



The Looming Crisis in Rate Setting

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Introduction to Prop. 218 and 26

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Proposition 218

- Adopted by voter initiative in 1996, and adds procedural and substantive requirements to California Constitution for property related fees, including water, sewer, solid waste and storm water
- **Procedural:** Public hearing, 45-day notice, majority protest
- **Substantive:**
 - Cost of service;
 - Revenue used for limited purpose;
 - Amount is proportional to property or parcel;
 - Actually used or immediately available;
 - Revenues not for general government services available at large.



Proposition 26

- A new definition of “tax” requiring voter approval.
- **Tax:** Any levy, charge, exaction
- **Exceptions:**
 - 1. Specific benefit limited by cost of service
 - 2. Specific product or service limited by cost of service
 - 3. Regulatory licensing and permitting
 - 4. Entrance to government property
 - 5. Fine or penalty as a result of legal violation
 - 6. Condition of property development
 - **7. Assessments and property-related fees imposed in accordance with Proposition 218**



(ACWA) Legislation in Action

Nicholas Whipps
Deputy City Attorney
City of San Francisco

Lawsuits and Laws at Play

Stormwater (Sewer)

- *Gluck v. San Francisco*

Hydrants (Water)

- *Toy v. San Francisco; Kessner* litigation
- *Aquilina v. San Francisco*

Validation

- *Gluck v. San Francisco; Aquilina v. San Francisco*

Prop. 218 – Why Legislation Matters

“Legislature’s interpretation of uncertain constitutional terms, as reflected in subsequently enacted legislation, is entitled to great deference by the courts.”

- *Davis v. City of Berkeley* (1990) 51 Cal.3d 227

Stormwater (Sewer) Legislation

SB 231/Gov. Code §§ 53750, 53751 (2018)

- **Why** – *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 – *held*; stormwater services require voter approval (i.e., not sewer service)
- **What** – Defines stormwater as a component of sewer service

Stormwater (Sewer) Legislation in Action

Gluck v. San Francisco (2023)

- Complaint alleges: "stormwater charges cannot be adopted without voter approval."

Stormwater (Sewer) Legislation in Action

"[San Francisco's] combined sewer system, which treats wastewater and stormwater, provides 'sewer services' under Proposition 218 and are exempt from Proposition 218's voting requirement."

-Gluck Order Sustaining Demurrer

Stormwater (Sewer) Legislation in Action

"[T]he term 'sewer services' in Proposition 218 is ambiguous. The Legislature therefore had the right to interpret the ambiguous term and the court accords high deference to that interpretation."

-Gluck Order Sustaining Demurrer

Hydrant (Water) Legislation

SB 1386/Gov. Code § 53750.5 (2020)

- **Why** – *Kessner* litigation
- **What** – Defines hydrants as component of water service under Prop 218

Hydrant (Water) Legislation in Action

Toy v. San Francisco; Aquilina v. San Francisco

- "Plaintiffs allege that [San Francisco] has improperly included costs associated with public fire service in calculating its cost of service."
- Both lawsuits pending at trial court

Validation Legislation

SB 323/Gov. Code § 53759 (2021)

- **Why** – potentially unlimited years of rates could be sued upon, so water retailers were never “safe” from lawsuits
- **What** –
 - Provide notice of validation limitation
 - 120-day statute of limitations to challenge rate action
 - Must first file a Government Claims Act claim
 - Rates adopted 2022 and on

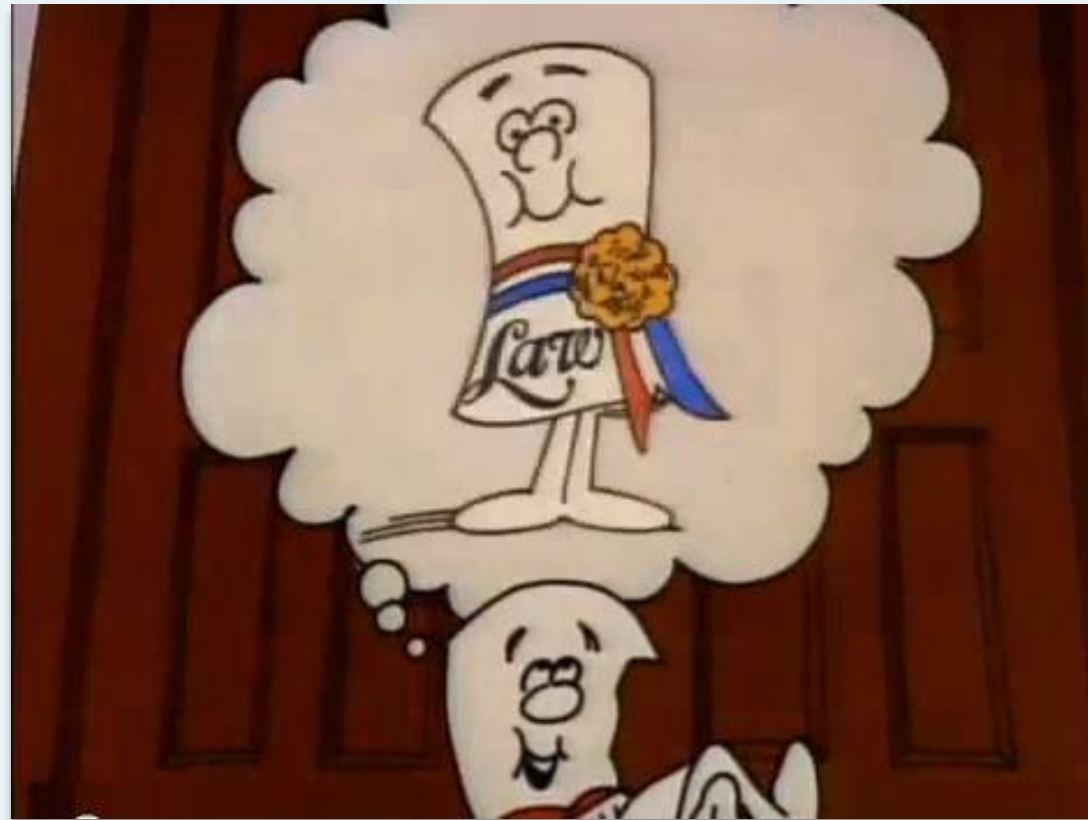
Validation Legislation in Action

Gluck v. San Francisco; Aquilina v. San Francisco

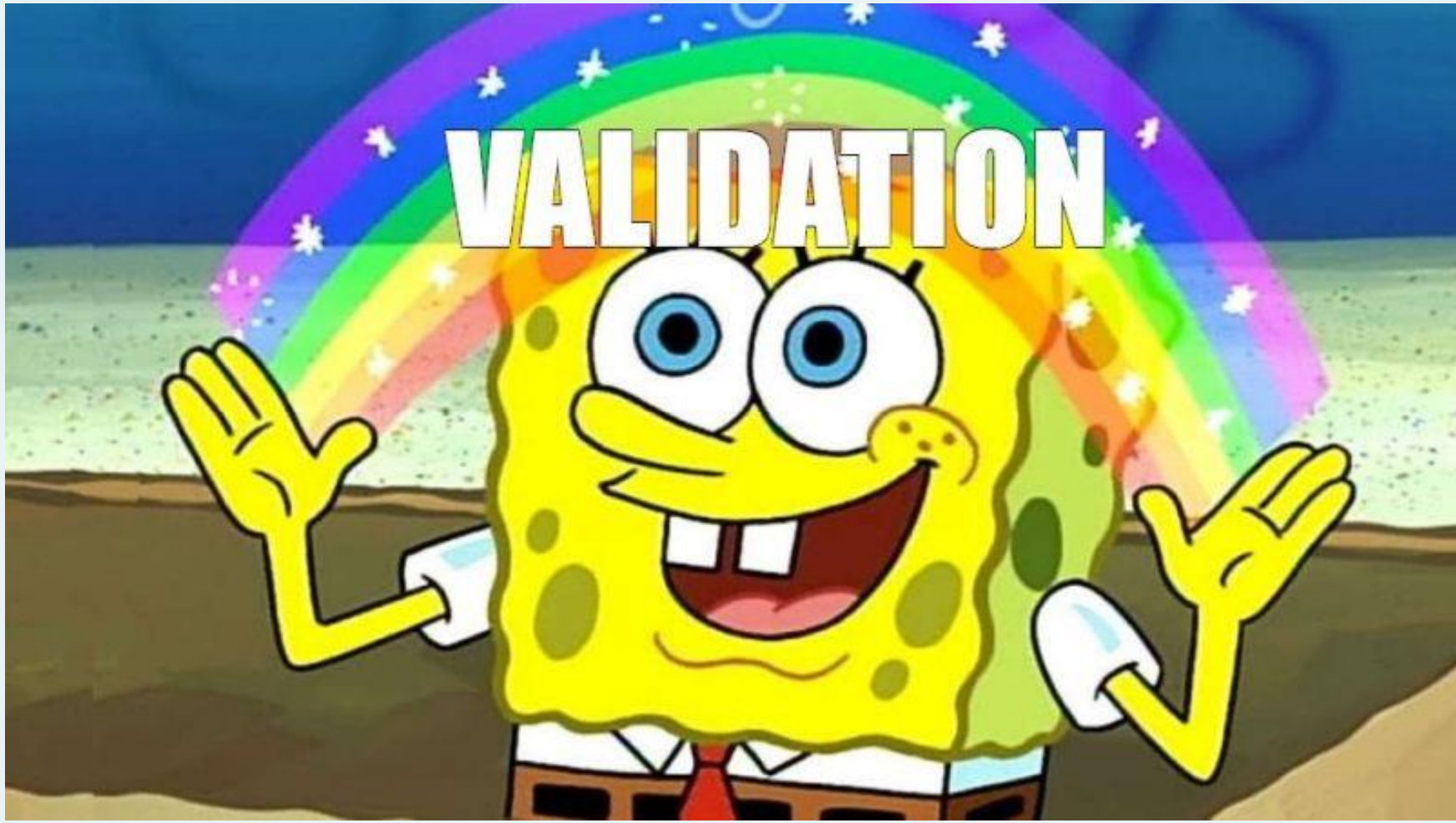
- SFPUC issued notice with validation language
- Two plaintiffs' groups (*Aquilina*, *Gluck*) filed tort claims and then filed suit
- Defense against any further lawsuits

Under California Government Code section 53759, there is a 120-day statute of limitations for challenging any new, increased, or extended fee or charge. This statute of limitations applies to the water and sewer service rates and charges proposed in this notice. It also applies to future changes to water and sewer rates and charges.

LEGISLATION **MATTERS**



Get the Validation You Deserve!





Current Rates Lawsuits

Claire Collins
Partner
Hanson Bridgett

ACWA as Amicus Curiae in 3 Suits

- Why do we participate as Amicus? In order to be the voice of the public water sector, and advise the court on the public policy implications of their decision
- What is at stake in these three suits?
 - Millions of dollars
 - That would need to be raised by future rates
 - To refund prior (high) water users
 - Who argue that they paid more than their fair share
 - But who (likely) never protested before the rates were set

Patz v. San Diego and Coziahr v. Otay

- Originally one case, bifurcated into separate actions
- Both water suppliers primarily/exclusively have one source of imported water (no ability to differentiate rates based on source of supply)
- Peaking factors (base-extra capacity method) used to allocate higher proportion of infrastructure costs to higher users
- High water users claim that peaking factors can only be used if supplier employs a “time of use” approach, similar to electric utilities
- Rate challenge reaches back to 2013 rates
- Seeking refunds in amount of \$80 million (SD) and \$24 million (Otay) plus interest and attorneys fees. **Total potential liability > \$125 million**

Howard Jarvis Taxpayers Assn. v. CVWD

- Two cases
- One relates to customers that take raw water from its canals for irrigation purposes, under Prop. 218
- One relates to groundwater pumpers to fund groundwater replenishment, under Prop. 26
- In both cases the trial court invalidated the rates, ordered ~\$17 million in refunds (total of approx. \$34 million)
- Court ordered CVWD to impose flat and uniform rates – despite evidence in the record of analysis allocating differential costs among customer classes



Current Prop. 218 Legislation

Kris Anderson
Sr. Legislative Advocate
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Current Prop. 218 Bills

... the holy trinity

ACWA Bill – AB 2257

Exhaustion/Substantive Objections Prior to Adoption/Record Only

IRWD/Coastkeeper Bill – AB 1827 (Papan)

Declaring Meter Charges/Peaking Components are Valid

Otay/San Diego Bill – SB 1072 (Padilla)

No Refunds for Prop. 218 Violation Unless Under Statute

Proposed Legislation- AB 2257

Authored by Assemblymember Lori Wilson
Sponsored by ACWA

Pertaining to 218 challenges

- Exhaustion of Administrative Remedies
- Scope of the Administrative Record

AB 2257 (Cont.)

Exhaustion Requirement for Ratepayer

- Would bar legal challenges, unless the Challenger first brings their issue before the legislative body during the rate setting process
- Would apply only to agencies that opt in to the prescribed procedural requirements

Why is this good?

- Allows agencies to respond to/address issues through the rate setting process
- Helps to avoid unnecessary litigation
- Could result in a better product for the agency and its customers

Concerns?

- Might be confusing - new procedural requirements don't replace or modify the existing protest procedures under Prop 218

AB 2257 (Cont.)

Administrative Process for Agency

- Post on agency website at least 45 days prior to the protest hearing
- Provide a written response to timely objections
 - Explain the substantive basis for not adjusting the fee or charge
 - Present these to the legislative body prior to protest hearing/ballot tabulation
 - Responses will become part of the administrative record
- Include in the Prop 218 notice:
 - Timeline for submittal of written objections
 - Advise that failure to so object is a legal bar to later challenge
 - Identify requirements for submitting an objection (both substantive and procedural)

AB 2257 (Cont.)

Scope of Administrative Record

- Cost of Service Study and other engineering and staff reports
- Transcript or minutes or any proceeding of an advisory body or the legislative body related to the rate setting
- Notices
- Timely objections and protests, and all agency responses
- Written evidence and correspondence on the rates to or from the agency prior to the protest hearing
- Final agency action on rates (resolution or ordinance)
- Agency evidence supporting the rates
- Evidence outside the record only in certain cases

AB 2257 (Cont.)

Proposed limitations on Scope of Administrative Record

Why is this good?

- In line with writ proceedings
- Focuses on what was in front of the legislative body at the time of rate adoption
- Avoids protracted discovery disputes related to administrative record contents

Concerns?

- Will this limit evidence that may be helpful?

Proposed Legislation- AB 1827

Authored by Assemblymember Diane Papan
IRWD/Coastkeeper Bill re Peaking/Meter Charges

Water service fees or charges may include the incrementally higher costs of water service due to including

- Higher water demand of parcels
- Maximum potential use (meter charges)
- Projected peak water usage

This codifies the generally universal practice of meter charges and peaking (or base-extra capacity) components of rate structures

Proposed Legislation- SB 1072
Authored by Senator Steve Padilla
Otay/City of San Diego Bill re No Refunds w/o Statute

(a) If a court determines that a fee or charge for a property-related service, including water, sewer, and refuse collection, violates [Prop. 218], then the local agency shall, in the next [ratemaking] credit the amount of the fee or charge attributable to the violation against the amount of the revenues required to provide the property-related service unless a refund is explicitly provided for by statute.

(b) This section does not apply to claims related to billing errors.

(c) This section does not constitute a change in, but is declaratory of, existing law.

SB 1072 (Cont.)

- Recognizes that Prop. 218 does not authorize a refund remedy
- Recognizes the usual practice, and now requires, that any “overcollection” is used to defray future costs (similar to connection fees under Gov. C. 60016(a))
- Allows for effectiveness of any other refund statutes (such as Health & Safety C. 5472)
- Allows for billing errors (such as misclassification) to remain subject to refund

How to support these bills?

Email your support by navigating to the bill on the legislature's website, or contact the following folks for form support letters or to be added to coalition support letters:

- ACWA Bill re Exhaustion: KrisA@acwa.com
- Papan Bill re Meter Charges/Peaking: Compton@irwd.com
- Otay/San Diego Bill re No Refunds: totero@otaywater.gov

2024 Impact Fee Legislation

- **AB 1820 (Schiavo):** would allow developers to request in preliminary applications an estimate from a local agency of the fees expected to be imposed on the project.
 - **Amendments:** removed the inclusion of water and sewer connection fees and capacity charges from fees subject to estimate. Require agencies to provide a development proponent with a fee schedule for water/sewer fees, upon request.
- **SB 937 (Wiener):** prohibit local agencies from requiring the payment of fees until the certificate of occupancy is issued.
 - **Amendments:** removed connection fees and capacity charges from the provisions of the bill.
- **SB 1210 (Skinner):** prohibit connection/capacity fees from exceeding 1% of reported building permit value of that housing unit; require agencies to issue connection/capacity fees over a period of 10 years.
 - **Amendments:** require agency to post online (1) fee schedules, and (2) the estimated timeframes for completing typical service connections needed for each housing development type.

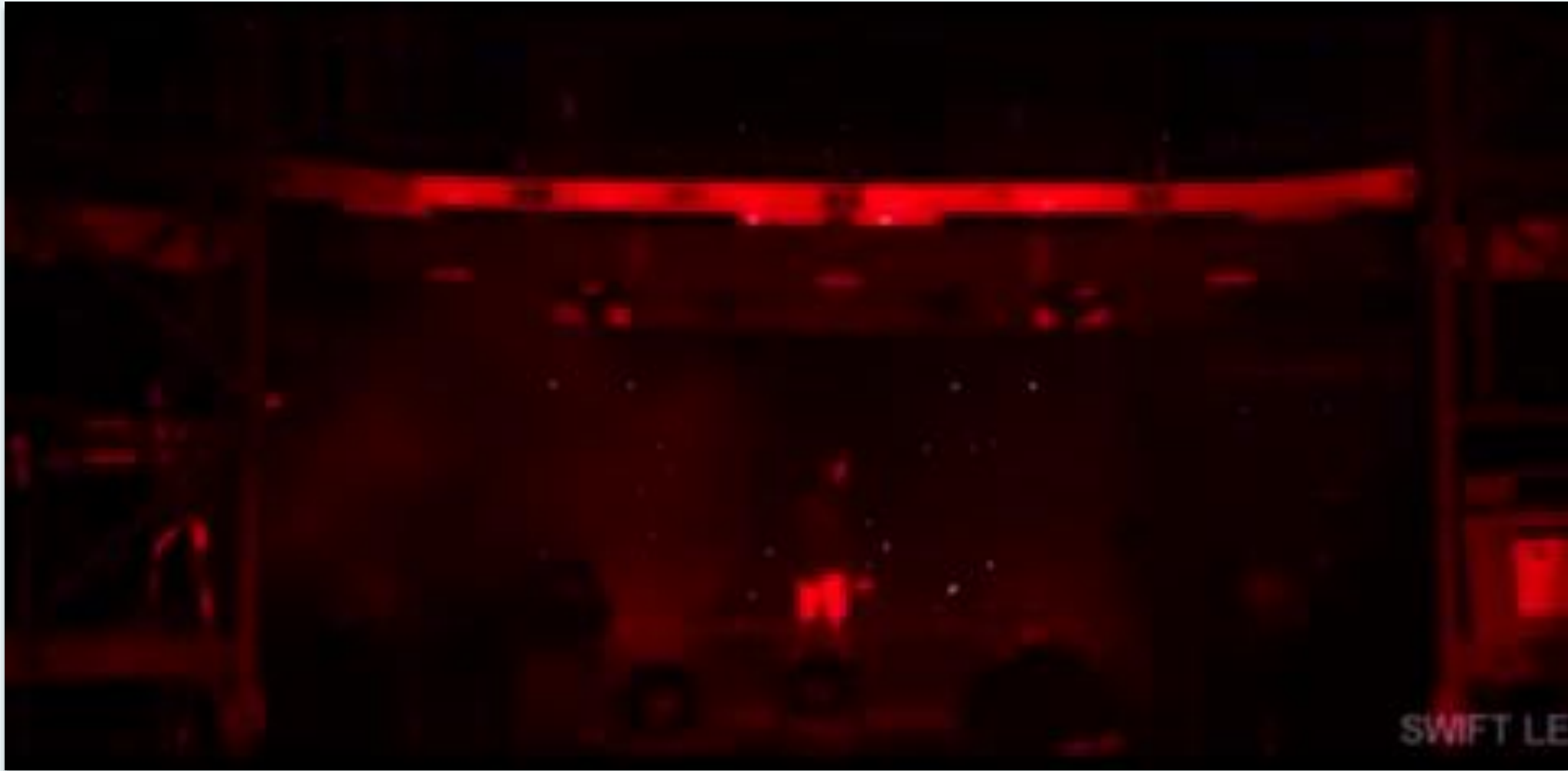


Setting Yourself Up For Success

Molly MacLean
General Counsel
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SETTING YOURSELF UP FOR SUCCESS



Do Your Homework

- Know your agency
 - Consider whether to use AWWA data versus individual agency data (*Patz, et al v. San Diego*, pending on appeal)
- Gather a clear picture of financial needs, which is needed to develop a record of costs (input from your board as needed)
- The COSA is expert evidence that tells and justifies the financial story
 - Check your work
 - Show your work (judges do not like math, include narratives)
 - Think about how you will explain to a judge why and how the COSA demonstrates Prop 218 substantive compliance
- Use a lifeline – Consider calling in expert legal assistance

Communication

- Develop your story
 - Why is the agency doing this? What are the agency's goals?
 - Develop FAQs/Talking Points for your board
 - Clearly communicate proposed rate impacts
 - Assure consistency of messaging
- All of this can be used later to answer questions post-rate adoption

Timeline and Process

- Work backwards from rate hearing/anticipated rate adoption to assure you can meet deadlines
 - Posting and mailing Prop 218 Notice – at least 45 days prior to hearing
 - » mailing list development
 - Public communication and workshops
 - Board meetings necessary to make input decisions
- Develop a system to collect and log protests
 - Who can protest? (Customers/ parcel owners)
 - Not double counting protests (One protest per parcel)
 - Make redacted protests available for review at the rate hearing to promote transparency and allow ratepayers to see their protest was counted

Post-Adoption

- Use SB 323
 - 120 day statute and reverse validation process applies
 - Consider filing agency validation action
 - Best case, you bar legal challengers that fail to participate in the process
 - Worst case, you are in rate litigation but have framed the picture and gained control of the process
 - Be prepared for the complex procedural requirements. They perfect the case, and can eliminate latecomers.
- Administrative Record (this is where AB 2257 could help add clarity)
- Class Action – To bifurcate or not to bifurcate? Force early certification when justified.
- Settlement – Be clear eyed about your case. Press legal advantages to gain leverage and look for openings.

