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 PETITION FOR REVIEW

Of 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

***

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION.

As provided by the pleadings [Appellants' Appendix at volume 1 pages 45-80 (AA 1:45-80)], Rolland Jacks and Rove Enterprises, Inc. dba Hotel Santa Barbara ["Appellants" or "Plaintiffs"] filed a Proposition 218 action against the City of Santa Barbara ["Petitioner" or "City"] contesting the City's enactment, without voter approval, of Ordinance 5135, which imposed a 1% consumption based utility tax. The Court of Appeal, applying the parties' Stipulated Facts ["Stipulations", AA 2:343-351 and 3:676-681], which addressed the enactment, purpose and effect of Santa Barbara Ordinance 5135, and the law defining franchise fees, utility user taxes and Proposition 218 rights, held that the City's imposition of the charges upon utility users, without voter approval, violated Proposition 218. *Jacks v City of Santa Barbara*, (Feb 26, 2015, 2d Civil No. B253474) ["Decision" or "Opinion"].

From inception, this has been a Proposition 218 case[1] and

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[1]"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." [citation omitted] It also

Proposition 218 instructs courts to liberally construe its provisions "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 5, p. 109, reprinted at Historical Notes, 2A West's Ann. Cal. Const. (2008 supp.) foil. art. XIII C, § 1, p. 85 (Historical Notes).)

The Petition for Review ["Petition"] refuses to acknowledge the import, purposes or mandate of Proposition 218 and the requirement that it be construed liberally *to limit* local government revenue authority. The Petition is based upon the false assertions that the case is about contractual franchise fees. Petitioner's factual contentions fail to acknowledge Appellants' election and voter rights and fail to apply the Stipulations to the Proposition 218 issues or to the definitions of franchise fees or Utility Users Taxes ["UUTs"].

While the City has shown discipline in refusing to go off message to address Proposition 218, taxpayer rights, and the Stipulations, that refusal does not alter the case. Throughout the case (including this Petition), the City has masqueraded the financial burdens it imposed upon Appellants as

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states: The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Prop. 218, § 5.) [emphasis added]" *Greene v. Marin County Flood Control and Conservation Dist* (2010) 49 Cal.4th 277, 284-85.

Southern California Edison ["SCE"] contractual franchise fees.

As will be explained below, the Petition fails because review of the Decision is not "necessary to secure uniformity of decision or to settle an important question of law." [California Rules of Court, Rule 8.500].[2] Rather, the Decision correctly followed Proposition 218, and state law defining franchise fees (*County of Tulare v. Dinuba* (1922) 188 Cal. 664, 670) and Utility User Taxes ["UUTs"]. *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 135, *City of Modesto v. Modesto Irrigation District* (1973) 34 Cal.App.3d 504, 508, and *Edgemont Community Services District v. City of Moreno Valley* (1995) 36 Cal.App.4th 1157, 1159-60, 1163.

II. THE PETITION'S FACTUAL PREREQUISITE, THAT THE CHARGES ARE "FRANCHISE FEES", DOES NOT EXIST.

The Petition asserts that the 1% Surcharge is a *contractual* franchise fee that is paid for SCE's use of public rights-of-way. That assertion is false. [AA 2:343-351 and 3:676-680.] As SCE did not pay the 1% Surcharges and as Appellants do not pay contractual franchise fees, the

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[2]Review is not appropriate pursuant to Rule 8.512 for either *Citizens for Fair REU Rates v City of Redding* [*Redding*], Case No. S224779 or *Wheatherford v City of San Rafael* [*Wheatherford*]. As to *Redding*, see footnote 4 to Opinion. As to *Wheatherford*, that is not a Proposition 218 case but is a Section 526a spending and a standing case. Because those cases do not have legal issues in common with the Proposition 218 tax issues in this case, they are not a basis for Rule 8.512 Review.

Petition is factually unsupportable.[3] The conclusion reached in the Opinion that the Surcharges were Proposition 218 implicated UUTs, and not franchise fees, was correct pursuant to law and fact.

A. STIPULATED FACTS.

The Stipulations establish that the 1% Surcharges are UUTs.

1. Stipulated Facts, Set 1 [AA 2:343-351].

Stipulated Facts, Set 1 [AA 2:343-351] include the following:

"7. In 1994, the City of Santa Barbara (the "City") and Southern California Edison ("SCE") . . . began negotiating the terms of a possible franchise extension. . . .

8. During the negotiations . . . , the City staff sought to negotiate an increased annual "franchise fee" in an amount equivalent to two percent (2%) of SCE's gross revenues from SCE's sale of electricity . . . The City staff sought to negotiate an increase in the SCE franchise fee in order to raise franchise fee revenues . . . for general governmental purposes. . . . [Fn

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[3]A utility cannot unilaterally increase utility rates to require that ratepayers repay the utility for contractual franchise fees. Those charges are the responsibility of the utility. A utility can, when proper, seek authorization from CPUC to increase rates when its expenses increase. The CPUC process includes the requirement of a showing of reasonableness. Public Utilities Code section 454. See also, California Constitution Art. XII sections 3, 5-6, Public Utilities Code sections 450 et seq, sections 727 et seq and section 491 [See also, AA 2:468-477 and 2:479]

1 in the Stipulated Facts omitted].

9. After a period of negotiations, SCE presented the City with a proposal for the 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 . . . 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's customers in the City. . . .

12. The Santa Barbara City Council acted to adopt Santa Barbara City Ordinance 5135 on December 7, 1999; this Ordinance granted the thirty (30) year franchise to SCE as described above . . .

16. . . . The 1999 Franchise further provides that, if . . . SCE has not received CPUC approval of an Advice letter by SCE seeking to include the "Recovery Portion of the Extension Term Fee" on the electricity billings . . . in accordance with CPUC Opinion 89-05-063, the 1999 Franchise would continue only on a year to year basis at the Initial Term Fee (i.e., a one percent gross receipts franchise fee payable by SCE to 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 seeking CPUC approval of the Recovery Portion of the Extension Term Fee. . . . As

such, the original 1% franchise fee 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 Fee during that period of time. . . .

20. On or about March 30, 2005 SCE submitted Advice Filing 1881-E (U 338-E) to the CPUC pursuant to . . . CPUC Decision 89-05-063 . . . requesting CPUC consent to allow SCE "to bill and collect **from its customers** . . . a 1.0% electric franchise surcharge to be remitted to the City by SCE ***as a pass-through fee*** . . .

22. On April 20, 2005, the CPUC consented to the SCE Advice Filing thereby allowing SCE to place upon its bills to its customers . . . a 1% electricity franchise surcharge, which became effective on May 9, 2005. . . .

23. After being advised by the CPUC that its March 30, 2005 "Advice Filing" was "effective" in 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.

24. The 1% Recovery Portion of the Extension Term Fee that is charged by SCE to the electricity payers . . . was not submitted to or approved by the voters of the City. [emphasis added]" [AA 2:343-351 (and exhibits 2:352-479)]

2. Stipulated Facts Set 2. [AA 3:676-681]

"3. After a period of negotiations, SCE drafted the proposal for the new Franchise Agreement. That proposal provided that SCE would **remit** to the City a two percent (2%) franchise fee provided that the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE would ***only*** be due and payable by SCE when and if the California Public Utilities Commission ["CPUC"] consented to SCE's request to include the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE as a surcharge on the bills of all SCE electricity customers in the CITY. . . .

8. After being advised by the CPUC that the "Advice Filing" was "effective," in November of 2005 SCE began assessing and collecting 1% RECOVERY PORTION OF THE EXTENSION TERM FEE from all electricity users within the City. 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 3:676-680]

B. UTILITY USER TAXES.

The legal definition of a UUT is undisputed and not subject to the need for Supreme Court Review[4].

> "A utility users' tax is a tax imposed by a city or county on the users of a utility service, such as gas, electricity, water, or telephone. (*Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 135.) The utility company providing the utility service is required to collect the tax on the bills it sends to its customers and then to remit the tax to the entity imposing the tax. (*City of Modesto v. Modesto Irrigation District* (1973) 34 Cal.App.3d 504, 508.) The **taxpayer is the utility customer**, and the utility is only a conduit for collecting the tax and remitting it to the taxing entity — the city or county imposing the tax. (*Edgemont Community Services District v. City of Moreno Valley* (1995) 36 Cal.App.4th 1157, 1159-60, 1163.) Because it is just an instrument for the collection of the tax, the utility company only has to collect the tax and is not liable if the tax is in anyway improper. (Pub. Utilities Code § 799.) Essentially, the **utility has no obligation itself to pay the tax** – it just serves as a tax-collecting agent on behalf of the local government. [emphasis added]" [Respondent's Brief on Appeal ["RB"] at pp. 29-30]

As UUTs are pass along taxes **imposed by** cities *upon utility users*[5], the task for the Court of Appeal was to apply the stipulations to this law. As the Stipulations state, Appellants are required by Ordinance 5135 to pay the

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[4]The Petition, p. 10 cites CPUC D.89-05-063 and states: "utility user taxes 'are merely collected for the governmental entity by the utility' – i.e. the utility collects and remits the fee but does not pay it because it bears neither legal nor the economic incidence of the tax. (AA 2:438)."

[5]CPUC Decision 89-05-063 defines a UUT as: " " utility users' taxes are **pass-along" taxes** *to the consumer*, usually based on consumption, but **collected by the utility** for the taxing entity." [AA 2:423]

1% consumption based charges and SEC's ***only*** obligation is to collect and remit the taxes. [AA 2:343-351 facts 20-24 and 3:676-681, facts 8, 16 and 21-23] Therefore, the Decision was correct and the factual prerequisite of the Petition fails.

C. FRANCHISE FEES.

Confirmation that the Ordinance 5135 charges are Proposition 218 implicated UUTs is made by applying the Stipulations to the definition of franchise fees as similarly identified by the trial court, court of appeal, Petitioner and Appellants. [AA 1:1-23, the Decision, RB at p. 22, and AA 1:81 to AA2:342.] The Opinion at page 6 correctly stated:

> "[T]he definition of "franchise fee" has been constant for nearly a century. 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." (*Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670; accord, *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1171.) [Emphasis added]"

"Franchise fees" are fees **paid by business franchisees** for **their use** of a city's infrastructure. [See also, Defendant's Sixth affirmative defense AA 1:59-62.] A utility franchise is a *contract* for which negotiated fees are paid by the contracting utility to a City for that contracting party's use of City assets. *Cox Cable San Diego, Inc. v. County of San Diego* (1986) 185

Cal.App.3d 368, 375. Therefore, the definition of franchise fees is not an issue necessitating Supreme Court review.

Contractual franchise fees are negotiated and owed by the utility. In this case, the Surcharge is not an SCE financial obligation, but is a tax imposed by the City upon utility users. [See also, AA 2:468-477 and 2:479.]

Utility users pay the Surcharges pursuant to Ordinance, not contract. As the payments are not made by SCE, they are not be consideration for SCE's use of city rights-of-way. [AA 2:343-351 and 3:676-681.] Therefore, the Petition's foundational fact, that the 1% Surcharge is a contractual fee to pay for SCE's use of City streets, fails.

III. SCE AND THE CITY NEVER CONSIDERED THE ORDINANCE 5135 CHARGES TO BE FRANCHISE FEES.

Petitioner's claim that the Ordinance 5135 taxes are franchise fees is contrary to the actions of the City and SCE *prior to* the litigation. Advice Letter 1881-E [AA 2:468-471] explained *why* the contracting parties **did not** impose a 2% contractual franchise fee upon SCE, *why* the City enacted a 1% consumption based UUT on utility users, and *why* the contracting parties only burdened SCE with the UUT collection responsibilities. [AA 3:676-680 and AA 2:468-471.] Advice Letter 1881-E provides:

> "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.

As the contracting parties did not interpret the agreement as imposing contractual franchise fees, the Petition's factual prerequisite fails. Therefore, the Petition fails.

IV. THE EXISTENCE AND APPLICATION OF APPELLANTS' PROPOSITION 218 RIGHTS ARE PRIMARY ISSUES.

The purpose, terms and case law interpreting Proposition 218 are not in conflict and preclude the City's enactment of UUTs upon appellants without voter approval. As explained in footnote 4 of the Decision: "Several cases have held that utility user taxes imposed on the use of electricity are subject to Proposition 218's voting requirement. (E.g., *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1186.)"

"The ballot arguments in favor of Proposition 218 emphasized the **guarantee** of the right to vote on taxes **even if denominated "fees,"** including the right to vote on utility taxes. [emphasis added]" *Citizens Association of Sunset Beach v Orange County Local Agency Formation Commission* (2012) 209 Cal.App.4th 1182, 1196.

Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431 [79 Cal.Rptr.3d 312] (*Silicon Valley*) explained: "The [Proposition 218] 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 Petition seeks to eliminate these protections.

Proposition 218 was enacted to *"limit **the methods by which local governments*** exact revenue from taxpayers without their consent.' [citation omitted] [emphasis added]" *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 235. Proposition 218 requires the courts to consider the propriety of financial burdens imposed upon citizens by municipalities, to protect the payers, not recipients, of the taxes. *Silicon Valley* at p. 445.

By the Petition's failure to identify a conflict between the Decision and Proposition 218, the Petition fails.

V. APPELLANTS WERE BURDENED WITH THE LEGAL AND ECONOMIC INCIDENCE OF THE UUT BY CITY ORDINANCE 5135.

At pages 27-31 the City fabricates a legal issue to try to separate the "economic" and "legal" incidence/burdens of the Ordinance 5135 tax. Petitioner's analysis does not quote or cite any portion of Proposition 218 or Proposition 218 case law to support the existence of this issue to a Proposition 218 case. Further, for the following reasons, the argument fails.

A. THE CITY'S CLASSIFICATION OF THE CHARGE IS NOT DETERMINATIVE.

By this fabricated issue, the City seeks to create law and obtain discretion for the City, in a Proposition 218 setting, (1) to label the Ordinance 5135 charge as a contractual franchise fee and (2) to impose the legal incidence of the Surcharge upon SCE separately from the economic burden it imposed upon utility users.

The Petition provides no legal authority granting a city the power to divide a UUT or a franchise fee into separate legal and economic burdens. Instead, the Petition (1) proclaims that it can and has divided the burdens of the Ordinance 5135 charges and (2) contends that courts must accept a city's labeling of the financial burdens it imposes and a city's claims concerning the alleged division of the legal and financial burdens imposed. However, local government labeling of the financial burdens they impose

has always been viewed with suspicion. "Although the classification of a revenue-producing device can be determinative of the lawfulness of the device, courts look to the actual attributes of the device as enacted in order to arrive at the proper classification; *the label attached to the device by the local government is not determinative.* [emphasis added.]" *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1422.

The *Sinclair Paint Co v State Board of Equalization* (1997) 15 Cal.4th 866 discussion of "Taxes or Fees?" provides that analysis of the "primary purpose" of a charge begins by identifying the payor. Id at pp. 874-876. Thereafter, the court considers the purpose of the charge from the payer's perspective to determine whether it is a tax or a fee. Id at 873-81. See also, *Apartment Assoc. of LA County v. City of Los Angeles* (2001) 24 Cal.4th 830, 840-841.

Petitioner requests Review to present the hypothesis that, in a Proposition 218 case, the law *should* grant a city authority and discretion to label financial obligations that it imposes and that a city should be allowed to split the "economic" and "legal" burdens of the revenue devices. [Petition pp. 18-22] Proposition 218 precludes those powers from the City. *Silicon Valley* at p. 449 and *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 235. Therefore, as the law does not lack

uniformity but establishes that courts can critically review a city's enactment of financial burdens, the Petition fails.

B. THE OPINION DOES NOT UNDERMINE CONTRACTUAL FRANCHISE FEES.

The contention and factual pre-requisite of the Petition that the "Opinion jeopardizes every franchise fee in the state" [Petition p. 21] is unsupportable. Rather, the Decision provides: "We are not foreclosing *legitimate* franchise fees, however; only those that are in effect utility user taxes masquerading as franchise fees." Decision at page 11.

While the Petition apparently seeks review to protect city contracting authority, review is not necessary to unify or clarify state law because the Decision does not apply to contractual franchise fees that a negotiating utility pays to a city. In fact, while the SCE-City agreement imposed the contractual 1% franchise fee upon SCE [the "Initial Term Fee"], that franchise fee was *never* at issue in this case. Therefore, the Petition fails.

C. STATE LAW DOES NOT SPLIT THE ECONOMIC AND LEGAL INCIDENCE OF ORDINANCE 5135 TAXES.

The legal vs economic incidence issue presents confused and false statements of the law and fact. The confusion arises because the portion of the Petition raising this issue addresses the UUT as a "revenue measure" without identifying a Proposition 218 classification of the charge.

The authority for an alleged division of the legal and economic burdens of *a tax* arises for a limited category of *taxes*; business *taxes* that can, *statutorily*, be charged to customers[6]. However, the Petition denies that the 1% Surcharge is a tax, and the Petition provides no legal authority for a division of legal vs economic burdens of the charges that is applicable to its theory of the case, i.e. the charges are franchise fees.

In fact, the Petition *cannot* admit that the Ordinance 5135 charge is a tax (to try to advance its legal vs economic incidence argument) because it ***cannot*** contract (with SCE) to impose a tax, and if the Surcharge is a tax upon utility users, the Decision is correct. Therefore, as it has placed its eggs in the "right to contract" with SCE basket, Petitioner is stuck with a contractual "franchise fee" theory for which there is no support for a division of legal and economic burdens of the 1% Surcharge.

D. CITIZEN'S ARTICLE XIII SECTION 32 AND DUE PROCESS RIGHTS.

By raising a false narrative, i.e. SCE has the "legal incidence" of the UUT, Petitioner seek to *create new law* to shift the judicial analysis to a utility's alleged legal burdens to, thereby, eliminate judicial consideration of utility users' rights and economic burdens. The City's attempt to divide the

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[6]E.g, Revenue and Taxation Code sections 6051, 7351 et seq and 8733 concerning gas and sales taxes.

burdens of the UUT proposes consideration of Appellants' Proposition 218 rights from the perspective of the false franchise fee hypothesis. State law does not have confusion or conflict as to this issue. Because the Surcharge financially burdens appellants [AA 3:676-680], the Proposition 218 analysis requires consideration of Appellants' rights, not an SCE-City contract. This Proposition 218 analysis *triggers* California Constitution Article XIII section 32, which provides the constitutional right to those paying taxes to contest taxation. The request for review seeks to *create conflicting law* that limits judicial analysis to a city's utility contract, rather than consideration of the enactment of the financial burdens upon Appellants. Such law would deny Plaintiffs' their Article 13 section 32 rights.

Next, the payers of the 1% Surcharge have due process rights to contest the City's "taking" of ***their*** finances, i.e. the imposition of the "economic incident' of the tax. There is no conflict as to the existence of *Appellants'* federal and state due process rights contest the City's taxation and this case is not about SCE franchise fees.

In *Richards v. Jefferson County, Alabama* (1996) 517 U.S. 793. [*Richards*], the U.S. Supreme Court addressed a taxpayers' right to contest taxation and identified taxpayer Constitutional due process rights to contest taxation in a res judicata context.

The *Richards* taxpayer class action was filed in the Alabama Circuit Court. Several years prior, suit was filed by the director of finance for the City of Birmingham to contest the legality of the same tax. The director of finance's action was consolidated with a suit by three taxpayers. The consolidated action, *Bedingfield v. Jefferson County,* 527 So.2d 1270 [*Bedingfield*], was resolved when the Alabama Supreme Court upheld the legality of the tax. Thereafter, summary judgment was entered in the *Richards* class action based upon a res judicata application of *Bedingfield.* The *Richards* summary judgment was upheld by the Alabama Supreme Court. The matter was then appealed to the U.S. Supreme Court.

The Supreme Court unanimously held that "the State Supreme Court's holding that petitioners are bound by the adjudication in *Bedingfield* deprived them of the due process of law guaranteed by the Fourteenth Amendment." *Richards* at 797. *Richards* identified each taxpayer's right to contest a previously paid tax as a **constitutionally protected** property interest, "a chose in action." *Richards* at 804.

Richards acknowledged that if *Bedingfield* had succeeded, it would have benefitted taxpayers. The Court then held that, in spite of this fact, application of res judicata against each taxpayer **violated** Federal Constitutional due process protections. Each taxpayer's constitutional right to contest wrongful taxation must be protected and analyzed by the courts. Petitioner's proposed analysis of their 1% Surcharge obligation as an SCE contract issue would deny taxpayers judicial

consideration of their rights as impinged by enactment of Ordinance 5135 and the financial burdens it imposed.

California courts have similarly held that constitutional due process applies to taxpayer actions. As stated in *Macy's Dept Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, 1449-1450:

> "The parameters of state-afforded relief were made clear in *McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18 [110 L.Ed.2d 17, 110 S.Ct. 2238] (*McKesson*), where the Supreme Court held: "To satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with, not only a *fair opportunity to challenge* the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' [citation], for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one. [Emphasis added]" (*Id.* at p. 39, fn. omitted.)"

As the law is without conflict as to Appellants' constitutional rights to contest the City's imposition of financial burdens, and as the Decision applied those rights by considering the imposition of the tax from the perspective of those financially burdened, (1) the Petition should be denied and (2) law should not be created to preclude the judicial analysis that was performed by the Decision. As Proposition 218, due process and Article XIII section 32 uniformly do not allow for the judicial analysis of a wrongful tax from the perspective proposed by Petitioner, and do not allow a city authority to determine the Proposition 218 designations of a charge, the basis of the Petition fails.

VI. PROPOSITION 218, NOT THE OPINION, LIMITS CHARTER CITY HOME RULE AUTHORITY.

The Petition misrepresents charter city home rule authority and Proposition 218 to claim a "conflict" in the law. At page 34, the Petition states:

> "Thus, the Opinion vitiates as a tax under articles XIII A and XIII C what article XI, section 9, subdivision (b) and article XIII, section 8 define as a fee. This Court should grant review to harmonize these provisions."

Pages 8-11 and 32-34 of the Petition contend that a charter city's Article XI, section 5, 7 and 9 and Article XII section 8 authorities are adversely affected by the Decision's application of Proposition 218. The Petition contends that either (1) Proposition 218 ***cannot*** affect charter city powers or (2) the Decision is erroneous ***because*** Proposition 218 did not limit a city's powers to impose the Ordinance 5135 charges. In either respect, the Petition claims that the application by the Decision of Proposition 218 to Ordinance 5135 creates a conflict in law because the Decision burdened charter city home rule and contracting rights.

The Primary flaws to the argument are twofold. First, the Appellants were not parties, to or financially burdened by, a city franchise agreement. Further, the SCE-City franchise agreement was not determined by the Decision to have been an improper use of city contracting authority. [AA 3:676-681] Contrary to the Petitioner's claims about conflicting law, the Decision does not limit or affect charter city contracting rights. Second, because Article XIIIC section 1(b) applies to charter cities, Proposition 218 limits charter city powers to financially burden citizens. *Howard Jarvis Taxpayer Association v City of Roseville* (2003) 106 Cal.App.4th 1178, See also, *Silicon Valley,* 44 Cal.4th 431, *Greene v. Marin*

County Flood Control and Water Conservation Dist. (2010) 49 Cal.4th 277, 297 [109 Cal.Rptr.3d 620] (*Greene*), *Santa Clara County Local Transportation Authority, v. Guardino* (1995) 11 Cal.4th 220. Because, Proposition 218 and the Decision are in agreement as to the limitations imposed on cities to enact financial burdens, the Petition fails. Further, because the Decision does not impose limits on charter city contracting authority, no conflict of law exists.

VII. PROPOSITION 26 HAS NO APPLICATION.

A. INTRODUCTION.

While the City was before the trial court and court of appeal, Petitioner sought to avoid the broad Proposition 26 definition of "tax" upon the 1% Surcharge. The trial court specifically found that the Proposition 218 requirement that a city obtain voter approval of taxes would implicate Ordinance 5135 if the Proposition 26 definition of "tax" applied. In other words, if Proposition 26 applied retroactively, the trial court would have denied the City's MSJ and granted Appellants MSJ. [AA 1:8-18]

Petitioner successfully argued that Proposition 26 is irrelevant to this litigation because it did not apply retroactively. [AA 3:622-639, 3:650-675 and 3:764-783] The trial court therefore did not deny the City's MSJ.

In a reversal of these arguments, Petitioner contends at pages 24-27 that Proposition 26 applies and the failure of the lower courts to apply it with Proposition 218 to create a conflict in the law. Petitioner seems to

contend that the Decision, which does not rely upon Proposition 26, creates a conflict in interpreting Proposition 26 *because* Proposition 26 should have been applied. As to these issues, the Decision states:

> "The [trial] court found that the 1% surcharge *does* constitute a tax under the 2010 amendments to article XIII C of the California Constitution brought about by Proposition 26. Ultimately, however, the court ruled that Proposition 26's definition of "tax" does not apply retrospectively to the 1999 franchise agreement. Accordingly, the court entered judgment in favor of the City. [Emphasis added]"

The Decision did not overturn the trial court finding and Petitioner did not appeal the trial court's Proposition 26 decision. Therefore, the claim that the Decision creates a conflict in law over the interpretation of Proposition 26 fails (1) because the issue was waived on appeal by the City (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167) and (2) because the Decision necessarily cannot conflict with law as to issues that it did not address.

B. TERMS OF PROPOSITION 26 AND DEFINITION OF TAXES.

Proposition 26 was intended to further the Proposition 13, 62 and 218 limits on local government taxation practices. The Proposition 26 findings and declaration of purpose states:

> "The people of the State of California find and declare that:
> (a) Since the people overwhelmingly approved Proposition 13 in 1978, the Constitution of the State of

California has required that increases in state taxes be adopted by not less than two–thirds of the members elected to each house of the Legislature.

(b) Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters.

(c) Despite these limitations, California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all–time highs. Californians are taxed at one of the highest levels of any state in the nation.

. . .

(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees' in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as 'regulatory' but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.' " (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114; see Historical Notes, 2A West's Ann. Cal. Const., supra, foil. art. XIII A, § 3, pp. 141-142.)"

Petitioner's claim that its labeling of the Ordinance 5135 tax as a "fee" removes it from the definition of "taxes" in Proposition 26 is without support. Proposition 26 defines "taxes" very broadly. Proposition 26 amended section 1 of article XIII C of the California Constitution to read:

(a) 'General tax' means any tax imposed for general governmental purposes.

(b) 'Local government' means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

. . .

(e) As used in this article, 'tax' means **any** levy, charge, or exaction of any kind **imposed by a local government**, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product. . . .

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." [emphasis added]

As the utility users who pay of the charges do not receive rights to enter or use government property and did not contract with SCE or the City to pay the charges, Petitioner's "contract" and "fee" arguments fail. The Surcharge is a Proposition 26 tax. Additionally, if Petitioner had wished to apply Proposition 26 to the Surcharge during the case, it would have had to address these issues based upon its Proposition 26 burdens:

> "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are

allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

As the Stipulations provide that the charges are paid by utility users based upon the City Ordinance and as there are no Stipulations that SCE does more than collect and remit the taxes [AA 2:343-351 and 3:676-681], the Petitioner's discussion about Proposition 26 and franchise fees is legally and factually void.

Lastly, the Petition at pages 24 to 27 contends that Propositions 26 *and* 218 *could not* defeat a charter city's municipal authority under Article XI section 9 and Article XIII section 8 to contract and to enter franchise agreements. From these arguments, it appears (without the Petition so stating), that Petitioner seeks a finding that Proposition 218, Article XIIIC Section 1(b) is unconstitutional *if* Proposition 218 affects a charter city contracting rights. These arguments are inapplicable because the 1% Surcharge is not a contractual franchise fee but, as Stipulated by the parties, was imposed by city ordinance [AA 2:343-351 and 3:676-681]. There is not conflict in the law between Propositions 26, 218 and a Charter City's rights to enter franchises with a utility. Therefore, the Petition fails.

C. A CONFUSING PETITION IS NOT A BASIS FOR REVIEW.

The Petition, by a jumbled, complicated, rather incoherent recitation of bits and pieces of Proposition 26 and Proposition 218 issues, CPUC authority, and charter city home rule powers, attempts to paint a picture of law in chaos and conflict. However, because Petitioner's claims are without factual support (i.e. the 1% surcharge is not a franchise fee) and because Petitioner does not address the applicable definitions of UUTs or franchise fees (which are not in conflict), the Petition is unsupportable.

The Petition's attempt to create confusion fails because it does not identify conflicting law as to *relevant* Proposition 218 issues or as to the definitions of taxes and franchise fees. Petitioner's claim that charter city rights are disturbed by the Decision fails because the Decision does not address or disturb the City's contract with SCE and because Proposition 218 lawfully *applies* to charter cities to limit their authority to enact UUTs. E.g., *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1186 and California Constitution Article XIIIC Section 1(b). In fact, case law uniformly interprets Proposition 218 as limiting cities' imposition of financial burdens upon citizens. *Greene* and *Silicon Valley*.

The Petition fails because the Decision identified the issues, addressed the Appellants constitutional rights, did not assume facts, and did not create conflicts of law. The Decision correctly identified applicable law

and fact, applied them to one another and determined that the enactment of Ordinance 5135 violated Appellants' Proposition 218 rights.

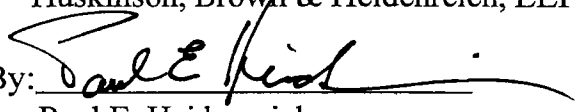
The Petitioner's attempt to cite broad, inapplicable categories of law as requiring clarification and harmonization fails. The Decision was correct, did not conflict with any Proposition 218 cases, and properly applied the Stipulations. Therefore, the Petition fails.

VII. CONCLUSION.

For the above stated reasons, Appellants request that the Court deny the Petition for Review.

Dated: April 24, 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 Appellants' Answer to the Petition for Review and I conducted the word count of this Answer using the Word Perfect computer program.

Using this program, I have determined that the word count for Appellant's Answer to the Petition for Review (including headings, footnotes and this Word Count Declaration, but excluding table of contents and table of authorities), is 6,512 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 24th day of April 2015 at Redondo Beach, California.

Paul E. Heidenreich

PROOF OF SERVICE CCP 1013A (3)

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 April 27, 2015, I served the foregoing documents described as:

ANSWER TO PETITION FOR REVIEW

[X] BY MAIL: I deposited such envelope(s) in the mail at Redondo Beach, California with postage thereon fully prepaid, in the United States mail to the addressee(s) listed on the attached list.

[ ] BY PERSONAL SERVICE: I caused such envelope(s) to be delivered by hand to the office(s) of the addressee(s) listed on the attached list.

[ ] BY OVERNIGHT MAIL: I placed such document(s) stated above in a sealed envelope, for deposit in a designated box maintained by Federal Express for overnight delivery pursuant to C.C.P. §1013(c), with delivery fully prepaid or provided for to the addressee(s) listed on the attached list.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence or mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing.

Executed on April 27, 2015, at Redondo Beach, California.

Tracie Hodge

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