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 BRIEF

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.

Rolland Jacks and Rove Enterprises Inc. ["Plaintiffs" or "Appellants"] brought a Proposition 218 putative class action against the City of Santa Barbara ["City" and "Respondent"] to contest a 1% surcharge imposed by the City upon utility users by Ordinance 5135 and collected by franchisee Southern California Edison ["SCE"]. [Appellants' Appendix ["AA"] volume 1 at bates stamped pages 63-80 [1:63-80]] This suit does not contest contractual franchise fees ["Initial Term Fees"] *paid* by SCE.

As the parties stipulated, beginning in 2005 and continuing to today, SCE has collected from Appellants and all electricity users within the City, the City's Ordinance 5135 1% consumption based surcharge. [AA 2:343-351 and 3:676-681] The 1% surcharge was enacted by the City and *imposed* upon utility users without a Proposition 218 election.[1] [AA 3:676-681]

As to the two primary factual issues in this case, who pays the 1% surcharge and why they pay it, the Opening Brief ["OB"] is contradictory and confusing. At a post Motion for Summary Judgment appeal wherein,

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[1]The City enacted the Ordinance 5135 1% surcharges. The OB at p. 45 admits: "Thus, the terms of Ordinance No. 5135, including the franchise fee, are legislative." Because Proposition 218 eliminated a city's legislative authority to enact financial burdens, while this admission defeats the "franchise fee" defense, the City's offer of a "Separation of Powers" defense for this legislative action also fails.

because of Stipulations, there are no issues of material fact, the OB states the following "facts"; (1) utility users pay 1% surcharges imposed by SCE and the CPUC [OB pp. 29-30], (2) SCE pays the 1% surcharges pursuant to its contract with the City [OB at pp. 17, 28, 29, 30, 32, 40, 41, 45, and 46], (3) utility users pay the 1% surcharges pursuant to contract as "rent"[2] for SCE's use of City streets [OB pp. 10, 12, 15, 17, 28-29, and 43], and (4) utility users pay the 1% surcharges because of the City's legislative enactment of Ordinance 5135 [OB at p. 45].

Because the City defends its enactment of the 1% surcharge with conflicting facts and "conclusions" as to who and why the 1% surcharge is paid, the OB provides pages of inapplicable analogy, misstatements of fact, and contradictory arguments about inapplicable fees, taxes and local government operations that are never applied to the stipulated facts. In fact, most sections of the OB raise legal theory unrelated to either Proposition 218 or the City's enactment of Ordinance 5135 [AA 676-681] and end with a conclusory sentence claiming that the charges are, "therefore", franchise

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[2]The OB is ambiguous, and contradictory. It largely addresses the 1% surcharges as "rent. These characterizations fail to acknowledge or analyze the enactment of Ordinance 5135 [See fns 1 and 2] which burdened utility users with the surcharges. [AA 3:676-681] The OB is ambiguous because it contends both that the 1% surcharge is paid by utility users (OB at pp. 11, 17, 18, 20, 29, 36, 40 and 46) **and** is not paid by utility users but is paid by SCE (OB at pp. 17, 28, 29, 30, 32, 40, 41, 45, and 46).

fees or rent or . . .

The OB fails to justify the City's revenue enactment practices because it (1) ignores the purpose and intent of Proposition 218, (2) misrepresents the case as presenting issues concerning SCE's financial burdens, and (3) presents theories that are precluded by the Stipulations. For example, the City contends that the 1% surcharge paid by utility users[3] are contractual franchise fees "on the nature of rent" for SCE's for-profit activities. This defense fails because contractual "franchise fees" are not city revenues paid by utility users based upon City Ordinance. *County of Tulare v. Dinuba* (1922) 188 Cal. 664, 670.) [See, Section VII below] The contract defense also fails because the law of contracts and Proposition 218 preclude public contracts that impose direct financial burdens upon citizens who are not parties to the contract.

As the City stipulated that the 1% surcharge is a financial obligation

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[3]1% surcharges are financial obligations *imposed* upon utility users by Ordinance 5135. SCE's obligation is limited to that of tax collector.

> 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.]"

that it *imposed* by Ordinance 5135 upon utility users and as Ordinance 5135 was enacted without an election [AA 3:676-680], the 1% surcharge violated and violates Appellants' constitutional rights. Therefore, the Court of Appeal order to enter judgment for the Plaintiffs should affirmed

II. STATEMENT OF THE CASE/ISSUE FOR REVIEW.

The Issue for Review is limited:

> "Is the City of Santa Barbara's 1% increase on its electricity bills (i.e., the 1% surcharge) a tax subject to Proposition 218's voter approval requirement or a franchise fee that may be imposed by the City without voter consent? [emphasis added]"

The Answer: Utility users' payments are not contractual but are payments of a tax enacted by City Ordinance that implicates Proposition 218 Art. XIII C, Section 2 voter approval requirements. Proposition. 218 - Article XIII C Section 2(d) provides:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote."

The Issue for Review is answered by applying the Stipulated Facts to Respondent's statement at p. 11 of the OB that: "The law is well settled that whether a charge is a tax is determined by . . . who has a legal duty to pay it. [emphasis added]" As Ordinance 5135 ***obligates*** utility user payments [See, fn 2, AA 3:676-681 and OB at pp. 11, 17, 18, 20, 29, 36, 40,

45 and 46], the 1% surcharge is not a contractual franchise fee but is a tax. As the Court of Appeal stated: "We conclude that the 1% surcharge is an illegal tax masquerading as a franchise fee. [cite omitted] " *Jacks v. City of Santa Barbara* (2015) 234 Cal.App.4th 925, 927 ["*Jacks*"].

III. PROCEDURAL HISTORY.

Plaintiffs presented the Proposition 218 issues by a Government Claims Act claim to the City (Government Code sections 810 et seq.) [AA 1:113-120]. The claim was denied. On December 2, 2011 a putative class action lawsuit (County of Santa Barbara Superior Court Case No. 1383959) was filed contesting the Constitutionality of the Ordinance 5135 charges imposed upon utility users. [AA 1:45-58.] The Complaint alleged that Ordinance 5135 surcharges were UUTs enacted without an election in violation of Proposition 218. Subsequently, a First Amended Complaint was filed that added, in an abundance of caution, Proposition 218 Property Related Fee ["PRF"] issues that would apply if the City raised a defense that the charges were not taxes, because they were PRFs. [AA 1:63-80.]

By Stipulation the parties agreed that the 1% surcharge was enacted by the City without an election. The City defends its revenue enactment practices, in part, by contending that the 1% surcharge did not implicate Proposition 218 because the charges are contractual fees paid for SCE's use

of city streets. [AA 2:343-351 and AA 3:500-528]

The parties filed Cross Motions for Summary Judgment to address the liability issues. Appellants' motion contended that the charges were utility user taxes, while Respondent's motion contended the charges were contractual franchise fees. [AA 1:81 to 2:342 and AA 3:500-528]. The trial court technically denied both motions. However, the Ruling on the motions for summary judgment provided legal and factual findings that the Ordinance 5135 charges were *contractual franchise fees* unless the Proposition 26 definition of "tax" applied retroactive. [AA 1:24-44]

The City subsequently filed a Motion for Judgment on the Pleadings. The trial court ruled that the Proposition 26 definition of "tax", which, if applied to the Ordinance 5135 charges, was determinative in favor of Appellants, was not retroactive and, therefore, combined with the MSJ ruling, the City Ordinance 5135 charges were contractual franchise fees, which Appellants had no legal basis or right to contest. Judgment was entered for the City. [AA 1:24-44.]

Appellants filed a timely Notice of Appeal. The Court of Appeal in *Jacks* held: "We conclude that the 1% surcharge is an illegal tax masquerading as a franchise fee. [citation omitted" *Jacks* at p. 927. *Jacks* further held: "We are not foreclosing *legitimate* franchise fees, however;

only those that are in effect utility user taxes masquerading as franchise fees. It is not an onerous requirement that local governments seek taxpayers' consent before subjecting them to new and increased taxes. And even if it were, that is what the California Constitution requires. If cities find this burden too great, their recourse is to convince the voters of the need for constitutional change." *Jacks* at 935-936.

The City Petitioned the Supreme Court for Review of *Jacks*. This Court granted limited Review.

IV. STANDARD OF REVIEW.

A. CONSTITUTIONAL INTERPRETATION.

"We review questions of law about the meaning of Proposition 218, as other questions of law, de novo." *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836 [102 Cal.Rptr.2d 719]. *Silicon Valley Taxpayers Association, Inc v Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 448-450 [*Silicon Valley*], and *Greene V Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277, 287 [*Greene*].

B. CONTRACT INTERPRETATION.

The interpretation of contract provisions is a legal issue subject to de novo review, unless the contract is ambiguous and its interpretation turns

upon the credibility of witnesses or the resolution of factual disputes. (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71 [56 Cal.Rptr.2d 723].) Whether the City-SCE contract imposes legal duties upon Respondents to pay the Ordinance 5135 surcharges is a question of law that is reviewed de novo.

C. SUMMARY JUDGMENT.

Appellate courts review a Judgment entered on an MSJ de novo. "The trial court must grant a summary judgment motion when the evidence shows that there is *no triable issue* of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]' " *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 818, 123 Cal.Rptr.3d 8.

D. MOTION FOR JUDGMENT ON THE PLEADINGS.

> " ' "The motion for judgment on the pleadings performs the function of a general demurrer. Therefore, it " 'admits all material and issuable facts pleaded." ' [Citation.]" [Citation.]... The standard of appellate review of a judgment on the pleadings is, therefore, identical to that on a judgment following the sustaining of a demurrer. [Citation.]' [Citation.]" (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876 [22 Cal.Rptr.2d 819]; *see Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347-1348 [81 Cal.Rptr.3d 852].) Where a demurrer is sustained or a

> motion for judgment on the pleadings is granted, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. (*Gami, supra,* at p. 877.)" *Rodriguez v County of Los Angeles* (2013) 217 Cal.App.4th 806, 810.

V. STIPULATED FACTS.

Rather than engage in discovery as to undisputed facts, stipulations were entered. [AA 2:343-351 and 3:676-681]. Therefore, there are *no* issues of fact as to whether Appellants and utility users pay the 1% surcharge or why they pay it.

A. STIPULATED FACTS FOR MOTIONS FOR SUMMARY JUDGMENT.

For the Cross Motions for Summary Judgment, the Stipulated Facts included the following:

1. The City of Santa Barbara ("City") was incorporated on April 19, 1850. . . .

5. In late 1984, the City and SCE, as authorized by City Ordinance 4312, entered into a franchise with SCE to provide electricity to all homes, businesses and manufacturers located within the City . . . The 1984 Franchise was set to expire in September of 1994. . . .

6. At the conclusion of the 1984 Franchise, five extensions of the 1984 franchise were authorized by the City Council . . . from September of 1995 to December of 1999.

7. In 1994, the City and SCE began negotiating the terms for a possible franchise extension. Subsequently, both SCE and the City realized that their negotiations for the new agreement would take more time to complete than they had anticipated, and, as a result, the above described franchise extensions were granted. This allowed the City and SCE the time to complete the City/SCE negotiations for a new long term franchise agreement.

8. During the negotiations for the new franchise agreement to replace the 1984 Franchise, 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 within the City. The 1984 Franchise Agreement provided for a franchise fee paid by SCE to the City of one percent (1%) of SCE's gross annual receipts for the electricity sold within the City. The City staff sought to negotiate an increase in the SCE franchise fee in order to raise franchise fee revenues for the use of the City Council for general governmental purposes. . . .

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. . . .

12. The Santa Barbara City Council acted to adopt Santa Barbara City Ordinance 5135 on December 7, 1999; . . .

13. Section 3 of the 1999 Franchise provides for an initial SCE franchise term beginning on January 1, 2000 and ending on December 31, 2002 (defined in the 1999 Franchise as the "Initial Term"). During the Initial Term, the 1999 Franchise Agreement provides that SCE was to commence appropriate efforts to obtain consent from the CPUC of an SCE Advice Letter that SCE would be allowed to include within SCE's Santa Barbara electricity users' billings a charge for the additional 1% Recovery Portion of the "Extension Term Fee".

14. Section 5(A) of the 1999 Franchise Agreement defines the term "Extension Term Fee" to mean "the Initial Fee (1% of the Gross Annual Receipts of the Grantee) plus an additional 0.5% of the Gross Annual Receipts of Grantee (SCE) [within the City] for payment to the City's General Fund, and another 0.5% of the Gross Annual Receipts of Grantee for payment to a City Undergrounding Projects Fund, for a total Extension Term payment equal to the sum, annually, of 2% of the Gross Annual Receipts of Grantee (the "Extension Term Fee")." Section 5(B) of the 1999 City/SCE Franchise defines the two combined component 0.5 % franchise fees as the "Recovery Portion" of the "Extension Term Fee" and Section 6 of the 1999 City/SCE Franchise provides, in pertinent part, as follows with respect to the "Extension Term Fee":

> "Prior to Grantee's payment to the City of the Recovery Portion of the Extension Term Fee, Grantee **shall receive approval** from the California Public Utilities Commission (CPUC) **to collect** the Recovery Portion (as described in Section 5 above) in accordance with CPUC Decision 89-05-63 *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities*, 32 CPUC2d 60, May 26, 1989 (the 'CPUC Recovery Guidelines.')"

. . .

16. Section 3(D) of the 1999 Franchise Agreement provides that, if the CPUC approves the SCE Advice Letter seeking to bill and collect from its customers within the City of Santa Barbara the Recovery Portion of

the Extension Term Fee, the Initial Term of the 1999 Franchise shall be automatically increased by the period of the Extension Term and the Franchise "shall expire on December 31, 2029." The 1999 Franchise further provides that, if, prior to the end of the Initial Franchise Term, 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 for the SCE's Santa Barbara customers 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 because of uncertainties related to the California energy de-regulation transition period. . . . 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. . . .

20. On or about March 30, 2005 SCE submitted Advice Filing 1881-E (U 338-E) to the CPUC pursuant to the authority and terms of

CPUC Decision 89-05-063. SCE submitted an "Advice Filing" requesting CPUC consent to allow SCE "to bill and collect **from its customers** within the City of Santa Barbara (City) a 1.0% electric franchise surcharge to be remitted to the City by SCE ***as a pass-through fee***, pursuant to SCE's new franchise agreement with the City." . . .

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, 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 . . . and that is remitted in its entirety to the City was ***not submitted to or approved by the voters*** of the City. [emphasis added]" [AA 2:343-351 (and exhibits 2:352-479)]

B. STIPULATED FACTS FOR MOTION FOR JUDGEMENT ON THE PLEADINGS.

A second set of Stipulations was entered for the hearing of the Motion for Judgment on the Pleadings which provided:

"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]

17. The CITY understands and believes that SCE assesses and collects the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE against ROLLAND JACKS, an individual and ROVE ENTERPRISES, INC. dba "HOTEL SANTA BARBARA similarly to how it assesses and collects the 1% RECOVERY PORTION OF THE EXTENSION TERM FEE against all other SCE electricity users in the CITY. . . .

22. It is the understanding and expectation of the CITY that SCE has properly undertaken all of its obligations concerning the assessments, collections and remittance of the 1% RECOVERY PORTION OF THE

EXTENSION TERM FEE as required by Santa Barbara City Ordinance 5135. [AA 3:676-681.]

VI. PROPOSITION 218 TERMS AND INTERPRETATION.

A. THE INTENT OF PROPOSITION 218.

Greene v. Marin County Flood Control and Water Conservation District (2010) 49 Cal.4th 277 states the purpose, intent and policy of Proposition 218: protect taxpayers from local governments exacting revenue without taxpayer consent. It provided:

> "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**." "Id at 284-285.

Proposition 218 analysis begins with application of the rules of constitutional interpretation. As provided by *Silicon Valley*:

> "In determining the effect of article XIII D, section 4, subdivision (f), we apply the familiar principles of constitutional interpretation, the aim of which is to "determine and effectuate the intent of those who enacted the constitutional provision at issue." (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418 [9

Cal.Rptr.3d 121, 83 P.3d 518].) [emphasis added]" Id at pp. 444-445.

The purpose and intent of Proposition 218 are to protect taxpayers. Effectuating that intent precludes the City's proposed deference for its Ordinance 5135 revenue enhancement activities and requires analyzing a city's actions to exact revenue specifically from the perspective of the taxpayers.

> *"The stated purpose of Proposition 218 was to 'protect[] taxpayers by* ***limiting 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 eliminated local government authority (legislative, contractual, or otherwise) to enact financial burdens upon citizens unilaterally and empowered the people to make those decisions. "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] [emphasis added]" *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, 448. [*Silicon Valley.*] *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.

Because Proposition 218 placed the ballot box directly between citizens' pocketbooks and the City's general fund for any new or increased taxes, Proposition 218 applies to the City's enactment and continuing collection of Ordinance 5135 surcharges from utility users.

B. APPLICATION OF PROPOSITION 218.

This case presents a core constitutional issue concerning the Proposition 218 designation of the City *imposed* 1% surcharges paid *by utility users*. This issue arises because Article XIII C Section 2(b) provides:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote."

Application of Proposition 218 must address and advance the intent of Proposition 218 to protect taxpayers, not cities. The OB ignores the terms and intent of Proposition 218 (and the stipulated facts) to proclaim that it and/or SCE had the right to imposed these financial burdens upon Appellants. The City then claims at page 12 that Appellants failed to propose a "serviceable test" for the application of their legal rights.

Throughout the litigation Plaintiffs stated the Proposition 218 test. [AA:1:81-110, AA 3:533-556, AA 3:650-675, and Appellant's Court of

Appeal Opening Brief and Reply to the City's Respondent Brief.] The Proposition 218 test is more than a decade old and is self-evident: (1) identify the payer of the charges (utility users), (2) define the Proposition 218 type of financial burden imposed (tax), (3) identify the legal duty that compels payment (Ordinance 5135), and (4) determine if the city satisfied its Proposition 218 obligations to enact the charge. Article XIIIC section 2(b).[4]

As provided by the Stipulated Facts and the definitions of "franchise fees" and "utility user taxes" [Sections VII and VIII below], it is indisputable that the utility users pay the City Ordinance 5135 utility consumption charge that is collected by SCE and was enacted without an election. [AA 2:343-351 and 3:676-681]

Rather than applying this simple test which protects the intent and purpose of Proposition 218, the City proposes a convoluted "test" that ignores Appellants' Proposition 218 *rights and financial burdens*. The City proposes consideration of an inapplicable SCE-City contract, the "market

[4]"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*. ('Proposition 218 guarantees your right to vote on taxes imposed on your water, *gas*, *electric*, and telephone bills.'...)" (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1196, italics added.) 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.)

power" of the City and non-party to the suit SCE, SCE's tax collection (so called "legal incidence") for the 1% surcharge, a revision of contract law to create a new type of contract to allow a city to impose binding financial burdens upon tens of thousands non-contracting parties, and the creation of constitutional authority for a city to extinguish citizens' Proposition 218 rights by entry into a franchise contract. This 'test' is offered as justification to grant deference to City's euphemistic characterization of the charge.

As the trial court stated, "The incidence of the Recovery Fee falls squarely on the utility consumer, to whom the Recovery Fee is billed as a separate line item. The amount collected is then remitted in its entirety to the City. (Stipulation 1, fact 24; Stipulation 2, fact 9.) *From the perspective of the utility consumer*, there is no functional difference between the Recovery Fee and *a utility users tax*. [emphasis added]" [AA 1:1-23, p.13 of 18]. That is the beginning, middle and end of the Proposition 218 test for the Ordinance 5135 financial burdens. A "serviceable Proposition 218 test" *must* address the factual issues from the perspective of the payer of the city enacted financial burdens. (See *Sinclair Paint, Bay Area Cellular, supra,* 162 Cal.App.4th at p. 695; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 738 [4 Cal.Rptr.2d 601], *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 596-597 [77 Cal.Rptr.2d 752] (*Isaac*).)

C. THE CITY'S PROPOSED PROPOSITION 218 LOOPHOLES.

1. A CITY CANNOT "CONTRACT" WITH A UTILITY TO ELIMINATE CITIZENS' PROPOSITION 218 RIGHTS.

The OB misrepresents the facts to contend that Santa Barbara found the gold standard of Proposition 218 loopholes: authority to enter contracts that grant monopolistic electricity utilities and that simultaneously *eliminate* citizen Proposition 218 participatory rights for the city's enactment of financial burdens upon non-contracting utility users. As provided below, this contract defense is contrary to law defining and applying franchise fees, UUTs, Proposition 218 and the law of contracts. *County of Tulare v Dinuba* (1922) 188 Cal. 644, 670, California Constitution Article XIII C section 2(b), Civil Code sections 1635 et seq, *Silicon Valley*, and *Greene.*

The OB cites *Santa Barbara County Taxpayers Assn v Board of Supervisors* (1989) 209 Cal.App.3d 940 ("*SBC Taxpayers*") as authority for the claim that the Ordinance 5135 surcharge is a "franchise fee". It is not. *SBC Taxpayers* is a Pre-Proposition 218 case addressing materially different issues from those presented herein. The issue in *SBC Taxpayers* was stated as: "Do franchise fees fall within the definition of " '**proceeds of taxes**' " under article XIII B, section 8, subdivision ©, to be counted towards the appropriations limit?" *Id* at p. 943.

SB Taxpayers does not apply. It addressed charges the parties to that suit *agreed* were franchise fees. Therefore, it did not define franchise fees, and it did not address Proposition 218 or city enacted surcharges (1) from the perspective of the legal burdens imposed upon the payer of the charges, (2) from the perspective of the rights of the taxpayers, or (3) from the perspective of the burdens imposed upon a city by Proposition 218. *SBC Taxpayers* did not grant a city authority to avoid Proposition 218 by imposing financial burdens upon citizens by carefully crafted franchise agreements.

Next, the OB relies upon *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866 ["*Sinclair Paint*"], a case that addressed the differences between taxes and fees in a Proposition 13 setting.[5] The *Sinclair Paint* discussion of "Taxes or Fees?" analyzes various revenue devices and provides that the correct analysis to characterize a government imposed financial obligation requires identifying (1) **the payor** and (2) purpose of the charges. Id at 873-81. See also, *Apartment Assoc. of LA County v. City of Los Angeles* (2001) 24 Cal.4th 830, 840-841.

[5]Footnote 2 of *Sinclair Paint* acknowledged that the Proposition 13 analysis provided by the Court was not based upon Proposition 218 which "contains new restrictions on local agencies' power to impose fees and assessments." However, courts have applied *Sinclair Paint* to determine whether a fee is a tax for purposes of Proposition 218. *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 694 fn. 6.

The flaw in the City's application of *Sinclair Paint* is clear. First, the OB presents contradictory "facts" as to (1) who pays the 1% surcharge [See, fns 1-3] and (2) whether the fee is imposed (a) by the City's legislative act, (b) by contract with SCE imposing the obligation on SCE, (c) by contract imposing the obligation on utility users, or (d) unilaterally by SCE. [See, fns 1-3 and 8] Next, the 1% surcharge is not a *Sinclair Paint* "fee" that might avoid Proposition 218 burdens because the *payers* of the 1% surcharge do not receive benefits or services for their payments.[6] [AA 3:676-681] (See *Sinclair Paint* p. 874 and *Silicon Valley* at p. 449)

Similar to *Sinclair Paint*, *Isaac* precludes the City's proposed Proposition 218 loophole. User fees are "charged only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided. [Emphasis added]" (*Isaac*, *supra*, at p. 597.) As the 1% surcharge is paid by *utility users* and provides no benefit to the payers of the surcharge [AA 2:401-413], the 1% surcharge payments are not "fees", franchise or otherwise.

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[6]Regulatory and user fees are generally not regarded as taxes, and thus are exempt from the reach of Article 13A and 13D, because with each of these levies, a discrete group receives a benefit, service, or public improvement that inures to the benefit *of the fee payers*. See, *Bay Area Cellular Tel.Co v City of Union City* (2008) 162 Cal.App.4th 686, 695; *Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 738 [4 Cal.Rptr.2d 601]

2. NEITHER SCE NOR THE CPUC IMPOSED THE ORDINANCE 5135 1% SURCHARGE THAT IS PAID BY APPELLANTS.

At page 29-30 the OB provides:

> "If anyone "imposed" the fee at issue on Jacks, SCE or the PUC – not the City – did so: SCE obtained the PUC's permission to pass a portion of the franchise fee to its customers. Yet Jacks sued the City, not SCE[7] or the PUC. Neither SCE nor the PUC is a "local Government" or an "agency" subject to Proposition 218. (Cal. Const., art. XIII C, §1, subd. (b) [defining "local Government" for purposes of Article XIII C]; *id.* at art. XIII D, §2, subd. (a) ["agency" for purposes of Article XIII D means "any local government defined in subdivision (b) of Section 1 of Article XIII C"].)"[8]

This is non-sense and misrepresents the stipulated facts: "Pursuant to City Ordinance 5135, all PERSONS in the CITY receiving electricity from SCE are obligated to pay the 1% [surcharge]" [AA 3:676-681.] The fees collected for the City by SCE provide no benefit to SCE or the CPUC, but are funds remitted in there entirety to the City. In fact, the City contract with SCE *required* SCE to pursue PUC D89-05-063 processes to obtain permission to bill utility users with the City's pass-along surcharge. Further, the city agreed to allow SCE to withhold seeking CPUC permission for

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[7]Public Utility Code section 799 grants immunity to SCE and precludes it from being a party to the case contesting a city's UUT wherein its sole function was merely as tax collector of the city imposed taxes/fees.

[8]This argument admits that SCE and the City *did not* contract to impose an obligation on SCE to pay the 1% surcharge.

years. During that time SEC did not pay the 1% surcharge. [Facts 13, 17-19 to AA 2:343-351] Neither SCE nor the CPUC created or imposed the Ordinance 5135 1% surcharge, benefitted from the surcharge, or participated in the City's enactment of Ordinance 5135. [OB at p. 45] The City did not create a Proposition 218 loophole that allowed it to use the contractual burden on SCE to apply D89-05-063 processes to obtain authority to bill the 1% surcharge as a means to redefine its "pass through" fee as an SCE imposed charge.

VII. FRANCHISES FEES.

A. INTRODUCTION.

While it was stipulated that "[p]ursuant to City Ordinance 5135, all PERSONS in the CITY receiving electricity from SCE are obligated to pay the 1% [surcharge]" [AA 3:676-681], the City's franchise fee defense is based upon the contradictory position that 1% surcharge payments are made (1) pursuant to contractual obligations and (2) as consideration for SCE's use of city streets. The contentions at OB pp. 10, 12, 15, 17, 28, 29, and 43 that the 1% surcharge paid by Appellants is a *negotiated or "agreed"* contractual "franchise fee" intended to pay **for** SCE's for profit activities is preposterous. [AA 2:343-351 and AA 3:676-681.] There is a vast difference between (a) charges a *utility negotiates and pays* for the right to operate a

franchise and (b) consumption based surcharges/taxes *imposed* by a city *upon utility users* and collected by the utility. *Tulare County* at p. 670.

B. THE 1999 FRANCHISE AND ORDINANCE 5135.

In 1999, SCE and the City entered a Franchise Agreement (adopted by Ordinance No. 5135) in which SCE agreed (a) to pay 1% of its gross annual receipts to the City in exchange for its use of City streets (the "1% Initial Term Fee"); and (b) to bill and collect from customers within the City's boundaries an additional 1% pass-along surcharge in exchange for fixing the term of the franchise through 2029, subject to approval of the CPUC. [AA 2:343-351, AA 2:403-413, and 3:676-681]

SCE is obligated to pay the 1% Initial Term Fee and separately obligated to *assess* the 1% surcharge and *remit* the payments that it collects from its customers. [AA 3:676-681] When Ordinance 5135 was enacted, the 1% surcharge revenues were designated as follows: (1) ½% allocated to the City's general fund, and (2) ½% allocated to the City's Undergrounding Projects Fund. [AA 2:403-413] (i.e. part general tax and part special tax.)

SCE and the City agreed that if the CPUC did not authorize billing the 1% Surcharge as a pass through fee to be paid by utility users, the franchise would continue on a year-to-year basis <u>without payment of the surcharge</u>. [A 2:403-413] The 1% Franchise Fee is apparently paid from

SCE's profits, whereas the 1% Surcharge is paid only by SCE's customers within the City. [AA 3:676-681]

C. LEGAL DEFINITION - FRANCHISE FEE.

The City seems to claim that because Proposition 218 did not define "tax" or "general tax", that it has discretion to characterize its 1% surcharge as a "contractual franchise fee". [OB p. 26-30] This is unsupportable.

> "Although the acceptance of a franchise is a **matter of contract**, the offer of such a contract is on a take-it-or-leave-it basis; a franchisee may only accept a franchise on the terms dictated by the Legislature. 'It is purely a matter of contract. While it is true that the payment is required by law as a condition of the franchise grant, it is a matter of option with the applicant whether he will accept the franchise on those terms. **His obligation** to pay is not imposed by law but by **his** acceptance of the franchise.' *(County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670.) [emphasis added]" *County of Sacramento v. Pacific Gas and Electric Company* (1987) 193 Cal.App.3d 300, 305."

Determining if the 1% surcharge is a franchise fee is resolved by identifying (1) who pays the charge [utility users] and (2) the legal act compelling payment of the charge [Ordinance 5135]. *County of Tulare* at p. 670. The mentioning of a UUT in a franchise agreement, does not alter the nature of the charge. Franchise fees are *not* contractual obligations of utility users, nor are they charges imposed by city ordinances upon utility users.

> 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. [emphasis added]" *Tulare County* p. 670; accord, *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1171.

D. APPLICATION OF FACTS TO DEFINITION OF FRANCHISE FEES.

The City Stipulated that the 1% surcharge is a financial burden imposed by upon utility users by City Ordinance:

> *"Pursuant to City Ordinance 5135*, all PERSONS in the CITY receiving electricity from SCE are obligated to pay the 1% [surcharge]." [AA 3:676-681, fact 16]

That Stipulation, when applied to the *Tulare County* definition of franchise fee precludes defeats the City's franchise fee defense. [AA 3:676-681.] As *only* utilities pay contractual franchise fees, charges paid by utility users cannot be "franchise fees". *Tulare County.* At p. 670, The Broughton Act (Public Utility Code sections 6001-6092 (particularly sections 6006)), and The Franchise Act of 1937 (Public Utilities Code sections 6201 et seq. (E.g. section 6231) and *County of Alameda v. Pacific Gas and Electric Co.* (1997) 51 Cal.App.4th 1691.

VIII. UTILITY USER TAXES.

A utility users tax is a tax "on the consumption of electricity, gas, water, sewer, telephone, telegraph, and cable television services. . . ." *E.g.*

Cal. Rev. & Tax. Code §§ 7284.2 and 7284.3. Although the obligation to pay the tax is imposed by a local government on utility customers, a city has the authority to compel service providers to collect the UUT and remit it to the city. *City of Modesto v. Modesto Irrigation Dist.*, (1973) 34 Cal.App.3d 504, 506. Although the utility has a duty to collect the tax, a city's "utility users' tax, unlike a sales tax levied by a city . . . is a tax against the utility user, not the utility supplier." *Id.* Indeed, the City has a 6% electric UUT and that UUT is identified in the franchise agreement. [AA 2:403-413] See Santa Barbara Municipal Code ("SBMC"), Section 4.24.030. The City compels SCE to collect and to remit both UUTs to the City. See SBMC Section 4.24.090(A). The 1% surcharge is factually identical to the SBMC Section 4.24.030 electricity UUT which provides:

> "A. TAX IMPOSED; RATE. There is imposed a tax upon every person in the City using electrical energy in the City. The *tax imposed* by this Section shall be at the rate of six percent (6%) of the charges made for such energy and shall be paid by the person paying for such energy. "Charges" as used in this Section, include charges for:
>
> 1. Metered energy; and
> 2. Minimum charges for service, including customer charges, service charges, demand charges and annual and monthly charges."
>
> [emphasis added]

To try to avoid the application of the definition of UUTs, at p. 22 the OB presents a general statement about Pre-Proposition 218 definitions of

taxes as having been "blurry" and "taking on different meanings in different contexts". The OB then implies that utility user taxes were undefined prior to Proposition 218. [OB p. 25] However, the definition of a UUTs was not uncertain prior to Proposition 218. As previously provided by the City, the definition of UUT that preexisted Proposition 218 was:

> "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]" [The City's **Respondent's Brief** on Appeal ["RB"] at pp. 29-30]

UUTs are pass along taxes **imposed by** cities *upon utility users.*[9]

Like any other UUT, SCE has a duty to *collect* the City's 1% surcharge, but has no duty to pay it. [AA 3:676-681] Indeed, to "pay" means to

[9]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]

"contribute to." *In re Marriage of Bailey*, 198 Cal. App. 3d 505, 515 (1988).[10] SCE does not contribute to or pay the 1% surcharge, it only collects and remits. [AA 2:403-413 and 2:343-351] Further, SBMC § 4.24.110 imposes penalties upon a utility for failing to collect and timely remit those taxes.

By applying the Stipulations to the definition of UUT, it is unquestionable that the 1% surcharge is a city *imposed* consumption based pass-along charge paid by utility users and collected by the utility, i.e. a UUT. [AA 2:403-413, AA 2:343-351 and 3:676-681]. Indeed, as the trial court found "[f]rom the perspective of the utility consumer, there is no functional difference between the [1% surcharge] and a utility user[ ] tax." *Jacks* at p. 4. The City's arguments ignore/misrepresent the facts and attempt to redefine every UUT enacted throughout the State as a "fee", rather than a Proposition 218 Utility tax.

IX. CONTRACTING PARTIES SCE AND THE CITY DID NOT CONSIDER THE 1% SURCHARGES TO BE "FRANCHISE FEES" IMPOSED UPON SCE OR UTILITY USERS.

The SCE-City contract [AA 2:403-413] provided that SCE would not pay the 1% surcharge but would work with the City to submit an Advice

[10]Black's Law Dictionary defines "pay" as: "To discharge a debt by tender of payment due; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance. . . To compensate for goods, services or labor."

Letter to the CPUC to obtain permission for SCE to bill and collect the City's 1% pass along surcharge. [AA 2:343-351.]

That Advice Letter explained *why* the City **did not** impose a 2% contractual franchise fee upon SCE, *why* the City enacted a 1% UUT on utility users, and *that* SCE assumed tax collection responsibilities. [AA 3:676-681 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 **knew** and intended that the franchise did not impose the 1% surcharge as a contractual franchise fee owed by utility users *or SCE*, the "franchise fee" defense is, at best, disingenuous.

X. CONTRACTUAL INTERPRETATION AND THE FRANCHISE AGREEMENT.

Because the OB admits that the 1% surcharge is paid by utility users [OB at pp. 11, 17, 18, 20, 29, 36, 40 and 46, See also, AA 3:676-681], because the OB admits that the Ordinance 5135 surcharge was enacted by legislative act by the City [OB at p. 45], because the OB, by contending that the 1% surcharge was imposed by SCE and CPUC, admits that it was not enacted by contract [OB at p. 29-30], because the City stipulated that the 1% surcharge is paid by utility users [AA 2:343-351 and AA 3:676-681], because the City stipulated that SCE's 1% surcharge obligation is only to assess, collect and remit [AA 2:343-351 and AA 3:676-681], because the City receives 100% of the utility user 1% surcharges collected by SCE [AA 2:403-413], 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 payers of the 1% surcharge do not receive any benefits or services from the city for payment of the surcharges, and because Article XIII C section 2(b) does not include a "contract" exception, the defense that the 1% surcharge is a franchise fee necessarily fails.

A. SCE-CITY CONTRACT TERMS.

The OB seems to contend that the SCE-City franchise defines the 1% surcharge as a "franchise fee" paying "rent" for SCE's for-profit

endeavors.[11] [OB at pp. 28-34] Because the franchise agreement was enacted by Ordinance 5135 to financially burden Appellants and utility users who were not parties to the electricity franchise agreement, analysis of terms of Ordinance 5135 resolves this ambiguous defense:

> "SECTION 4. Compensation.
> This Franchise is granted upon the express condition of, and in exchange for, the commitment by Grantee that Grantee, as a consideration therefor and ***as compensation for use of the streets*** in the City, as herein authorized and permitted, shall pay to the City on the first day of November of each year during the Initial Term of this Franchise, a sum, annually, which shall be equivalent to **1%** of the Gross Annual Receipts of Grantee (the "Initial Term Fee"). [emphasis added]"
>
> SECTION 5. Extension Term Payments.
>
> . . .
>
> B. Grantee shall **collect** a portion of the Extension Term Fee in the amount of 1% of the Gross Annual Receipts of Grantee (the "Recovery portion") **from all electric utility customers** served by Grantee within the boundaries of the City. The customer collection shall be applied equally to Grantee's electric utility customers based on consumption or use of

[11]Like the definition of a tax or a franchise fee, the definition of "rent" necessarily requires consideration of the identity of the obligated payer and the person obtaining rights to use the property. As stated in *Davis v Fresno Unified School District* (2015) 237 Cal.App.4th 261 at footnote 3: rent is the "consideration paid periodically in exchange for the use or occupancy of real property. (Black's Law Dictionary (9th ed. 2009) p. 1410 [definition of rent].)"

electricity, including residential, commercial, industrial, government and wholesale customers.

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].*

SECTION 6. California Public Utilities Comm. Approval.

A. Prior to Grantee's payment to City of the Recovery Portion of the Extension Term Fee, Grantee *shall receive approval* from the California Public Utilities Commission (CPUC) to collect the Recovery Portion (as described in Section 5 above) in accordance with CPUC Decision 89-05-63[12], *Guidelines for the Equitable Treatment* of *Revenue Producing Mechanisms Imposed* by Local *Government Entities on Public Utilities,* 32 CPUC 2d 60, May 26, 1989 (the "CPUC Recovery Guidelines"). . . .

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[12]CPUC Decision 89-05-63 does not address rate increases or *utility imposed* charges as the OB contends. It is entitled *Guidelines for the Equitable Treatment of Revenue Producing Mechanisms Imposed by Local Government Entities on Public Utilities* and provides the process for a utility to obtain CPUC permission to bill, by separate line item, charges ***imposed*** by local governments. The City's contention at p. 17 that D89-05-063 created a "requirement the PUC approve a utility's request to recover the costs of such a [contractual] fee from its customers' rates" is a false statement of law. SCE did not submit a CPUC Public Utilities Code §454(a) application to change its rates and D89-05-063 is a different process than that required for rate increases. "Passthrough" fees, because they are not a *utility's* charges to provide services are not a part of a utility's "rates". Public Utility Code sections 451, 453, 453.8, 454, 464, and 728 and CPUC D89-05-063.

C. In the event the Recovery Portion required is not approved by the CPUC, the **Initial Term Fee shall remain due** and owing to the City for each annual period (or portion thereof) during which this Franchise remains in effect.

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

SECTION 7. Franchise Payments.

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.]

B. INTRODUCTION.

Because the OB argues contradictorily that both SCE and utility users pay the 1% surcharge [See footnotes 1-3], because the City argues intermittently that all of the payments are made by contract [*Contra See*, OB page 29-30 regarding the alleged imposition the surcharge ***by SCE*** and OB p. 45 regarding the City's legislative enactment of Ordinance 5135], and because the City stipulated that utility users pay the 1% surcharge [AA 2:343-351], the ambiguously expressed contract defense must *contend* that

the 1% surcharge payments ***made by utility users*** are somehow contractual.[13]

However, as the city stipulated that utility users are obligated by Ordinance 5135 to **pay** the 1% surcharge [AA 3:676-681, fact 16] this defense is absurd. However, in an abundance of caution and to avoid waiving any legal or factual issues, this convoluted, factually unsupported argument will be addressed in detail.

To determine if the 1% surcharge is "contractual" requires applying the rules of contractual interpretation to the contract the City seeks to apply, the SCE-City franchise. The City's proposal, i.e. non-contracting utility users are (1) *contractually* burdened by the 1% surcharge (2) as consideration for SCE's use of City streets, is unsupported by the contract, the Stipulate facts, or Proposition 218. Rather, because utility users *did not agree by contract* to pay the 1% surcharge, the City enacted Ordinance 5135 to create Appellants' legal obligation to pay the 1% surcharge. [OB p. 45, AA:2:403-413. See also, AA 3:676-681]

C. RULES OF CONTRACT INTERPRETATION.

[13]If the franchise fee defense addresses payments made *by SCE* pursuant to its contractual franchise fee obligation, the defense fails because it has no application to the damage and liability issues in the case that address the utility users financial burdens. [AA 2:403-413, AA 2:343-351 and 3:676-681.]

The contract defense misrepresents the relationship between utility users and the City and violates all tenets of contract interpretation. Civil Code Sections 1635 et seq. The law requires interpreting a contract to avoid absurdity [Civil Code 1638], to allow the language of the contract to govern its interpretation [Civil Code §1638], to give effect to the entire contract [Civil Code §1641], to give an interpretation that is reasonable and capable of being carried into effect [Civil Code Section 1643], and to give effect in the sense in which the promisor believed, at the time of making it. [Civil Code §1649].

The rules of contractual interpretation requiring answering key questions: *who* entered the contract?, *what* were *their* duties?, *what*, if any, are Appellants' contractual duties?, *who* pays the surcharges?, did the utility users promise to be bound by the contract?, did the utility users acquire rights to use City property by their payments of Ordinance 5135 surcharges?, and did Appellants agree to pay SCE's consideration for its for-profit activities and use of City streets?

The Stipulations answer these questions. The utility users are not parties to the contract, they are required to pay the charges by City Ordinance, not contract, and they never agreed to pay "contractual consideration" to advance SCE's for-profit endeavors. [AA 3:676-681 and

AA 2:403-413] Therefore, the defense that utility users' 1% surcharge financial burden was "negotiated" or "agreed" or a contract based "fee" fails. Further, neither of the contracting parties, SCE or the City, had authority to act as agents for Appellants *to waive their Proposition 218 rights*[14]. Civil Code §§2019 et seq, §§2304 et seq, and §§2339 et seq.

D. CONTRACT LAW AND THE CITY'S DEFENSE.

The OB seeks a legal finding, contrary to logic, the stipulated facts, and Ordinance 5135, that Appellants and the utility users who pay the subject charges, make the Ordinance 5135 payments based upon contract *as consideration* **for SCE's** for-profit activities. The defense fails because:

- Santa Barbara never had legal authority to impose contractual burdens upon each of thousands of utility users.
- SCE never had legal authority to impose contractual burdens upon its customers to benefit the City's general fund.
- Appellants and Utility users were not "contracting parties".
- Proposition 218 does not include an exception from citizen participatory rights for local government imposed financial burdens

[14]Because Proposition 218 precludes new city taxes imposed without voter approval, any claim that a city could act as an agent for the voters to waive Proposition 218 rights is necessarily absurd, because it would render the Proposition meaningless.

that are imposed by city ordinance, referenced in public contracts, and collected by franchisees.

- No Legal authority exists to allow a franchise contract to burden non-contracting utility users with the obligation to pay *contractual consideration* for a franchisee's for-profit activities.

The City's contract defense further fail because of the following:

1. The term "party" or "promissor" for contractual enforcement and interpretation does not include non-parties to the contract. [See, Civil Code sections 1556 et seq.]
2. "Consent" and "mutual consent" by SCE to assess, collect and remit a UUT is not "consent" by utility users to pay the surcharges. [See, Civil Code sections 1565 et seq]
3. The terms "object of a contract" and "lawfulness of the object of a contract" preclude a City contract that eliminates Proposition 218 rights. [See, Civil Code sections 1595 et seq and Proposition 218].
4. The terms "contractual consideration" and "consideration" do not include payments made by non-contracting parties of City Ordinance surcharges as the "consideration" to benefit a contracting franchisee's for-profit activities. [See, Civil Code §§1605 et seq]

5. SCE and the City's contractual "intent" cannot impose financial burdens upon non contracting parties. [See, Civil Code §§ 1636-37]

The subject contract, when applied to the law of contracts, precludes the City's contract defense.

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

A. THE CITY'S EFFORT TO DEFINE TAXES, CONTRACTS, AND FINANCIAL BURDENS IT IMPOSES VIOLATES PROPOSITION 218.

Page 36 of the OB acknowledges that there is a material difference between the Initial Term Fee and 1% surcharge. They "differ . . . in that the franchise ordinance expressly allows the latter to be passed through to customers. However, . . . both fees are in fact passed through to SCE's customers[15] and both fund the City's general fund." This hypothesis that a (1) difference in the identify of the payer of a City enacted charge (utility users and not franchisees), (2) difference in the City's actions to *impose* the fee (Ordinance and not franchise agreement), and (3) difference in the character of the Proposition 218 charges [tax and not fee] is irrelevant to

[15]The City attempts to define franchise fees, utility rates, and UUTs as identical. However, Ordinance 5135 provides that the 1% surcharge is a City enacted pass along fee subject to CPUC D89-05-063 processes. CPUC D89-05-063 does not apply to utility rates or to SCE business expenses for which rate increases may be necessary. Public Utility Code §§ 451 et seq.

Proposition 218 analysis, is presented without legal support or explanation. However, this is an *admission* that (1) SCE does not pay the 1% surcharge and (2) utility users do. In a Proposition 218 case addressing City enacted financial burden enacted without an election, that admission resolves the case in favor of the Plaintiffs.

B. ECONOMIC AND LEGAL INCIDENCE.

The City's efforts to deny Appellants' their Proposition 218 rights continues at page 37-40 wherein the City posits a convoluted issue apparently claiming that the mere reference in a franchise agreement to a utility's tax collection obligations has the legal affect of separating an alleged economic and legal incidence of **that tax** to create a heretofore unknown Proposition 218 exception. This hypothesis fails.

First, the claim begins with the unsupportable conclusion that SCE has a "legal" burden to *pay*, rather than only to collect and remit, the 1% surcharge. It does not. The Stipulated Facts [AA 2:343-351 and 3:676-681. See also, OB at pp. 17, 28, 29, 30, 32, 40, 41, 45, and 46] and Ordinance [AA 2:403-413] place the financial obligation only on utility users.

Second, Ordinance 5135 did not split the surcharge into a separate economic and legal "incidence". [See, Section X.A. *infra*] In fact, the pleadings specifically exclude issues concerning contractual payments made

by SCE. [AA 1:63-81 and 2:403-413] Further, if SCE owed a 2% franchise fee (as the OB intermittently implies), the 1% Initial Term Fee and the 1% surcharge would be identical and the charges would not be "passed along" but would either be paid from SCE's gross profits or would be a basis for an effort by SCE to increase its electricity rates. SCE did not agree to pay a 2% Franchise fee payment. [AA 2:403-413. See also, AA:2:468-471] Each pay period, SCE makes separate, and always different, payments to the City: (1) a franchise fee payment and (2) remittance of the utility user 1% surcharge payments. These amounts **are never identical** and the 1% surcharge has been the lesser amount for every known period. [AA 2:334.]

Third, the City's legal vs economic incidence issue is not expressed as an analogy, but is presented by the City as an applicable statement of law. [OB at pp. 37-40] The argument misrepresents the law. This division of a tax arises *in limited, rare and specific instances.* It arises when a division between the legal and economic burdens of *business taxes* can, *statutorily,* be made so the tax owed by a business can lawfully be passed by that particular business to its customers. Under this limited and inapplicable circumstance, a *business* that is *statutorily* obligated to pay a tax may *statutorily* pass along the tax to its customers.[16] That *statutory* situation

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

does not apply to the City's contract defense or to UUTs, franchise fees, or the 1% surcharge.

Fourth, Proposition 218 does not include an exception to allow the City, by contract, to divide an alleged "legal" and "economic" incidence of a Proposition 218 tax to eliminate taxpayer rights. Respondent's discussion of this issue cites neither Proposition 218 nor Proposition 218 case law as *authority for a City* to split a UUT into separate legal and economic incidence to eliminate citizens' Proposition 218 rights.

Fifth, this theory *only* applies to taxes. Therefore, the argument on its face (like the Separation of Powers argument at OB p. 45) is an admission that Article XIIIC section 2(b) taxes were enacted by the City for which an election was required.

Sixth, *Torres v City of Yorba Linda* (1993) 13 Cal.App.4th 1035 is an irrelevant case addressing standing in a statutory sales tax setting and *Cornelius v Los Angeles County etc Authority* (1996) 49 Cal.App.4th 1761 is a Code of Civil Procedure section 526a Waste case addressing "standing" applicable to statutory sales and gas tax issues.[17] Neither case involves an

[17]If these "standing" cases are raised by the City for the contention that utility users, who pay the 1% surcharge, lack standing to contest Ordinance 5135, that defense, if applied to preclude consideration of the taxpayers' financial burdens and rights, would violate appellants' Article XIII section 32 rights and their state and federal due process rights to contest taxes imposed upon them. See also, *Richards v. Jefferson County, Alabama*

attempt by a governmental entity to deny citizens' Proposition 218 rights by a city contract that allegedly separated the legal and economic incidence of financial obligations that a city *imposed* upon utility users. [AA 3:676-681 and 2:403-413.]

Seventh, this effort to redefine the 1% surcharge to try to eliminate citizens' Proposition 218 voter rights was not an issue that was accepted by the Court for Review.

Therefore, this Court should affirm the Court of Appeal Order to enter judgment for the Plaintiffs.

XII. THE PROPOSITION 26 DEFINITION OF "TAX" IS NOT NECESSARY TO DEFINE THE ORDINANCE 5135 CHARGES.

Proposition 26 post dates the enactment of Ordinance 5135 and post dates the applicable definitions of franchise fees and Utility Users taxes. The City appears to contend that because Proposition 26 enacted a definition of general taxes that is more complete than provided by Proposition 218, that (1) Proposition 218 did not apply or was too ambiguous to "general" taxes to apply or (2) the pre-existing definitions of UUT and franchise fee, because they were not part of Proposition 218 should not be applied by courts. No legal support is provided for that claim.

(1996) 517 U.S. 793.

However, Proposition 26 is important because it confirms the intent of Proposition 218, taxpayer rights and the Proposition 218 election mandate imposed for new taxes. The Proposition 26 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.

For decades, California taxpayers have held sole authority over the imposition of revenue streams derived from their pockets. Since the enactment of Proposition 218, if not before, the ballot box has stood firmly between taxpayers and the City's general fund.

XIII. THE CITY'S FALSE "EQUIVALENCY" ARGUMENTS.

The City tries to label all funds paid or remitted by SCE as "contractual", regardless of who pays the charges or how the charges were enacted. To do so, the City contends that the 1% surcharge and 1% Initial Term Fee are, regardless of the terms of Ordinance 5135, the actions of the City to impose each charge, or the Proposition 218 protections, equivalent revenue sources for the City and, therefore, equivalent financial burdens for utility users. [OB at p. 36] The "equivalency" defense, like the contract

defense, proposes judicial consideration of Appellants' Proposition 218 rights *only* from the City's proposed hypotheses: i.e. both are general fund revenue sources "paid" by SCE's customers.

The "equivalency" defense fails, in part, because attempts to extend SCE's franchise fee obligation to the utility user surcharge obligation is unsupported by law [Sections VII to IX] or fact [AA 2:343-351 and 3:676-681]. Proposition 218 precludes City authority to euphemistically characterize taxes, fees, or assessments as interchangeable or equivalent financial burdens for which citizens participatory rights can be ignored. Cal. Constitution Articles XIIIC and XIIID. *Silicon Valley* at p. 449

The equivalency argument tends to provide that *if* SCE's customers ultimately "*pay*" both charges, there is no reason to deny the City discretion to label both revenue streams as "contractual". In this regard, page 36 of the OB provides: "The Initial Term Fee and 1% increase differ . . . in that the franchise ordinance expressly allows the latter to be passed through to customers. However, . . . both fees are in fact passed through to SCE's customers[18] and both fund the City's general fund." However, that

[18]Any thought that the customers of a business [in this case utility users] are "contractually" obligated to pay the contractual debts of the business [for example franchise fees] is ludicrous.

argument necessarily admits that utility users pay the 1% surcharge which triggers Proposition 218.

Next, the response to this "defense" begins with the fact that the City and SCE entered a *monopolistic* electricity franchise.[19] [AA 2:343-351] The law protects citizens' from excessive, monopolistic charges in various ways including by Proposition 218 and the CPUC's gatekeeper obligations. California Constitution Article XII, Public Utilities Code §§451, 453, 453.8, 454, 464, and 728.

The equivalency defense appears to be based upon the implied claim at OB page 36 that Proposition 218 allows a "franchise ordinance [to] expressly allow[] the [1% surcharge] to be passed through to customers." That unsupported claim is actually the *crux of the case*. Proposition 218 **precludes**, rather than allows, a local ordinance or public contract from eliminating citizens' Proposition 218 participatory rights by contract or city ordinance.

Next, SCE's 1% franchise fee and 1% surcharge are not equivalent. During the years of franchise fee negotiations SCE *refused* to pay a 2% franchise fee, apparently knowing the fee would *automatically* be paid by

[19]The claim that cities and franchisees have authority to impose Proposition 218 implicated surcharges or rate increases through contracts for franchise fees is unsupportable. [Proposition 218, Cal Constitution Article XII and Public Utilities Code §§ 451 et seq. and Civil Code §§ 1635 et seq.]

utility users. Eventually, SCE agreed (1) to continue to pay the 1% Initial Term Fee and (2) to seek CPUC permission to collect and remit the City imposed pass-along 1% surcharge. [AA 2:343-351] Stipulated Fact 17 explained that soon after the 1% surcharge was enacted, the City and SCE agreed that approval from the gatekeeper CPUC to bill the surcharge could be problematic. Stipulated Fact 17 provides:

> "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 because of uncertainties related to the California energy de-regulation transition period. . . . 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."

The City and SCE knew near the time of contracting, that the PUC was not a mere rubber stamp of financial burdens they might try to impose upon utility users. During that period from 1999 to 2005 prior to getting CPUC authority to bill the 1% surcharge, SCE only paid its contractual 1% franchise fee and not the 1% surcharge. The factual prerequisite to the City's claim that the 1% surcharge and 1% Initial Term Fee are equivalent was known by the City to be false at the time of contracting. [AA 2:343-351 and 3:676-681]

The 1% surcharge is not equivalent to SCE's contractual obligations and the mere reference to a pass-along surcharge in the franchise does not eliminate Appellants' Proposition 218 rights over the enactment of those financial burdens.

XIV. CONCLUSION.

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

Dated: August 28, 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 Answer to the Opening Brief 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 City of Santa Barbara's Opening Brief (including headings, footnotes and this Word Count Declaration, but excluding table of contents and table of authorities), is 11,646 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 28th day of August 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 August 31, 2015, I served the foregoing documents described as:

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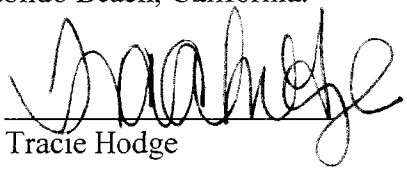

Tracie Hodge

SERVICE LIST

Ariel P. Calone, City Attorney
Tom R. Shapiro, Asst. City Attorney
Post Office Box 1990
Santa Barbara, CA 93012
[Attorneys for Respondent/Petitioner, City of Santa Barbara]

Michael G. Colantuono
Ryan T. Dunn
Colantuono, Highsmith & Whatley, PC
300 S. Grand Avenue, Ste. 2700
Los Angeles, CA 90071-3137
[Attorneys for Respondent/Petitioner, City of Santa Barbara]

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

The Honorable Thomas P. Anderle
Santa Barbara Superior Court
1100 Anacapa Street, Dept. 3
Santa Barbara, CA 93101
[Trial Court Judge]

Jan I. Goldsmith, City Attorney
City of San Diego
1200 Third Avenue, Suite 1100
San Diego, CA 92101-4100
Attorneys for Amicus Curiae, City of San Diego

Patrick Whitnell
League of California Cities
1400 K Street, Suite 400
Sacramento, CA 95814
Attorney for Amicus Curiae, League of California Cities