DENNIS J. HERRERA
City Attorney

OPINION NO. 2003-03

TO: Michael Carlin
Public Utilities Commission

FROM: Thomas J. Owen
Deputy City Attorney

DATE: August 29, 2003

RE: The Public Utilities Commission's "Exclusive Charge" Under Proposition E

QUESTION PRESENTED:

What does the term "exclusive charge" mean in Charter Section 8B.121(a), giving the Public Utilities Commission ("the PUC") "exclusive charge of the construction, management, supervision, maintenance, extension, expansion, operation, use and control of all water, clean water and energy supplies and utilities of the City as well as the real, personal and financial assets, that are under the Commission's jurisdiction or assigned to the Commission"?

SHORT ANSWER:

The "exclusive charge" provision means that the Board of Supervisors may not adopt ordinances directed specifically at the PUC or the City's utility system. In addition, the Board may not adopt ordinances that would significantly interfere with the PUC's ability to fulfill its duties and responsibilities enumerated in the Charter or other core functions. But the PUC must otherwise still comply with all local ordinances applicable to City departments in general.

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BACKGROUND:

The voters adopted Proposition E at the November 2002 election. According to the ballot question for Proposition E, the measure was intended to "increase the authority and duties of the Public Utilities Commission concerning its water and sewer utilities, [require] use [of] surplus funds from its utilities to operate and maintain the utilities before transferring any surplus to the General Fund, and end early the water and sewer rate freeze." (Voter Information Pamphlet, November 5, 2002 Consolidated General Election.)

According to the Preamble to the new Charter Article VIIIB, one purpose of the measure is to "clarify" that the PUC has "exclusive control" of water, clean water and power assets owned or maintained by the City. (SF Charter § 8B.120 [¶ 4] subd. 1.) To reach that goal, the measure gives the Public Utilities Commission ("PUC") a number of specific new powers:

- Authority to enter into joint powers agreements (SF Charter § 8B.121(b));
- Authority to issue revenue bonds (SF Charter § 8B.124);
- Authority to set rates (SF Charter § 8B.125);
- Authority to enter into individual employment contracts with the General Manager and a deputy director (SF Charter § 8B.126);
- Authority to enter into contracts for the purchase or sale of water (SF Charter § 8B.127);
- Authority to enter into project labor agreements for the Capital Improvement Project (*ibid.*); and,
- Authority to transfer surplus revenues between utilities (SF Charter § 16.103).

Previously, these powers were held by, or shared with, other City officers or bodies, such as the Mayor and the Board of Supervisors. The Charter prevented the PUC from transferring surplus revenues between utilities.

In addition, the section addressing the PUC gives the Commission "exclusive charge" over the City's public utility system:

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> Notwithstanding Charter section 4.112,[1] the Public Utilities Commission shall have ***exclusive charge*** of the construction, management, supervision, maintenance, extension, expansion, operation, use and control of all water, clean water and energy supplies and utilities of the City as well as the real, personal and financial assets that are under the Commission's jurisdiction or assigned to the Commission under Section 4.132.

(SF Charter § 8B.121(a); emphasis added.) You have asked what "exclusive charge" means in this context.

ANALYSIS:

Generally, the same principles of construction applicable to statutes apply to the interpretation of municipal charters. (*United Assn. Of Journeymen v. City and County of San Francisco* (1995) 32 Cal.App.4th 751, 760.) The courts must always look first to the express language of the statute to determine its meaning. (*Id*.) But where the plain language of the statute does not show what a particular word or phrase means, the courts may look at how the same or similar language has been used in other statutes. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 42-43.) We will examine how the City has applied similar provisions of the 1932 Charter and the 1996 Charter that give City departments and agencies exclusive control or jurisdiction over their properties or operations.

Plain Language of Proposition E

Charter Section 8B.121(a) provides that the PUC shall have "***exclusive charge*** of the construction, management, supervision, maintenance, extension, expansion, operation, use and control of all water, clean water and energy supplies and utilities of the City as well as the real, personal and financial assets that are under the

[1] "SEC. 4.112. PUBLIC UTILITIES COMMISSION.

"The Public Utilities Commission shall consist of five members appointed by the Mayor, pursuant to Section 3.100, for four-year terms. Members may be removed by the Mayor only pursuant to Section 15.105.

"The Commission shall have charge of the construction, management, supervision, maintenance, extension, operation, use and control of all water and energy supplies and utilities of the City as well as the real, personal and financial assets, which are under the Commission's jurisdiction on the operative date of this Charter, or assigned pursuant to Section 4.132."

Commission's jurisdiction or assigned to the Commission under Section 4.132. [Emphasis added.]"

The dictionary defines "exclusive" as "not divided or shared with others," "not accompanied by others; single or sole," and "complete; undivided." (American Heritage College Dictionary (Houghton Mifflin 3rd ed. 2000).)

The dictionary definition, however, does not explain what "exclusive charge" means in this context. Nor does the measure itself provide any specific guidance. It does not contain any general exclusion from City laws regarding civil service, purchasing, contracting, resource conservation, etc. The ballot digest and official argument do not mention, let alone discuss, the "exclusive charge" provision. Nor do any of the paid arguments.

A literal interpretation of "exclusive charge" that left the PUC with complete and undivided control over the City's utility system, to the exclusion of any other City authority, would represent an unprecedented and unheralded revision of the Charter. A court will avoid, if possible, a literal construction of a statute that would lead to harsh or absurd consequences unintended by the legislature or the voters. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071-72.)

Interpreting Similar Language Under The 1996 Charter

The 1996 Charter gives the Municipal Transportation Agency ("the MTA"), like the PUC, "exclusive charge" of its property and assets.[2] But unlike the ballot measure establishing the Municipal Transportation Agency, Proposition E contains no provisions expressly making the PUC subject to local planning and zoning ordinances.[3] Nor is there an analog to the provisions requiring the MTA to comply with laws of general application.[4] If the drafters assumed that without provisions confirming the application

[2] "The [Municipal Transportation] Agency shall [have] exclusive charge of the construction, management, supervision, maintenance, extension, operation, use, and control of all property, as well as the real, personal, and financial assets of the Municipal Railway; and have exclusive authority over contracting, leasing, and purchasing by the Municipal Railway, . . ." (SF Charter § 8A.102(b)(1).)

[3] "The planning and zoning provisions of this Charter and the Planning Code as they may be amended from time to time shall apply to all real property owned or leased by the [Municipal Transportation] Agency." (SF Charter § 8A.110.)

[4] "Except as expressly provided in this Article, the [Municipal Transportation] Agency shall comply with all of the restrictions imposed by the ordinances of the City and County, including ordinances prohibiting discrimination of any kind in employment and contracting, such as Administrative Code Chapters 12B et seq., as amended from time to time. The Agency shall be solely responsible for the administration and enforcement of such requirements." (SF Charter § 8A.101(g).)

of general law to an agency with "exclusive control" of its operations, general law would not apply, then, it could be argued, the differences between the two measures are significant. By failing to include such provisions for the PUC, the drafters arguably intended a different result than the MTA. (See *People v. Turner* (1993) 15 Cal.App.4th 1690, 1698 [where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute governing a related subject is significant to show that a different intention existed]; *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73 [same].)

But rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent. (*People v. Cruz* (1996) 13 Cal.4th 764, 782-83.) The statutory construction rule against surplusage will be applied only if it results in reasonable reading of the legislation. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 234-35; *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 443.) The courts have recognized that drafters may include provisions as part of a statute that repeat or re-emphasize existing law, especially if the statute will be put before the voters:

> ***Although a statute or constitutional provision should be interpreted so as to eliminate surplusage, there is no rule of construction requiring us to assume that the Legislature has used the most economical means of expression in drafting a statute or constitutional amendment.*** In this case, it is understandable that, even if the legislative drafters of the November 1970 amendment understood there to be a general right to referendum with regard to county employee compensation under article II, section 11 of the California Constitution (see pt. III *post*), they would wish to emphasize in the amendment that the supervisors' salaries were subject to referendum. [Emphasis added.]

(*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772-73; see also *People v. Martinez* (1995) 11 Cal.4th 434, 449.)

And in *Santa Clara County Local Transportation Authority v. Guardino*, *supra*, the court accepted for the sake of argument that the second clause of Article XIII, Section 24, of the California Constitution, which declares that the Legislature may authorize local governments to impose taxes, was unnecessary because the power was already included in the Legislature's plenary power to tax under Article IV, Section 1, of the Constitution. (11 Cal.4th at p. 251.) But the court rejected the argument that the premise therefore rendered the second clause of Section 24 "surplusage":

> [I]t is too harsh to condemn the second clause of article XIII, section 24, as "surplusage." To be sure, the principal purpose of article XIII, section 24, is to prohibit the Legislature from imposing local taxes, as it decrees in its first clause. But the second clause serves an ancillary purpose. ***Rather than leave to inference the important matter of who has the power to tax for local purposes, the drafters chose to spell out the complete scheme***: thus the first clause of the provision bars the Legislature from imposing local taxes, while the second clause expressly confirms the Legislature's authority to grant local governments the power to levy such taxes. [Emphasis added.]

(*Id*. at pp. 251-52.)

As these cases show, a statutory provision is not surplusage simply because it confirms or reiterates a point of law that might also be established elsewhere. The provisions of Article 8A, acknowledging that the MTA is subject to general law, are not surplusage simply because the application of general law would otherwise be required by construction of the Article and the Charter. Conversely, the absence of parallel provisions in Proposition E does not mean that the voters understood or intended that general law would not apply to the PUC.

Interpreting Similar Language Under The 1932 Charter

This office examined the concept of "exclusive charge" in at least two contexts under the 1932 Charter. Former Charter Section 3.552 ("Recreation and Park Department – Powers and Duties") provided, in relevant part:

> Except as provided in Charter Section 3.698-3, the recreation and park commission shall have the ***complete and exclusive control, management and direction*** of the parks, playgrounds, recreation centers and all other recreation facilities, squares, avenues and grounds which are in the charge of the commission on the effective date hereof, or are thereafter placed in the charge of the commission, except as in this charter otherwise provided. * * * [Emphasis added.]

In San Francisco City Attorney Opinion No. 87-6, this office advised, among other things, that the Art Commission's jurisdiction under the Charter was limited to how a fence or a piece of playground equipment would look. As the opinion states, the Art Commission had authority over design, but "the Recreation and Park Commission is the City agency entrusted with the 'complete and exclusive control, management and

direction' of City parks and with the authority to construct new parks and playgrounds," and therefore was the appropriate agency to determine whether a fence or play area apparatus was necessary and where they should be placed to best serve their purpose. The "complete and exclusive control" language was not construed to eliminate the jurisdiction of other City agencies. Thus, the Art Commission had jurisdiction to approve the appearance of the playground equipment installed by the Recreation and Park Commission.

Although Opinion No. 87-6 dealt with the Art Commission's jurisdiction under the Charter, this office apparently reached a similar conclusion with respect to requirements imposed by ordinance. In San Francisco City Attorney Opinion No. 88-02, this office advised that Administrative Code Section 3.13, the Art Enrichment Ordinance, applied to Recreation and Park Department projects. There was no discussion of whether the Charter language cited above might shield the department from the provisions of the ordinance. (See also SF City Atty Op No. 78-13 [also applying, without comment, the Art Enrichment Ordinance to construction of a Rec & Park building].)

This conclusion, however, must be viewed in light of the laws as they existed at that time. In 1988 (and 1978), the Art Enrichment Ordinance was advisory. Before a department proposed a bond issue or made a request for an appropriation to construct a building, the Art Commission had to be given the opportunity to make a recommendation regarding the percentage of the budget to be set aside for public art at the project. The ordinance was amended as Section 3.19 and re-numbered in 1997 to require a two percent set-aside. The fact that the ordinance in 1988 was only advisory, and that it was part of the Board's process for proposing a bond issue or appropriating funds, might have underlain an implicit assumption that application of the ordinance did not substantively conflict with the grant of authority to Rec & Park in Section 3.552

The 1932 Charter also gave the Port Commission "exclusive power" to lease its properties. In City Attorney Opinion No. 86-05, this office advised that, notwithstanding the grant of "exclusive power," developments of Port property were subject to the Transit Impact Development Fee ordinance (SF Admin C §§ 38.1 *et seq*.). In addition, in Opinion 86-17, the office advised that development of Port property not needed for maritime purposes was subject to Prop. M (a 1986 initiative ordinance adding Priority Policies to the City's Master Plan) and Planning Code Section 101.1. (See also SF City Atty Letter Op No. 69-82 [advising that Port property not needed for maritime purposes was subject to the City's zoning power].) These conclusions suggest that even where the Port had "exclusive power" over its property, at least where used for non-maritime purposes, it nonetheless was subject to the Board's general legislative power.

Again, however, that interpretation may have been influenced by factors not present here. As we noted in Opinion No. 86-17, before the State transferred the port to

the City in 1968, Harbors and Navigation Code Section 3000.7 empowered the City to apply its zoning ordinances to surplus Port property:

> [T]he [San Francisco Port] authority shall request ***the City and County of San Francisco*** to provide zoning ordinances for property the authority intends to lease under Section 3000.5 [relating to surplus Port property] and said City and County ***is hereby authorized to prepare and adopt*** precise plans and ***zoning plans for such property*** pursuant to this section. [Emphasis added.]

It may be that the conclusion that the City had power to zone surplus Port property, even after the transfer and the eventual repeal of Section 3000.7, was based more on the statute (and the fact that we received the Port subject to that statute), rather than on an affirmation of the local legislative power. In Opinion No. 86-17, we concluded that in the context of the City's statutory authority to impose its zoning ordinance on surplus property, the words "exclusive power" clearly meant that the Commission alone would decide such matters as whether Port property is surplus, whether it should be leased, for what purposes it should be leased, and on what terms it should be leased. "At the same time, however, ***in the absence of an express disavowal by the City of Harbors and Navigation Code Section 3000.7***, the Commission's power to do these things remained subject to the City's police power in zoning matters." (SF City Attorney Opinion No. 86-17, at p. 21; emphasis added.)

"Exclusive Charge" Under Proposition E

As noted above, the Charter now gives the PUC explicit authority over a number of subject areas, including issuance of revenue bonds, setting of utility rates, and contracting for the purchase or sale of water. In those areas, Proposition E controls over contrary provisions of the Charter and local ordinances.

Prop. E also significantly expands the PUC's general control over decision-making affecting the utility system. Under Charter Section 2.114, the Board of Supervisors generally is barred from interfering directly in the administrative affairs of individuals departments, but retains the power to adopt legislation governing such affairs:

> Notwithstanding any other provisions of this section, ***it shall not constitute prohibited interference*** for a member of the Board of Supervisors to testify regarding administrative matters other than specific contract and personnel decisions at a public meeting of a City board, commission, task force or other appointive body, or ***for***

> ***the Board of Supervisors to adopt legislation regarding administrative matters*** other than specific contract and personnel decisions. [Emphasis added.]

The "exclusive charge" language of Section 8B.121(a) places the PUC beyond the Board of Supervisors' authority to adopt legislation dictating administrative matters for individual departments. (SF Charter § 2.114.) The Board no longer has jurisdiction to enact ordinances specific to the PUC or the City's utility system.

But Proposition E does not place the PUC beyond the reach of the City's general law-making power. It does not make the PUC an independent agency or a separate political entity. The PUC has authority over proprietary aspects of operations and administration -- "the construction, management, supervision, maintenance, extension, expansion, operation, use and control" of the system. But the PUC was not given independent authority over several key elements of "self-governance" that fall outside the operational sphere. For example, Proposition E does not give the PUC authority over its budget process (other than rate-setting), the appropriations process, merit system and civil service requirements (other than specific individual contracts), or other personnel issues. With a few narrow exceptions, PUC contracts remain subject to review by the Board of Supervisors under Charter Section 9.118. The PUC remains part of the City, existing by virtue of the same Charter, and subject to the legislative power otherwise reserved in that Charter to the Board of Supervisors. The Board may not adopt ordinances directed specifically at the PUC or the City's utility system. It may not adopt ordinances that would significantly interfere with the PUC's ability to fulfill its duties and responsibilities enumerated in the Charter or other core functions. But the PUC must still comply with all local ordinances applicable to City departments in general.[5]

Permits and Shared Jurisdiction

Where an ordinance would otherwise require the PUC to get a permit from another City department to construct, repair, or maintain its utility systems, the PUC must meet any substantive requirements of the ordinance, but it is not required to get the actual permit. Stated another way, PUC activities must conform to any applicable standards set in the Municipal Code, but an ordinance may not vest in another City

[5] City departments are not automatically subject to all police power ordinances of general community-wide application – only those that expressly or by necessary implication limit the sovereign power of the City. (*State of Cal. ex rel. Dept. of Employment v. General Ins. Co. of Amer.* (1970) 13 Cal.App.3d 853, 857-58.) Conversely, the San Francisco Administrative Code is directed for the most part only at City departments.

department the discretion to grant or deny a permit necessary for the PUC to exercise its primary authority over its utility assets and operations.

By analogy, this office has advised the Asian Art Museum and the War Memorial that they must participate in the landmark designation review process under Article 11 of the Planning Code. Both the Asian Art Museum and the War Memorial have "exclusive charge of the trusts and all other assets under their jurisdiction," similar to the PUC's "exclusive charge" over its assets and operations. (See SF Charter § 5.101.) But because of their trust responsibilities, neither the Asian Art Museum nor the War Memorial was required to obtain a certificate of appropriateness before proceeding with work on their properties.

The PUC must comply with those City ordinances that apply to other City departments. The PUC must make sure that it meets substantive standards created in those laws. For example, if the PUC decided to build an new office building, it would be responsible for making sure that the construction met all applicable Planning, Building, and Fire Code requirements. It ordinarily would want to seek out the expertise of the departments administering these laws in order achieve this result.

But the PUC does not have to follow procedures in the ordinances that would require the PUC to submit to the jurisdiction of another City department or give another City department discretion to say "no" to a PUC action that otherwise satisfies the ordinance. In the example cited above, the PUC would not be required to get permits from the Planning Department, the Fire Department or the Department of Building Inspection.

In some instances, the PUC's authority over its assets and operations will overlap and potentially conflict with the authority of another City department over a shared City asset, requiring some practical accommodation of the competing interests. For example, when the PUC wants to build a building on its own property, it can determine for itself whether it is in compliance with the Building Code, the Electrical Code, and the Planning Code. But when the PUC wants to lay a pipeline under City streets, it must coordinate the exercise of its jurisdiction with that of the Department of Public Works, which is made primarily responsible for street excavation in Article 2.4 of the Public Works Code. Public Works cannot tell the PUC whether to place a pipeline under a particular street, but DPW can enforce against the PUC substantive requirements regarding the location of the pipeline under the streets, the timing of the excavation, shoring, or other aspects of the construction that could affect other uses of the street surface as well as the subsurface. While the PUC is not required to obtain street excavation permits from DPW, it should work with DPW to coordinate the timing of excavations.

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Appropriations and Reserves

The grant of "exclusive charge" also affects the scope and exercise of the Board of Supervisors' fiscal authority over the PUC.

The Board of Supervisors still has a significant degree of power over the PUC's finances after Proposition E. The Board is not limited to voting "yes" or "no" on the PUC's proposed budget, as it is in the case of the Municipal Transportation Agency. (Cf. SF Charter § 8A.106(c) [Board may allow MTA's proposed budget to go into effect without any action on the Board's part, or may reject but not modify it by a two-thirds' vote].)

But the Board may not use its budgetary power as a means to interfere with or override the PUC's "exclusive charge" over its assets and operations. It may not do indirectly what it is prohibited from doing directly; the Board may only use its budgetary power consistent with its fiscal oversight responsibilities. The Board may cut the PUC's budget where the Board determines that a particular expenditure is financially unwise – where, for example, the PUC has not identified sufficient funds to pay for an entire contract, the costs for a project are inflated, or it would be a waste of money to perform a series of projects in the order that the PUC proposes. The Board in these instances would be acting within its power to prevent the waste of public funds, including PUC monies.

The Board does not have the authority, however, to cut an appropriation because it disagrees with the PUC's underlying policy decision. The Board may not refuse to appropriate funds for an otherwise fiscally-sound project because the Board thinks a proposed reservoir should be located in another neighborhood. And if the Board does cut an appropriation for fiscal reasons, it may not compel the PUC to spend the savings on another use that the Board favors and the PUC opposes.

Similar restrictions also apply to the Board's power to place PUC appropriations on reserve. The Board may only create reserves to further its legitimate fiscal oversight responsibilities. The Board may place appropriations on reserve where it determines, for example, that the particular expenditure is questionable financially for the City, or where the Board concludes that it does not have sufficient information regarding the expenditure to make a determination related to its oversight function. But the Board may not impose reserves simply because it does not agree with a choice the PUC has made about how best to carry out its operations.

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Policy decisions about how to spend PUC funds are entrusted exclusively to the PUC, and – except for fiscal reasons -- the Board may not override those decisions. The Board may not directly compel the PUC to change its policy, and it may not use its fiscal oversight authority to induce the PUC to achieve the same result.

Very truly yours,

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/S/

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APPROVED:

/S/

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