

**SENATE LOCAL GOVERNMENT COMMITTEE**  
**Senator Tom Torlakson, Chair**

**BILL NO:** AB 3036

**AUTHOR:** Yee

**VERSION:** 8/23/04

**HEARING:** 8/25/04

**FISCAL:** Yes

**CONSULTANT:** Detwiler

***CAPITAL FACILITIES FEES***

**Background and Existing Law**

In its 1986 *San Marcos* decision, the California Supreme Court ruled that public agencies that provide public utility services cannot charge capacity fees to other public agencies without statutory permission.

The Legislature responded by authorizing public agencies that provide utility services to continue charging capital facilities fees, and authorizing public agencies that receive utility services to pay those fees. A *capital facilities fee* or *capacity charge* is a nondiscriminatory charge that pays a public utility facility's capital cost. *Nondiscriminatory* means that the capital facilities fee doesn't exceed an amount based on the same objective criteria and methodology that apply to non-public users, and doesn't exceed the proportionate share of the public utility facilities' costs. However, public agency utilities must negotiate their capital facilities fees with school districts, community college districts, the California State University, the University of California, and state agencies (AB 1350, Cortese, 1988).

Legislation in 2000 affected the ability of local publicly owned electric utilities (cities, special districts, joint powers agencies) to charge capital facilities fees to school districts, community college districts, the California State University, the University of California, and state agencies. To impose a new capital facilities fee for electrical utility service, a local publicly owned electric utility must show that the fee is nondiscriminatory and doesn't exceed the amount needed to provide the capital facilities for which the fee is charged (AB 1674, Assembly Utilities and Commerce Committee, 2000).

Some public agencies say that the public agencies that provide utilities improperly include capital costs in their service rates. They contend that the only way a public agency utility can recover the capital costs of a public utility facility is through designated capital facilities fees or capacity charges.

Public agency utilities counter that it's an established practice to include the costs of facility repair, replacement, rehabilitation, and debt service in the rates they charge for utility service. While the Cortese bill required them to follow new procedures when they charge connection fees and capacity charges, they say that the 1988 legislation didn't affect their practice of charging fees to maintain a util-

ity system's facilities. Besides, it's infeasible to segregate these system-wide costs and assign them to specific consumers.

The sharp differences between the public agency utilities and their public agency consumers over what the agencies can charge has resulted in lawsuits. Last year, Governor Gray Davis vetoed a bill that would have allowed public agencies to charge other public agencies nondiscriminatory utility service rates (AB 1051, Goldberg, 2003). The Governor's veto message stressed his concern for the bill's "potentially significant fiscal impact on public entities and state agencies, specifically, educational institutions."

### Proposed Law

**I. Authorization to charge.** **Assembly Bill 3036** allows a public agency that provides public utility service to only charge another public agency rates, charges, surcharges, or fees based on the same objective criteria and methodology that applies to comparable nonpublic users.

**II. Public notice.** Some public agencies that provide utility services set their utility rates by holding public hearings and adopting formal ordinances, while others set rates by resolution or motion at public meetings. All local agencies must conform to the Brown Act which requires local agencies to post their agendas at least 72 hours before their regular meetings. All public agencies must follow the Public Records Act and disclose documents, except for materials that are specifically exempt.

When a public agency that provides public utility service holds a public meeting to establish or increase rates, charges, surcharges, or fees, **Assembly Bill 3036** requires the agency to give public notice 60 days before the meeting to any public agency that formally asked for notice. At the request of a public agency at least 30 days before this public meeting, **Assembly Bill 3036** requires the providing agency to meet with the affected agency to disclose, describe, and discuss the data and methodology for establishing or increasing the rate, charge, surcharge, or fee.

**III. Statute of limitations.** Current law declares that a capital facilities fee is imposed on the date that the bill goes out but does not specify a statute of limitations for lawsuits over contested capital facilities fees. The California Supreme Court's 2001 *Utility Cost Management* ("UMC") decision explained that the deadline for these lawsuits is 120 days from the enactment of the fees (not the mailing of the charge). For lawsuits challenging local publicly owned electric utilities' capital facilities fees, current law contains a 120-day statute of limitations, starting on the effective date of the action raising the charge.

**Assembly Bill 3036** sets a 120-day deadline for filing a suit by a public agency seeking a refund of a fee, rate, charge, or surcharge, or any increase in these

charges, or challenging the validity of these charges on or after January 1, 2004. This deadline begins on the effective date of a charge. **Assembly Bill 3036** repeals the current statutory declaration that a capital facilities fee is imposed on the date that the bill goes to the public agency consumer. These provisions automatically terminate (“sunset”) on January 1, 2008.

**IV. Validating suits.** Current law allows a public agency to file a validation suit, asking a court to review the validity of a decision. If the agency does not file its own validation suit, any interested party can file a validation suit within 60 days of a public agency’s decision.

**Assembly Bill 3036** prohibits a public agency that imposes or increases a public utility fee, rate, charge, or surcharge from filing a validation suit any earlier than 120 days after the effective date of the fee’s imposition or increase. This provision automatically terminates (“sunsets”) on January 1, 2008.

**V. Burden of proof.** In civil suits, the plaintiff usually has the burden of proof. When school districts, community college districts, the California State University, the University of California, or state agencies sue public agency utilities over their capital facilities fees, current law assigns the burden of proof to the public agency that imposes the capital facilities fee. The public agency utility must produce evidence to establish that the capital facilities fee is nondiscriminatory and the fee doesn’t exceed the amount needed to provide the capital facilities.

**Assembly Bill 3036** declares that the public agency that imposes or increases a fee, rate, charge, or surcharge has the burden of showing that the charge was established pursuant to the statutory procedures. This provision automatically terminates (“sunsets”) on January 1, 2008.

**VI. Affect on litigation.** **Assembly Bill 3036** declares that these changes are not intended to affect litigation involving public utility services provided before January 1, 2004, brought before or after that date. **Assembly Bill 3036** says that nothing in the legislative history should be construed as any indication of the law’s meaning before these amendments.

**VII. Definitions.** **Assembly Bill 3036** affects statutory terms’ definitions to:

- Separately define a “capacity charge” as a one-time charge to recover the costs of needed public utility facilities.
- Separately define a “capital facilities fee” as a nondiscriminatory connection fee, a nondiscriminatory capacity charge, or both, but not a rate, charge, surcharge, or their capital components.
- Revise the definition of “nondiscriminatory” to mean that the fee does not exceed an amount based on the same objective criteria and methodology ap-

plied to comparable nonpublic users, and that the fee is not in excess of the proportionate share of the use of those facilities.

- Define a “connection fee” as a fee to recover the costs of the physical facilities needed to directly connect a public agency facility to a public utility service (including meters, meter boxes, and pipelines) and the actual cost of the installation’s labor and materials.
- Clarify the definition of “public agency” by explicitly listing the California State University, a county office of education, a school district, and a community college district.
- Redefine “public utility service” to include: water, light, heat, communications, power, or garbage, or flood control, drainage, or sanitary purposes, or sewage collection, treatment, or disposal.

### Comments

1. Say what you mean, mean what you say. AB 3036 poses a clear policy choice for legislators. Should public agencies that use the utility services provided by other public agencies pay the same charges that other consumers pay? This question is the policy thread that weaves through the 1986 *San Marcos* case, the 1988 Cortese bill, the 2000 electrical utility legislation, the 2001 UMC decision, and last year’s Goldberg bill. The providing agencies say that it’s their custom and practice to include the capital costs for facilities when they calculate their service rates; that’s what public agencies charge private consumers. The consuming agencies say that capital costs must be negotiated separately; that’s what the law requires. Because the agencies can’t agree, legislators must choose. AB 3036 answers the question in favor of the providing agencies.

2. Revisionist politics. After winning the 1986 *San Marcos* case, public schools, public universities, and state agencies secured separate treatment in the 1988 Cortese bill. Unlike local governments, these entities can negotiate their capital facilities fees, shifting the burden of proof to the providing agencies. When capital costs show up in their monthly utility bills, these entities say that public agency utilities aren’t following the statutes. They worry that public agency utilities think of them as deep pockets that can pay for capital costs. These entities see AB 3036 as an attempt to rewrite history, eroding their hard-won advantages. Instead of reopening the late-1980s debates, they urge legislators to reject the revisions in AB 3036.

3. Playing the zero-sum game. If the public universities win their lawsuits against water agencies, public agency utilities will have to remove facility maintenance and debt service charges from their monthly bills. The public agency utilities may be able to negotiate higher capital facilities fees with the public

schools, public universities, and state agencies. Those costs won't go away but they will shift. If they can't recover their full costs, the public agency utilities have three basic choices:

- Cut back on capital spending,
- Shift the costs to private consumers and local governments, or
- Annually negotiate thousands of separate cost agreements with public schools, public universities, and state agencies.

Once again, the policy question is who should pay for a utility system's construction, repair, rehabilitation, and debt service. Who benefits? Who pays?

4. Did Proposition 218 change things? A key premise underlying the California Supreme Court's 1986 *San Marcos* decision was that capital facilities fees were really special assessments. Because public agencies were exempt from assessments, they didn't have to pay capital facilities fees unless required by statute. The 1988 Cortese bill specifically authorized the charging and payment of capital facility fees. In 1996, when the voters passed Proposition 218, they amended the California Constitution to declare that public property is not exempt from assessments unless a public agency demonstrates that it doesn't receive special benefits. The Committee may wish to consider whether this 1996 constitutional shift fundamentally alters the debate over whether public agency consumers should pay for the capital costs of the public agency utility facilities that they use.

5. Legislating and litigating. Some legislators maintain that Sacramento should not legislate while parties litigate. Other legislators insist that if the statutes aren't clear, they have a responsibility to rewrite the law. During last year's debates over AB 1051, some worried that the bill might undercut pending suits. This year's AB 3036 clarifies that its provisions are prospective and do not interfere with litigation.

6. Legislative history. As introduced, AB 3036 was a measure authored by Assembly Member Dymally relating to quality councils at state-run mental hospitals. The March 31 amendments made Assembly Member Yee the bill's author. The August 23 amendments deleted the bill's contents and instead substituted the language relating to capacity fees. Mr. Yee remains the bill's author. On August 24, the Senate Rules Committee referred AB 3036 to the Senate Local Government Committee for a policy hearing, pursuant to Senate Rule 29.10.

### Assembly Actions

Not relevant to the August 23, 2004 version of the bill.

**Support and Opposition** (8/24/04)

Support: City and County of San Francisco, Association of California Water Agencies, California Hotel & Lodging Association, California Manufacturers & Technology Association, California Municipal Utilities Association, California Special Districts Association, East Bay Municipal Utility District, San Francisco Public Utilities Commission.

Opposition: California Suburban School District Association, Community College League of California; 2 individuals.