Date of Hearing: April 15, 2021

ASSEMBLY COMMITTEE ON ELECTIONS
Marc Berman, Chair
AB 871 (Kiley) – As Amended April 8, 2021

SUBJECT: Political Reform Act of 1974: contribution prohibitions.

SUMMARY: Prohibits contributions from electrical or gas corporations to candidates for elective state office. Specifically, **this bill**:

1) Prohibits an electrical corporation or a gas corporation, as those terms are defined in the Public Utilities Code, from making a contribution to a candidate for elective state office.

2) Prohibits a candidate for elective state office from accepting a contribution from an electrical corporation or a gas corporation.

3) Specifies that the provisions of this bill do not prohibit an electrical or gas corporation from making an independent expenditure (IE) or a contribution to a political party, political party committee, legal defense fund, officeholder account, small contributor committee, political action committee, candidate controlled ballot measure committee, or any other expenditure or contribution that is not a direct contribution to a candidate for elective state office, except as otherwise provided by law.

4) Makes the following findings and declarations:

    a) Public entities are barred from making political contributions under existing state law.

    b) Electrical and gas corporations are quasi-public entities, behaving in many ways like arms of the state. They claim monopolies on entire regions, seize property through eminent domain, and enjoy a fixed rate of return. State officials, in turn, are essentially embedded in their corporate structure. Officials closely control prices, operations, and purchasing.

    c) Under precedents of the United States Supreme Court, the First Amendment does not afford absolute protection to political donations.

EXISTING LAW:

1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).

2) Defines "person," for the purposes of the PRA, as an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.

3) Defines "statewide elective office," for the purposes of the PRA, to mean the offices of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller,

Secretary of State, Treasurer, Superintendent of Public Instruction, and member of the State Board of Equalization.

4) Defines "elective state office," for the purposes of the PRA, to include all of the "statewide elective offices" detailed above, along with the offices of Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member elected to the Teachers' Retirement Board.

5) Defines "electrical corporation," for the purposes of the Public Utilities Code, to include every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except as specified.

6) Defines "gas corporation," for the purposes of the Public Utilities Code, to include every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state, except as specified.

7) Establishes the following limits on a contribution from a person, other than a small contributor committee or political party committee, to a candidate for elective state office:

   a) In the case of a candidate for elective state office other than statewide elective office, $4,900 per election;

   b) In the case of a candidate for statewide elective office other than Governor, $8,100 per election;

   c) In the case of a candidate for Governor, $32,400 per election.

8) Prohibits an elected state officer or candidate for elected state office from accepting a contribution from a lobbyist, and prohibits a lobbyist from making a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer.

FISCAL EFFECT: Unknown. State-mandated local program; contains a crimes and infractions disclaimer.

COMMENTS:

1) **Purpose of the Bill:**

   Investor-owned utilities like PG&E, while privately-owned, are uniquely intertwined with the State of California. In many ways, they behave like arms of the state. Assembly Bill 871 will prohibit an investor-owned utility from making a contribution to a candidate for elective state office while also prohibiting a candidate from accepting any contribution from an investor-owned utility. AB 871 is in line with precedent to separate campaigns from governing bodies. By enacting AB 871, we are further ensuring the public's right to fair elections and policymaking.

2) **Investor-Owned Utilities**: The California Public Utilities Commission (CPUC) regulates investor-owned electric and natural gas utilities operating in California. The term "investor-owned utility" (IOU) is not defined in state law, but it is a term of art that is commonly used to refer to entities that are "electrical corporations," as defined by Section 218 of the Public Utilities Code, and "gas corporations," as defined by Section 222 of the Public Utilities Code. Those terms include major private electric and gas utilities, including Pacific Gas & Electric, Southern California Edison, San Diego Gas & Electric, and Southern California Gas, as well as smaller multijurisdictional electric utilities including Bear Valley Electric Service, PacifiCorp, and Liberty Utilities. The terms do not include other types of energy utilities, including community choice aggregators and municipal utilities districts. The CPUC generally has responsibility for regulating the safety and reliability of private energy utilities, and for setting the rates charged by those utilities to their customers.

3) **Contribution Limits**: Proposition 34, which was approved by the voters at the November 2000 statewide election, established limits on the size of campaign contributions made to candidates for elective state office, among other provisions. Proposition 34 was approved with 60.1% of the vote. The findings of Proposition 34 noted that the measure would, "minimize the potentially corrupting influence and appearance of corruption caused by large contributions by providing reasonable contribution and voluntary expenditure limits." Those limits—which apply to contributions made by individuals as well as those made by non-individual entities including corporations—allow a contributor (other than a small contributor committee or a political party) to contribute up to $4,900 per election to a candidate for elective state office other than statewide elective office, up to $8,100 per election to a candidate for statewide elective office other than Governor, and up to $32,400 per election to a candidate for Governor.

   To the extent that the current contribution limits are reasonable, and are accomplishing the goal of "minimiz[ing] the potentially corrupting influence…caused by large contributions," it is unclear why a contribution from an electric or gas corporation would pose greater concern than a similar-sized contribution from another entity. If a campaign contribution of $4,900 from an electric or gas corporation to a candidate for state legislature has the potential to have too great of an influence on that candidate, wouldn't a $4,900 contribution from an executive at that corporation present the same concern?

4) **Independent Expenditures**: In January 2010, the United States Supreme Court issued its ruling in *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, a case involving a nonprofit corporation (Citizens United) that sought to run television commercials promoting a film it produced that was critical of then-Senator and presidential candidate Hillary Clinton. Because federal law prohibited corporations and unions from using their general treasury funds to make expenditures for "electioneering communications" or for communications that expressly advocated the election or defeat of a candidate, Citizens United was concerned that the television commercials promoting its film could subject the corporation to criminal and civil penalties. In its decision, the Supreme Court struck down the 63-year old law that prohibited corporations and unions from using their general treasury funds to make IEs in federal elections, finding that the law unconstitutionally abridged the freedom of speech.

   While this bill prohibits electrical and gas corporations from making contributions to candidates in the state, it expressly provides that it does not limit the ability of electrical and

gas corporations to make IEs. In fact, in light of the *Citizens United* ruling described above, it seems unlikely that such a restriction on IEs would be found to be constitutional.

Previously enacted restrictions on campaign contributions to candidates for elective state office have been instructive in demonstrating how campaign contribution restrictions can drive an increase in IEs. Specifically, the amount and percentage of campaign spending made through IEs increased substantially after Proposition 34 at the November 2000 statewide general election enacted campaign contribution limits to candidates for elective state office. In the March 2000 and November 2000 elections, the last two elections that were not subject to the Proposition 34 campaign contribution limits for legislative races, the total amount of money spent on IEs for all legislative races was less than $500,000. By comparison, according to information from campaign disclosure reports that were filed with the Secretary of State, the last three election cycles (2015-16, 2017-18, and 2019-20) have had an average of almost $57.5 million in spending on IEs in state legislative races.

While this bill restricts the ability of an electrical or gas corporation to contribute money *directly* to a candidate for elective state office, it does not otherwise restrict the amount that an electrical or gas corporation can *spend* in attempting to influence an election for state office. If electrical and gas corporations are unable to make campaign contributions to candidates they support, those entities may instead use those funds for IEs that are intended to help elect those same candidates.

5) **Disparate Application**: State law generally does not prohibit entities that otherwise are permitted to make expenditures in connection with elections in the state from contributing directly to candidates for elective office. Instead, the PRA seeks to minimize any concern that campaign contributions could lead to corruption or the appearance of corruption through generally-applicable campaign contribution limits, as discussed in more detail above. The one notable exception is a prohibition on lobbyists making contributions to elected state officers and candidates for elected state office under certain conditions. That prohibition reflects a determination that contributions from lobbyists create a different set of policy concerns than contributions made by other entities, because registered lobbyists are paid to influence governmental action through direct contact with elected state officials, and their continued employment depends on their success in influencing governmental action.

   Singling out electrical and gas corporations by prohibiting them from making contributions to candidates for elective state office may pose precedential issues. The author of this bill argues that there are unique circumstances that distinguish IOUs from other industries that justify treating them differently than other corporations. In particular, the findings and declarations of this bill state that IOUs "are quasi-public entities," that "claim monopolies . . . seize property through eminent domain, and enjoy a fixed rate of return," and that public officials "closely control prices, operations, and purchasing." While it is true that the utility industry is subject to extensive regulation, many other industries similarly are highly regulated, including the insurance, health care, gaming, and alcoholic beverage industries, among others.

   Furthermore, prohibiting a specific industry or type of corporation from making campaign contributions could present legal issues. Courts have found that the government's interest in preventing quid pro quo corruption, or the appearance of such corruption, can justify restricting campaign contributions (see *McCutcheon v. FEC* (2014) 572 U.S. 185; *Buckley v.*

Valeo (1976) 424 U.S. 1), provided that the restriction is "closely drawn to avoid unnecessary abridgment of associational freedoms" (*Buckley*, 424 U.S. at 25). Using that test, the United States Supreme Court upheld a federal law that prohibits corporations from contributing directly to candidates for federal office against a challenge that applying the prohibition to nonprofit advocacy corporations violates the First Amendment (*FEC v. Beaumont* (2003) 539 U.S. 146). More recently, in *Thalheimer v. City of San Diego* (2011) 645 F.3d 1109, the Ninth Circuit Court of Appeals upheld a San Diego ordinance that made it unlawful for "non-individuals" to contribute directly to candidates.

Those rulings do not, however, necessarily mean that the courts would similarly uphold a ban on *specific types* of corporations making direct contributions to candidates. In *Ball v. Madigan* (2017) 245 F. Supp. 3d 1004, the United States District Court for the Northern District of Illinois, Eastern Division, invalidated an Illinois law that prohibited medical cannabis cultivation centers and dispensaries from making campaign contributions to candidates. In its decision, the court held that the state's interest in preventing quid pro quo corruption was a sufficiently important governmental interest, but found that the ban on contributions was not closely drawn to address the government's interest in preventing corruption. Although the state of Illinois sought to defend the ban on the grounds that the risk of corruption in the medical cannabis industry was especially high because cultivation centers and dispensaries required state licensure to operate and were competing for a limited number of permits, the court noted that the state had not provided evidence that the medical cannabis businesses "in fact pose a greater risk of corruption than other potential donors, including those subject to similar regulation and licensure requirements." In determining that the contribution ban was not closely drawn, the court additionally noted that the state had offered "no legitimate basis for singling out medical cannabis cultivation centers and dispensaries from other potential donors who also 'reap profits' and 'require State licensure to operate.'"

Notably, while the author of the bill has alleged general malfeasance by one IOU, the findings and declarations of this bill do not provide evidence that IOUs post a greater risk of corruption than other regulated industries, or that the risk of such corruption cannot appropriately be addressed by the generally-applicable contribution limits that are detailed above. Furthermore, this bill seeks to prevent IOUs from making campaign contributions to candidates for elective state office even though those officials are not primarily and directly involved in the regulation of IOUs that the author cites as a justification for this bill. Rather, that regulation is primarily the responsibility of an appointed body—the CPUC. While certain elected state officials play a role in the appointment of members to that body or their confirmation, many other elected state officials do not. In light of all the foregoing information, it is unclear whether a court would find the contribution ban proposed by this bill to be closely drawn to address a sufficiently important governmental interest.

6) **Arguments in Opposition**: In opposition to this bill, Southern California Edison writes:

> **AB 871 is unconstitutional.** The First Amendment of the U.S. Constitution prohibits the government from restricting freedom of speech and expression because of its message, idea, subject matter, or content (*Ashcroft v. American Civil Liberties Union*, 2002). Although California may have the power to prohibit political contributions from all corporations, the U.S. Supreme Court warned in *Citizens United v. FEC* (2010) that the First Amendment prohibits the government

from "restrictions distinguishing among different speakers, allowing speech by some but not others."…

AB 871 not only fails legal scrutiny; it also promotes censorship of IOU perspectives and viewpoints that are vital to public policy discussions within our political system. … IOUs are in the unique position of knowing the industry and representing the interests of our stakeholders, and this bill seeks to silence our voice from participating in the political process. This will result in an unlevel political playing field that silences the voices of those we represent.

IOU contributions are funded by shareholders, not ratepayers. Edison International, SCE's holding company, funds its political contributions from shareholder dollars. No customer dollars, or any part of the rates paid by utility customers, are used to support political candidates. AB 871 is not designed to protect customer interests but attempts to restrict IOU free speech funded by shareholders – a private rather than public decision – without a demonstrable need to do so.

7) **Related Legislation**: AB 20 (Lee), which is pending in this committee, would prohibit contributions from business entities to candidates for elective office.

8) **Previous Legislation**: AB 2079 (Kiley) of 2020 was substantially similar to this bill. As was the case for many bills introduced in 2020, AB 2079 was not heard in committee after changes to the legislative calendar and operations that were made in an effort to slow the transmission of the 2019 novel coronavirus (COVID-19) limited the number of bills that the Legislature was able to consider in 2020.

   SB 947 (Leno) of 2010 would have prohibited a specific electrical and gas corporation from spending funds received from ratepayers on political and public affairs related to state or local governments. SB 947 failed passage in the Assembly Utilities & Commerce Committee on a 3-7 vote.

   SB 11 (Bowen) of 2005 would have prohibited manufacturers and vendors of voting equipment from making campaign contributions to candidates for elective state office, county supervisor, city council member, mayor, or elections official, among other provisions. SB 11 failed passage in the Assembly Elections & Redistricting Committee on a 3-3 vote.

   SB 798 (Speier) of 2001 would have prohibited contributions to the Insurance Commissioner from persons regulated by the Department of Insurance (DOI), or from attorneys and law firms doing business with the DOI. SB 798 failed passage in the Assembly Elections, Reapportionment, and Constitutional Amendments Committee by a 3-4 vote.

9) **Political Reform Act of 1974**: California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders, and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

California Chamber of Commerce
Pacific Gas and Electric Company
Southern California Edison

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