SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MIRIAM GREEN, Plaintiff/Petitioner, vs. CITY OF PALO ALTO, et al., Defendants/Respondents.	Case No. 16CV300760 (Consolidated with Case No. 18CV336237) **STATEMENT OF DECISION RE: PHASE II TRIAL**

The Court issued its Tentative and Proposed Statement of Decision in this matter on October 8, 2020. The City of Palo Alto filed a Response on October 23, 2020, which the Court has received and reviewed. Having considered the record and the arguments of counsel, and having received no other response to the Tentative and Proposed Statement of Decision, the Court adopts its Tentative and Proposed Statement of Decision, with the corrections proposed in the City's Response, as follows:

This is a consolidated class action for writ of mandate, declaratory judgment, and refunds of gas and electric fees imposed by defendant/respondent the City of Palo Alto in 2012, 2016,

and 2018. Phase I of the proceedings addressed the merits and liability issues raised by plaintiff/petitioner Miriam Green's consolidated petition and complaint. The Court rejected Green's challenges to the City's electric rates, but found that its gas rates constituted unapproved taxes in violation of article XIII C of the California Constitution "to the extent [the City's General Fund Transfer ("GFT")] and/or market-based rental charges were passed through to ratepayers." Phase II of the trial addressed the proper form of relief to be issued with regard to the gas rates, as well as a conclusive determination of the extent to which the GFT and market-based rental charges were passed through to gas ratepayers and the dollar value of the refund to which class members may be entitled.

The Court, having fully considered the record and the parties' papers and arguments, now finds and orders as follows:

I. Allegations of the Operative Complaint and Procedural Background[1]

On October 6, 2016, Green filed the original complaint in this action, challenging the City's then-most-recent gas and electric rates. She amended her complaint after exhausting her administrative remedies concerning certain claims, and the City answered. The Court subsequently entered a stipulated order certifying a class and partially staying the case pending a decision by the Supreme Court of California in *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 ("*Redding*").

On June 11, 2018, the City increased its gas and electric rates. Green submitted a new administrative claim challenging the 2018 rates and filed a new action following the denial of that claim, *Green v. City of Palo Alto, et al.* (Santa Clara Super. Ct., Case No. 18-CV-336237). The Supreme Court issued its opinion in *Redding*, and the stay in Green's original action was lifted. In a stipulated order filed on February 15, 2019, the Court consolidated Green's 2016 and 2018 actions and amended the class definition to encompass the following classes with respect to the gas rates:

[1] A fuller factual and procedural background is set forth in the Court's Statement of Decision re: Phase I Trial, and is not repeated here.

the "2012 Gas Rate Class" of "[a]ll gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service between September 23, 2015 and June 30, 2016";

the "2016 Gas Rate Class" of "[a]ll gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service between July 1, 2016 and June 30, 2018"; and

the "2018 Gas Rate Class" of "[a]ll gas utility customers of the City of Palo Alto Utilities whom the City billed for natural gas service between July 1, 2018 and the date on which the Court orders notice to be sent to class members."[2]

On February 27, 2019, Green filed the operative Consolidated Verified Petition for Writ of Mandate and Complaint for Declaratory Relief and Refund of Illegal Tax, asserting causes of action for (1) petition for writ of mandate pursuant to Code of Civil Procedure section 1085, (2) declaratory relief, and (3) refund of illegal tax. The City answered, and, at a case management conference, the Court bifurcated the trial into a "merits/liability" phase and a remedy phase.

The hearing on liability was held on October 9, 2019.[3] Following the submission of supplemental briefing by the parties, the Court issued its Tentative and Proposed Statement of Decision on January 2, 2020. No party specified controverted issues, made proposals not covered in the decision, or served objections, and the Statement of Decision became final on January 21, 2020.

II. Legal Standard Governing Challenges to Fees Under Article XIII C

As discussed in more detail in the Phase I Statement of Decision, "in 2010, … state voters approved Proposition 26." (*Jacks v. City of Santa Barbara (2017)* 3 Cal.5th 248, 260.) Proposition 26 "expanded the reach of article XIII C's voter approval requirement by broadening

[2] The parties have agreed that notice of class certification will issue after the Court rules on the merits of Green's claims. Because the City has enacted new gas rates in the meantime, the parties agree that the class period for the 2018 Gas Rate Class should end on June 30, 2019. The City's request for judicial notice of city council resolutions reflecting its enactment of new gas rates (Exhibits A and B to the request supporting its opening brief) is GRANTED. (Evid. Code, § 452, subd. (c).)

[3] The City's request for judicial notice of the transcript of this hearing (Ex. F to the request supporting its reply brief) is GRANTED. (Evid. Code, § 452, subd. (d).)

the definition of ' "tax" ' to include 'any levy, charge, or exaction of any kind imposed by a local government.' (Cal. Const., art. XIII C, § 1, subd. (e).)" (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200.)

> The definition contains numerous exceptions for certain types of exactions, including for "property-related fees imposed in accordance with the provisions of Article XIII D" (*id.*, § 1, subd. (e)(7)), as well as for charges for "a specific benefit conferred or privilege granted," or "a specific government service or product" that is 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" (*id.*, § 1, subd. (e)(1) & (2)). To fall within one of these exemptions, the amount of the charge may be "no more than necessary to cover the reasonable costs of the governmental activity," and "the manner in which those costs are allocated to a payor" must "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*Id.*, § 1, subd. (e).)

(*City of San Buenaventura v. United Water Conservation Dist.*, *supra,* 3 Cal.5th at p. 1200.)

"Whether a government imposition is a fee or a tax is a legal question decided on an independent review of the facts the [defendant] is now required to prove by a preponderance of the evidence under Proposition 26." (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1050, citation omitted; see also *Citizens for Fair REU Rates v. City of Redding*, *supra,* 6 Cal.5th at p. 11 and *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1441, both citing Art. XIII C, § 1, subd. (e), final par.) Here, it is the City's burden to show that it charges its gas customers " 'no more than necessary to cover the reasonable costs of the governmental activity' …." (*City of San Buenaventura v. United Water Conservation Dist.*, *supra,* 3 Cal.5th at p. 1200, quoting Cal. Const., art. XIII C, § 1, subd. (e).)

The California Supreme Court recently interpreted Proposition 26 in *Redding*, addressing facts similar to those at issue here. The court held that a budgetary transfer from a city-owned utility's enterprise fund to the city's general fund is not itself a "levy, charge, or exaction" subject to Proposition 26. Rather, a reviewing court must analyze whether the resulting utility *fees* imposed on ratepayers constitute taxes or else fall within an exception to Proposition 26, such as the exception for charges that do not exceed the reasonable costs of providing a service to ratepayers. In *Redding*, the court held that the rates at issue qualified for that exception,

because the charges did not exceed the costs of providing service to ratepayers and the city's enterprise fund had sufficient non-rate revenues to fund the challenged budgetary transfer. The opinion explained that

> the mere existence of an unsupported cost in a government agency's budget does not always mean that a fee or charge imposed by that agency is a tax. The question is not whether each cost in the agency's budget is reasonable. Instead, the question is whether the charge imposed *on ratepayers* exceeds the reasonable costs of providing the relevant service. If 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.

(*Redding*, *supra,* 6 Cal.5th at p. 17, italics original.) Significantly, the Supreme Court held that "Article XIII C does not compel a local government utility to use other non-rate revenues to lower its customers' rates." (*Id.* at p. 18.)

III. Summary of the Court's Ruling in Phase I

After rejecting the City's preliminary argument that the issue of rental charges was not properly before the Court (whether because Green's complaints or administrative claims were inadequate or due to failure to exhaust administrative remedies),[4] the Court applied the analysis conducted by the Supreme Court in *Redding* to the challenged electric and gas rates. As in *Redding*, the Court relied on the City's financial projections used to set the rates—an approach to which the parties agreed at the Phase I hearing.[5]

The *Redding* court undertook the following analysis:

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[4] The Court declines the City's request that it "revisit its decision that Green properly exhausted her challenges to the City's rental challenges before suit" in light of new authority, *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621. The California Supreme Court has granted review in *Hill*, which therefore has no precedential value. (Cal. Rules of Court, rule 8.1115(e)(1).) In any event, *Hill* does not impact the Court's analysis of this issue as reflected in its Phase I Statement of Decision.

[5] In a message issued six days prior to the Phase I hearing, the Court specifically directed the parties to be prepared to address this issue. ("In determining whether Article XIII C has been violated, should the Court rely on utilities' financial projections used to set rates or on its actual financial results, reported later?") As stated in the Phase I Statement of Decision, "[d]uring the Phase I trial, the parties agreed that the Court should focus its analysis on the financial projections the City used in setting the challenged rates, with actual, retrospective financials serving at most as secondary evidence supporting or undermining the reasonableness of the City's projections." The City did not object to this characterization of the parties' agreement when the Court issued its Tentative and Proposed Statement of Decision, which subsequently became final.

> The city prepared a five-year financial plan for REU in 2009. In fiscal year 2010 to 2011, when the city council adopted the rate increase, REU was projected to collect $102.1 million in rate revenues. REU's expenses were projected as follows: power supply ($82.3 million); operations and maintenance ($28.5 million); debt service ($13.9 million); revenue-funded capital projects ($5.2 million); rolling stock and major plant maintenance ($0.8 million); and the PILOT ($6.0 million). These projected expenses would result in a $34.6 million shortfall between rate revenues and projected expenses. That gap was to be bridged with the surplus in the enterprise fund and revenues from a variety of non-rate sources.

(*Redding*, *supra,* 6 Cal.5th at p. 17.)

Applying *Redding*, the Court found that with regard to the City's electric rates, "the shortfall between rate revenues and projected expenses was bridged with transfers from reserves and non-rate revenues." The Court held that "*Redding* approved this practice, and rejected the premise, fundamental to the argument of the plaintiffs in that case and Green here, that 'the city was required to subsidize [the utility's] rates by using its non-rate revenues.' (*Redding*, *supra,* 6 Cal.5th at p. 18.)" The Court rejected plaintiff's argument that the City failed to properly account for costs incurred in generating wholesale and other non-rate revenues, finding that the City had satisfied its burden to show that costs associated with generating wholesale revenues were appropriately allocated to ratepayers, and plaintiff had failed to identify any other non-rate revenues giving rise to costs that were improperly allocated to ratepayers.[6]

With regard to its gas rates, the City conceded in its opposition—as quoted in the Statement of Decision—that "[i]f the Court does not find that the GFT from its gas utility is a 'reasonable' cost under Proposition 26, … the City admits it does not generate sufficient non-rate revenues to cover it under the *Redding* logic." The Court addressed the financial projections supporting the gas rates in a preliminary analysis. It concluded that, unlike the electric rates, the challenged gas rates exceeded the reasonable costs of the service provided to ratepayers, in light of the Court's holding that the challenged GFT and market rental expenses must be excluded from the reasonable costs of service. Per the parties' agreement, the Court relied on the financial

[6] The Court explained that "[w]hile it is the City's burden to justify its rates, it is not required to address every entry on its financial statements in the absence of a challenge by Green. (See *Redding*, *supra,* 6 Cal.5th at p. 17 [where '[t]he only expense plaintiffs challenged was the PILOT,' they conceded the defendant's other costs were reasonable].) Green has thus waived any argument that the City's other costs are unreasonable."

projections used to determine the challenged gas rates for purposes of assessing liability, although it noted how the analysis might change if retrospective financials were used.

The Statement of Decision concluded:

> With regard to liability, the Court finds that the challenged electric rates are not taxes under *Redding*, but that the challenged gas rates are to the extent the GFT and/or market-based rental charges were passed through to ratepayers. The GFT and market-based rental charges do not correspond to the "reasonable costs to the local government" of the service provided to ratepayers under article XIII C, subdivision (e)(2).
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> While it has set forth preliminary calculations above, the Court will conclusively determine the extent to which the GFT and market-based rental charges were passed through to gas ratepayers, and the dollar value of the refund to which class members may be entitled, during Phase II of these proceedings. Phase II shall also address the proper form of relief to be issued with regard to the gas rates, be it a writ of mandate, declaratory relief, and/or a money judgment, as well as the issue of whether any of the causes of action asserted herein are moot.

IV. Extent to Which the GFT and Market-Based Rental Charges Were Passed Through to Ratepayers and Dollar Value of the Refund

Green urges the Court to calculate the refunds owed to the class by subtracting the non-rate revenues, including reserves, that the utility projected it would utilize in each year at issue from the combined GFT and market-based rental charges imposed on its ratepayers as an expense. This is consistent with, although not identical to, the method employed in *Redding* and with the Court's own preliminary calculations.

Despite its admissions and concessions on these points during Phase I,[7] the City now urges the Court to rely on actual financial results in calculating any refund to which gas customers may be entitled—if using the actual financials results in a lower refund. Moreover, the City now appears to take the position that it never actually passed any portion of the GFT or market rental charges on to its gas customers, who consequently should receive no refund. In

[7] In its reply brief, the City denies that it "stipulate[d]" to try remedy on projected financial data alone. It explains that "[i]n the first phase, counsel for the City agreed 'that rates are evaluated on the basis of financial projections[,]' but also noted '[a]ctual financial data may be secondary evidence suggesting or undermining the reasonableness of a projection[.]' " Now, however, the City urges the Court to rely on actual financial data, not as secondary evidence supporting the reasonableness of its projections, but as primary evidence used to calculate the refund owed to the class.

this regard, the City urges the Court to evaluate its finances over several years rather than on a fiscal-year-to-fiscal-year basis, with an eye to the City's use of its reserve accounts to manage "the unpredictable ebbs and flows of its revenues and gas market prices."[8] Green responds that if correct actual financials were used, the total refund owed to the class would actually ***increase***.

A. The City's Proposed Calculation

The City proposes that the Court adopt the following approach to calculating a potential refund:

Step 1 Potential Remedy Calculation: Calculate Potential Remedy

[Projected revenue from retail gas rates] *minus* [Projected "reasonable costs" incurred to serve retail customers] = Step 1 Potential Remedy

This first step is consistent with the analysis in *Redding*, which was adopted by the Court in its Phase I Statement of Decision. Plaintiff indicates that she generally agrees with the calculations presented by the City as to this step (with limited exceptions, discussed below).

However, the City proposes that the Court perform the following additional steps in calculating a potential refund:

Step 2 Potential Remedy Calculation: Apply Projected Non-Rate Sources

[Step 1 Potential Remedy] *minus*

[Projected non-rate revenue sources and reserves]

The City contends that this second step is necessary to "consider[] non-rate sources, which the Court and *Redding* hold the City need not use to subsidize retail rates and the City can therefore use them to fund expenses not deemed 'reasonable' under Proposition 26." However, as urged by Green, it would be inappropriate to deduct non-rate revenues and reserves from the potential remedy calculated in Step 1. This is because the Step 1 calculation ***already excludes*** such revenues, since it begins with ***retail*** revenues, not total revenues. Put differently, Step 1

[8] The City asks the Court to take judicial notice of the concept of "rate shock," which relates to "the economic dislocation that occurs when utility prices change suddenly, unsettling expectations across the economy…," and of the concept that utility providers, including the City, use reserves to avoid rate shock and "to cover unexpected or rising costs without immediately raising rates." Green does not oppose the City's request, which is GRANTED. (Evid. Code, § 452, subd. (h).) The Court does not take judicial notice of any other facts or propositions reflected in Exhibits C–E to the City's request for judicial notice supporting its opening brief.

already credits the City for non-rate revenues: it does not hold the City liable for the entire amount of the GFT and market rental charges, but only for that portion of those transfers that was actually projected to be passed through to ratepayers. Thus, the Court will not adopt the City's proposed Step 2.

Regardless of whether the Step 1 or Step 2 potential refund is considered, the City contends that the Court should compare any potential remedy based on projections to its actual financial results, and should limit any potential refund to the amount by which ratepayers were actually overcharged:

Step 3 Potential Remedy Calculation:

Compare Step 2 Potential Remedy and Actual Over-Collection

Lesser of: (1) [Step 2 Potential Remedy] *and (2)* Actual Over-Collection [Actual revenue from retail gas rates minus actual "reasonable costs" to serve retail customers][9]

Focusing on this third step, the City contends that its gas utility "operated at a loss for most years shown in this record due to difficulties in adapting to rates that passed through to customers savings in gas wholesale prices, which fell far and fast as the U.S. became a net exporter of energy." It urges that "[c]ustomers were undercharged, not overcharged, so no remedy is due," and argues that any "overcharges merely restored reserves drawn down earlier when rates were below costs." Green disputes the City's calculations in this third step, and contends that relying on its actual financial results would result in an even larger total refund to class members than relying on its projections.

B. Use of Actual Versus Projected Financials

As reflected by the discussion above, a fundamental issue raised by the parties is whether the Court should calculate a refund based on the financial projections used by the City to set rates, or whether it should limit any refund based on the City's actual financial results. The Court will analyze that issue with reference to the authorities relied on by the parties and identified in its own research.

[9] Notably, the City does not contend that the Court should subtract non-rate revenues from the "actual over-collection" calculated in this step, even though it would seem that projected and actual over-collections should be calculated in the same manner.

1. The City's Authorities

In support of its argument that the Court should look to actual financial results rather than relying on the financial projections used to establish rates, the City cites three cases: *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032 ("*CBIA*"), *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 ("*Moore*"), and *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 ("*Morgan*").

In *CBIA*, the Supreme Court rejected an article XIII A challenge to a fee schedule imposed by the State Water Resources Control Board.[10] Applying *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, which it stated had been "codified in article XIII A," the court held that "[t]he first question under *Sinclair Paint* is whether the approved fees ***would exceed*** the reasonable, ***estimated costs*** of administering the permit program," and found that the record refuted this conclusion. (At pp. 1050–1051, emphases added.) Contrary to the City's position, this focus on the "estimated costs" at the time the challenged fees were approved supports reliance on financial projections, consistent with *Redding*. *CBIA* continued, "the second question under *Sinclair Paint* is whether the fee is used to generate *excess revenue*, that is, to generate more revenue than necessary to pay for the regulatory program." (*Id.* at p. 1051, italics original.) The court found there was no evidence to support this conclusion, reasoning that "all fees are deposited in the Permit Fund and can only be spent to implement the Porter-Cologne Water Quality Control Act" and "cannot be spent for unrelated purposes." (*Ibid.*) Here, by contrast, gas utility funds are admittedly transferred to the City's general fund through the GFT and market rental charges. *CBIA* thus undermines rather than supports the City's position.

The City contends that *CBIA* looked "to the utility's actual financial performance to determine remedy." This is incorrect: since no constitutional violation was found by the Supreme Court in that case, it provided no direction on how a remedy would be calculated. The City further emphasizes *CBIA*'s discussion, while analyzing whether fees were fairly ***allocated*** among ratepayers in several different permit categories or "program areas," of a "gap between

[10] Similar to article XIII C, article XIII A deems a tax "any levy, charge, or exaction of any kind imposed by the State," with exceptions including for charges "imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits ... and the administrative enforcement and adjudication thereof."

stormwater permit fee revenues and stormwater program area expenses" that narrowed over time. (*CBIA, supra,* 4 Cal.5th at pp. 1052–1053.) While the court emphasized "flexibl[ity]" and "the imprecision inherent in predictions" in this context, it was applying a different standard to its analysis, since "all that is required" with regard to allocation under article XIII A "is that the record demonstrate a ***reasonable basis*** for the manner in which the fee is allocated among those who pay it." (*Id.* at p. 1053, emphasis added.) Here, Green does not challenge how the City allocated its gas rates among customers: the issue is whether it charged customers, as a group, " '***no more than necessary*** to cover the reasonable costs of the governmental activity' …." (*City of San Buenaventura v. United Water Conservation Dist.*, *supra,* 3 Cal.5th at p. 1200, quoting Cal. Const., art. XIII C, § 1, subd. (e), emphasis added.) As discussed during the Phase I hearing, while the Court might properly rely on actual financials as "secondary evidence" to assess whether an allocation or projection of costs was ***reasonable***, here, the City did not establish that the GFT or rental charges were cost-based at all.

Turning to the second case cited by the City, in *Moore*, the Court of Appeal rejected an article XIII D challenge to sewer service charges, a portion of which the City of Lemon Grove transferred to its general fund. However, in that case, the City presented evidence that the general fund transfer represented a "reimburse[ment]" for the City's provision of services to its Sanitation District. (*Moore, supra,* 237 Cal.App.4th at p. 369 ["The District presented evidence showing most functions required for it to operate are provided by City employees that divide their time among various activities," who provide the District with "support staff, accounting software, accounts payable staff, computer and geographic information systems," etc.].) *Moore* distinguished *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637 ("*Roseville*") and *Howard Jarvis Taxpayers Ass'n. v. City of Fresno* (2005) 127 Cal.App.4th 914 ("*Fresno*")—discussed at length in the Court's Phase I Statement of Decision—on the ground that, in those cases, "each city made no attempt to show that the flat fees represented the actual cost of providing the service as required by article XIII D…." (*Id.* at p. 372.) Because the City had presented such evidence in *Moore*, the plaintiff's challenge was "to Respondents' method of showing they used the fees collected for only the purpose for which the fees were charged," a

challenge which the Court of Appeal rejected. (*Ibid.*) Here, the City contends that *Moore*'s discussion of "post hoc interviews of staff supporting [the City of Lemon Grove's] allocation of overhead" to the District supports the Court's reliance on actual as opposed to projected financials in this case; again, however, *Moore* was addressing the distinct issue of whether the cost-based method of calculating the transfer to the general fund in that case was "reasonable," an inquiry not at issue here, where the challenged transfers are undisputedly not cost-based. (*Id.* at p. 374.) Like *CBIA*, *Moore* ultimately did not address the issue of how to calculate a refund where transfers to a general fund were not cost-based or fully funded with non-rate revenues. However, it did state that "[t]o show a fee is not a special tax, the government should prove (1) the ***estimated costs*** of the service or regulatory activity…." (*Moore, supra,* 237 Cal.App.4th at p. 375.) Like *CBIA*, *Moore* thus supports the conclusion that the Court should rely on the City's financial projections.

Finally, *Morgan* rejected an article XIII D challenge to water rates, based on the trial court's finding that the cost of service study on which the increase was based was reliable. Again, the plaintiffs in that case challenged the allocation of costs among parcels based on the cost of service study. The City contends that *Morgan*'s "comparing [of] ratemaking records to actual field measurements" in that context supports the Court's reliance on actual financials in issuing a refund here, but, like *CBIA* and *Moore*, *Morgan* simply does not address the issue before the Court.

2. Other Authorities

Green urges that "no published case addresses damages specifically in a Proposition 26 case." She therefore cites to authorities addressing tax refunds in unrelated contexts, which apply the general principles that "[a]ctions to recover taxes paid under protest are equitable in nature," and one "seeking to challenge the validity of a tax must pay or offer to pay the portion of the tax to which the taxing authority is entitled in equity and good conscience." (*Simms v. Los Angeles County* (1950) 35 Cal.2d 303, 316.) Based on these principles, any recovery in a tax refund action is limited "to the difference between the tax actually paid and that which properly ***should have been exacted***." (*Ibid.*, emphasis added.) As urged by Green, this focus on the tax

that "should have been exacted" suggests that the Court should look to the financial projections relied on by the City, consistent with *Redding*.[11]

As discussed above, *CBIA* and *Morgan* state that courts should look to "estimated costs" in assessing whether a purported fee is a tax under both article XIII A and article XIII D. In *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, the Court of Appeal for the Sixth District reasoned that the same analysis should apply in an action under article XIII C:

> As pertinent here, Proposition 26 added subdivision (e) to article XIII C, section 1 of the California Constitution. The new subdivision expanded the definition of "tax," to include "any levy, charge, or exaction of any kind imposed by a local government." (Cal. Const., art. XIII C, § 1, subd. (e).) Expressly excepted from that definition is "A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." (Cal. Const., art. XIII C, § 1, subd. (e)(3).)
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> The concluding sentence of the newly added subdivision provides: "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 bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).) This language repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax. As stated in *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145–1146 [250 Cal.Rptr. 420], "A 'special tax' under section 4 [of California Constitution article XIII A] does not embrace fees charged in connection with regulatory activities which do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and are not levied for unrelated revenue purposes. [Citations.] [¶] ... [T]o show a fee is a regulatory fee and not a special tax, the government should prove (1) ***the estimated costs of the service or regulatory activity***, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (See *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 878 [64 Cal.Rptr.2d 447, 937 P.2d 1350].)

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[11] Green notes that this language from *Simms* was quoted in dicta in *Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, which held that a City must pay its groundwater assessment during the pendency of its article XIII D challenge to the assessment in a related action. (At p. 1464 ["while the City might ultimately prevail in the Proposition 218 Lawsuit, it is not likely that even after a final judgment the City will be allowed to continue to produce groundwater without having paid any assessment whatsoever"].)

(*Griffith v. City of Santa Cruz*, *supra,* 207 Cal.App.4th at pp. 995–996, emphasis added.) *Griffith* (which ultimately held that the fees at issue were not taxes) provides additional support for the conclusion that the standard described in *Sinclair Paint* should be applied to the reasonable costs analysis under article XIII C, as with related constitutional provisions.

3. Analysis

It would be straightforward and logical to calculate the refund to which class members may entitled using the financial projections that the City relied on in setting rates. This approach is consistent with *Redding*'s—and this Court's—analysis as to liability, and with dicta in other types of tax refund actions to the effect that a refund should be limited "to the difference between the tax actually paid and that which properly ***should have been exacted***." (*Simms v. Los Angeles County*, *supra,* 35 Cal.2d at p. 316, emphasis added.) Also, it is supported by authorities applying *Sinclair Paint*'s focus on "***estimated costs***" beyond the context of article XIII A, in cases under related articles XIII C and XIII D. As urged by Green, it could create a bad incentive to allow a municipality to impose a "tax" that is unconstitutional at the time it is imposed, by knowingly adopting inaccurate projections that reasonable costs will meet or exceed projected revenues, while avoiding liability to taxpayers based on later developments. Moreover, consistent with such an approach, taxpayers would be entitled to a refund if the situation were reversed, and rates that did not exceed costs at the time they were imposed turned out to exceed actual costs in retrospect. (Of course, permitting taxpayers to obtain a refund under these circumstances would create an intolerable amount of uncertainty and unavoidable litigation costs for municipalities.) As discussed below, refunds issued in this case should be paid from the City's general fund, not from the gas utility. Thus, the utility itself will not have to bear the cost of a larger refund based on financial projections coupled with poorer actual financial results.

Still, there is some force to the City's argument that it should not be required to effectively subsidize rates that did not actually exceed costs of service, contrary to the central principle stated in *Redding*. Complicating the Court's choice between these two alternatives is

the fact that the parties do not agree on the impact of considering actual financial results. Setting aside the City's erroneous "Step 2" calculation, discussed above, the parties are in relative agreement with regard to the refund that would issue based on financial projections. With regard to actual financials, the picture is muddier. The City urges that relying on the actual results from FY 2016 would eliminate any refund owed to the 2012 Gas Rate Class, while Green contends it would merely reduce the refund. The City does not take a position on how using actual financials would impact refunds owed to the 2016 and 2018 Gas Rate Classes,[12] while Green urges that this would result in a larger refund to these classes and a larger overall refund to ratepayers in this case.

As a threshold matter, the parties disagree as to which documents reflect the City's actual financial results, and whether the Court may consider them. As to FY 2016, the City relies on 65 AR 4418, a document entitled "Gas Financial Forecast Detail" that was attached to the gas utility's FY 2017 financial plan. As urged by Green, this document was presented at an April 12, 2016 Utilities Advisory Committee Meeting, and thus predates the end of FY 2016. As stated on the face of the document, it is simply an updated "forecast" and does not purport to reflect the City's actual financial results.

In its reply brief, the City urges that "[u]sing the gas utility financial plan published near the end of FY16 — the most up-to-date information available to rate-makers when they set rates for FY17 — to determine the remedy owed to the class for that year is most accurate and equitable. These data reflect what the City had collected to that date in FY16 and its then-best estimates of what it would collect in the balance of that year and into the future, and thus determined the rate increase needed in FY17." The City does not further explain its apparent new position that that Court should rely not on final actual financial results—which would reflect how much of the GFT and rental charges were ***actually passed through*** to ratepayers—but rather on updated projections used to set the following year's rates. Presumably, lower than expected revenues in one year might have caused the City to dip into reserves, and to raise rates the

[12] While it maintains that the Court need not rely on actual financials for these years, the City states in its reply brief that the Court should hypothetically "look to the utility financial plan prepared in FY18 (when it set rates for FY19) for data on FYs l7 and 18, and the plan prepared in FY19, when it set FY20 rates, for FY19 data." The City does not provide the Court with an analysis of what refund would result based on those documents.

following year to replenish them; however, the Court has declined to scrutinize the City's management of its reserves in this case, and this outcome consequently would not be held against the City in any event. Per *Redding*, the Court's calculation of the amount of the GFT and market rental charges passed through to ratepayers will exclude amounts covered by reserves. Thus, while there is some logic to the City's original argument that the Court should look to actual financial results in fashioning a remedy, the City does not satisfactorily explain its new position that the Court should rely on updated projections used to set future rates.

Ultimately, the City asks the Court to rely on a document that admittedly does not reflect final, actual revenues and costs for FY 2016: thus, it fails to meet its burden to show that gas rates did not exceed actual reasonable costs of service by as much as it estimated when setting rates, even assuming that it would be appropriate for the Court to reduce the refund owed to the class in these circumstances. The City does not even attempt to show that relying on actual financial results would reduce the refund owed to the class for the remaining years at issue. The Court will accordingly rely on the City's financial projections to calculate the refunds owed to the class.[13]

C. Calculation of Refunds Owed to the Class

As discussed during the Phase I hearing, with regard to the 2012 Gas Rate Class only, the utility's financial projections are set forth in separate documents for the "supply fund" and the "distribution fund," which must be combined to find the projections for the utility as a whole. The parties agree that the combined total revenues set forth at 29 AR 1878 and 29 AR 1881 are the retail rate revenues, excluding the revenues from "Service Connections and Transfers" set

[13] Green contends that if the Court considers actual financials, it should rely on those set forth in the City's audited Consolidated Annual Financial Reports, Exhibits B–E to Green's request for judicial notice. The City objects to using these documents because they were "unavailable to ratemakers" setting the next years' rates and were "absent from the administrative record." The City further contends that "the income statement accounts for 'depreciation and amortization' (non-cash accounting expenses) and ignores the City's significant capital investments, which rates may fund." Because the City objects to the Court's consideration of its Consolidated Annual Financial Reports and otherwise fails to meet its burden regarding the refund that would issue if actual financial results were considered, the Court will rely on the financial projections used to set rates and will not consider the Consolidated Annual Financial Reports. Green's request for judicial notice of these reports is accordingly DENIED. Green's request for judicial notice of the City's March 2020 Gas Financial Forecast Detail, reflected in its FY 2021 Gas Utility Financial Plan, (Exhibit A to Green's request for judicial notice) is similarly DENIED.

forth at 29 AR 1881.[14] This results in total projected rate revenues of $43,071,528 for FY 2016, the only period at issue from the 2012 rate setting. The parties also agree that the total non-rate revenues for FY 2016 were projected to be $595,970 (per the City's calculation at page 18 of its opening brief, Interest Income + Other Revenues (29 AR 1878); Interest Income + Other Revenues and Transfers (29 AR 1881); no transfers from reserves as reflected in 29 AR 1877). Finally, the parties appear to agree that the projected GFT was $6,860,944 (29 AR 1881) and market rental charges were $213,369 (29 AR 1878 and 29 AR 1881), for a total of $7,074,313.[15] Green arrives at her potential remedy of $6,478,343 by subtracting non-rate revenues from the GFT and market rental charges, recognizing that the City may fund such transfers with non-rate revenues. The City arrives at its potential revenue in a different manner, by subtracting the asserted reasonable costs of service—calculated in the manner described in footnote 15, which does exclude the GFT and market rental charges—from the rate revenues. However, the City nowhere explains the calculation described in footnote 15, nor does it introduce any expert declaration or other evidence that would justify it.

The parties agree that because Green's claim only goes back to September 23, 2015, it is necessary to pro-rate the potential refund amount, dividing it by 366 days to get a daily value, which must then be multiplied by 282 days to arrive at the pro-rated refund.

Green provides the following chart comparing the parties' calculations (using the City's "Step 1" calculation):

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[14] The City confirms in its reply brief that it "does not suggest [that non-rate proceeds of service connection and capacity fees] offset the GFT or rent (Opening Brief, pp. 18–21)."

[15] In its Step 1 calculation for FY 2016, the City calculates that Projected Reasonable Expenses (Projected Operating Expenses [Total O&M (29 AR 1878); Total O&M + Interest Expense - Depreciation (29 AR 1881); Debt Principal + Estimated Capital Additions (29 AR 1882)] minus Rent (29 AR 1878; 29 AR 1881) minus General Fund Transfers (29 AR 1878; 29 AR 1881) equal $37,295,903. Total O&M as reflected on 29 AR 1878 is $19,613,548. Total O&M + Interest Expense - Depreciation as reflected on 29 AR 1881 is $18,587,013. Debt Principal + Estimated Capital Additions as reflected on 29 AR 1882 is $6,169,655. Thus, projected operating expenses as calculated by the City are $44,370,216, minus the GFT and rent totaling $7,074,313, or $37,295,903.

FY 2016	City Calculations (ROB p. 18, Figure 4)	Correct Calculations:
Retail Rate Revenues:	$43,071,528	$43,071,528
Expenses Less GFT/ Rent:	*($37,295,903)*	*($36,593,185)*
Potential Remedy:	$5,775,625	$6,478,343
Pro-Rated Refund:	$4,450,071	**$4,991,510**

The parties' estimated expenses differ by $702,718, a difference which Green attributes "in part" to the City's inclusion of $5,616,905 in estimated capital additions, but which neither party clearly explains. Ultimately, it is the City's burden to show what portion of the GFT and market rental charges was not a tax because it was not passed to ratepayers. The City has failed to meet that burden or to demonstrate why Green's calculation is incorrect. Given these circumstances—and considering that the parties agree that only $595,970 in non-rate revenue was projected to be available to fund these undisputed charges—the Court will adopt Green's refund calculation for the 2012 Gas Rate Class.

With regard to the 2016 and 2018 Gas Rate Classes, the parties both rely on the projections set forth at 65 AR 4418 and 107 AR 7328, respectively. They agree that the retail rate revenues are $33,259,000 for FY 2017; $37,038,000 for FY 2018; and $33,096,000 for FY 2019. They agree that the GFT and rent are $6,722,000 + $455,000 for FY 2017, for a total of $7,177,000; $6,945,000 + $467,000 for FY 2018, for a total of $7,412,000; and $6,888,000 + $480,000 for 2019, for a total of $7,368,000.[16] Finally, they agree that non-rate revenues (Other Revenues & Transfers In + Interest plus Gain or Loss on Investment) and transfers from reserves

[16] In its Step 1 calculations for these fiscal years, the City calculates "Projected Reasonable Expenses" by subtracting "Rent" and "Transfers to General Fund" from "Total Uses of Funds." These calculations confirm that the City used the same values for "Rent" and "Transfers to General Fund" as Green did:

- For FY 2017, Total Uses of Funds is $40,418,000, minus the GFT and rent ($6,722,000 + $455,000, for a total of $7,177,000), results in "Projected Reasonable Expenses" of $33,241,000.
- For FY 2018, Total Uses of Funds is $41,721,000, minus the GFT and rent ($6,945,000 + $467,000, for a total of $7,412,000), yields "Projected Reasonable Expenses" of $34,309,000.
- For FY 2019, Total Uses of Funds is $38,728,000, minus the GFT and rent ($6,888,000 + $480,000, for a total of $7,368,000), yields "Projected Reasonable Expenses" of $31,360,000.

are $1,661,000 + $4,480,000 for FY 2017, for a total of $6,141,000; $1,740,000 + $1,896,000 for FY 2018, for a total of $3,636,000; and $2,186,000 + $2,367,000 for FY 2019, for a total of $4,553,000.

The parties calculate the remedies owed to these classes differently, consistent with their respective approaches to the 2012 Gas Rate Class. Again, Green subtracts non-rate revenues and transfers from reserves from the combined GFT and market rental charges, resulting in refunds of $1,036,000 for FY 2017; $3,776,000 for FY 2018; and $2,815,000 for FY 2019. The City utilizes the calculation described in footnote 16 to determine the "Projected Reasonable Expenses" for each year, which it subtracts from the retail revenues.

Green provides the following charts comparing the parties' calculations (using the City's "Step 1" calculations):

FY 2017	**City Calculations (ROB p. 20, Figure 6)**	**Correct Calculations:**
Retail Rate Revenues:	$33,259,000	$33,259,000
Expenses Less GFT/ Rent:	*($33,241,000)*	*($32,224,000)*
Potential Remedy:	$18,000	**$1,035,000**

FY 2018	**City Calculations (ROB p. 20, Figure 6)**	**Correct Calculations:**
Retail Rate Revenues:	$37,038,000	$37,038,000
Expenses Less GFT/ Rent:	*($34,309,000)*	*($33,261,000)*
Refund:	$2,729,000	**$3,777,000**

FY 2019	**City Calculations (ROB p. 20, Figure 7)**	**Correct Calculations:**
Retail Rate Revenues:	$33,096,000	$33,096,000
Expenses Less GFT/ Rent:	*($31,360,000)*	*(30,281,000)*
Refund:	$1,736,000	**$2,815,000**

As to these fiscal years, Green correctly urges that the difference between the parties' refunds for each year ($1,017,000 for FY 2017; $1,048,000 for FY 2018; and $1,079,000 for FY

2019) are equal to the revenues associated with "Service Connection & Capacity Fees." This supports Green's argument that the costs associated with these revenues—which the City agreed during oral argument are paid from this associated revenue stream[17]—are essentially equal to the revenues, both of which should be excluded from the calculations of the refunds in this action. Notably, Green has raised this argument repeatedly in her briefing in connection with both phases of trial,[18] and the City has failed to respond in its briefing: it concedes that revenues associated with "Service Connection & Capacity Fees" should not be used to fund the GFT and rent, but does not explain how it accounts for the associated costs, and does not argue that it is entitled to impose such costs on ratepayers. The record reflects that costs associated with "Customer Connections" are included in the utility's capital costs in the projections used to set rates for the 2016 and 2018 Gas Rate Classes. (See 65 AR 4411, 4412, and 4418; 107 AR 7321, 7322, and 7328.) In any event, it is the City's burden to show what portion of the GFT and market rental charges did not constitute a tax because it was not passed on to ratepayers. The City does not explain the difference between the refunds produced by Green's calculations—which are based on the undisputed GFT, market rental charges, and non-rate revenues—and its own calculations based on disputed "Projected Reasonable Expenses." Accordingly, the Court will adopt Green's refund calculations for the 2016 and 2018 Gas Rate Classes as well.

D. Conclusion

For the reasons discussed above, the Court will adopt Green's refund calculations for the 2012, 2016 and 2018 Gas Rate Classes, based on the financial projections that the City relied on in adopting the challenged gas rates.

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[17] Counsel explained during oral argument that the City is "required to segregate the proceeds of connection charges and capacity charges, and spend them only on capital costs which benefit new customers as a class. Therefore, we cannot use those revenue streams to cover any portion of the cost of service to existing customers."

[18] In her opening brief on liability, Green urged that "[a]s with rates, ['service connection and capacity fees'] must be no more than their associated costs. Thus, their inclusion in the revenue requirement is a wash." In her responsive brief on remedy, she squarely raised the issue of these costs:

> As Green argued in her opening and reply briefs in phase I of trial, gas "Service Connection & Capacity Fees" are cost recovery fees imposed on customers for gas utility service. [Citations.] The City has offered no rebuttal to Green's argument and the Court did not address connection and capacity fees in its Statement of Decision. Because the City concedes such fees should be excluded from non-rate revenue charged against any refund, it is erroneous to ignore costs recovered by such fees in the analysis.

V. Proper Form of Relief

Green contends that the Court should issue a writ of mandate directing the City to pay the refunds owed to class members immediately from its general fund—not from the utility. She further urges that class members are entitled to pre-judgment interest. Finally, she asks the Court to issue a declaratory judgment stating "that Palo Alto's gas rates are taxes and that the GFTs and rents are not valid costs of service for purposes of article XIII C, section 1, subdivision (e)(2)."

The City proposes that any refund to the class be issued over a three-year period in the form of credits to their gas bills. It also asks the Court to issue declaratory relief in its favor on three points.

The parties agree that Green's request for a writ of mandate directing the City to cease collecting any of the unlawful rates is moot, because the City enacted new rates that went into effect on July 1, 2019.

A. Refund

As urged by Green, the California Supreme Court held in *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 that "[c]lass claims for tax refunds against a local governmental entity are permissible under [Government Code] section 910 in the absence of a specific tax refund procedure set forth in an applicable governing claims statute." (At p. 253.) Neither party contends that a more specific claims statute applies here.

Government Code section 970.2 provides that "[a] local public entity shall pay any judgment in the manner provided in this article. A writ of mandate is an appropriate remedy to compel a local public entity to perform any act required by this article."

> Except as provided in Section 970.6, the governing body of a local public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment, with interest thereon, out of any funds to the credit of the local public entity that are:
>
> (a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes; or
>
> (b) Appropriated for the current fiscal year for the payment of judgments and not previously encumbered.

(Gov. Code, § 970.4.) Government Code section 970.5 provides that, "[e]xcept as provided in Section 970.6, if a local public entity does not pay a judgment, with interest thereon, during the fiscal year in which it becomes final, the governing body shall pay the judgment, with interest thereon, during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose."

The Court will order issuance of refunds in this action pursuant to the above authorities cited by Green. In support of its credit approach, the City cites a treatise on class actions that does not address the Government Code provisions at issue here, as well as the Court's "equitable power to frame relief." However, while there may be efficiencies to be gained by issuing refunds in the form of credits, Green correctly responds that it would not be equitable for the utility to fund such credits in this case. Here, the issue is the City's improper transfer of funds from the gas utility to its general fund. Consequently, allowing the City to issue refunds to class members without directing that those refunds be paid from the general fund (or another fund containing monies appropriated for the payment of judgments) would not remedy the wrong that occurred here: without this direction, the City could presumably recover any credits issued to ratepayers from future ratepayers, who should not be required to fund these illegal taxes any more than past ratepayers. There may be a method of refund that could be achieved through a transfer from the general fund to the utility in a manner that does not create the inequity that petitioner points out, but neither party proposes such an approach.

To the extent that paying refunds to class members in the manner provided by the Government Code would cause the City financial hardship, the Government Code specifies a procedure to address this through installment payments. (See Gov. Code, § 970.6, subd. (a).) Finally, given the Government Code's mandatory language (Gov. Code, § 970.2 ["[a] local public entity shall pay any judgment in the manner provided in this article"]), it is not clear that the Court has discretion to issue relief in a manner different than the one specified by the statute, and the City provides no authority suggesting that it does.

The Court will thus order the City to pay the refunds at issue as provided by Government Code section 970.2.

B. Prejudgment Interest

Pursuant to Civil Code section 3287, subdivision (a), plaintiffs who recover damages from a government entity are entitled to prejudgment interest under the same circumstances as other plaintiffs:

> (a) A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.[19]

"[S]ection 3287, subdivision (a), has been applied consistently to allow the recovery of prejudgment interest in causes of action other than those in contract," including in mandamus actions. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 796.)

The City contends that Green's claim for prejudgment interest fails because her damages are not "certain," citing *Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054 for the proposition that "[d]amages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." (At p. 1060.) However, this is only one situation where damages are deemed certain.

Ultimately, "liability for prejudgment interest occurs only when the defendant knows or can calculate the amount owed and does not pay." (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 293.) Any entitlement to prejudgment interest

[19] Green submits a declaration by her counsel, which computes prejudgment interest based on the assumption that "the right to recovery vested at least at the end of each class period." Because an award of prejudgment interest is not appropriate here for the reasons discussed below, Green's request for judicial notice of the Daily Treasury Yield Curve Rates her counsel used to calculate prejudgment interest is DENIED.

commences from the day when "damages were certain or capable of being made certain by calculation." (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 391.) "[W]here the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (*Children's Hosp. and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 774.) Specifically, "damages that must be judicially determined based on conflicting evidence are not ascertainable"; however, "[a] legal dispute concerning the defendant's liability or uncertainty concerning the measure of damages does not render damages unascertainable." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 919; but see *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 524 ["because there was considerable dispute between the parties concerning the relevant elements by which to compute damages, rendering them not reasonably susceptible to ready and certain calculation, prejudgment interest may not be awarded under section 3287, subdivision (a)"].) Consistent with these principles, "courts have reasoned that where an accounting is required in order to arrive at a sum justly due, interest is not allowed." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 908–909, internal citation and quotations omitted [noting, however, that "we do not foreclose the possibility of prejudgment interest in an accounting action where equity demands such an award"].) Similarly, where there is a large discrepancy between the amount of damages demanded in the complaint and the amount of the eventual award, this militates against a finding of certainty. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 961 [noting that the lack of a significant disparity conversely supports a finding of certainty; "[t]he greater the disparity between the complaint and the damages, … the less likely prejudgment interest is appropriate"].)

Here, the amount of the refunds to which the class is entitled was hotly disputed, to the degree that the parties agreed to address this issue in a separate phase of trial. Some of the parties' disputes in this regard related to the City's underlying liability under *Redding* and to the appropriate measure of damages under *Redding* in a legal sense. However, other disputes—such as the issue of whether costs associated with wholesale revenues were reasonably allocated to ratepayers based on the City's argument that it purchased only a reasonable "cushion" of extra

supply to ensure uninterrupted service for its gas customers—were factual in nature and required the Court to evaluate the record evidence. Consequently, the damages in this action are not certain for purposes of section 3287, subdivision (a). Moreover, the City correctly urges that Green's administrative claims acknowledged that the value of the claims was "unknown."[20] Similarly, her complaint sought damages in an amount to be determined at trial. These circumstances lend support to the conclusion that the damages here are uncertain.

In light of this conclusion, the Court will not award prejudgment interest to the class.

C. Declaratory Relief

"Any person … who desires a declaration of his or her rights or duties with respect to another … may, in cases of actual controversy relating to the legal rights and duties of the respective parties" bring an action for declaratory relief, "and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time." (Code Civ. Proc., § 1060.)

> That the constitutionality of an ordinance can be a proper subject for declaratory relief is without doubt. "An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law." (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723, 45 Cal.Rptr.2d 752.)

(*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Still, declaratory relief "operates prospectively to declare future rights, rather than to redress past wrongs." (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 549, quoting *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.)

Both parties contend that the Court should issue declaratory relief in this action, but they differ as to the declarations they seek. Green asks the Court to issue a declaratory judgment stating "that Palo Alto's gas rates are taxes and that the GFTs and rents are not valid costs of service for purposes of article XIII C, section 1, subdivision (e)(2)." However, because the portion of the City's gas rates that are taxes is equal only to the portion of charges that do not correspond to reasonable costs of service that are passed through to ratepayers, it would be too

[20] The City's request for judicial notice of Green's administrative claims (Exs. G and H to its request supporting its reply brief) are GRANTED. (Evid. Code, § 452, subds. (c) and (h).)

broad for the Court to declare that the City's "gas rates are taxes." Similarly, while it would be accurate to declare that "the GFTs and rents are not valid costs of service for purposes of article XIII C, section 1, subdivision (e)(2)" assuming that these charges continue to be calculated by the City in the manner at issue in this action, this declaration is too broad insofar as it implies the City could not calculate GFTs or rent in a different, cost-based manner without running afoul of the constitution. Ultimately, because the City has imposed new gas rates superseding the ones at issue in this action, it is not clear that the GFT and market rents are still imposed on ratepayers or that they are calculated in the same manner as they were in the past. For all these reasons, the Court declines to issue the declarations that Green seeks.

The City asks the Court to issue the following declaratory relief in its favor:

- The City need not subsidize utility rates with non-rate revenues and reserves not proven to be derived from retail rates;
- The City's use of transfers from reserves to fund challenged expenses does not violate Proposition 26 absent proof (not present here) those reserves derive from retail rates; and
- Wholesale supply costs are "reasonable costs" which Proposition 26 permits to be funded by rates for service, and proceeds of sale of excess supply are non-rate revenues that need not be used to subsidize rates.

These declarations essentially restate the holdings of *Redding* and the Court's Phase I Statement of Decision in this case in ways that are not entirely accurate. The Court accordingly declines to issue the declaratory relief requested by the City.

D. Conclusion

The Court will issue monetary relief in the form requested by Green, and will not issue declaratory relief. The Court will not award prejudgment interest.

VI. Remaining Issues

Green proposes that the parties meet and confer on "procedural issues" and the form of judgment following the Court's decision on Phase II of the trial:

> [T]here remain procedural issues to be addressed after the Court issues a Statement of Decision at Phase II. These issues largely revolve around the parties' agreement to postpone notice to the classes until after the Court's decision at

> Phase II. Because that process may impact the judgment, Green believes it is appropriate for the parties to meet and confer and to appear before the Court for a further status conference prior to submitting a proposed judgment to address those issues.

The Court agrees with this approach, and schedules a case management conference for October 22, 2020 at 10:00 a.m. In addition to meeting and conferring on the form of judgment and the issue of notice to the class, the parties shall meet and confer regarding when payment will issue to the class, how this process will be administered, how the refund ordered by the Court should be allocated among individual class members, and the impact of any appeal. They shall address their respective positions on each of these issues in a joint case management conference statement of up to fifteen pages, to be filed by end of day October 19, 2020.

VII. Conclusion and Order

The Court will issue a writ of mandate directing the City to pay refunds to the class in the following amounts:

- $4,991,510 to the 2012 Gas Rate Class;
- $4,812,000 to the 2016 Gas Rate Class; and
- $2,815,000 to the 2018 Gas Rate Class.

The refunds shall be paid pursuant to Government Code section 970.2, from the City's general fund or another fund containing monies appropriated for the payment of judgments, and not from the utility.

Green's request for a writ of mandate directing the City to cease collecting any of the unlawful rates is moot. The Court will not issue declaratory relief or award prejudgment interest to the class.

Green is the prevailing party and shall be awarded fees and costs according to law. Fees and costs shall be fixed pursuant to the procedures set forth in California Rules of Court, rules

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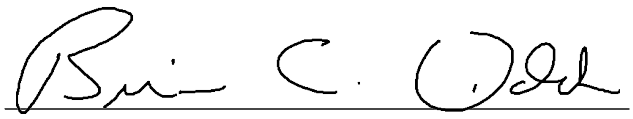
3.1700 and 3.1702.

IT IS SO ORDERED.

October 27, 2020



Brian C. Walsh
Judge of the Superior Court