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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CASE NO. S225589

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

APPELLANTS' RULE 8.520(d) SUPPLEMENTAL BRIEF

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

Reversing 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

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I. INTRODUCTION/REASON FOR SUPPLEMENTAL BRIEF.

California Rule of Court, Rule 8.520(d) provides: "A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." This is the basis for this Supplemental Brief.

Since the briefing by the parties was completed, two California Supreme Court cases and one State Attorney General Opinion have been published addressing issues regarding (1) California Public Utility Commission authority, (2) the application of Proposition 26 to a "franchise fee", and (3) the interpretation of local tax ordinances. As these Opinions have potential relevance, those matters are briefly addressed herein.

II. Monterey Peninsula Management Water District v Public Utilities Comm. (2016) 62 Cal.4th 693. ["*Monterey Peninsula*"]

Monterey Peninsula reiterated that the California Public Utilities Commission ["PUC"] has no authority to review local public agency fees or taxes imposed upon utility customers.

> "Petitioner Monterey Peninsula Water Management District, a public agency, imposed a fee on a public utility's customers for work it had undertaken to mitigate environmental damage caused by the utility. The agency's fee was charged as a line item on the utility's bill and was collected by the utility on behalf of the agency. The question before us is whether the Public Utilities Commission (PUC or Commission), which is empowered to regulate the rates and charges of public utilities, had the authority to review the amount of the

agency's fee. We conclude that the PUC did not have such authority. [Emphasis added.]" Id at 695.

Monterey Peninsula considered the PUC's authority, if any, for local taxes and surcharges from the perspective of both California Constitution Article XII and Public Utility Code sections 451 et seq. It confirmed that the PUC *cannot* review City imposed utility user surcharges or taxes.

For the Ordinance 5135 surcharges, the PUC's only involvement provided that SCE Advice Filing 1881-E[1] "is effective May 9, 2005." [AA 2:479]. Thereafter, SCE collected the surcharge for the City. [AA 2:334.]

During the litigation, the City argued that the PUC reply to the Advice Letter that allowed SCE to collect the surcharges was the act that *imposed* the surcharges upon utility users, rather than the enactment of Ordinance 5135[2] [AA 2:405]. The City contends that if the PUC approval

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[1]SCE Advice Letter 1881-E sought "to add an additional 1.0% franchise fee surcharge (referred to in the franchise agreement as the Franchise Extension Term Fee) line item on the electric bills of customers within the City pursuant to SCE's current franchise agreement with the City, which expressly provides for the additional amount to be surcharged **to SCE's customers** within the City. [Emphasis added." [AA 2:468]).

[2]Ordinance 5135 §§ 3 and 6 required SCE to file the "Extension Term Fee Advice Letter". Ordinance 5135 § 6(D) provides: "If the Recovery Portion is approved by the CPUC, Grantee shall implement *customer collections* as soon as possible following the CPUC approval. [Emphasis added]" [2:406-407.]

of the Advice Filing[3] [AA 2:479] ***enacted*** the surcharges, the PUC is a necessary party.[4]

As *Monterey Peninsula* provided that the PUC never had authority to review utility user charges, PUC approval of Advice Letter 1881-E [AA 2:479] could not "enact" the surcharge.

III. OFFICE OF THE ATTORNEY GENERAL - OPINION 13-403 DATED JANUARY 15, 2016.

Attorney General Opinion 13-403 ["the Opinion"] considered Proposition 26 in the context of a cable television "franchise fee" authorized by the State's Digital Infrastructure and Video Competition Act (and the Federal Cable Communications Policy Act of 1984) to fund public, educational, and governmental access television programming.

The Attorney General Opinion provides that when a local entity uses

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[3]PUC Decision 89-05–63, which is cited in Ordinance 5135 § 6 to identify the PUC process to be used, states: "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 2:343-351, Stip. Fact 15 and AA 2:415-448.]

[4]Ordinance 5135 § 7 provides: "In the event that . . . 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, . . . then City shall be **solely responsible** for such repayment. [Emphasis added.]" This section confirms that the City, having created and/or agreed to the PUC process and having enacted the Ordinance to burden utility ratepayers, was the guarantor should the processes be determined to be defective.

state franchise processes to establish a fee authorized by statute, that in this special circumstance the "public access fee" is not a local tax and, therefore, it does not require voter approval. This finding was confirmed by the fact that state law authorized the cable television franchise holder to elect to recover "as a separate line item on the regular bill of each subscriber" its financial obligations. Public Utilities Code section 5870(o).

AG Opinion 13-403 explained that the "Digital Infrastructure and Video Competition Act of 2006" transferred the cable television franchising authority from local entities *to the state*. The facts and circumstances applicable to City Ordinance 5135 *do not* include state statutes authorizing SCE to elect to recover its financial obligations "by billing a recovery fee as a separate line item on the regular bill of each [utility user]" as Section 5870(o) authorizes. The Opinion addressed fees that were subject to processes controlled by state and federal legislation and, therefore, "the public access fee is not a "levy, charge, or exaction . . . imposed by a local government"—that is, a *tax*—within the meaning of article XIII C."

For the analysis of Ordinance 5135 (and as provided by the Parties' Stipulations [AA 2:343-351 and 3:676-681]), the 1% surcharge was **not** imposed upon utility users by SCE pursuant to state authority, but was imposed by the City on utility users by City Ordinance 5135. The Ordinance

5135 surcharges are distinguished from the California's Digital Infrastructure and Video Competition Act "public, educational, and governmental access fee" because, like a sales tax or gasoline tax[5], the cable television fee is a financial burden *statutorily* allowed to be transferred *by the utility* to its customers. The Ordinance 5135 surcharges (1) were not created pursuant to a statutory Act granting SCE authority to pass-along these fees, (2) were not imposed upon SCE, and (3) are Utility User Taxes enacted by city ordinance.

Therefore, any attempt to apply the Opinion as "confirming" a right by the City to split the "incidence" of its tax to separate an alleged legal and economic incidence fails. Such "split" in financial liability requires a state statute granting the **payer** of the charge (and not the taxing entity) authority to pass along its burdens (i.e. split the incidence of the tax). As the surcharge was created by Ordinance 5135 as a revenue source for the City, was not created by SCE, and was not an SCE financial burden, the Opinion does not support any of the City's defenses.

IV. In re Transient Occupancy Taxes, S218400 (2016).

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[5]E.g, Revenue and Taxation Code §§ 6201, 6202, 6401; (b); *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal.App. 4th 514, 520 [72 Cal.Rptr.3d 857] and Civil Code § 1656.1 concerning sales taxes and Revenue and Taxation Code §8732 et seq regarding fuel taxes.

In Re Transient Occupancy Taxes analyzed local Transient Occupancy Taxes ["TOTs"] in the context of contracts between hotel operators and online travel company (OTCs). The question before the Court addressed whether charges collected by OTCs for their services to advertise and book reservations for hotel operators triggering OTC TOT obligations.

In Re Transient Occupancy Taxes began by reiterating the rule of law for the interpretation of tax statutes: "an ambiguity in a tax statute will generally be resolved in favor of the taxpayer (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 759; see *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330)". *In Re Transient Occupancy Taxes* was resolved by *critical* application of the rules of statutory interpretation to the local TOT ordinances, without granting local cities discretion as to how they "interpret" their ordinances.

The case held that because the TOTs were "calculated as a percentage of the 'Rent charged by the Operator [emphasis added]' of the hotel (See San Diego Mun. Code, § 35.0103)" and because OTCs did not operate hotels, that the TOT ordinances did not impose financial burdens that implicated the OTC retained portion of the charges. The Court determined that the cities had no right to have ambiguities interpreted to favor its revenue streams. The court determined that the OTCs were not

hotel "operators" or taxpayers, and determined that under the applicable ordinances, TOTs are only collected by hotel operators from taxpayer "transients", which taxes are then *remitted* to the cities.

Similarly, for consideration of Ordinance 5135, strict application of the rules of statutory interpretation to City Ordinances 5135 creates the applicable rule of law:

Step one, identify the payer of the local charge[6] acknowledging that tax collectors (such as hotel operators and utilities) are not the payers of the charges;

Step two, identify the statutory basis of the charge; and

Step Three, strictly interpret the statute that imposed the financial obligations, without granting discretion to the local entity over its nomenclature, while resolving any ambiguities in favor of the taxpayer to determine if the charge is implicated by Proposition 218.

When the Ordinance 5135 surcharges are thus interpreted, similar to

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[6]Determining who paid the charge must be made with consideration of the Article XIII, section 32 rights of the payer of the charges and application of the intent/purpose of Proposition 218 to protect citizens "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. Cities have no right to short cut this element or simply proclaim who the Payer is, as the City attempts to do by interposing SCE into this calculation.

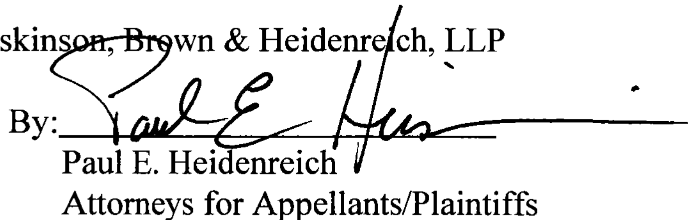
the statutory interpretation used in the TOT case, the City's offered franchise fee and contract defenses wilt. Ordinance 5135 required utility users pay a City UUT. [AA 2:403-413]

V. CONCLUSION.

This case raises questions about taxpayer rights to redress illegal local taxes. As provided by the above referenced Opinions, consideration of local taxes requires critical analysis of the rights of the party *paying* the local charges and strict interpretation of the Ordinance *imposing* the financial burdens. Proposition 218 precludes performing that analysis by granting local entities discretion to label euphemistically surcharges as "franchise fees" or discretion as to the interpretation of the taxing ordinance as a city's process to avoid Proposition 218 mandated elections.

For the above stated reasons and as provided by Appellants prior briefs, Plaintiffs request that this Court affirm the Court of Appeal Order to enter judgment for the Plaintiffs.

Dated: March 22, 2017 Huskinson, Brown & Heidenreich, LLP



By:______________________

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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, counsel of record for the Plaintiffs/Appellants. 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 Supplemental Brief 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' Supplemental Brief (including headings, footnotes and this Word Count Declaration, but excluding table of contents and table of authorities) is 1,994 words.

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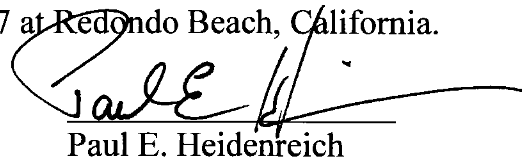
Executed this 23rd day of March 2017 at Redondo Beach, California.



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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.**

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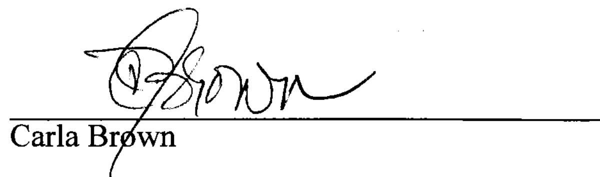

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