

TPAC Second Administrative Claim Hearing

May 18, 2017

>> SAM LICCARDO: Administrative hearing for claim two, and we're going to conduct this hearing on the issue of claim for breach of contract inequities, filed by Tributary Agencies against San José and Santa Clara. We'll first begin our presentations from the Tributary Agencies, who have 10 minutes to present. And then we'll return to the co-owners. John?

>> JOHN GATTO: Yeah, before we start, can we have somebody explain what the problem or possible outcome to this would be and what the ramifications of that outcome might be?

>> SAM LICCARDO: Uh... Trying to figure out who would be in the best authoritative position to answer that. That'd be Rosa or...? Okay.

>> What was the question?

>> SAM LICCARDO: Let me get her attention.

>> Oh. I'm -- I'm sorry.

>> SAM LICCARDO: John, you want to repeat the question?

>> JOHN GATTO: Yeah. Can you tell us what the possible outcomes of this hearing might be and what the ramifications of those outcomes would be?

>> Uh, well...

>> JOHN GATTO: I mean, it's either yes or no? Is that...?

>> TPAC will make a decision under the master agreement. There is a report and a resolution that follows. Any part that objects to the resolution or finding of TPAC has the opportunity to appeal it. That's just the procedural process that's in the master agreement.

>> JOHN GATTO: But we can vote yes or no on the -- What is the -- the vote that we would be taking?

>> Whatever you decide. It's, you know, based on our presentations. You vote however, you know, you believe the claim should fall.

>> JOHN GATTO: But then, is it -- Is it a recommendation that goes to -- to the next level?

>> It is a TPAC resolution that then can go to the next level if there is an appeal, yes.

>> So, yes, just to add, I will be recommending that TPAC recommend to the owners settlement of our claims. So I think that's the appropriate action item.

>> SAM LICCARDO: Well, I think what we're determining is whether or not there's a finding of breach. Is that -- Is that right?

>> Yes.

>> SAM LICCARDO: Yeah, so... This -- This body is responsible for determining/making/finding was there a breached contract or not.

>> JOHN GATTO: And if we determine yes, is that the end of it, or what happens?

>> Well, the body needs to make a recommendation. It needs to do a report and a recommendation.

>> JOHN GATTO: And then that would go to the Council?

>> That would go to the owners.

>> JOHN GATTO: To the owners, okay. And then they would do what? Either accept that or not accept that?

>> It would actually go to the...

>> So I think David would agree. [Laughs] It's my understanding in the master agreement that once TPAC makes a decision that any of the agencies can object to the decision, and they can appeal. That goes to a joint meeting of all the legislative bodies akin to what's still pending from the first claim, which was an objection from the Trib Agencies, and we are attempting to schedule a joint meeting of the legislative bodies on the first claim.

>> JOHN GATTO: Okay. So, the -- whatever the decision is of this body, that's the decision that either is accepted or appealed. And then, if it's not accepted, then it goes to the -- to the larger group?

>> Yes, to the -- Under the contract, it's a joint legislative meetings of all the agencies.

>> Hypothetically, it could be accepted.

>> JOHN GATTO: Yeah. No, I'm saying --

>> And that would be the end of it.

>> JOHN GATTO: But it doesn't go to the Council. It goes to the next group.

>> Yes.

>> JOHN GATTO: Okay.

>> Okay. Ready to proceed?

>> DAVID MEHRETU: Yes. So, thank you. Good afternoon. My name is David Mehretu. I'm from Meyers Nave. I'm special counsel to the Tributary Agencies. So, today's hearing concerns the Agencies' second claim for breaches of the master agreements between the owners and the Agencies. Given the short time period I have here today -- just 10 minutes -- I'm going to address three main issues. Before I do that, I want to start off by clarifying what this dispute is not about. It's not about the Agencies trying to avoid paying their share. It's not about preventing anyone from pursuing environmentally beneficial or socially beneficial projects. And it's not about preventing San José from exercising its discretion to manage the plant in accordance with the master agreements. Thank you. Rather, the dispute comes down to transparency, ensuring that our repair funds are used for legitimate purposes, and being able to plan, budget, and pay for plant costs. So, first, I'm going to address the lack of contractual authorization for the capital improvement plan, or the CIP. As a legal matter, large improvements like the \$1.5 billion CIP are not authorized under the master agreements, as detailed in our claim. This does not mean that the Agencies don't support the CIP. We do. The problem is that, because the master agreements don't contemplate major capital improvements, except those expressly agreed by the parties, or for expansion, the master agreements don't have the terms to facilitate the CIP. For example, there are no terms that will ensure that the Agencies can effectively plan, budget, and pay for large capital improvements. We, therefore, support amending the master agreements to authorize the CIP and to include the provisions to allow us to do this -- to allow -- to allow the Tributary Agencies to plan, budget, and pay for the CIP. Contrary to the owners' response, we're not suggesting that the master agreements should be amended in a piecemeal fashion before embarking on each CIP program. Rather, the master agreement should be amended once to authorize all the CIP projects and to add the provisions to allow the Agencies to adequately plan, budget, and pay for the CIP. An example of the appropriate provisions that would accomplish this -- but there are a number of options -- would be for the parties to participate in common financing under fair terms. San José will probably point to one instance where the plan underwent an \$84 million or \$85 million capital improvement unrelated to expansion and without amending the master agreements. What you

should know is that such improvement occurred in the aftermath of a major spill at the plant. We, therefore, did not insist on an amendment to the master agreement. Next, I'm going to address transparency. As a legal matter, the Agencies have the right to audit San José's compliance with the master agreement. San José incurs tens of millions of dollars on behalf of the Agencies every year, so, of course, we're entitled to know where that money goes and how it's spent. The owners will likely cite a laundry list of documents and information they provide to us. What's provided to us, however voluminous it might be, does not contain the necessary and required information to confirm compliance in many areas. For example, we cannot determine that our bills are correct, because key information has been withheld, such as the underlying records supporting the line items in bills. For example, in the instance of actual costs, the Tributary Agencies are not provided with a detail of actual costs incurred for a project with a clear audit trail to the city's general ledger. True-up statements, which are necessary for reconciling budgets with actual expenses, contain undefined line items, such as "rebudgeted," and we don't know what "rebudgeted" refers to. Oftentimes, the rebudgeted amounts are the most significant items in the third-quarter billing. And when we find inconsistencies in bills, which exist, we have no way of determining why, because San José doesn't give us the policies or practices it employs to true-up the bills. This is a clear breach of the master agreements. San José is required to provide us with a statement outlining the methods of adjusting costs and actual adjustments. It doesn't provide this. Contrary to the owners' response, the citywide audit is not designed to test compliance with the master agreements. For example, it would not test whether San José properly allocates the cost to the Agencies according to the allocation methods in the master agreements. It's hard to imagine why San José would be opposed to a compliance audit. Such transparency is not only good public policy, it's San José's public policy, and the Agencies are willing to bear the substantial cost of planning such an audit. I'm going to move next to the evidence of misuse of funds that we've seen, which substantiates our concerns. We discussed many of these issues in our claim, and I'm going to address them here. There's six of them. First, San José plans to charge the Agencies tens of millions of dollars to expand the recycled water facility. Although the existing facility is used to comply with our permit, San José is not authorized to expand the facility without our consent. The owners seem to try to legitimize this cost by casting them, or the costs -- as casting them as reliability improvements. But this is belied by San José's own planning documents, which make clear that

the improvements are needed to expand capacity to meet increasing demand. Second, San José has already charged the Agencies tens of millions of dollars for an advanced treatment facility to provide ultra-purified water. This facility is entirely unnecessary for the plant, nor owned or operated by the plant. The owners are wrong that the cost of this advanced treatment facility are legitimate, simply because the facility discharges back to the plant. According to that reasoning, the Agencies would have to pay for any use San José allows to discharge to the plant, which is obviously not true. Third, San José has charged the plant millions of dollars for public art, purportedly through an ordinance that does not legally apply to plant costs. Public art for the city of San José is clearly not a legitimate wastewater expense. Contrary to the owners' response, this doesn't change simply because some of the art could possibly be used to convey messages about wastewater, whatever that exactly means. Fourth, San José has used the plant funds to sponsor holiday programs in San José parks. Again, it's hard to see how holiday programs are a legitimate wastewater cost, however small the costs might be in the bigger picture. The owners try to legitimize this by saying the sponsorship provided opportunities for outreach, but they point to no evidence that this was the actual intention or that any outreach was actually done. Fifth, San José has not provided records to validate whether the plant pays more than its share of pension liability for San José employees, although this is a very plausible outcome and would clearly be a serious breach of the master agreements. The owners fail to even respond to this in their claim, except to simply state that San José is entitled to be reimbursed for overhead, which is a generic point that nobody refutes. Finally, we've learned from a senior San José employee that San José essentially double bills the Agencies, or I should say the plant, for overhead costs related to San José's staff who manage investment funds for the plant. The owners, again, don't bother to respond to this specific claim in their response, which either shows bad faith, gamesmanship in the hearing process, or suggests that this claim is actually valid.

>> SAM LICCARDO: Thank you. I'm sorry. Did you say 10? No, no, we still have time, don't we?

>> Yes.

>> SAM LICCARDO: Okay. Forgive me. Please proceed. I'm sorry.

>> About 1 1/2.

>> DAVID MEHRETU: Thank you. So, I'm actually wrapping up now.

>> SAM LICCARDO: Okay.

>> DAVID MEHRETU: For all these reasons and those discussed in our papers, we request that the committee recommend to the owners that they settle our claims on the reasonable terms we requested and find the breaches of the master agreements we've identified. Thank you.

>> SAM LICCARDO: Forgive me for cutting you off.

>> DAVID MEHRETU: No problem. I was close to being done.

>> SAM LICCARDO: Okay. Okay. So, the co-owners have 10 minutes, as well.

>> So, thank you for the opportunity to respond on behalf of San José and Santa Clara, the co-owners of the facility. Instead of a formal response, I'm going to focus on what I think are the critical issues in the claim. We were before March of last year on the first claim. The issues raised by the second claim are substantially similar, except the interpretation of the master agreement in support of the claim have evolved over time. These were the claims from the first claim, the allegations from the first claim, and TPAC's findings. In the master agreement, the administering agency's authority is very clear, and the Agencies don't dispute that. This includes the obligation to make improvements to the facility. And they approved the 1983 agreements with the Agencies. The councilmembers' full support and approving the master agreements were also very clear that these master agreements supercede all other prior agreements, including the settling agreement. It is the intent to update new information through the exhibits of the master agreements versus revising the entire agreement each time there was a project. This was intended for long-term viability of the facility and stability and funding. The

master agreement amendments are very clear. The conditions under which they are amended are related to when there's an expansion in design capacity to realize participation in financing, which could conceivably occur here, if we have call on financing on the projects. That's when the amendments would be done. And to document the...which is a capacity between the Agencies, which also occurred in 2006 and 2009. So, the definitions are clear, because...to the second claim is there no concept now that future improvements in the master agreement, the definition of future improvements and what capital costs could be charged for could not possibly include the types of projects in the CIP. But the definitions in the master agreements are essentially identical to what's in the state revenue guidelines. And these guidelines dictate what kinds of costs can be charged to residents and businesses. They're identical to what's in the master agreements, in terms of what we can charge the Agencies for authorization and maintenance and for capital costs. So, in the master agreement...be the charge for capital costs for future improvements, and they have to be based on the adopted budget. And the reason for capital costs for improvements is associated with the reserve capacity is the concept that there's allowed use for life we put in place in improvement that is amortized over time for the benefit of future users. And examples of improvements that have occurred in the past that is...in many of the projects that are in the current CIP is listed here in this slide. For example, the...building improvement, which was Headworks 2. There are two projects in the current CIP that would also repair the Headworks -- save Headworks and make Headworks improvement. The alternative disinfection facility, which allowed the facility to transition from the gaseous chlorine using the railcars, there's one project similar to that, which is the Iron Salt Feed Station in the current CIP. They both involve similar work. The electrical reliability improvements that was previous done, there are latter projects in the current CIP that also intend to address reliability and energy management. This is a...facility, the emergency diesel generator, and the switchgears. Fire Main replacement, same thing. There's a...water systems improvement in the current CIP that would replace water piping systems throughout the facility. Hand rail replacement that was previously there. There was a nearly identical project that is for support building improvements for the same purpose, which is to address improvements in fire...system upgrades. So, as you can see, the past improvements we've made are very much akin to the improvements that are in the current CIP. Those two pages illustrate the 33 packages that were confirmed after the validation process. I would like to point out the master agreement provides

that even if we can't come to an agreement on a new term, as long as the Agencies discharge to the plant, there is an obligation to reimburse the owners for the cost of treating the sewage. And the cost of treating the sewage includes the costs to operate and maintain the facility includes the cost to put in new improvements. So, there's really no way to get around the fact that these are going to be real costs to the owners. The second claim...speaks to the fact that they are being double billed for overhead. That's certainly not the case. And overhead does include the town benefits, because that is the cost of personnel. The personnel that is necessary to properly administer and operate the plant. The master agreements recognize that pension and other benefits are part of employee costs. Their...in the second claim that overhead due to retirement is higher than it should be is entirely speculative. In fact, the Agencies acknowledge that portion amount might be underestimated. The opinion is that the facility are part of the federal-aided retirement system, not a separate system for plant employees... The retirement boards sets the pension contributions. San José does not control the determination of the portion contribution. And this is not a bill that the city can simply decline to pay. The Agencies should understand this since they also receive a bill from... ..retirement is not an issue that is unique to San José. With respect to records, my written response will provide examples of information that are sent to the Agencies throughout the year. ...records but careful study as we have tried to do in exhibit P and Q, you can track how these public records from the public records request can inform the periodic communications we provide to the Agencies. The wastewater treatment program is a large and complex program, and the process for understanding how it works must be iterative. But it isn't overreach to assume that the records that were provided are insufficient and to accuse us of fraud and malfeasance just because understanding records requires investment in time and resources. ...the master agreement charges for...capital costs must benefit the treatment program. The Agencies agree to pay for the costs of...under the master agreement of 1995. This...continues until it is...a permit requirement and a debt is paid off. And because the water that's treated by AWTF does, in fact, come back to the facility, it has been...distributed as recycled water, the AWTF is part of the treatment process. The reliability projects that would address current...operation during peak hours is also a legitimate operational cost for the South Bay. Example -- the TPS upgrade would provide a backup dump to ensure...in case the main pump fails. If the main pump fails and there isn't a backup pump, there's gonna be a reduction in pressure in the entire system.

Public art...capital projects. If they are included as part of the physical structure, that becomes a cost to the structure. And it is not millions of dollars that the Agencies have been charged. In fact, it's \$129,000, which is more smaller now, the money, but its uses are legitimate.

>> One minute.

>> We would urge TPAC to make the following findings -- that the Agencies are required to pay their share, which they've acknowledged they're willing to do. The Agencies have been provided sufficient records and that they were properly charged for overhead, recycled water, public art, and educational outreach. Here I would like to take this opportunity to say what gets lost in the dispute, we have an incredibly dedicated group of public servants whose first priority is to ensure the safe operation of this facility. Every day, plant staff work with...personnel to manage a facility that could fail with each delay. In these times, it's much easier to criticize than to be part of the solution. We should all be hopeful that the capital program will be a success and provide staff with the resources we all need to succeed.

>> Time.

>> Thank you.

>> SAM LICCARDO: Thank you. Okay. We have two members of the community that would like to speak, so I'm gonna ask them to come forward now, and then we'll proceed to the discussion from the board. Ken Colson is the director of the Burbank Sanitary District and Rebecca Yoder, who, I believe, also works at Burbank.

>> KEN COLSON: Yeah, I'm Ken Colson, Director of Burbank Sanitary District. I have three points I'd like to make. To get to the topic of claim number two, I have to introduce how we were informed as a -- as a non-member of TPAC. On May the 5th, the mayor sent a letter to us, addressed to TPAC, asking for a waiver of the remainder of the administrative hearings. And what interested me was the fact that, although we are recognized as participating members of TPAC for the plant, we are not recognized at this table. So our voice is -- is not heard other

than being a guest, and I think that's unconscionable. It's just...schizophrenic. You can't have it both ways. We're either on this, or we're not. The second point I want to make is, uh... the Tributary Agencies believe that our claim is legitimate and valid. I've heard over and over again two conversations here, that the Agencies don't want to pay, are not willing to pay it at the same time, your attorneys said, were trying to get around it. Which is it? Are we willing to pay? Yes. We are not trying to avoid anything. Um... The accusation that the -- the plant has paid for things like Christmas in the Park are valid. I don't know how you could sell that to anyone out there paying taxes. I really don't. So, um... I think that the issue of invoicing is a valid part of our claim. If we can't -- If the city can't get the invoice clear of what you're spending it on and you have refused or been unable to present it to us, and the claim that the reason we don't understand is because we haven't taken the time or the energy to read hundreds of documents is nonsense talk.

>> SAM LICCARDO: Thank you, Mr. Colson.

>> KEN COLSON: Thank you very much.

>> SAM LICCARDO: Thank you. Rebecca Yoder.

>> REBECCA YODER: Hi. I'm Rebecca Yoder, President of the Burbank Sanitary District board of directors. Louder? Sorry. I just want to say, in 1983, when the master agreement was drafted, all I wanted for Christmas was my two front teeth. I was playing music on a Fisher-Price record player. Those words are still controlling how we operate today, and I think they need to be updated. There were no...programs, there was no water recycling, there was no public art, and none of this is reflected in our master agreement, and I don't think it's fair for people in Burbank Sanitary District who don't vote for mayor, don't vote in city elections, don't get city police, don't get city services to be responsible for paying for art and Christmas in the Park and all of these other things. I have to answer to the people who voted for me, and it's their money that is being spent here, and I need you guys to be accountable. Furthermore, I'd like some voice. I'd like to be able to sit at the table instead of in the peanut gallery. I think we have that responsibility to the people in our district, as small as it may be. It's real. As far as

the audits go, you guys have audits, but those audits are not for us. They are not for making sure that we are paying what we're supposed to be paying, and I think that's important. It's like me asking you guys how to get to Starbucks and you hand me the white pages from New York City. Lots of information -- not relevant. That's my point. Thank you.

>> SAM LICCARDO: Thank you. Michelle? Michelle Kaelker-Boor from Burbank Sanitary District.

>> MICHELLE KAELKER-BOOR: Hello. My name is Michelle Kaelker-Boor, from the Burbank Sanitary District. There has been, and continues to be, a huge disconnect between ownership of the wastewater treatment plant and the Tributary Agencies, in my opinion. We have been trying to find concrete answers so that we can all move forward and do what needs to be done. We need a solution, and quickly, so we continue to support the effort to improve this treatment plant. We understand it's important. From the beginning, and for more than a year now, the Tributaries have been on board to pay their fair share. I can't stress that enough. We want to pay our fair share. Please don't mistake that again. We have continued to pay it throughout this time of trying to negotiate our master agreement contracts. Our main goal is to make sure that these outdated agreements with the ownership are solid and adequate to sustain ongoing and future projects. The current contracts are extremely vague and do not provide enough clear definition to encompass the enormous task of rehabilitating the wastewater treatment plant. We need a clear solution. Also, the city-level audit may look -- it may work fine just for most situations, but when it comes to being accountable to our rate payers, as Becky has said, for our share of a \$1.3 billion project, they want and deserve complete transparency to know that we have the ability to track their hard-earned dollars. The Tributary Agencies even went as far -- as far to hire two separate, nationally recognized auditors to go through those piles of paper that we received, and they were unable to see clearly how our districts funds were being used and managed. So we need a transparent solution. We also have been asking for a cohesive team. As it stands now, there are only three out of five Tributary Agencies that have representation at the TPAC to be able to discuss relevant terms that are important to the wastewater treatment facility. For example, as elected officials at the Burbank

Sanitary District, we have to ask our rate payers to pay into this project, yet there's no ability for our district to openly discuss and ask questions and voice our concerns.

>> SAM LICCARDO: Thank you, Michelle.

>> MICHELLE KAELKER-BOOR: I have one other thing I'd like to say.

>> SAM LICCARDO: If you could wrap it up.

>> MICHELLE KAELKER-BOOR: Yep. So, we need a cooperative solution, but, really, we need more. We need a complete solution. We need a clear, transparent, cooperative, reasonable solution, and we need a seat at this table. Thank you.

>> SAM LICCARDO: Okay. We turn now to the TPAC members for discussion.

>> JENNIFER POUSHO: Excuse me, Mayor. Jennifer Pousho from the city attorney's office. Just for the record, I have a clarification. I think you've mentioned that you want to -- that you're gonna ask the committee to settle the Trib's claims, and just for the record, I'm just trying to get clarification that it's not set forth here in the claim, so --

>> Well, I think the claim asks for the relief that we want.

>> JENNIFER POUSHO: Okay. Just wanted to...

>> So I want the board-- the committee to recommend that.

>> JENNIFER POUSHO: And to uphold the claim.

>> Yes.

>> JENNIFER POUSHO: Thank you.

>> SAM LICCARDO: Okay.

>> JENNIFER POU SHO: Thank you.

>> SAM LICCARDO: Okay. So, our decision is whether we uphold the claim or deny it. All right, discussion. John?

>> JOHN GATTO: Well, no, I think the claim is valid, and I would make a motion that we uphold it.

>> SAM LICCARDO: Okay. There's a motion. Is there a second?

>> Second.

>> SAM LICCARDO: Okay. Motion and second. Discussion. I just had a couple quick questions myself. This issue about whether the advanced treatment facility is really necessary for plant operations. My understanding is, to some extent, that's not really up to us. I believe, in 2014, didn't we ask State Water Resources Control Board to remove the SBWR requirement from -- from the permit?

>> Yes. We did. We tried to get it removed as a requirement.

>> SAM LICCARDO: Yes, I'm sorry. Remove the program as a requirement. Forgive me.

>> Right. And they would not do that...

>> SAM LICCARDO: Okay.

>> ...in the 2014 renewal.

>> SAM LICCARDO: So, as far as the state's concerned, it's part of what we pay for in operations of the plant.

>> \$10 million worth.

>> It is a requirement of the permit to maintain the South Bay system.

>> SAM LICCARDO: Okay. On the issue of the programs that ESD ran in the parks -- I believe it was Christmas in the Park -- you want to explain what that was about?

>> It's my understanding that, over the course of the many years, there was about \$2,500 that were allocated to the Agencies to fund Christmas in the Park. They do outreach and education to visitors to Christmas in the Park about the wastewater program. And, um... 40% of the visitors that come to Christmas in the Park, in fact, come from surrounding cities. So it's safe to say that the residents of these service areas likely benefited from the education and outreach about the program.

>> SAM LICCARDO: Okay. So, Rosa, the amount, you say, was \$2,500?

>> That's correct -- \$2,500.

>> SAM LICCARDO: Okay. And was that in multiple years, or...?

>> Yes, that's in all of the years.

>> SAM LICCARDO: In total.

>> Cumulative.

>> Cumulative.

>> SAM LICCARDO: Okay. So that's the total amount. And then the public art, I understand -- I think you clarified -- it was a hundred and...

>> \$129,781.

>> SAM LICCARDO: The \$129,000... I recall a few years ago, we were doing our best to characterize projects as rehabilitation rather than capital so we'd avoid that charge. Is that right?

>> That's correct.

>> SAM LICCARDO: Okay. We, I believe, are taking this back to the council to essentially eliminate the requirement altogether. Is that right?

>> Prospectively, yes. Or, there is a proposed ordinance that will be before the city council to eliminate projects at the art...and the public art allocation.

>> SAM LICCARDO: Okay. Thank you for all that. Just a question, I guess, the counsel for the Tributaries. I'm trying to understand the concern about whether the plant pays an excessive share of the pension liabilities. It seems to me we publish lots of information about our pension liabilities, and we have a lot of public scrutiny over that issue, both at the council level and at the pension-board level. We have outside auditors that determine the exact amount. We certainly know and can calculate the number of employees and how long they've been working there. So, help us understand what is not -- what is not seen, what is not transparent.

>> DAVID MEHRETU: The concern here is that the plant includes other stakeholders, so it's not just about San José. So we don't necessarily have any doubt that pension, as a general matter, pension liability is handled in an improper way, citywide. We have no basis to know one way or the other. What we know is that the plant is a separate unit, and the profile of the plant employees might be different from the average employees of the city. So, as the Tributary Agencies, we don't share in San José's overarching employee structure. We only are concerned

with those related to the plant. And so, if their profile is different from your average employee in San José, then we might be overpaying for pension liability for the plant.

>> SAM LICCARDO: Okay.

>> DAVID MEHRETU: And so it goes back to transparency, and it's more of an example, more than anything, to show that we just don't have enough transparency, in terms of what's going on with the plant.

>> Okay. I heard you describe a list of six items that were evidence of misuse of funds. It sounds like what you're saying is you don't know whether or not these dollars are misused.

>> DAVID MEHRETU: That's an example of a potential misuse of funds.

>> Okay. So, it seems to me that's a fairly easy problem to figure out -- that is, identifying X number of employees and calculating -- We're obviously calculating the pension cost ourselves.

>> If I may, the retirement board sets the pension contributions...

>> Right.

>> ...and gives the bill to the city. We don't dictate how they come to that number.

>> Agreed.

>> And that number is based on the entire demographic of the city.

>> Okay.

>> And that is the case for...as well. It's of the pool. There isn't a specific actuarial that is done for plant employees.

>> SAM LICCARDO: Right.

>> They don't have a separate retirement system. Just like in...any city that participates in it doesn't have its own actuarial for that particular city, in terms of their pension contribution. That's just not how it works.

>> SAM LICCARDO: Right. So, I guess, then, for counsel, then, is your assertion that the average life duration of members who work at the plant is half a year shorter than the rest of the city's, we should be somehow doing separate actuarial calculations for every employee to figure that out?

>> DAVID MEHRETU: Well, the city -- It's my understanding that there is a citywide actuarial study.

>> SAM LICCARDO: Yes.

>> Yes.

>> SAM LICCARDO: Yep. And that's published.

>> DAVID MEHRETU: Yes. And so the plant might be an exact replica of that, in terms of its profile.

>> SAM LICCARDO: Right.

>> DAVID MEHRETU: Okay. That's possible.

>> SAM LICCARDO: Right.

>> DAVID MEHRETU: But it's very unlikely.

>> SAM LICCARDO: Yeah.

>> DAVID MEHRETU: So, to the extent that it's different, we're either being overcharged or potentially undercharged.

>> SAM LICCARDO: Right. But they might be getting a bargain.

>> DAVID MEHRETU: But the bottom line is that the city has other stakeholders involved. So it's not as easy to just say, "Well, let's just kind of X these things out and cancel them out, let them net out." It's an example of where the plant is being operated as just an extension of the city, and that's not appropriate for the Tributary Agencies.

>> SAM LICCARDO: Is there some legal basis for concluding that? I'm trying to understand.

>> DAVID MEHRETU: Well, just the contract that we have. So... That would be the legal basis.

>> SAM LICCARDO: Okay.

>> And I would dispute that based on the exact language of the master agreement, which is that the administering agency provides the personnel. The personnel costs includes the retirement benefits. It's whatever retirement benefits are actually paid. This is reimbursement. No one's making a profit out of this endeavor.

>> SAM LICCARDO: Mm-hmm. Okay. Other questions or comments? Yeah. Pat?

>> I -- I think you adequately responded to the public-art issue. That's been remedied. I think that the educational outreach was pretty minimal, and if you brought it up today, I'd support it. Um... And the issues of perceived or suspected misconduct, the only thing I can say is, if we have strong physical evidence to support these allegations, then maybe we could investigate

them, but absent proof, physical evidence, that some of these six things occurred, I don't know how we can proceed. But I do have one -- one question about -- about who is -- represents the individual members on that, on the TPAC committee, the advisory committee. Is that enumerated in the agreement...

>> Yes.

>> ...who will be on? Okay. That's -- That was my only question.

>> SAM LICCARDO: Okay.

>> Yes.

>> That's set forth in the M.A.

>> SAM LICCARDO: Member Davis.

>> And my... David... He brought up -- Well, the art, that was answered. And also, this Christmas in the Park, but you also brought an opposition to an audit? You said something that they will not -- their -- that we have an opposite to an audit.

>> DAVID MEHRETU: No, I said I can't imagine why San José would be opposed to an audit.

>> So -- And then you said this rebudgeted item, what is -- Can someone just explain that to me?

>> DAVID MEHRETU: Sure. There's a budget, and that's how the Tributary Agencies are initially charged. And then there's a true-up, where, basically, the plant looks at the actual costs and says, "Okay. We told you we're gonna pay \$100 million or whatever, \$1 million. Actually, the cost was \$900,000. So you get \$200,000 back." That's the true-up. When we get the true-up, it's supposed to represent actual costs, but sometimes there are line items that say

"rebudgeted." There's no explanation for what that means. There's no explanation for what it is. There's no underlying documents for that. And the problem is, unlike perhaps the public art that, you know, has, essentially, to me, sort of been explained away, these are large items. They're sometimes the largest items in the third-quarter billing, and it's just vague. We don't know what it means, and our public accountants cannot figure out what it means. There's no underlying documents. And there's no description of how the true-up is prepared, which is an express requirement in the master agreement. This is not sort of a fuzzy "we can choose to do it or not."

>> So that's where this transparency issue comes into. Can you answer that question, or...?

>> Yes, and my position would be the reconciliation documents. Those, in fact, set forth the basis for rebudget. In fact, the Agencies were provided far more than that. They were provided the backup accounting documents for that. And...to test each transaction, then the appropriate forum would have been to meet together and say, "I want the invoices for this specific transaction," and we would have been happy to provide that. But the fact of the matter is, if you want every single invoice for every single receipt for every single transaction that crosses half a dozen departments, in terms of this city, you know auditors don't function that way. What they do is, they look at these accounting reports, and then they test the transactions. We then track down those invoices, and they verified that that was the case. If there was a question about a rebudget in the third-quarter reconciliation, then they locate the records that support the rebudgeted amount, where did this filing come from, where did it go, and they follow the documents, and we provided those documents to the Agencies.

>> Okay. Well, David seems to think you're not doing that job, so, okay. All right. And then the other thing was... You said something about an audit --

>> SAM LICCARDO: Could you pull the microphone closer?

>> Oh, sorry.

>> SAM LICCARDO: Yep.

>> Oh, my gosh. I keep forgetting about this microphone stuff here. You also said something about a concern with... I think I wrote this down. Concern with financing audits. So, I kind of --

>> DAVID MEHRETU: Citywide audit.

>> You were speaking, and I was kind of writing really fast. So, something about a -- I guess a concern for financing audits. So, is that where -- Is it part of this rebudgeting thing? Was that in that same vein?

>> DAVID MEHRETU: Well, I think what you're referring to is the citywide audit. I hope I didn't refer to it as the financing audit, but maybe I did.

>> Okay. All right.

>> DAVID MEHRETU: But the --

>> The finance audit. That's it. Okay.

>> DAVID MEHRETU: Well, the city has an audit conducted on the city. It's a citywide audit. And the owners's response has been that, "Listen, you can look to the citywide audit to figure out whether we're doing things -- or, we're complying with the master agreements at the plant." The citywide audit is not designed to test compliance with the master agreements. The master agreements have numerous provisions that say, "Do X, Y, and Z." The citywide audit is not looking at that at all. So it just doesn't -- It just doesn't relate to the master agreements. That's just our point.

>> So, are you looking -- Are you looking for a deeper dive, separating the plant from city business?

>> DAVID MEHRETU: That -- Well, those are -- I think those are two different things. We're looking for a separate audit.

>> Okay.

>> DAVID MEHRETU: A separate issue. And as Rosa noted, audits don't just look at everything. They test. They do deep dives into specific transactions. But to suggest that the Tributary Agencies, on their own, kind of have to do these ad hoc audits and sort of beg for extra information, it's my understanding, actually, that we have already done that, and we haven't gotten anywhere. I think it's inappropriate. We are entitled to audit compliance.

>> Okay.

>> DAVID MEHRETU: That's a legal requirement.

>> Okay. Thank you.

>> SAM LICCARDO: Rosa, could I ask, how many pages of documents have been provided so far in response to PRAs and other requests over the last couple of years in this dispute?

>> Around 50,000. But I would like to point out that there isn't actually an audit requirement in the master agreement. We are required to keep proper records, and the Agencies, even though the master agreement doesn't expressly provide it, are free to come in and audit our records. And I'm not at liberty to disclose the extensive discussions we've had, but the devil is always in the detail, in terms of what each agency is willing to do. So...

>> SAM LICCARDO: Right. So, just to understand it. So, we've produced 50,000 pages of documents so far. And if any agency had questions about, "Hey, this issue about recycled water infrastructure, is this really about rehabilitation, or is it about expansion? Show me additional

documents that substantiate what exactly you're spending money on," they could come in and give them a couple boxes of receipts, and they can look at all those documents?

>> Well, I think what happens with the reliability projects, as an example, is you have a strategic master plan. But in order for any of these projects to go forward, there has to be a contract or a project that's associated with it, and at that point in time, they have to describe, "What is the purpose of this project? Is it, in fact, for reliability?" And it comes before TPAC, and that's when the conversation is, "Well, if TPAC doesn't believe it's for reliability, then your recommendation is to not proceed." But there's usually extensive council meetings, technical meetings. That is available to the Agencies as to the purpose of each project before the money is actually spent.

>> SAM LICCARDO: So you're saying... Let me go back for a moment. First, what we're saying is, the information would be available before the decision's made. Now I'm asking you, after the decision is made, is there any reason why a particular agency can't come to you and say, "Hey, can we look at the invoices on that project to make sure the dollars were spent the way they were supposed to be spent?"

>> There is no reason why. They would all be public records.

>> SAM LICCARDO: Okay. All right. Questions? Anything more? All right. So, we have a motion, I believe, to uphold the claim of breach. That was by member Gatto, and it was seconded, I believe, by member Grilli. I'm gonna post that motion. Any other comments? All right. On the motion, all in favor?

>> JOHN GATTO: Aye.

>> Aye.

>> Aye.

>> SAM LICCARDO: There are three ayes.

>> I want to uphold it. If I uphold this, are they still gonna work this out? Is that what we're doing? Not shutting them down? There's still a conversation going on here?

>> SAM LICCARDO: [Chuckles] I don't know exactly how to answer that question. There's gonna be negotiations before, after, and during all this, but, Rosa, do you want to respond?

>> Upholding the claim would be basically saying that they have no obligation to pay for the capital improvement project, because the second claim expressly says that the master agreement does not authorize San José and Santa Clara for charging them for the projects. It also would uphold their claim that they've been mischarged for public art, for the recycled-water program -
-

>> Okay. Then I have to change -- Okay. So long as the dialogue is still going and we're still going to have a conversation, but, okay. So I can't uphold it because you did explain a lot of this away. In my view. But I still think that there's room for some conversation with them.

>> SAM LICCARDO: Mm-hmm.

>> Because they don't have a place at the table. I just kind of think that it would be fair that they have information to them, for them. It's just -- I look at fair and balanced, so... That's just how I feel.

>> SAM LICCARDO: Okay. Let's take it back again. Let's make sure everyone's clear about the vote. The motion is to uphold the claim for breach of contract. All in favor?

>> JOHN GATTO: Aye.

>> Aye.

>> SAM LICCARDO: Okay. Three aye. All opposed? No.

>> No.

>> No.

>> No.

>> No.

>> No.

>> SAM LICCARDO: Okay. 2, 3, 4, 5, 6 opposed. All right. That motion fails. Entertain another motion?

>> Motion to deny this claim.

>> SAM LICCARDO: All right. Motion to deny.

>> Second.

>> SAM LICCARDO: All in favor?

>> Aye.

>> Aye.

>> Aye.

>> Aye.

>> SAM LICCARDO: All opposed?

>> Aye.

>> No.

>> SAM LICCARDO: Okay. [Laughter] We'll take that as a no.

>> Yeah, a no.

>> SAM LICCARDO: 6 to 3 -- that passes.

>> I'm not leaving 'cause I lost the no vote.

>> SAM LICCARDO: I understand. [Laughter] I understand. You're not storming out. Understood. Good luck. Good luck.