S225589

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROLLAND JACKS and ROVE ENTERPRISES, INC.,
Plaintiffs/Appellants
v.
CITY OF SANTA BARBARA
Defendant/Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

After a Published Decision of the
Second Appellate District, Division Six, Case No. B253474

Regarding a Judgment of the Superior Court of the State of California
for the County of Santa Barbara Case No. 1383959
Honorable Thomas P. Anderle, Judge Presiding

HUSKINSON, BROWN & HEIDENREICH, LLP
David W.T. Brown (SBN 147321)
Paul E. Heidenreich (SBN 116618)
1200 Aviation Boulevard, Suite 202
Redondo Beach, CA 90278
Telephone: (310) 545-5459
Email: huskinsonbrown@att.net

Attorneys for Appellants
ROLLAND JACKS, ET.AL.

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I. INTRODUCTION.

The Amicus Curiae Brief ["ACB"] of the League of California Cities ["Amicus" or "League"] contends that this litigation is about a contractual relationship between the City of Santa Barbara ["City"] and Southern California Edison ["SCE"] and about contractual obligations that financially burden, and are paid directly by, SCE as compensation for SCE's use of City rights-of-way. These claims are without merit or factual support.

As provided by the Stipulations, Rolland Jacks and Rove Enterprises Inc. ["Plaintiffs"] and all utility users paid and pay the surcharge imposed by City Ordinance 5135.[1] The case does not address *financial obligations owed by SCE.*[2] It is a Proposition 218 case, and Proposition 218 "**protects taxpayers** by limiting the methods by which local governments exact revenue from taxpayers **without their consent**." *Greene v. Marin County Flood Control and Water Conservation Dist* (2010) 49 Cal.4th 277, 284-85.

By paying their Ordinance 5135 surcharge obligations, the Plaintiffs and utility users obtained the due process right, pursuant to California

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[1]"Pursuant to City Ordinance 5135, all PERSONS in the CITY receiving electricity from SCE are obligated to pay the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE." [Appellate Appendix ["AA"] volume 3 at p. 679, Fact 16. [i.e. AA 3:679]]

[2]"The SCE assessments, collections and remittance of the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE were required by Santa Barbara City Ordinance 5135. . . ." [AA 3:678, fact 8]

Constitution Article XIII section 32, to contest those financial burdens[3].

The ACB is irrelevant because it ignores the Plaintiffs' rights, financial burdens, and constitutional protections. SCE is not a party to this action and did not pay a penny of the damages that are at issue. [AA 3:676-681.] The League's contradiction of the facts to contend that SCE is contractually indebted to pay the surcharges is unsupportable.

Regardless of the number of times that Amicus contends that Plaintiffs' Ordinance 5135 financial burdens were SCE's contract debts[4], the facts do not change. "Superfluity does not vitiate." Civil Code § 3537.

II. THE FACTUAL PREREQUISITES TO AMICUS' CLAIMS ARE UNSUPPORTED.

A. THE FACTS REFUTE THE LEAGUE'S CLAIMS.

ACB presents a myriad of claims based upon "facts," which are not facts at all. This Brief does not attempt to respond to every statement of "fact" but addresses representative misstatements of fact.

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[3]The ACB, by essentially ignoring the Plaintiffs and their financial burdens, implies that utility users who pay the surcharge are irrelevant. However, it is SCE that is irrelevant. Public Utilities Code § 799 and AA 2:407, section 7.

[4]The alleged split of the "economic" and "legal" incidence of the UUT [ACB p. 18] is a red herring for three primary reasons: (1) the City has no legal authority to split the alleged incidence of the UUT to avoid Proposition 218 duties, (2) Ordinance 5135 does not split the "incidence" of the tax, and, (3) pursuant to Article XIII section 32, the Proposition 218 cause of action presents the rights of utility users who pay the tax, not SCE who collects it.

1. "This case challenges the ability of local governments to negotiate fees for the valuable use of their property by private, for-profit utilities." [ACB p. 2]

Response: First, the Complaint [AA 1:45-58 at paras 14, 32, 34, 39-41 and 47], First Amended Complaint [AA 1:63-80 at paras 14, 16, 35, 38, 39, 43-45 and 52], Points and Authorities for Plaintiffs' Motion for Summary Judgment [AA 1:81-110 at pp. 91:3-11, 92:6-10, 97:1-6, and 98:21 to 99:3], Plaintiffs' Statement of Undisputed Facts for its MSJ [AA 2:480-499, Facts 13-27, 32 and 40], Plaintiffs' Opposition to the City's Motion for Summary Judgment [AA 3:533-556 at pp. 539:19-541:5, 542:2-10 and 542:15-544:1], Plaintiffs' Opposition to the City's Motion for Judgment on the Pleadings [AA 3:640-649 at pp. 641:1-6 and 642:23-644:3], Plaintiffs' Opening Appellate Brief [pp. 1-2, 4-8 and 44-49], Plaintiffs' Reply to the Respondent's Brief at the Court of Appeal [pp.1-8], and Plaintiffs' Supreme Court Answer Brief [*passim*] expressly provide that the case is about utility user payments only, not SCE contractual obligations.

Second, the 1% surcharge is paid by utility users as required by City Ordinance. SCE is only a tax collector. As the parties stipulated:

> "8. . . . The SCE assessments, collections and remittance of the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE were **required by Santa Barbara City Ordinance 5135**. . . .
> 16. *Pursuant to City Ordinance 5135*, all PERSONS in the CITY receiving electricity from SCE **are obligated to pay** the 1%

RECOVERY PORTION OF THE EXTENSION TERM FEE. [emphasis added]" [AA 3:676-681]

ACB misconstrues the issues in this legal action. [AA 1:63-80] As this suit does not contest SCE's contractual franchise fee debts [the "1% Initial Term Fees"], the ACB analysis fails and 'sky is falling' argument that statewide contractual franchise fees *paid by utilities* are at risk fails.[5]

2. "The [lower court] Opinion places strict limitations on the ability of local governments to adopt franchise fees . . ." [ACB at p.3]

Response: The lower court did not "place" limitations upon local governments. It applied Proposition 218 to Santa Barbara's enactment of financial burdens upon utility users. The lower court applied existing law to preclude the City's (1) efforts to create Proposition 218 loopholes, (2) proposed discretion to label taxes euphemistically as "fees", and (3) enactment of a UUT without an election. This action seeks no more than to require taxing bodies extracting revenue from utility users to provide the processes due to taxpayers as mandated by the state constitution.

3. "The City granted only a temporary and–in franchise terms–brief extension of SCE's prior

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[5]ACB's evidence that local governments commonly impose similar revenue streams [ACB's Mt for Judicial Notice, Exh A] does not identify a single similar revenue stream imposed (1) by City Ordinance (2) upon utility users (3) by D.89-05-063 processes, but appears to list contractual franchise fees similar to the "Initial Term Fee, which fee (and type of fee) is not at issue.

franchise rights for a 1% fee. But the heart of the consideration the parties agreed to exchange was a 2% fee for a 30 year franchise." [ACB p. 4.]

Response: SCE did not "agree" to pay a 2% franchise fee. It agreed:

(1) to be indebted to pay a 1% franchise fee [AA 2:406, §§3, 5-6]

(2) to seek CPUC approval, pursuant to CPUC D.89-05-063 to bill the surcharge to utility users [AA 2:405-407, §§ 3 and 6];

(3) if the CPUC did not approve the Advice Letter, to pay the 1% Initial Term Fee. In that case, SCE agreed that the length or terms of the franchise could be affected (presumably to allow the City to conduct an election for the UUT). (AA 2: 403-413, Section 3E); and

(4) if the CPUC approved the Advice Letter, to pay the 1% Initial Term Fee and to "levy, collect and deliver" the City's 1% surcharge. (AA 2:403-413, Section 3D and 6D).

SCE did not pay the 1% surcharge prior or subsequent to CPUC approval of the Advice Letter (AA 2:343-351, Facts 17-20 and 23), and Ordinance 5135 did not impose the 1% surcharge upon SCE. As Sections 3 and 6 of Ordinance 5135 provide that regardless of the CPUC response to the Advice Letter, SCE would *not* be obligated to pay more than the 1% Initial Term Fee, the theory that SCE "agreed" to pay a 2% fee fails. [AA 2:403-413, §§3, 5-6.]

4. "The City has no interest in or authority to direct the manner in which SCE recovers the costs of its services." [ACB p. 5.]

Response: This argument, by presuming the 1% surcharge was an SCE debt and cost of providing electricity, is contrary to facts, to Ordinance 5135, to Proposition 218, to CPUC D.89-05-063 and to the Public Utility Code process for a utility to increase utility rates to recover the costs of providing services. E.g., Public Utility Code section 454. The foundational fact for ACB's statements is precluded by the following:

> 8. "The SCE assessments, collections and remittance of the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE were required by Santa Barbara City Ordinance 5135." [AA 3:676-681.]

SCE does not pay the 1% Extension Term Fee, did not seek CPUC approval to increase its rates, and did not unilaterally create the Advice Letter process.[6]

Based upon the City's desire to obtain the 1% surcharge, based upon the decision not to follow Proposition 218, and based upon the risks of using CPUC processes (rather than Proposition 218 processes), the

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[6]"On November 23, 2004, the Santa Barbara City Council authorized City staff to send a letter to SCE directing SCE to pursue the implementation of the increase in the City's franchise compensation from 1% to 2% of SCE's Gross Annual Receipts by having SCE seek consent from CPUC to include the additional 1% recovery portion of Extension Term Fee as a line item surcharge on SCE billing to its Santa Barbara customers. [emphasis added]" [AA 2:348, fact 18]

franchise agreement imposed the financial exposure of using CPUC processes upon the City. The City would not assume those risks if it had "no interest in or authority" over the Advice Letter process. Section 7 provides:

> In the event that the CPUC or any court of competent jurisdiction orders the return to electric utility ratepayer(s) of any amount represented by the Franchise payments, which has been collected by Grantee and paid to the City, or in the event the parties agree as a result of a challenge and settlement thereof that a refunding will occur, then **City shall be solely responsible for such repayment.** [Emphasis added]" [AA 2:403-413.]

Therefore, ACB's claim is not true.

5. "If . . . any part of the franchise fee goes unpaid, SCE loses it franchise . . ." (ACB at p. 6)

Response: First, the statement is vague, but *appears* to contend that if any part of the 1% Initial Term Fee *or* the 1% Extension Term Fee is unpaid, SCE automatically "loses its franchise." This statement is contrary to Ordinance 5135, the facts and the payment record for these fees.[7]

As set forth by Ordinance 5135 sections 3, 5 and 6, SCE's duties for the 1% surcharge were to submit an Advice Letter to the CPUC to request authority to bill the surcharge and to levy, collect and deliver the taxes to

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[7]ACB argues that if utility users fail to pay the surcharge, SCE must do so or lose the franchise. Ordinance 5135 includes no such obligation. In fact, if SCE paid unpaid surcharges, payments of the 1% Initial Term Fee and surcharge remittance would be identical; they are not. [AA 2:334.]

the City, if the CPUC approved the Advice Letter.

Ordinance 5135 does not provide (1) that SCE loses its franchise if utility users fail to pay the surcharge or (2) that SCE is a guarantor of the surcharge payments.[8] As provided by Sections 3 and 6 of Ordinance 5135, the parties agreed that, depending upon the CPUC response to the Advice Letter, the franchise term and SCE's franchise duties would be affected.[9] The inclusion of contingent terms based upon the alternative CPUC responses, establishes that the City was cognizant of the issue and the effect that the CPUC decision would have on its revenues. Knowledge of these possibilities did not lead to the inclusion of a contingent obligation for SCE to pay the surcharge. [AA 2:403-413.] Therefore, this claim fails.

6. After years of receiving a 1% franchise fee from SCE, the City sought to increase that fee to 2% beginning with a new franchise in 1999. SCE eventually agreed, and the City adopted the terms

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[8]As this litigation addresses only the utility user payments, even if SCE was a contractual guarantor of unpaid utility users surcharge payments, any such SCE payments would not be at issue in this case.

[9]The League presents a convoluted theory at pp. 10-12. The League argues that because Ordinance 5135 includes a contingency to address the City's potential loss of revenue from an adverse CPUC decision, the agreement *must* include a duty upon SCE to "pay" the surcharge if the City's right to terminate is triggered. However, the franchise does not include this SCE contingent duty. Further, had the agreement included such a contingency, because the CPUC did not deny the Advice Letter, the imposition of that imagined duty upon SCE to pay the surcharge never arose.

> **of their agreement by Ordinance No. 5135. Under that agreement, the City granted a 30-year franchise "in exchange for" SCE's agreement to pay 2% of its gross annual receipts–as defined–"as consideration . . . and as compensation for use of the streets in the City . . ."** [ACB p. 10.]

Response: As provided above, SCE *only* agreed to be indebted to pay the 1% Initial Term Fee as its contractual obligation. [AA 2:403-413, sections 3, 4, 5 and 6.] In fact, the City did not receive "2% beginning with a new franchise in 1999". For the first six years of the 1999 franchise, the City *only* received 1% Initial Term Fee, and at no time has SCE paid the surcharge. [AA 2:343-351 and 3:676-681] As the parties stipulated:

> 9. After a period of negotiations, SCE presented the City with a proposal for a new Franchise Agreement. That proposal provided that SCE would remit to the City a two percent (2%) franchise fee provided that the City agreed that the increase in the franchise fee would be payable to the City *only if* the California Public Utilities Commission ["CPUC"] consented to SCE's request that it be allowed to include the additional 1% amount as a customer surcharge on the bills of SCE sent to its customers in the City. . . .
>
> 10. On that basis, the City staff and SCE tentatively agreed to the terms of a new 30-year SCE Franchise Agreement with SCE agreeing to **remit** to the City two percent (2%) of its gross receipts from its operations within the City, provided that the additional 1% portion of the total 2% Franchise Fee would become payable ***only if*** SCE was successful in obtaining CPUC consent that the additional 1% would be billed **as a customer surcharge** imposed on the SCE customers within the City. . . .

17. In April 2001, the City consented to SCE's request to delay for up to two years an SCE "Advice Filing" with the CPUC . . . As such, the original 1% franchise fee that was set by the prior City/SCE Franchise agreement continued during the extension, **and SCE did not pay the new 1% Recovery Portion of the Extension Term during that period of time**. . . .

22. On April 20, 2005, the CPUC consented to the SCE Advice Filing thereby allowing SCE to place upon its bills to its customers within the City a 1% electricity franchise surcharge . . .

23. . . . [I]n November of 2005 SCE began billing and collecting the new Recovery Portion of the Extension Term Fee (the new 1% additional surcharge) **from the electricity users** within the City and remitting those revenues in their entirety to the City. [emphasis added]" [AA 2:343-351]

The contention that SCE agreed to "pay 2% of its gross receipts . . . as a consideration" for its use of City streets is contrary to Ordinance 5135 and to the facts. [AA 2:343-351] Proof that the surcharge is not an SCE Franchise fee obligation is provided by the Advice Letter:

"SCE's electric franchise agreement (Franchise) . . . was adopted on December 7, 1999. The Franchise requires SCE to pay a basic franchise fee equal to 1.0% of SCE' s "gross receipts" from the sale of electricity within the corporate limits of the City. This is the maximum fee provided for in the Franchise Act of 1937, Cal. Pub. Util. Code § 6201, et seq. As an express condition of the City granting SCE a new franchise, the Franchise further requires that, upon City request, SCE use its best efforts to obtain Commission approval to charge an additional 1.0% surcharge to the customers within the City. . . .

> In accordance with D.89-05-063 and by the terms of the Franchise, which provides for the Franchise Extension Term Fee (surcharge), **SCE shall collect**, with the Commission's approval, the additional 1.0% as a surcharge to its existing franchise fee rate. . . . SCE will **bill and collect the surcharge revenues and pass through the revenues directly to the City**. [Emphasis added]" [AA 2:468-471.]

Lastly, Section 4 of Ordinance 5135 states the "Compensation" owed by SCE to use City streets: "1% of the Gross Annual Receipts of Grantee (the "Initial Term Fee")." The ACB can proclaim from the hilltops that SCE "pays" a 2% franchise fee as "compensation for use of the streets in the City." That does not change the Franchise Agreement or stipulations.

7. "The City did not establish the mechanism SCE uses to recover the cost of its franchise from its customers." [ACB p. 12]

Response: It is true that Santa Barbara did not establish the CPUC's powers, the Public Utility Code provisions to enact utility rate increases, or CPUC D.89-05-063. However, the Franchise Agreement did "establish" the use of the D.89-05-063 process. [AA 2:403-413, sections 3 and 6] In fact, SCE only moved forward with the Advice Letter process when it was "directed" by the City to do so. [AA 2:348, Facts 17-19] The claim that the City was uninvolved in the agreement to use D.89-05-063 processes to collect the City's revenue is unsupportable.

Further, the claim that the D.89-05-063 process was SCE's effort to "recover the cost of the franchise" misrepresents Public Utility Code mandated processes for a utility to increase utility rates to impose their "costs" on utility users. In fact, D.89-05-063, *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities*, addresses city enacted revenue mechanisms. Further, D.89-05-063 acknowledges that the CPUC has no jurisdiction to determine the propriety of *City enacted* revenue streams. D.89-05-063 provides as a Finding of Fact:

> "The Commission has no jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers, or utilities, or users' taxes on commodities used by a utility to produce its products." [AA 2:442]

Additionally, D.89-05-063 provides:

> "This Commission does not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general law or judicial decision, has jurisdiction to impose, *levy,* or increase. Any *issue* relating to such local authority is a matter for the superior Court, not this commission." [AA 2:435-36]

Therefore, ACB's claim fails.

> **8. "But the surcharge was not a requirement of the City. The City has no interest in the manner SCE recovers the cost of paying a 2% fee. Nor does it have any legal authority to establish such a surcharge."** [ACB p. 13]

Response: The City, not SCE, desired a 2% revenue stream: SCE's 1% Initial Term Fee and the utility users 1% surcharge. Based upon the City's desire, it obligated all utility users to pay the surcharge:

> "Pursuant to City Ordinance 5135, all PERSONS in the CITY receiving electricity from SCE are obligated to pay the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE." [AA 3:676-681, Fact 16.]

The Franchise Agreement parties agreed to use a D.89-05-063 process to seek CPUC authority for SCE to bill the City imposed utility user 1% surcharge. The argument that the City "has no interest" in the processes to collect its stream of revenue is inexplicable; as is the premise that the City had "no legal authority to establish such a surcharge" *because*, as the parties stipulated, City Ordinance 5135 did just that. [AA 3:679, Fact 16.]

9. "The franchise agreement provides that SCE 'shall pay to the City' the full 2% franchise fee." [ACB p. 18]

The League extracts a portion of a clause from the introductory sentence of Section 5 of Ordinance 5135 to support the claim that SCE *is obligated to pay and actually pays* the 1% surcharge. In doing so the League misrepresents Ordinance 5135 and denies the stipulations.

The section 5 clause, with the qualifying terms, actually provides: "Grantee . . . , as herein authorized and permitted shall pay to the City . . . the following." Identifying the conditions precedent that are "herein

authorized and permitted" and identifying "the following" payments requires greater analysis than provided by the ACB. First, the franchise agreement at Subsection 5(C) includes "conditions precedent":

> C. The conditions precedent to the obligation of Grantee under this Section 5 to levy, collect, and deliver to City the Recovery Portion as a part of the Extension Term Fee, shall be the conditions set forth in Section 6 below [concerning CPUC approval].

The conditions precedent are reiterated in Section 5B which identifies the funds to "pay" the surcharge. SCE is required (i.e., "shall") collect the 1% surcharge "from all electric utility customers" which "collection shall be . . . based on consumption or use of electricity." [i.e., SCE assesses and collects a consumption based utility user tax.]

In addition, application of the limiting clause "as authorized and permitted herein," requires consideration of sections 3, 5, and 6 of the Ordinance which conflict with the League's claim that SCE agreed to be directly obligated to "pay" the surcharge.[10]

Further, Section 4 of Ordinance 5135 identifies the "Compensation" that the City ***agreed*** to accept from SCE for *its use* of City rights-of-way:

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[10]In the Advice Letter, SCE states that it did not agree to pay the surcharge. Neither the League nor the City proffered evidence that SCE ever intended to be obligated by the Franchise Agreement to pay the 1% surcharge.

the 1% "Initial Term Fee". The implied claim that SCE agreed to "pay" the "full 2% franchise fee" as the charge/fee to use City streets, therefore, fails.

The totality of the Ordinance explains that the Section 5 reference to SCE's obligation to "pay" implicates two elements: SCE's obligation to pay the 1% Initial Term Fee *and* SCE's Section 5 duties to "collect" and "to levy, assess and deliver to the City" the 1% Extension Term Fee.

Continuing, Section 6 mirrors the Section 3 requirement that SCE obtain CPUC approval to bill and collect the 1% surcharge *before* it will be obligated to "deliver" payment to the City. Subsection 6(D) provides:

> D. If the Recovery Portion is approved by the CPUC, Grantee shall implement **customer collections** as soon as possible following the CPUC approval. . . .

As SCE's obligation is to "levy, collect, and deliver to the City" the surcharge, it did not "agree" to "pay" a 2% franchise fee.

B. APPLICATION OF THE FACTS.

The League failed to apply the totality of Ordinance 5135, to acknowledge in a meaningful way the financial burdens the City imposed upon the taxpayers, to recognize the taxpayers' Article XIII section 32 rights to contest their financial burdens, to apply the facts as stipulated by the parties, or to acknowledge the existence, terms or policy of Proposition

218 because to recognize or apply any of these truths is to admit that all of Santa Barbara's defenses fail.

As the parties stipulated, beginning in 2005 and continuing to today, SCE collects from Plaintiffs and all electricity users within the City, an Ordinance 5135 1% consumption-based utility surcharge that was enacted without an election and has never been paid by SCE. [AA 3:676-681]

Because Plaintiffs pay the 1% surcharge, because SCE is not a party to this lawsuit, because contract rights or duties of non-parties to the suit are irrelevant, and because the City enacted and receives the revenue stream created by the surcharge, Proposition 218 was violated by the City's failure to provide an election.

III. PROPOSITION 26 AND PROPOSITION 218.

A. INTRODUCTION.

The ACB implies that because Proposition 26 does not impose an election obligation upon a city enacting contractual franchise fees, that Proposition 26, if applicable, would not mandate an election for the 1% surcharge *and* that that is an indication that the drafters of Propositions 26 and 218 never intended for utility user consumption fees to be implicated by election processes. [ACB p. 8 and 15-16] This claim fails.

First, the trial court held that if Proposition 26 had been retroactive, the surcharge was a tax, and was not a franchise fee. [AA 3:617-620] The League's theory that Proposition 26 would not implicate this revenue stream ignores that ruling, which was not subject to appeal by the City.

Next, for purposes of the City's Motion for Judgment on the Pleadings [AA 3:622-639], the City did not deny or oppose the application by the court of the finding from cross motions for summary judgment that the surcharge was not a franchise fee under Proposition 26. Instead, it argued that Proposition 26 should not be applied retroactively to its enactment of Ordinance 5135. In ruling upon the City' Motion for Judgment on the Pleadings, the trial court again held that the surcharge, because it was paid by utility users and did not grant any added uses of City rights-of-way above those obtained from the payment of the 1% Initial Term Franchise Fee, would be a Proposition 26 tax. [AA 1:24-44.]

Because the facts cited by the trial court as proof that the surcharge was not a Proposition 26 franchise fee apply equally to the pre-Proposition 26 definitions of franchise fees and because the City did not appeal the trial

court's Proposition 26 rulings, if Proposition 26 has any import to this case, it is to establish that Ordinance 5135 did not enact a franchise fee.[11]

However, as the trial Court held that Proposition 26 was not applicable to the subject action and as the position was not subject to appeal [See, *Jacks v City of Santa Barbara* (2015)234 Cal.App.4th 925, 936 fn. 7], analysis of the intricacies of Proposition 26 is not necessary. Therefore, Proposition 218 (and the common law definitions of franchise fees, UUTs and taxes in place when Ordinance 5135 was enacted) must be applied.

B. PROPOSITION 218.

> "Proposition 218's findings and declarations state: "The people of the State of California hereby ***find and declare*** that Proposition 13 was *intended to provide effective tax relief* and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also **threaten the economic security** of all Californians and the California economy itself. This measure **protects taxpayers** by limiting the methods by which local governments exact revenue from taxpayers **without their consent**." " *Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277, 284-285.

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[11]The definition of "franchise fee" was not affected by Proposition 26 and is unchanged since *County of Tulare v. Dinuba* (1922) 188 Cal. 664, 670. Therefore, the trial court conclusion that, in a Proposition 26 analysis, the 1% surcharge is not a franchise fee, would be similarly applicable to a pre-Proposition 26 analysis.

Proposition 218 constitutionally eliminated local government discretion or authority (legislative, contractual, or otherwise) to enact financial burdens upon citizens unilaterally and empowered the people to make those decisions. The League's claim that city councils for charter cities have constitutional or statutory authority to impose the subject charges upon utility users based upon their right to "contract" (ACB pp. 16-17) fails because Proposition 218 is a constitutional provision limiting the authority of all local taxing bodies. Further, Proposition 218 "specifically states that '[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' [citation omitted.]" *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 448.

Silicon Valley explained: "The ballot arguments identify what was perhaps the drafter's *main concern*: tax increases **disguised via euphemistic relabeling** as 'fees,' 'charges,' or 'assessments' ". [Emphasis added]" *Id.* at 449. The City had no constitutional or statutory right or discretion to euphemistically label UUTs imposed upon utility users as "franchise fees" to avoid the obligations to provide an election.

Proposition 218 does not include a loophole to allow a city, by mere reference within a public contract of financial burdens a city imposed upon citizens, to eliminate citizens' constitutional rights over those burdens.

C. FRANCHISE FEES.

The ACB admits at page 7 that a franchise fee is "a 'charge which the holder of the franchise undertakes to pay as part of the consideration for the privilege of using the avenues and highways occupied by the public utility. (*Ibid* citing *Tulare County v City of Dinuba* (1922) 188 Cal. 664, 670; *City of Santa Cruz v Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1171)." As provided above, SCE (1) does not, and never has, paid the 1% surcharge and (2) agreed that its consideration for use of City streets was limited to the 1% Initial Term Fee. [AA 2:405-406, section 4]

Therefore, the ACB proclamation at pp. 6-8 that the 1% consumption based utility user fees collected by SCE and remitted/delivered to the City are contractual franchise fees is unsupportable. ACB's contention is expressly contrary to Ordinance 5135 Section 4 which provides that the 1% Initial Term Fee is the consideration for SCE's use of City rights-of-way.

As provided throughout, ACB's factual support for its franchise fee hypothesis contradicts the Ordinance itself, the definition of franchise fee, and the stipulated facts. The definition of "franchise fees" [See, *County of*

Tulare v. Dinuba (1922) 188 Cal. 664, 670] precludes the ACB's proposed franchise fee claim because utility users do not pay franchise fees or pay "consideration" for a for-profit utility's use of city streets. The continuing unsupportable theory that the "primary purpose" of the 1% surcharge imposed by the City upon utility users was to provide "consideration" for SCE's use of city streets has no support in the record, in Ordinance 5135, in the Advice Letter, or in the Stipulations.

IV. CONCLUSION.

Because utility users pay the surcharge pursuant to City Ordinance [AA 3:679, fact 16], because SCE's surcharge obligation is "to levy, collect and deliver to the City" [AA 2:403-413, section 5C], because, at the time of contracting, SCE and the City believed that SCE could not be burdened with a 2% franchise fee [AA 2:468-471], because the utility users do not receive any benefits or services from the city for payment of the surcharges, because Ordinance 5135 Section 4 identifies the consideration paid by SCE for the use of City rights-of-way as only the 1% Initial Term Fee, and because Article XIII C section 2(b) does not include the ACB's proposed Proposition 218 loophole, the claim that the surcharge is a contractual fee fails.

For the above stated reasons, Plaintiffs request that this Court affirm the Court of Appeal Order to enter judgment for the Plaintiffs.

Dated: November 4, 2015 Huskinson, Brown & Heidenreich, LLP

By: _____

Paul E. Heidenreich
Attorneys for Appellants

CERTIFICATE OF WORD COUNT

I, Paul E. Heidenreich, declare and state as follows:

I am a Partner of the law firm of Huskinson, Brown & Heidenreich, LLP. I am licensed to practice law before Courts of the State of California. I make this declaration under penalty of perjury. I was personally involved in the drafting of this Response to the Amicus Brief served by The League of California Cities and I conducted the word count of this Response using the Word Perfect computer program.

Using this program, I determined that the word count for Plaintiffs' Response to the League of California Cities Amicus Curiae Brief (including headings, footnotes and this Word Count Declaration, but excluding table of contents and table of authorities) is 5,303 words.

I certify and declare under penalty of perjury pursuant to the laws of the State of California that the forgoing is true and correct.

Executed this 4th day of November 2015 at Redondo Beach, California.

Paul E. Heidenreich

PROOF OF SERVICE - 1013A (3) CCP
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **1200 Aviation Boulevard, Suite 202, Redondo Beach, CA 90278.**

On **November** 10 **, 2015** I served the foregoing documents described as:

ANSWER TO AMICUS CURIAE BRIEF OF
THE LEAGUE OF CALIFORNIA CITIES

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Tracie Hodge

Clerk, Court of Appeal
Second Appellate District, Division Six
200 E. Santa Clara Place
Ventura, CA 93001

Honorable Thomas P. Anderle
Santa Barbara Superior Court
1100 Anacapa Street, Department 3
Santa Barbara, CA 93101
Trial Court Judge

Ariel P. Calone, City Attorney
City of Santa Barbara
PO BOX 1990
Santa Barbara, CA 93012
Attorneys for Defendant/Respondent City of Santa Barbara

Michael G. Colantuono
Colantuono, Highsmith & Whatley, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, CA 90071
Attorneys for Defendant/Respondent City of Santa Barbara

Trevor A. Grimm
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Attorneys for Amicus Curiae Howard Jarvis Taxpayers Association and California Taxpayers Association

Jan I. Goldsmith, City Attorney
City of San Diego
1200 Third avene, Suite 1100
San Diego, CA 92101
Attorneys for Amicus Curiae City of San Diego

Adam W. Hoffman
Hanson Bridgett, LLP
425 Market Stret, 26th Floor
San Francisco, CA 94105
Attorneys for Amicus Curiae League of California Cities

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **November** 10 **, 2015,** at Redondo Beach, California.

Tracie Hodge