropolitan wheeled water through the State Water Project facilities on the Water Authority's behalf. Under the view adopted by the trial court, no part of the cost of those facilities could be included in the rate charged to the Water Authority for wheeling that water over those facilities." Op. at 23. Those statements are fundamentally incorrect in several ways.

As an initial matter, it is important to emphasize again that the trial

court did not hold, as the Opinion repeatedly asserts, that State Water Project costs "may not be considered in calculating Metropolitan's wheeling charges," that "no part of those payments may be included in Metropolitan's wheeling rate," or that "no part of the cost of those facilities could be included in the rate charged to the Water Authority for wheeling that water over those facilities." *Id.* at 2, 22, 23. Rather, as Metropolitan itself has emphasized, the trial court "held only that it was unreasonable to allocate ***all***" of DWR's water-supply-delivery charges to Metropolitan's transportation rates. AOB at 114 (emphasis in original). Specifically, the trial court held that there "is no substantial evidence in the record to support Met's inclusion in its transportation rates, and hence in its wheeling rate, of ***100%***" of Metropolitan's payments for DWR's "transportation of that purchased water." 27-AA-7516 (emphasis added).

Furthermore, the evidence does not show, as the Opinion incorrectly states, that in 2009—or at any time—"***Metropolitan*** wheeled water through State Water Project facilities on the Water Authority's behalf." Op. at 23 (emphasis added). Rather, in the 2009 transfer of water from Placer County, "***DWR*** agree[d] to store and convey the Transfer Water through SWP facilities." 18-AA-5097 (emphasis added). Contrary to the misimpression Metropolitan created on appeal, Metropolitan has no authority to wheel water through State Water Project facilities. Nor does Metropolitan have any authority to set wheeling rates for the use of State

Water Project facilities. DWR sets its own wheeling rates. *See, e.g.*, 5-AR2010-1236-37. In fact, Metropolitan's binding responses to requests for admissions establish that Metropolitan not only lacks any ownership interest in the State Water Project, but also "does not operate the State Water Project," "does not transport State Water Project water from Northern California to DWR's terminal reservoirs at Castaic Lake and Lake Perris," and "does not pump State Water Project water from Northern California to DWR's terminal reservoirs at Castaic Lake and Lake Perris." 9-AA-2330-32. Those are all functions performed by DWR, which alone owns ***and operates*** the State Water Project. *See id.*

Most importantly, as Metropolitan's own experts at RMI explained, when DWR wheels non-Metropolitan water pursuant to the terms of the State Water Project contract, the Water Authority should only pay what Metropolitan itself pays—incremental costs:

> Since all fixed charges are covered in Metropolitan's annual payment to the SWP, it would be expected that Member Agencies receiving on-behalf of wheeling service from Metropolitan would incur only variable SWP power charges from the Department of Water Resources. . . . Additional deliveries of non-Metropolitan water obtained by Member Agencies to offset deficient Metropolitan supplies would not need to contribute to the same fixed and nonvariable costs.

5-AR2010-1237, 1248. The 2009 transaction was exactly that: a transaction "to offset deficient Metropolitan supplies." 5-AR2010-1248. Because Metropolitan's rates are based on planned deliveries, not deliveries

to make up for deficiencies, Metropolitan's rates ***already*** collect for "Metropolitan's annual payment to the SWP," ***independent*** of any charges for conveying non-Metropolitan water through the State Water Project to make up for shortages of Metropolitan water. *See* 5-AR2010-1237.

As the Water Authority's Assistant General Manager, Dennis Cushman, testified at trial, Metropolitan had the Water Authority "in a water shortage allocation" from 2008 to 2010, so the Water Authority "went out into the market to buy additional water," to be wheeled through the State Water Project facilities by DWR, in order "to help cover those shortages and serve [its] customers' needs." 29-RT-1394:19-1397:13. But Metropolitan did not, as RMI recommended, simply charge the Water Authority the incremental costs DWR charged Metropolitan. Instead, Metropolitan charged its full wheeling rate, ***including State Water Project costs that Metropolitan had already collected from the Water Authority***. *See* 29-RT-1394:19-1400:8; 5-AR2010-1237, 1248.

Contrary to the Opinion's statement that, under the trial court's ruling, "no part of the cost of [State Water Project] facilities could be included in the rate charged to the Water Authority for wheeling [non-Metropolitan] water over those facilities," Op. at 23, the trial court held that the Water Authority should pay its share of "***all costs billed by the SWP to Met***." 27-AA-7506 (emphasis added). As Mr. Cushman testified, moreover, the Water Authority does not object to paying "the incremental

cost of moving that water through the DWR facilities." 29-RT-1399:7-1400:8. Nor does the Water Authority object to paying its share of the State Water Project contract costs that pay for the right to have DWR wheel non-Metropolitan water through the State Water Project facilities for only incremental costs—the Water Authority pays those contract costs when it buys Metropolitan water, and it buys more Metropolitan water than any other agency. *See, e.g.*, *Imperial Irrigation*, 80 Cal. App. 4th at 1408 n.3.

Rather, the Water Authority contends—***and RMI agreed***—that, having already paid for the right to have DWR wheel non-Metropolitan water through the State Water Project for only incremental costs, the Water Authority should benefit from that right when it purchases "on-behalf of wheeling service from Metropolitan" to "offset deficient Metropolitan supplies." 5-AR2010-1237, 1248. Instead of charging the Water Authority the incremental charges from DWR that Metropolitan actually incurred in connection with the 2009 transfer from Placer County, however, Metropolitan charged the Water Authority Metropolitan's full wheeling rate, thereby ***double charging*** the Water Authority for DWR's water-supply-delivery charges—a clear violation of Proposition 26, the Wheeling Statutes, Government Code Section 54999.7(a), and the common law. *See* 29-RT-1394:19-1400:8; 5-AR2010-1237, 1248; 27-AA-7504-06.

In any event, as the trial court held, even if Metropolitan "may from time to time use the state's transport capability to move some [of] its water,

that does not support the reasonableness of including **all** the state's transportation costs as part of Met's transportation costs." 27-AA-7504 (emphasis in original). The Opinion misinterpreted that as holding that "***no*** part of the cost of those facilities could be included in the rate charged to the Water Authority for wheeling that water over those facilities." Op. at 23 (emphasis added). But that is simply not what the trial court held—"***failed to support*** including ***all***" does not mean "***cannot*** include ***any***."

C. The Opinion further misstates material facts and issues relating to Proposition 26.

The Opinion also misstates material facts and issues relating specifically to Proposition 26. By overturning the trial court's determination that Metropolitan failed to carry its burden of proof that allocating ***100%*** of DWR's water-supply-delivery charges to transportation complies with Proposition 26, this Court, in effect, holds ***as a matter of law*** that allocating ***100%*** of these costs to transportation satisfies Proposition 26. In other words, this Court holds ***as a matter of law*** that Metropolitan carried its "burden of proving by a preponderance of the evidence" that ***100%*** of these costs are "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged"; that the ***100%*** charge "does not exceed the reasonable costs to the local government of providing the service or product"; that "the amount is no more than necessary to cover the reasonable costs of the governmental

activity"; and that allocating ***100%*** of these costs to transportation bears "a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." *See* Cal. Const. art. 13C, § 1(e)(2) & final para.; *cf.* 27-AA-7516; Op. at 30-32. This Court's ruling is wrong on the facts and as a matter of law.

The Opinion largely relies on its analysis of *Imperial Irrigation*, which this Court misreads as blessing Metropolitan's 100% allocation. *See* Op. at 1-2, 21-22. But *Imperial Irrigation* explicitly did ***not*** bless any 100% allocation, or any other sweeping pronouncements as a matter of law. On the contrary, *Imperial Irrigation* remanded for the trial court to decide whether Metropolitan "properly included specific costs in its wheeling rate calculation or has adopted a rate that violates the statutory mandate to facilitate wheeling." 80 Cal. App. 4th at 1436. The trial court here decided those questions, based on substantial evidence. Thus, it is this Court's Opinion, not the trial court's, that is inconsistent with *Imperial Irrigation* because the Opinion holds ***as a matter of law*** that ***100%*** of DWR's water-supply-delivery charges are properly allocated to transportation, despite the trial court's contrary findings—including its finding that Metropolitan's wheeling rates discourage wheeling, which the Opinion never addresses. The Opinion states that the Water Authority does "not dispute" that, under *Imperial Irrigation*, the Wheeling Statutes "do not as a matter of law prohibit the allocation of system-wide transportation costs to reasonable

wheeling charges." Op. at 1-2; *see also id.* at 21-22. But the Water Authority never conceded that, on the ***facts*** of the transfer, Metropolitan's "postage stamp" rate is lawful—it is not.

In any case, *Imperial Irrigation* preceded Proposition 26 by a decade, and therefore did not take into account the constitutional requirements of Proposition 26, which Metropolitan must ***prove*** it satisfied, as opposed to simply demanding deference. *See* Cal. Const. art. 13C, § 1, final para. Earlier authorities "cannot excuse" Metropolitan "from ascertaining cost of service now that the voters and the Constitution have chosen cost of service." *Capistrano*, 235 Cal. App. 4th at 1514. The voters have rejected the notion that cost allocation is "a legislative or quasi-legislative, discretionary matter, largely insulated from judicial review." *Id.* at 1505 (Proposition 218); *see also Newhall*, 243 Cal. App. 4th at 1451 n.6 (Proposition 26). Indeed, the voters have repeatedly amended the California Constitution precisely "in order to ***curtail*** discretionary models of local agency fee determination." *Capistrano*, 235 Cal. App. 4th at 1513 (emphasis in original) (citing *Silicon Valley Taxpayers Ass'n v. Santa Clara Cty. Open Space Auth.*, 44 Cal. 4th 431, 446 (2008)). Under Proposition 26, "it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review," *id.* at 1507, and it must be based on the actual cost of the specific service provided, not a preference for rate stability, *id.*, or broad

pronouncements about system-wide benefits, *see Newhall*, 243 Cal. App. 4th at 1438-39, 1445-46; *cf.* Op. at 13-14, 30-32.

The constitutional requirement that cost allocations must be based on cost causation "protects lower-than-average users from having to pay rates that are ***higher than the cost of service for them*** because those rates cover capital investments their levels of consumption do not make necessary." *Capistrano*, 235 Cal. App. 4th at 1503 (emphasis in original). And it prevents the "perverse effect of affirmatively penalizing conservation by some users." *Id.* Yet Metropolitan's rates for transporting conserved Colorado River water have ***exactly*** that "perverse effect," *id.*—which this Court's Opinion not only permits but sets in stone.

Furthermore, Metropolitan ***admitted*** in the trial court that it had made ***no effort*** to ensure that it charges the Water Authority only the State Water Project costs the Water Authority causes Metropolitan to incur, *see* 9-AA-2309-15; ***no effort*** to "break out its costs of transporting MWD water from its costs of transporting non-MWD water on behalf of its member agencies," 1-RA-379; and ***no effort*** to "break out its costs of delivering the Exchange Water from its costs of delivering other MWD water," 1-RA-385. Instead, Metropolitan ***always*** allocates ***100%*** of DWR's water-supply-delivery charges to Metropolitan's transportation rates, regardless of whether and to what extent Metropolitan is actually incurring such charges beyond what the Water Authority has ***already*** paid.

As the court in *Capistrano* made clear, the "fractional precision" of Metropolitan's ***100%*** allocation of DWR's water-supply-delivery charges to transportation cannot comply with cost causation, particularly given that the reason for Metropolitan's "mathematical tidiness" is its insistence on protectionist "rate stability." *Capistrano*, 235 Cal. App. 4th at 1504-05, 1507 (quoting *Palmdale*, 198 Cal. App. 4th at 937-39); *see* 27-AA-7506-09. Because Metropolitan admittedly "didn't try to calculate the actual costs of service," the trial court's ruling here "must be upheld simply on the basis of the constitutional text." *Capistrano*, 235 Cal. App. 4th at 1506; *see also* Cal. Const. art. 13C, § 1(e)(2) & final para.

The trial court's ruling also should be affirmed based on *Newhall*. The Opinion distinguishes *Newhall* because the charges there were based on groundwater that was not the defendant's. *See* Op. at 31-32. But Metropolitan's transportation rates are similarly based on State Water Project facilities that are not Metropolitan's, and which Metropolitan does not itself use to provide service, as it admitted. *See* 9-AA-2330-32.

Metropolitan evaded what should have been the fatal effect of those admissions by arguing that its service consists not just of providing its own conveyance services, but of managing wheeling on the State Water Project through its contract with DWR. But the defendant in *Newhall* similarly contended that the service it provided consisted "not just of providing wholesale water, but also of managing the Basin water supply, including

management of the Basin's groundwater." *Newhall*, 243 Cal. App. 4th at 1442 (quotation marks and ellipses omitted). The *Newhall* court rejected that argument because charges for that service failed Proposition 26's proportionality requirement, and also failed to qualify for the exception for a ***specific*** service provided ***directly*** to the payor that is ***not*** provided to those not charged. *See id.* at 1441-51; Cal. Const. art. 13C, § 1(e)(2); *see also Schmeer*, 213 Cal. App. 4th at 1327 (Proposition 26 exceptions apply only to activities "directly undertaken by the local government").

Again, Metropolitan admitted that conveyance on the State Water Project is not a service that Metropolitan provides directly to its member agencies. *See* 9-AA-2330-32; *see also, e.g.*, 17-AA-5097 (under the 2009 wheeling transaction on which Metropolitan and the Opinion rely, "***DWR*** agree[d] to store and convey the Transfer Water through SWP facilities"). Moreover, Metropolitan concedes that the benefits of its State Water Project contract extend to "those not charged." Cal. Const. art. 13C, § 1(e)(2). Specifically, Metropolitan asserts that its "use of water rates as a primary source of revenue has placed an increasing burden on ratepayers, which might more equitably be paid in part by assessments on land that in part derives its value from the availability of water." 40-AR2010-11512; *accord* 59-AR2012-16807.[7] Because, according to Metropolitan,

[7] These statements further confirm that Proposition 13 should apply to Metropolitan's rates. The Opinion states that the Water Authority "does

landowners benefit from the availability of State Water Project water even when Metropolitan does not actually deliver water to them and thus does not charge them its transportation rates, those rates violate Proposition 26. *See* Cal. Const. art. 13C, § 1(e)(2).

In sum, nothing in the record supports the conclusion that Metropolitan carried its "burden of proving by a preponderance of the evidence" that it imposes ***100%*** of DWR's water-supply-delivery charges "for a specific government service or product provided directly" by Metropolitan to the Water Authority "that is not provided to those not charged"; that this ***100%*** charge "does not exceed the reasonable costs to" Metropolitan of providing that service; that "the amount is no more than necessary to cover the reasonable costs of" that service; and that allocating ***100%*** of these costs to transportation bears "a fair or reasonable relationship to" the Water Authority's "burdens on, or benefits received from," that service. *See* Cal. Const. art. 13C, § 1(e)(2) & final para.

D. The Court should remand for the trial court to determine the Water Authority's "reasonable credit" under Section 1811(c).

If this Court does not affirm the trial court's invalidation of Metropolitan's wheeling rates—which it should—it should ***at least*** remand for a determination of the "reasonable credit" to which the Water Authority

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not contest" the trial court's contrary conclusion, Op. at 2 n.1, but that is incorrect. The Water Authority did argue on appeal that Proposition 13 applies. *See* RB at 66-67. Accordingly, the Water Authority respectfully requests that footnote 1 of the Opinion be modified to make this clear.

is entitled "for any offsetting benefits for the use of the conveyance system." Wat. Code § 1811(c). The Wheeling Statutes require that any determination of "fair compensation" for the owner of the conveyance system ***must*** include "reasonable credit" for "offsetting benefits." *Id.* In the trial court, the Water Authority demonstrated that Metropolitan's wheeling rates failed to give the Water Authority ***any*** credit for offsetting benefits—which is another reason for invalidating Metropolitan's wheeling rates. *See* 26-AA-7333-34. The trial court, however, did not reach this issue because it invalidated Metropolitan's wheeling rates based on Metropolitan's misallocation of State Water Project costs and its unlawful Water Stewardship Rate. *See* 27-AA-7516. The Water Authority tailored its damages calculations to those findings. *See* 33-AA-9350-52, 9361-62.

If, as this Court concluded, it is appropriate for Metropolitan to include all of DWR's water-supply-delivery charges in Metropolitan's wheeling rate—though it is not, as demonstrated above—then the trial court, on remand, must consider the Water Authority's "reasonable credit" under Section 1811(c), as it affects both the legality of Met's wheeling rate and the proper amount of damages. If "reasonable credit" is left unaddressed, that would not only be an error of law, but would undermine the water conservation efforts at the heart of "the largest agricultural-to-urban water transfer in United States history." *QSA*, 201 Cal. App. 4th at 788. That, in turn, would violate California public policy "to facilitate the

voluntary sale, lease, or exchange of water," Wat. Code § 1813, and "encourage voluntary transfers of water and water rights," *id.* § 109, especially from agricultural areas, *see* Stats. 1986, ch. 918, § 1(a)-(d).

The "offsetting benefits" associated with this transaction are very substantial. Indeed, based on DWR Director Kennedy's analysis, the "reasonable credit" to which the Water Authority is entitled for the transfer of its conserved Colorado River water amounts to hundreds of millions of dollars. *See* 32-AA-9110-13. In 1998, Director Kennedy found that the Water Authority's "reasonable credit" for the transfer of the Water Authority's conserved Colorado River water corresponds to the Water Authority's costs of conserving the Colorado River water, because Metropolitan would have had to pay to conserve that water if the Water Authority had not. *See* 32-AA-9113 n.3. Those costs were to begin at $250/AF and increase over time. *See id.* n.1. Metropolitan claimed at the time that it would have paid less than the Water Authority agreed to pay for the water conservation efforts, so Director Kennedy set the initial credit at $220/AF, or 88% of the amount the Water Authority agreed to pay for water conservation. *See id.* n.3.

If the trial court were to apply the same approach here, a credit of 88% of what the Water Authority paid IID to conserve water would be $392/AF for 2011, or $29,400,000 for 75,000 AF; $432/AF for 2012, or $33,108,048 for 76,639 AF; $475/AF for 2013, or $49,096,475 for 103,361

AF; and $523/AF for 2014, or $52,300,000 for 100,000 AF—a total of at least ***$163,904,523*** for just those four years. *See id.*; 21-AA-5988; 40-RT-2409:20-2410:22.[8]

But, no matter what, this is a determination the trial court must make under the law, but did not reach simply because the wheeling rate was invalidated on other grounds. Thus, this Court should remand to the trial court with instructions to determine the "reasonable credit" to which the Water Authority is entitled for "offsetting benefits." Wat. Code § 1811(c).

E. The Court should clarify that the Opinion does not uphold or validate the Water Stewardship Rate.

The Water Authority also respectfully asks the Court to clarify that it did not, as Metropolitan contends, uphold or validate Metropolitan's Water Stewardship Rate. The Court held that the Water Stewardship Rate violates the Wheeling Statutes and the common law, but did "not evaluate the validity of that rate under the other provisions on which the trial court relied." Op. at 30. In particular, the Court did not consider whether the Water Stewardship Rate is an unconstitutional tax under Proposition 26, or

[8] Note that this does not even include credit for the canal lining water, for which the State paid $235 million, but for which the Water Authority contributed several hundred million dollars more, continues to pay operations and maintenance fees, and bears all other risks and responsibilities. *See* 40-RT-2410:23-2411:20, 2465:7-2466:4. Director Kennedy did not address credit for the canal lining water, but it is an additional issue that must be considered under Section 1811(c). *See also* 1-RA-95 (Metropolitan calculations relating to offsetting benefits).

whether it violates Government Code Section 54999.7(a), and did not validate the Water Stewardship Rate, as a component of Metropolitan's "full-service rate" or otherwise. Rather, the Court noted that ***its holding*** "does not ***preclude***" Metropolitan "from including the water stewardship rate component in its full-service rate." *Id.* n.16 (emphasis added).

The validity of the Water Stewardship Rate in the context of purchases of Metropolitan water was not specifically addressed in the trial court's Statement of Decision and is not addressed in this Court's Opinion. It is, however, squarely presented in other cases pending between the parties. The Water Authority reserves its rights to argue, in those and any other cases, as well as in any further proceedings in this case—including before the California Supreme Court—that the Water Stewardship Rate is invalid for reasons in addition to the one addressed in the Opinion. For reasons the Water Authority explained below and on appeal, but which are not addressed in the Opinion, the Water Stewardship Rate is an unconstitutional tax under Proposition 26, as well as under Proposition 13—not only as a component of Metropolitan's transportation rates, but in general. *See, e.g.*, RB at 55-59, 66-67. The Water Stewardship Rate also violates the Wheeling Statutes, Government Code Section 54999.7(a), and the common law for reasons in addition to the fact that the Water Stewardship Rate is "supply-related, not transportation-related." Op. at 30.

In recent public statements, however, Metropolitan has asserted that

this Court "***upheld*** Metropolitan's full service rate," including the Water Stewardship Rate. Statement of Jeffrey Kightlinger, *available at* http://www.mwdh2o.com/PDF_NewsRoom/Statement_re_Appeals_Court_rate_case_ruling.pdf (emphasis added). But "it is axiomatic that cases are not authority for propositions not considered." *People v. Alvarez*, 27 Cal. 4th 1161, 1176 (2002). Because this Court did not uphold or validate the Water Stewardship Rate, *see* Op. at 30, and in light of Metropolitan's mistaken assertions to the contrary, the Water Authority respectfully requests that the Court clarify this point by, for example, replacing the text in footnote 16 of the Opinion with the following: "The holding here does not address whether Metropolitan may lawfully include its Water Stewardship Rate as a component of its charges for Metropolitan water; nor does it validate Metropolitan's Water Stewardship Rate in any respect."

F. The Water Authority objects to the Opinion's extensive use of materials not in the record on appeal or before the trial court.

Finally, Courts of Appeal "generally do not take judicial notice of evidence not presented to the trial court." *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 n.3 (1996). Yet this Court's Opinion relies extensively on materials that were not presented to the trial court and are not part of the record on appeal. For example, the Court relies on Metropolitan's website for the proposition that Metropolitan is a "voluntary collective." Op. at 4. Metropolitan uses that loaded term to support its

contention that it does not impose its rates—a contention the trial court correctly rejected. *See* 27-AA-7499. The Court also relies on the website of the Association of California Water Agencies, *see* Op. at 3, which is a special-interest lobbying organization aligned with Metropolitan. The hyperlink in the Opinion, moreover, directs the user to a page that says: "This is somewhat embarrassing, isn't it? It looks like nothing was found at this location." *See id.* (citing http://www.acwa.com/content/california-water-series/californias-water-california-water-systems). In any event, none of these extra-record materials are judicially noticeable for the truth of anything asserted therein. *See, e.g.*, *In re Marriage of Eaddy*, 144 Cal. App. 4th 1202, 1209 (2006). Thus, the Water Authority respectfully requests that the Court confine its statement of facts to the record.

III. CONCLUSION

For all of the foregoing reasons, the Water Authority respectfully petitions this Court for rehearing pursuant to Rule of Court 8.268. ***At the very least***, the Court should (1) clarify that on remand the trial court must consider the "reasonable credit" to which the Water Authority is entitled under Water Code Section 1811(c) for funding the water conservation efforts that are the cornerstone of the QSA; and (2) clarify footnote 16 of the Opinion, which Metropolitan has misinterpreted as validating its Water Stewardship Rate.

Respectfully submitted,

Dated: July 6, 2017

KEKER, VAN NEST & PETERS LLP

By: /s/ *Dan Jackson*
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CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.204(c))

This brief contains 9,756 words, not including the portions of the brief excluded from the word limit by California Rule of Court 8.204(c)(3).

Respectfully submitted,

Dated: July 6, 2017

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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On July 6, 2017, I served the following document(s):

SAN DIEGO COUNTY WATER AUTHORITY'S PETITION FOR REHEARING

☑ by **ELECTRONICALLY POSTING** to TrueFiling the website of the State of California, Court of Appeal. The Court performed service electronically on all ECF-registered entities in this matter.

☑ by **FEDEX**, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker, Van Nest & Peters LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

Clerk for the Honorable Curtis E.A. Karnow
Superior Court of California
County of San Francisco
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

Executed on July 6, 2017, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Maria S. Canales