

California's Proposition 16  
June 2010 Primary:  
An Analysis

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## **Proposition 16 and the Public Power Option: Birch Rod, or Risky Business?**

**Proposition 16 Synopsis:** This proposition would change the California Constitution to require the support of 2/3 of the voters in a local election before a local government could spend public funds or borrow money to create or expand public power service. For this purpose, public funds include money raised through electric rates, which are not taxes. This voting requirement would affect electric service from municipal utilities, irrigation districts, community choice aggregators, and similar public entities.

### **Background Summary**

Just over a hundred years ago, the electricity industry, as we know it today, was first coming into existence. In response to the consolidation of ownership of the nation's power utilities in a small number of holding companies, policy makers debated the merits of city ownership of electric companies versus state regulation of privately owned monopoly utilities. The evolving consensus was to rely on some of each. Privately-owned electric companies would be subject to state regulation, while some cities would have their own power systems. "[A]s an extra incentive for private companies to operate properly, cities should have the right to buy them out."<sup>1</sup>

While campaigning for President in 1932, Franklin D. Roosevelt discussed this consensus, which was adopted in most states (including California), and emphasized the special role of the public power option. Roosevelt said that while most people likely would be satisfied to receive electric service from a well-run private provider, he saw the public option as a critically important form of insurance. "I might call the right of the people to own and operate their own

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<sup>1</sup> Power Loss by Richard F. Hirsh, The MIT Press (1999), p.26.

utility something like this: a ‘birch rod’ in the cupboard to be taken out and used only when the ‘child’ gets beyond the point where a mere scolding does no good.”<sup>2</sup>

States have created numerous ways for local governments to exercise the public power option, such as through the creation of municipal utilities or irrigation districts (collectively referred to in this paper as “munis”). As part of the effort to promote electric utility deregulation in 1996, the California Legislature added another public power option—community aggregators—to give smaller customers a greater opportunity to benefit from retail competition. The Legislature did this to complement the retail competition provisions also contained in the bill. Up to 15 percent of electric service that otherwise would come from investor-owned utilities can now come from competitive retail providers. However, those relying on competitive providers are almost all large businesses and other institutions. While it should be noted that few studies have suggested that retail competition has led to lower rates, community aggregation enables smaller customers to combine their demand in order to attract more favorable prices and service from competitive retail providers. Today, fourteen years later, there is no community aggregator providing electric service in California. However, numerous entities in Marin County are poised to provide community aggregation. Other local governments continue to study the option.

While a muni or irrigation district might own and control everything including generating plant, transmission and distribution lines, meters, and

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<sup>2</sup> Works of Franklin D. Roosevelt, The “Portland Speech” – A Campaign Address on Public Utilities and Development of Hydro-Electric Power, Portland, Oregon, September 21, 1932  
<http://newdeal.feri.org/speeches/1932a.htm>.

billing systems, a community aggregator would merely buy power and arrange for its delivery to participating customers through the distribution system owned and operated by the regulated utility. While a muni or irrigation district might take over service to all of the customers in a given geographical area, no customer would be forced to buy power from a community aggregator.

## **Introduction**

Proposition 16, sponsored by the Pacific Gas & Electric Company (PG&E), would restrict the public power option in California by prohibiting the creation of new or expanded munis, power-serving irrigation districts, or community aggregations in the absence of approval through an election, supported by 2/3 of the voters. These new restrictions would not apply if the new or expanded entity would solely provide renewable energy or only deliver power for the local government's own use.

Under Proposition 16, it would become more difficult for a local government to exercise its option to reach for the "birch rod" in the hopes of prompting more responsive, efficient service from the regulated utility. The regulated utility's exclusive franchise would be more difficult to penetrate. Voters in the June election must decide whether this is a preferred outcome.

The stated purpose of Proposition 16 is to provide ratepayers and taxpayers with new voting rights:

"Section 2 (a) The purpose of this initiative is to guarantee to ratepayers and taxpayers the right to vote any time a local government seeks to use public funds, public debt, bonds or liability, or taxes or other financing to start or expand electric delivery service to a new territory or new customers, or to implement a plan to become an aggregate electricity provider."

The proponents of Proposition 16 make three related arguments in favor of the measure:

1. “In tough economic times like these, local voters have every right to have the final say on an issue as important as who provides them with local electric service, and how much it will cost.”
2. “Two-thirds voter approval is our best protection against costly and risky government schemes to take over local electric service.”
3. “These days, with government spending out of control and mounting government debt – the best financial safeguard for taxpayers is to give voters the final say in these decisions.”

The implications are that this would result in more meaningful protection of tax revenues, and that local elected officials cannot be trusted to make good spending decisions related to electricity service.

Although it would introduce new opportunities for taxpayers and other voters to control the growth of public power, Proposition 16 would not create any new rights related to voting on tax measures. Taxpayers already have the right to vote on new local taxes. To the extent that it addresses taxes, the initiative focuses on spending and borrowing decisions made by local governments under existing tax conditions.

This initiative would create the need for a public election before a local government could spend money on a specific type of activity related to public power, even when those funds come from electricity rates and not tax revenues, and that expenditure would carry the exceptional burden of requiring support from 2/3 of those voting. The proponents offer no example of an existing law or constitutional provision requiring that a local government go to the voters prior to making a spending decision. The new requirement would be written into the state’s constitution, making it more difficult to change it in the future. By

comparison, there is no law requiring that an investor-owned utility seek voter approval before spending ratepayer dollars, or before creating or expanding service.

As is often the case with state ballot measures, Proposition 16 contains many controversial provisions, and reflects a level of complexity that defies a simple yes or no decision. But, of course, that is the call that voters must make. This report is not intended to be and should not be considered as a recommendation as to how to vote on this ballot measure. Rather, this report is intended to serve as an independent and objective analysis of the legal issues relating to Proposition 16. Hopefully this analysis will help inform the public debate over Proposition 16, and be of use to California voters, commentators, and interested observers.

### **Key Provisions of Proposition 16**

The stated purpose of Proposition 16 is to amend the California Constitution to guarantee to ratepayers and taxpayers the right to vote, requiring two-thirds voter approval, whenever a local government plans to use public funds to start or expand electricity service, or to implement a program (such as community choice aggregation or a publicly owned utility) replacing retail electricity service provided by an investor-owned utility.

As written, Proposition 16 requires approval of “two-thirds of the voters within the jurisdiction of the local government and two-thirds of the voters within the territory to be served” whenever a local government uses public funds in the following situations:<sup>3</sup>

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<sup>3</sup> Proposition 16, Section 3 (to be codified in the California Constitution as Section 9.5(a)). The proposition defines “local government” in subsection (b), “electricity delivery service” in subsection (c), “a plan to become an aggregate electricity provider” in subsection (d), “a plan to become an aggregate electricity provider” in subsection (e), and “public funds” in subsection (f).

- to establish retail electric delivery service;
- to expand retail electric delivery service;
- to implement a plan to become an aggregate electricity provider

Proposition 16 would establish three exceptions to the two-thirds voter approval requirement:<sup>4</sup>

- any use of public funds that has been previously approved by the voters;
- any use of public funds that is *solely* for the purpose of purchasing, providing, or supplying electricity from specified types of renewable sources;
- any use of public funds that is *solely* for the purpose of providing electricity service for the local government’s own end use.

### **Local Public Power Options and How Proposition 16 Would Change Them**

One type of public power is the publicly-owned electric utility, which could be a municipal utility, irrigation district, or other special district.<sup>5</sup> To establish a muni, a local government must hold an election and obtain majority voter approval.<sup>6</sup> Once established, a muni is governed by a board of directors, which is elected by the voters.<sup>7</sup> The board makes all decisions for the muni, including concerning the provision of electricity service.<sup>8</sup> The board may issue bonds subject to 2/3 voter approval.<sup>9</sup> The board must generally hold a public hearing before expanding its service territory.<sup>10</sup> When expanding service into a city, a majority of the city’s voters must approve the decision to join the muni (with two-thirds voter approval if the city is to assume any indebtedness of the muni).<sup>11</sup> Before expanding service in unincorporated territory, the state’s

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<sup>4</sup> *Id.* at subsection (h) (emphasis added).

<sup>5</sup> CAL. PUB. UTIL. CODE § 10001.

<sup>6</sup> *See, e.g.*, CAL. PUB. UTIL. CODE § 11652(b).

<sup>7</sup> *See, e.g.*, CAL. PUB. UTIL. CODE §§ 11801, 11821.

<sup>8</sup> *See, e.g.*, CAL. PUB. UTIL. CODE §§ 11883-11885, 12801.

<sup>9</sup> *See, e.g.*, CAL. PUB. UTIL. CODE §§ 13201-13202, 13211.

<sup>10</sup> *See, e.g.*, CAL. PUB. UTIL. CODE §§ 13821-13826 (describing the public hearing process).

<sup>11</sup> *See* CAL. PUB. UTIL. CODE §§ 11504, 13851, 13854.



annexation laws determine whether an unincorporated territory’s voters and those voters within the existing muni must grant majority approval.<sup>12</sup>

<b>Action</b>	<b>Current Law</b>	<b>Proposition 16</b>
Establishing a muni	majority voter approval	2/3 voter approval
Providing electricity service within the muni’s territory	board approval	board approval and 2/3 voter approval
Expanding the muni’s territory to a new city	public hearing by the board, board approval, and majority approval by the city’s voters	public hearing by the board, board approval, and 2/3 voter approval (both by the muni’s voters and the city’s voters)
Expanding the muni’s territory to an unincorporated territory	public hearing by the board, board approval, and voter approval according to state annexation laws	public hearing by the board, board approval, 2/3 voter approval (both by the muni’s voters and the unincorporated area’s voters)
Issuing bonds	board approval and 2/3 voter approval	board approval and 2/3 voter approval

A second type of public power is community choice aggregation (community aggregation or CCA).<sup>13</sup> A local government must hold public hearings to consider and adopt an implementation plan for a CCA; however, there is no requirement for direct voter approval.<sup>14</sup> After deciding to establish a CCA, the local government must follow implementation rules established by the California Public Utilities Commission (CPUC) and receive that agency’s

<sup>12</sup> See CAL. PUB. UTIL. CODE § 14051; CAL. GOV’T CODE §§ 56737, 57075 (discussing when elections are required for annexations of unincorporated territories).

<sup>13</sup> CAL. PUB. UTIL. CODE § 331.1.

<sup>14</sup> CAL. PUB. UTIL. CODE § 366.2(c)(3).

authorization for the CCA.<sup>15</sup> Under the original 1996 deregulation act, community choice aggregation was an opt-in system by which customers in the CCA's service area would continue to receive electricity service from the investor-owned utility unless they opt-in to receive service from the CCA.<sup>16</sup> In 2002, the legislature changed this to an opt-out system to encourage local governments to pursue community aggregations; now the CCA must notify customers in its service area that they will receive electricity service from the CCA unless they opt-out to continue receiving service from the investor-owned utility.<sup>17</sup>

The following table summarizes the effects of Proposition 16 on community aggregations.

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<sup>15</sup> CAL. PUB. UTIL. CODE § 366.2(h),(i). *See also* CPUC, Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters, Decision 05-12-041, Rulemaking 03-10-003 (Dec. 15, 2005), *available at* [http://docs.cpuc.ca.gov/published/final\\_decision/52127.htm](http://docs.cpuc.ca.gov/published/final_decision/52127.htm).

<sup>16</sup> *See* Assembly Bill 1890, CAL. PUB. UTIL. CODE § 366(a).

<sup>17</sup> *See* Assembly Bill 117, CAL. PUB. UTIL. CODE §§ 366(a), 366.2(a).

<b>Action</b>	<b>Current Law</b>	<b>Proposition 16</b>
Establishing a CCA	public hearings and approval by the effected local governments	public hearings, approval by the effected local governments, and 2/3 voter approval
Providing electricity service within the CCA's territory	board approval; each customer may opt out	board approval and 2/3 voter approval; each customer may opt out
Expanding the CCA's territory to a new city	board approval, public hearings in city, and approval by the city's governing body	board approval, public hearings in city, approval by the city's governing body, and 2/3 voter approval (both by the CCA's voters and the city's voters)
Expanding the CCA's territory to an unincorporated territory	board approval and voter approval according to state annexation laws	board approval and 2/3 voter approval (both by the CCA's voters and the unincorporated area's voters)
Issuing bonds	board approval and 2/3 voter approval	board approval and 2/3 voter approval

It is unclear from the language of Proposition 16 whether two-thirds voter approval would be required for a muni or CCA to expand electricity service to new homes or businesses within the local government's service territory. The proposition's language specifies that "expand[ing] electric delivery service" does not trigger the voting requirement when the local government wishes to provide service within its boundaries and where the local government is the "sole electric

delivery source provider.”<sup>18</sup> Thus, two-thirds voter approval is required where the local government is not the sole electric delivery source provider.

However, the term “sole provider” is not defined. Within the jurisdiction of a muni or community aggregator, there may be schools and hospitals using cogeneration facilities that buy electricity from third parties, chain stores and colleges that directly purchase electricity from third parties, and homeowners who buy electricity related to their solar systems from the company owning the panels.<sup>19</sup> In these types of situations, the muni/CCA may not be the “sole provider” under Proposition 16, and thus connecting a new home or business to electricity service would require two-thirds voter approval. This ambiguity might create confusion and lead to litigation to determine whether or not a muni/CCA is the sole provider in an area, might require extra elections for the new developments, and might cause delay for new homeowners or business owners.

### **The Rationale for a 2/3 Vote Versus a Simple Majority Vote**

In typical elections, voter approval either requires a simple majority or a supermajority.<sup>20</sup> Simple majority rules require approval by over 50% of the voters. Simple majority rules are most common, but bring with them certain disadvantages: the majority can disregard the interests of minority groups or be overly influenced by a well-funded special interest group. Supermajority rules usually require support from 2/3 or 3/4 of those voting. The choice of ratio is often

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<sup>18</sup> Proposition 16, Section 3 (to be codified in the California Constitution as Section 9.5(d)).

<sup>19</sup> John Geesman, former Commissioner of the California Energy Commission and opponent of Proposition 16, has written extensively on this oversight in Proposition 16’s language. *E.g., Prop. 16’s Sloppy Drafting May Slow Home Sales in LA, Anaheim, Riverside, and 45 Other Locales*, <http://pgandeballotinitiativefactsheet.blogspot.com/2010/02/prop-16s-sloppy-drafting-may-slow-home.html> (Feb. 7, 2010).

<sup>20</sup> See generally Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=822927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=822927).

arbitrary.<sup>21</sup> The main justification for a supermajority rule is to provide additional stability in the law: enacting a decision by supermajority rule requires greater voter support to overcome the status quo and, once enacted, the new status quo is less subject to change.

According to an ongoing study sponsored by the League of California Cities, the imposition of a 2/3 voting requirement can make a dramatic difference in the outcome of a local election. For instance, of the more than 600 local tax and bond measures proposed since 2002 and requiring a 2/3 vote, over half of those measures failed. However, three out of five of the defeated measures received more than 55% of the vote. In other words, 53% failed because they did not receive 2/3 of the votes. Only 21% would have failed if passage required just slightly more than a simple majority.<sup>22</sup>

Two scholars, John O. McGinnis and Michael B. Rappaport, have considered the merits of a simple majority versus a supermajority voting requirement.<sup>23</sup> They conclude that simple majority rules work best when special interest groups are not a dominant factor. However, a supermajority rule better protects against undue influence by a well-funded special interest group favoring a specific ballot measure -- fewer voters need be convinced to defeat the measure. On the other hand, a simple majority requirement can protect against undue influence when a special interest group opposes a particular measure -- fewer voters need be convinced in order to pass the measure.

McGinnis and Rappaport also consider the optimal choice of voting rule based on a public interest model. They distinguish between voting based on self

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<sup>21</sup> See Melissa Schwartzberg, *Supermajority Rules, Arbitrariness, and Democratic Legitimacy* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1449600](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449600).

<sup>22</sup> Michael Coleman, *What Difference Does the 2/3 Vote Requirement Make in the Passage Rate of Local Tax and Bond Measures?* (2009) <http://www.ccspartnership.org/budgetResources/SpecialTaxes.pdf>.

<sup>23</sup> John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=982733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982733).

interest (e.g., “I’m voting against this option because it will cost me money.”) and voting based on the public interest (e.g., “I’m voting for this option because, even though it will cost me money, it will improve the lives of my neighbors.”). If more than half of the voters are expected to act based on the collective public interest, a majority rule would be appropriate. However, if voters are expected to rely solely on personal interest, a supermajority rule would be appropriate.

Proposition 16 would require a 2/3 supermajority vote for a local government to establish or expand public power service. Pursuant to the theories of McGinnis and Rappaport, this 2/3 voting requirement would make sense for the local decision-making process if the dominant special interest group is pushing for creation or expansion of public power. However a simple majority requirement would make more sense if the dominant player is a special interest group that opposes creating or expanding public power.

Proposition 16, itself, is an example of a dominant special interest group opposing public power. It is sponsored and heavily underwritten by a utility that is aggressive in opposing the creation of new munis and CCAs, as well as opposing the expansion of existing munis. Voters may want to consider whether it is more likely that future public power initiatives will face dominant proponents or dominant opponents.

### **Understanding the Reasons for Enacting Proposition 16 as a Constitutional Amendment**

Just as the supermajority rule provides greater stability in the law than a majority rule, a constitutional amendment provides greater stability in the law than a statutory enactment. Changing the law by amending the constitution presents more challenges than changing the law by enacting a statute. First, a constitutional initiative is more difficult (and expensive) to get on the ballot,

requiring signatures from 8% of the electorate while a statutory initiative requires signatures from 5% of the electorate.<sup>24</sup> Second, the courts may find statutes unconstitutional, but almost never invalidate constitutional amendments. Note that for the legislature to amend or repeal even a statutory initiative, it must submit the proposed changes to the citizens for a vote, unless the initiative statute expressly permits a change without voter approval.<sup>25</sup>

Voters confident about the provisions of Proposition 16 will appreciate the stability that will come from enacting it as a constitutional amendment, protecting its provisions from change. Voters unsure about the desirability of Proposition 16 or the wisdom of all its provisions might prefer a statutory initiative, or even legislation, instead of modifying the state constitution.

## **Protecting Taxpayers – How Proposition 16 Would Change Those Protections**

### **1. The Effect on Taxes**

Proposition 16 does not have a direct effect on the taxing power of local governments or on the tax rates of citizens. Under current California law, 2/3 voter approval is required for a government to impose or raise taxes. Proposition 16 does not change this requirement.

Moreover, with the exception of start-up costs, municipal utilities and community choice aggregators are normally not financed by the general funds of local governments. And the expectation is that the muni or community aggregator would repay the start-up costs from future energy revenues. Just like investor-owned utilities receive their revenue from electricity rates and not from taxes, munis and CCAs receive their revenues from electricity rates and not from taxes.

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<sup>24</sup> CAL. CONST. Art. 2, Sec. 8(b).

<sup>25</sup> CAL. CONST. Art. 2, Sec. 10(c).

## 2. The Effect on Taxpayer Liability

A group of local governments and agencies (the Modesto Irrigation District, SMUD, the City of County of San Francisco, the San Francisco Local Agency Formation Commission, the City of Moreno Valley, the California Municipal Utilities Association, the City of Redding, SJVPA, and Merced Irrigation District) filed a lawsuit in Sacramento County Superior Court to remove the proposition from the ballot, alleging that the proposition is false and misleading.<sup>26</sup> A major point of contention is the title of the proposition: “The Taxpayers Right to Vote Act.” The proponents of Proposition 16 are concerned that publicly provided power might be financed by bonds or other indebtedness guaranteed by taxpayers, or might otherwise involve the use of public funds.<sup>27</sup> The proponents fear that if a muni or CCA defaults on its obligations, the local government might need to expend tax revenues to cover the losses.

However, with this risk in mind, the finances of munis and CCAs are often structured to shield taxpayers from liability. For example, the San Joaquin Valley Power Authority (SJVPA), whose CCA program was the first and only to be approved by the CPUC, contracted with a public agency to operate its CCA program.<sup>28</sup> The parties agreed that all costs would be recoverable from the CCA electricity rates and further expressed the intent that liability to the operator for reimbursements not extend to the local governments and their taxpayers.<sup>29</sup>

Without such protections, the taxpayers might indeed be liable for the obligations of a muni or CCA. Currently, a concerned taxpayer can participate in

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<sup>26</sup> The case number at the Sacramento Superior Court is 34-2010-80000478. At the time of publication of this paper, a hearing is scheduled for May 5, 2010. See <https://services.saccourt.com/publicdms2>.

<sup>27</sup> Proposition 16, Section 1(e), Section 2(b).

<sup>28</sup> Nonetheless, the San Joaquin community aggregation has not gone into operation.

<sup>29</sup> Power Services Agreement between San Joaquin Valley Power Authority and Kings River Conservation District, § 9.2 (Oct. 23, 2007) (on file with authors).



the public review process to ensure that the muni/CCA operates responsibly.<sup>30</sup> Currently, a dissatisfied taxpayer (and eligible voter) can exercise his or her right to vote at the next election; a voter can disapprove of bond measures and elect new directors to the board. Under Proposition 16, the taxpayer would receive additional opportunities to vote before the muni/CCA could act.

### **Possible Implications of Restricting Public Power Options**

Proposition 16 would raise the barrier for local governments to provide public power. The benefit to such a barrier is that it would add another layer of voter control over the decisions of elected representatives related to public electricity service. What are the costs of erecting the barrier?

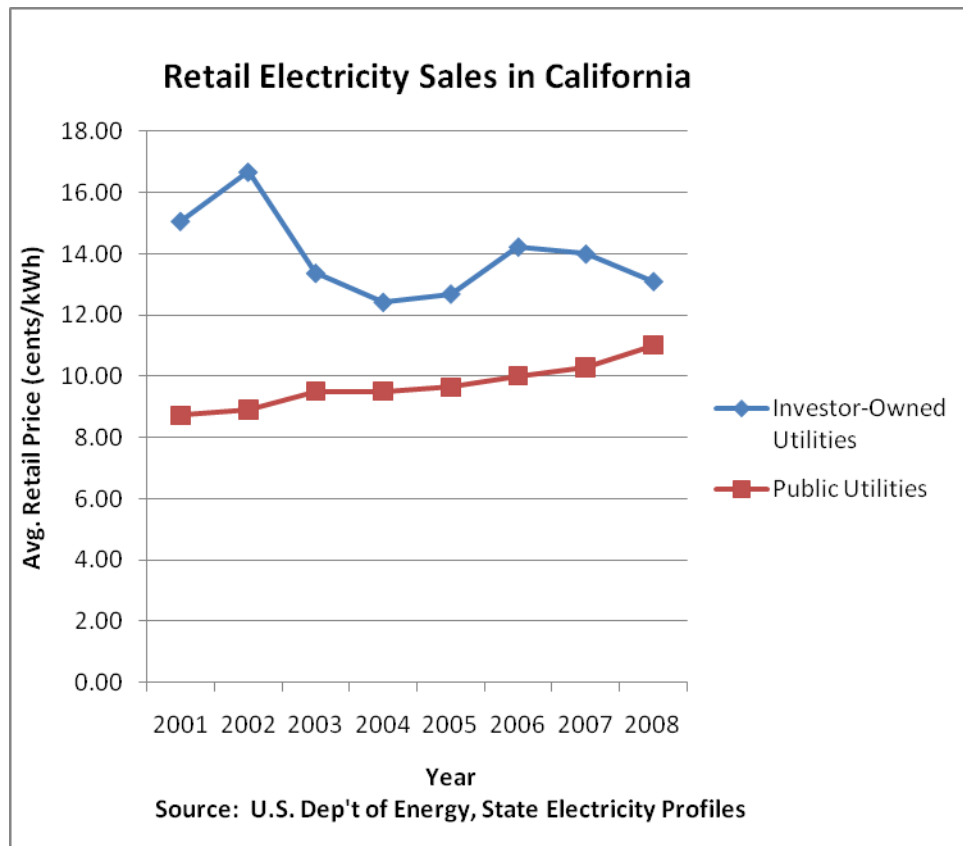
First, as noted in the introduction, the public power option is a form of insurance where, as in California, a state has granted to a private corporation monopoly status over electricity service in a region. Without the potential for public power, a monopoly investor-owned utility may be less compelled to heed its customers' concerns about electricity price, service, reliability, or energy source.

Second, many believe that munis and CCAs can provide electricity services at rates lower than those of investor-owned utilities. A public entity does not need to build a profit margin into its rate structure and can lower its operating costs by issuing tax-free municipal bonds. On the other hand, investor-owned utilities might be able to provide lower rates through economies of scale, experience and expertise in the industry, and oversight by the CPUC.

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<sup>30</sup> As mentioned earlier, munis have elaborate public review processes required by law. *See, e.g.*, CAL. PUB. UTIL. CODE §§ 13821-13826 (describing the public hearing processes for municipal utilities). Efforts at community aggregation, in addition to being subject to significant rules by the CPUC (*supra* note 15), have had extensive public review as a matter of practice. For example, SJVPA's efforts at developing and implementing its CCA program included numerous workshops, presentations, and publicly noticed meetings. Munis and CCAs are also subject to the open meeting and record requirements of the Brown Act. CAL. GOV'T CODE § 54950 et seq.

Data collected by the U.S. Department of Energy shows that over the last decade in California, the average retail price charged by public utilities has been consistently lower than that charged by investor-owned utilities, although the gap is narrowing.



Note, however, that the investor-owned utilities are required to serve all customers in their service territories, even in places where such service is expensive (as in remote locations). Indeed, proponents of investor-owned electricity service have argued that local governments exercise their public power option only where service is less expensive, ensuring lower rates for their communities, thereby leaving responsibility for the more expensive areas to the investor-owned utilities, which could raise their average prices.

Third, raising the barrier to locally-provided public power may affect the development of renewable energy. Under California’s Renewables Portfolio Standard (RPS), at least twenty percent of retail electricity sales (including investor-owned utilities and CCAs, but not munis) should come from renewable energy resources by the end of 2010.<sup>31</sup> While technically exempt from the specific RPS targets, the two largest munis—Los Angeles Department of Water & Power (LADWP) and Sacramento Municipal Utilities District (SMUD) –have pledged to achieve the same goal of twenty percent by 2010.<sup>32</sup> As shown in the table below, each of the major investor-owned utilities and munis has made significant progress toward the target of twenty percent by 2010.

Percentage of Renewable Power <sup>33</sup>			
		2008	2009
Investor-owned	PG&E	11.9%	14.4%
	SCE	15.5%	17.4%
	SDG&E	06.1%	10.5%
Muni	LADWP	16.5%	not available
	SMUD	08.0%	not available

However, while the investor-owned utilities are waiting for further governmental mandate, the two large munis have set ambitious goals for 2020 of 33% (SMUD) and 35% (LADWP), pushing the development of renewable

<sup>31</sup> CAL. PUB. UTIL. CODE §§ 399.11(a), 399.12(g).

<sup>32</sup> LADWP, Renewable Energy Policy, <http://www.ladwp.com/ladwp/cms/ladwp005864.jsp>; SMUD, Renewable Energy Portfolio, <http://www.smud.org/en/community-environment/solar-renewables/pages/renewable-energy-portfolio.aspx>.

<sup>33</sup> CPUC, California Renewables Portfolio Standard (RPS), <http://www.cpuc.ca.gov/PUC/energy/Renewables> (2009 data for investor-owned utilities); CPUC, RPS Quarterly Report, July 2009, 6, *available at* [http://www.cpuc.ca.gov/NR/rdonlyres/EBEEB616-817C-4FF6-8C07-2604CF7DDC43/0/Third\\_Quarter\\_2009\\_RPS\\_Legislative\\_Report\\_2.pdf](http://www.cpuc.ca.gov/NR/rdonlyres/EBEEB616-817C-4FF6-8C07-2604CF7DDC43/0/Third_Quarter_2009_RPS_Legislative_Report_2.pdf) (2008 data for investor-owned utilities); LADWP, 2008 Green Power Annual Report 5, *available at* <http://www.ladwp.com/ladwp/cms/ladwp005196.pdf>; SMUD, 2008 Status Report on Renewable Energy at SMUD 2, *available at* <http://www.smud.org/en/community-environment/solar-renewables/Documents/SMUD%20Brief%20on%20RPS%2009-28-09-ES%20ML%20MD.pdf>.

energy.<sup>34</sup> Some communities investigating the CCA option are also dedicated to supporting renewable energy beyond the mandated targets.<sup>35</sup> By making it more difficult for local governments to form and operate munis and CCAs, Proposition 16 could dampen the drive that some of the communities bring toward more renewables.

During the last legislative session, Governor Schwarzenegger vetoed two bills that would have created a requirement that all electric utilities achieve a 33% renewable energy level by 2020.<sup>36</sup> Instead, through an Executive Order he directed the California Air Resources Board to set up rules requiring 33% renewable energy by 2020 as part of its implementation of AB 32 (the state's greenhouse gas reduction law).<sup>37</sup> There are questions about the Governor's authority to circumvent the 20% requirement in current law. In addition, at least one major gubernatorial candidate has pledged to suspend the implementation of AB 32, if elected this fall. If that were to occur, the Air Resources Board's 33% requirement may disappear, as well. The formation of a muni or CCA could provide an opportunity for a local government to ensure aggressive pursuit of renewable energy options regardless of the fate of statewide efforts.

In the context of climate change, it is important to note that the regulated utilities not only deliver power that is relatively free of greenhouse gas emissions under the renewable portfolio standard, but also deliver a significant amount of relatively clean power from large-scale hydroelectric facilities and nuclear power plants, which state law excludes from the RPS. Since munis and

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<sup>34</sup> *Supra*, note 32.

<sup>35</sup> SJVPA was committed to developing renewable energy projects locally and meeting a 33% by 2020 goal. Community Choice, Energy Sources, [http://www.communitychoice.info/about/energy\\_sources.php](http://www.communitychoice.info/about/energy_sources.php). Marin Energy Authority is starting at 25% and expecting to achieve 50% by 2015 (as well as offering customers the option to purchase 100% renewable energy). Marin Energy Authority, Marin Clean Energy, <http://marincleanenergy.info> (follow links for Light Green Product and Deep Green Product).

<sup>36</sup> See, for instance the Veto Message of Governor Schwarzenegger concerning Senate Bill 14, [http://gov.ca.gov/pdf/press/2009bills/SB14\\_Simitian\\_Veto\\_Message.pdf](http://gov.ca.gov/pdf/press/2009bills/SB14_Simitian_Veto_Message.pdf).

<sup>37</sup> EXECUTIVE ORDER S-21-09, September 15, 2009, <http://gov.ca.gov/press-release/13273>

community aggregators do not have the same proportional access to these sources, they might be spurred to set and achieve higher renewable energy standards just to stay even with the regulated utilities in terms of greenhouse gas emissions.

### **Who Supports and Who Opposes Proposition 16**

Proposition 16 is supported by PG&E, the California Taxpayers' Association, various state and regional business groups, the California Chamber of Commerce, several local chambers of commerce (including Lincoln, Livermore, Palm Desert, Pleasant Hill, and Oakland Metropolitan), the Asian Business Association of Los Angeles, the Contra Costa Taxpayers' Association, the International Brotherhood of Electrical Workers Local 1245, the San Diego Tax Fighters, the California Republican Party, former Sacramento County Sheriff Lou Blanas, and former Assembly Speaker Willie Brown. The measure's website lists no individual current legislators expressing support. PG&E has provided most of the financial support for the proposition, having already spent approximately \$28.5 million.

Proposition 16 is opposed by AARP, the League of Women Voters of California, Sierra Club California, the Consumer Federation of California, the Agricultural Energy Consumers Association, the California Tax Reform Association, California State Senators Darrell Steinberg, Mark Leno, Jenny Oropeza, Lois Wolk, Christine Kehoe, Alan Lowenthal, Gilbert Cedillo, and Dean Florez,<sup>38</sup> the Palo Alto City Council, several local chambers of commerce

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<sup>38</sup> Senator Steinberg and his colleagues sent PG&E a letter hinting that its campaign to place Proposition 16 on the ballot might violate California law that "requires utilities to 'cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs.'" Letter from Cal. State Sen. Darrell Steinberg to PG&E Chairman & CEO Peter A. Darbee (Dec. 22, 2009), *available at* <http://latimesblogs.latimes.com/files/col-pge-steinberg-letter-to-pge.pdf> (quoting CAL. PUB. UTIL. CODE § 366.2(c)(9)).

(including Fremont and Santa Clara), the California Association of Realtors, the California Farm Bureau, the California Manufacturers & Technology Association, the Utility Reform Network, and former California Energy Commissioner John Geesman. Opponents have raised approximately \$40 thousand.

## **Conclusion**

The results of the coming election, and the way that these issues are resolved, could have a significant impact on the nature and cost of electricity service in California in the coming years. At issue is the potential effectiveness of Proposition 16 in protecting taxpayer funds as weighed against the limitations it would place on the future expansion or development of public power and renewable energy. We offer the following observations:

1. The bargain struck a century ago to justify the creation of regulated monopoly power companies meant that there would always be a public alternative to encourage the monopoly utilities to provide service its customers want at a reasonable price – what Franklin Roosevelt referred to as a “birch rod in the cupboard.” The passage of Proposition 16 would make it more difficult to form or expand a municipal utility or a community aggregation. What remains to be seen is whether this new barrier would undermine the monopoly utilities’ incentives related to service and price.

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In mandating that utilities “cooperate fully” with CCAs, the statute specifically identifies conduct such as utilities providing data (customer, billing, electrical load) to communities that are determining whether to establish electrical service to their inhabitants. The statute does not expressly address utilities’ use of legislative and initiative processes to modify the requirements for CCAs. A more restrictive interpretation could raise First Amendment implications. However, on May 3, 2010, the Executive Director of the CPUC sent a letter to PG&E instructing it to cease certain effort to persuade customers to “opt out”, concluding that those activities are inconsistent with the law, CPUC orders, and PG&E tariffs.

2. If passed, Proposition 16 would support the interest of voters who would prefer to preserve the regulated utilities' monopoly businesses or to restrict the expansion of local governments into the power business.
3. Although public power agencies are normally structured to protect local governments and tax funds from liability, Proposition 16 would provide additional protections for those interests by making it more difficult to achieve voter approval (due to the 2/3 voting requirement). However, it should be noted that because it costs money to conduct an election, the requirement that would exist with the adoption of Proposition 16 for an additional vote before even existing public power revenues could be used to implement a new or expanded program virtually guarantees that the proposition will cost more in taxes.
4. Despite the proposition's title, Proposition 16 does not have a direct effect on the taxing power of local governments or on the tax rates of citizens
5. The new requirement would be written into the state's constitution, making it more difficult to change it in the future.
6. Proposition 16, itself, is an example of a dominant special interest group opposing public power. It is sponsored and heavily underwritten by a utility that is aggressive in opposing the creation of new munis and CCAs, as well as opposing the expansion of existing munis. Voters may want to consider whether it is more likely that future public power initiatives will face dominant proponents or dominant opponents.

7. The proposition would go beyond the traditional restrictions placed on new taxes and government borrowing to require a supermajority (2/3rds) vote before a local government could spend existing tax revenues or public power revenues to implement new or expanded public power services.
8. The supermajority voting requirement contained in the proposition will make it more difficult for local governments to overcome opposition to public power from well-funded special interest groups.
9. The proposition may be found to have no impact on the development of renewable power, but under some circumstances, it might get in the way. The proposition exempts programs that provide only renewable energy from the 2/3 voting requirement. However, 100% renewable power is not a likely result in the near-term. Thus, the proposition might create a barrier for a local government seeking to exceed the regulated utilities' renewable energy goals.
10. In addition, the outcome of the next (or future) gubernatorial election could lead to a suspension of California's climate protection program, (AB32) which includes ambitious renewable power goals. In such a circumstance, the passage of Proposition 16 would make it more difficult for local governments to make up the difference.



11. The proposition contains some ambiguous language related to an exemption for public power in jurisdictions where the local government is the sole provider that could result in lengthy and expensive litigation.

As is so often the case with California's extensive use of ballot measures, it is incumbent on voters to move beyond the sound bites and simplified advertising messages to reach a knowledgeable understanding of the proposition and its likely impacts.

## Appendix – The Text of Proposition 16

### PROPOSITION 16

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the California Constitution.

This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

#### PROPOSED LAW

##### Section 1. FINDINGS AND DECLARATIONS

The People do find and declare:

- (a) This initiative shall be known as “The Taxpayers Right to Vote Act.”
- (b) California law requires two-thirds voter approval for tax increases for specific purposes.
- (c) The politicians in local governments should be held to the same standard before using public funds, borrowing, issuing bonds guaranteed by ratepayers or taxpayers, or obtaining other debt or financing to start or expand electric delivery service, or to implement a plan to become an aggregate electricity provider.
- (d) Local governments often start or expand electric delivery service, or implement a plan to become an aggregate electricity provider, without approval by a vote of the people.
- (e) Frequently the start-up, expansion, or implementation plan requires either construction or acquisition of facilities or other services necessary to deliver the electric service, to be paid for with public funds, borrowing, bonds guaranteed by ratepayers or taxpayers, or other debt or financing.
- (f) The source of the public funds, borrowing, debt, and bond financing is generally the electricity rates charged to ratepayers as well as surcharges or taxes imposed on taxpayers.
- (g) Such use of public funds and many forms of borrowing, debt or financing do not presently require approval by a vote of the people, and where a vote is required, only a majority vote may be required.

##### Section 2. STATEMENT OF PURPOSE

- (a) The purpose of this initiative is to guarantee to ratepayers and taxpayers the right to vote any time a local government seeks to use public funds, public debt, bonds or liability, or taxes or other financing to start or expand electric delivery service to a new territory or new customers, or to implement a plan to become an aggregate electricity provider.

(b) If the start-up or expansion requires the construction or acquisition of facilities or services that will be paid for with public funds, or financed through bonds to be paid for or guaranteed by ratepayers or taxpayers, or to be paid for by other forms of public expenditure, borrowing, liability or debt, then two-thirds of the voters in the territory being served and two-thirds of the voters in the territory to be served, voting at an election, must approve the expenditure, borrowing, liability or debt. Also, if the implementation of a plan to become an aggregate electricity provider requires the use of public funds, or financing through bonds guaranteed by ratepayers or taxpayers, or other forms of public expenditure, borrowing, liability or debt, then two-thirds of the voters in the jurisdiction, voting at an election, must approve the expenditure, borrowing, liability or debt.

Section 3. Section 9.5 is added to Article XI of the California Constitution to read:

*SEC. 9.5. (a) Except as provided in subdivision (h), no local government shall, at any time, incur any bonded or other indebtedness or liability in any manner or use any public funds for the construction or acquisition of facilities, works, goods, commodities, products or services to establish or expand electric delivery service, or to implement a plan to become an aggregate electricity provider, without the assent of two-thirds of the voters within the jurisdiction of the local government and two-thirds of the voters within the territory to be served, if any, voting at an election to be held for the purpose of approving the use of any public funds, or incurring any liability, or incurring any bonded or other borrowing or indebtedness.*

*(b) "Local government" means a municipality or municipal corporation, a municipal utility district, a public utility district, an irrigation district, a city, including a charter city, a county, a city and county, a district, a special district, an agency, or a joint powers authority that includes one or more of these entities.*

*(c) "Electric delivery service" means (1) transmission of electric power directly to retail end-use customers, (2) distribution of electric power to customers for resale or directly to retail end-use customers, or (3) sale of electric power to retail end-use customers.*

*(d) "Expand electric delivery service" does not include (1) electric delivery service within the existing jurisdictional boundaries of a local government that is the sole electric delivery service provider within those boundaries, or (2) continuing to provide electric delivery service to customers already receiving electric delivery service from the local government prior to the enactment of this section.*

*(e) "A plan to become an aggregate electricity provider" means a plan by a local government to provide community choice aggregation services or to replace the authorized local public utility in whole or in part for electric delivery service to any retail electricity customers within its jurisdiction.*

*(f) "Public funds" means, without limitation, any taxes, funds, cash, income, equity, assets, proceeds of bonds or other financing or borrowing, or rates paid by ratepayers. "Public funds" do not include federal funds.*

*(g) "Bonded or other indebtedness or liability" means, without limitation, any borrowing, bond, note, guarantee or other indebtedness, liability or obligation, direct or indirect, of any kind, contingent or otherwise, or use of any indebtedness, liability or obligation for reimbursement of*

*any moneys expended from taxes, cash, income, equity, assets, contributions by ratepayers, the treasury of the local government, or other sources.*

*(h) This section shall not apply to any bonded or other indebtedness or liability or use of public funds that (1) has been approved by the voters within the jurisdiction of the local government and within the territory to be served, if any, prior to the enactment of this section; or (2) is solely for the purpose of purchasing, providing or supplying renewable electricity from biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, or providing electric delivery service for the local government's own end use and not for electric delivery service to others.*

#### Section 4. CONFLICTING MEASURES

A. This initiative is intended to be comprehensive. It is the intent of the people that in the event that this initiative and another initiative relating to the same subject appear on the same statewide election ballot, the provisions of the other initiative or initiatives are deemed to be in conflict with this initiative. In the event this initiative shall receive the greater number of affirmative votes, the provisions of this initiative shall prevail in their entirety, and all provisions of the other initiative or initiatives shall be null and void.

B. If this initiative is approved by voters but superseded by law or by any other conflicting ballot initiative approved by the voters at the same election, and the conflicting law or ballot initiative is later held invalid, this initiative shall be self-executing and given full force of law.

#### Section 5. SEVERABILITY

The provisions of this initiative are severable. If any provision of this initiative or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.