S S225589 COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

**ROLLAND JACKS and ROVE ENTERPRISES, INC.,**
*Plaintiffs and Appellants*

vs.

**CITY OF SANTA BARBARA,**
*Defendant and Respondent.*

---



# PETITION FOR REVIEW

---

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

---

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

---

ARIEL PIERRE CALONNE,
City Attorney (110268)
TOM R. SHAPIRO,
Asst. City Attorney (127383)
TShapiro@santabarbaraca.gov
**CITY OF SANTA BARBARA**
P.O. Box 1990
Santa Barbara, CA 93012
Telephone: (805) 564-5326
Facsimile: (805) 897-2532

MICHAEL G. COLANTUONO (143551)
MColantuono@CHWLAW.US
*RYAN THOMAS DUNN (268106)
RDunn@CHWLAW.US
LEONARD P. ASLANIAN (278327)
LAslanian@CHWLAW.US
**COLANTUONO, HIGHSMITH & WHATLEY, PC**
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710

Attorneys for Petitioner City of Santa Barbara

S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

**ROLLAND JACKS and ROVE ENTERPRISES, INC.,**
*Plaintiffs and Appellants*

vs.

**CITY OF SANTA BARBARA,**
*Defendant and Respondent.*

---

# PETITION FOR REVIEW

---

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

---

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

---


ARIEL PIERRE CALONNE,
City Attorney (110268)
TOM R. SHAPIRO,
Asst. City Attorney (127383)
TShapiro@santabarbaraca.gov
**CITY OF SANTA BARBARA**
P.O. Box 1990
Santa Barbara, CA 93012
Telephone: (805) 564-5326
Facsimile: (805) 897-2532

MICHAEL G. COLANTUONO (143551)
MColantuono@CHWLAW.US
*RYAN THOMAS DUNN (268106)
RDunn@CHWLAW.US
LEONARD P. ASLANIAN (278327)
LAslanian@CHWLAW.US
**COLANTUONO, HIGHSMITH & WHATLEY, PC**
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710

Attorneys for Petitioner City of Santa Barbara

## TABLE OF CONTENTS


QUESTIONS FOR REVIEW ..... 1

INTRODUCTION ..... 2

STATEMENT OF FACTS ..... 4

I. THE HISTORY AND IMPORTANCE OF FRANCHISE FEES ..... 4

A. Case Law Has Long Afforded Chartered Cities Broad Authority to Set Franchise Terms ..... 4

B. Franchise Fees Are a Significant Portion of Statewide Municipal Revenues ..... 7

II. THE 1989 PUC RULING ON UTILITIES' RECOUPMENT OF FRANCHISE FEES ..... 8

III. SANTA BARBARA'S FRANCHISE FEE ..... 12

PROCEDURAL HISTORY ..... 14

I. THE TRIAL COURT FOUND THE SURCHARGE TO BE A TAX, BUT GRANDFATHERED BY PROPOSITION 26 ..... 14

II. THE COURT OF APPEAL REVERSES, FINDING THE 1 PERCENT INCREMENT "AN ILLEGAL TAX MASQUERADING AS A FRANCHISE FEE" ..... 16

ARGUMENT ..... 18

I. THE OPINION UNDERMINES ALL MUNICIPAL FRANCHISE FEES ..... 18

A. The Opinion Misapplies *Sinclair Paint* ..... 18
B. The Opinion Overlooks Proposition 26's Impact on *Sinclair Paint* ..... 21
C. The Opinion Overlooks That Most, If Not All, Franchise Fees Fund General Governmental Services ..... 22
D. Proposition 26 Excludes Franchise Fees from Its Definition of "Taxes" ..... 24
II. CALIFORNIA COURTS NEED GUIDANCE WHETHER A REVENUE MEASURE'S LEGAL OR ECONOMIC INCIDENCE CONTROLS ITS INTERPRETATION ..... 27
III. REVIEW IS APPROPRIATE BECAUSE THE PUBLISHED OPINION MAKES A NEGATIVE CONTRIBUTION TO THE LAW ..... 32
A. The Opinion Ignores the Constitution's Grant of Municipal Franchising Power ..... 32
B. The Opinion Allows the PUC to Convert Franchise Fees to Taxes Without Evidence It Could or Would Do So ..... 34
CONCLUSION ..... 37
CERTIFICATE OF COMPLIANCE ..... 39

## TABLE OF AUTHORITIES

Page(s)

**California Cases**

*Bay Area Cellular Telephone Co. v. City of Union City* (2008)
162 Cal.App.4th 686 ..... 20

*California Taxpayers' Ass'n v. Franchise Tax Bd.* (2010)
190 Cal.App.4th 1139 ..... 20

*Chiatello v. City and County of San Francisco* (2010)
189 Cal.App.4th 472 ..... 31

*Citizens for Fair REU Rates v. City of Redding* (2014)
233 Cal.App.4th 402, petn. for review pending,
S224779 ..... 3, 16

*City of San Diego v. Shapiro* (2014)
228 Cal. App. 4th 756 ..... 28

*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000)
82 Cal.App.4th 1167 ..... 4, 5

*Cornelius v. Los Angeles County etc. Authority* (1996)
49 Cal.App.4th 1761 ..... 30

*Contra Costa County v. American Toll Bridge Co.* (1937)
10 Cal.2d 359 ..... 6, 32

*County of Alameda v. Pacific Gas & Electric Co.* (1997)
51 Cal.App.4th 1691 ..... 12, 13

*County of Kern v. Pacific Gas & Electric Co.* (1980)
108 Cal.App.3d 418 ..... 6

*Griffith v. City of Santa Cruz* (2012)
207 Cal.App.4th 982 ..... 22

*Lexin v. Superior Court* (2010)
47 Cal.4th 1050 ..... 25

*Linnell v. State Dept. of Finance* (1962)
203 Cal.App.2d 465 ..... 32

*Morning Star Co. v. State Bd. of Equalization* (2004)
115 Cal.App.4th 799 ..... 20

*Northwest Energetic Services, LLC v. Cal. Franchise Tax Bd.* (2008)
159 Cal.App.4th 841 ..... 20

*Ravettino v. City of San Diego* (1945)
70 Cal. App. 2d 37 ..... 25

*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989)
209 Cal.App.3d 940 ..... 7, 16, 32

*Schmeer v. County of Los Angeles* (2013)
213 Cal.App.4th 1310 ..... 21, 25

*Sinclair Paint Co. v. State Board of Equalization* (1997)
15 Cal.4th 866 ..... *passim*

*Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988)
204 Cal.App.3d 660 ..... 5, 34

*People ex rel. Spiers v. Lawley* (1911)
17 Cal.App. 331 ..... 7, 32

*Torres v. City of Yorba Linda* (1993)
13 Cal.App.4th 1035 ..... 29

*Tulare County v. City of Dinuba* (1922)
188 Cal. 664 ..... 32

*Weisblat v. City of San Diego* (2009)
176 Cal.App.4th 1022 ..... 20

*Wheatherford v. City of San Rafael* (2014)
226 Cal.App.4th 460, review granted, S219567 ..... 4, 30

*In re Wright's Estate* (1929)
98 Cal.App. 633 ..... 25

**California Constitution**

Article II, § 8 ..... 26

Article II, § 9 ..... 26

Article II, § 9, subd. (b) ..... 1

Article XI, § 5 ..... 9, 11

Article XI, § 7 ..... 11

Article XI, § 9 ..... 3, 6, 33

Article XI, § 9, subd. (b) ..... 2, 4, 26, 34

Article XI, § 19 (1879 Constitution) ..... 4

Article XII, § 8 ..... *passim*

Article XIII A ..... 25, 34

Article XIII A, § 3, subd. (b)(1)–(5) ..... 25

Article XIII A, § 3, subd. (b)(4) ..... 2, 22, 24

Article XIII A, § 4 ..... 1, 19, 24, 26

Article XIII B ..... 7, 16

Article XIII B, § 3, subd. (b) ..... 1

Article XIII C ..... 25

Article XIII C, § 1, subd. (e) ..... 1, 18

Article XIII C, § 1, subd. (e)(1)–(5) ..... 25

Article XIII C, § 1, subd. (e)(4) ..... 2, 15, 22, 24, 26

Article XIII C, § 1, subd. (e)(6) & (7) ..... 25

Article XIII C, § 2 ..... *passim*

Article XIII C, § 3 ..... 26, 34

Article XIII D ..... 25

Article XIII D, § 3, subd. (b) ..... 24

**California Statutes**

Code Civ. Proc.
§ 526(a) ..... 4, 30

Gov. Code
§ 50076 ..... 17, 19
§ 53750 ..... 27

Pub. Util. Code
§ 600 ..... 5
§ 799 ..... 18
§ 5810, subd. (a)(2)(C) ..... 26
§ 6001.5 ..... 6
§ 6205 ..... 5, 35, 37
§ 6231, subd. (c) ..... 5, 12
§ 6264 ..... 6
§ 6350 et seq. ..... 6

**Other State Statutes**

Broughton Act of 1905 (Pub. Util. Code, § 6001 et seq.) ..... 5, 12, 34

Digital Infrastructure and Video Competition Act of 2006 (Stats. 2006, ch. 700) ..... 26

Franchise Act of 1937 (Pub. Util. Code, § 6201 et seq.) ..... *passim*

**Other Authorities**

Cal. Municipal Law Handbook (Cont.Ed.Bar 2014)
§ 6.62 ..... 6

Cal. P.U.C. Dec. No. 89-05-063 ..... *passim*

Cal. Rules of Court
Rule 8.512(d) ..... 3

Grodin et al., The California State Constitution: A Reference Guide (1993)
pp. 194–197, 209–210 ..... 4
p. 210 ..... 5

McQuillin, The Law of Municipal Corporations (3d Ed. 2014)
§ 36:2 ..... 25

**To the Honorable Chief Justice of the State of California and Associate Justices of the California Supreme Court:**

The City of Santa Barbara respectfully petitions for review of a published opinion of the Court of Appeal.

## QUESTIONS FOR REVIEW

1. Does *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 survive Proposition 26[1] and, if so, to what extent?
2. Do the requirements of Propositions 13,[2] 218, and 26[3] for voter approval of taxes limit constitutional municipal powers to regulate utilities operating in a city[4] and to franchise such utilities?[5]
3. Does a franchise fee for use of public rights of way become a tax if its proceeds are used for a municipality's general fund purposes?

---

[1] Cal. Const., art. XIII B, § 3, subd. (b); art. XIII C, § 1, subd. (e).

[2] Cal. Const., art. XIII A, § 4.

[3] Cal. Const., art. XIII C, § 2.

[4] Cal. Const., art. II, § 9, subd. (b).

[5] Cal. Const., art. XII, § 8.

4. In identifying charges exempted from Proposition 26's definition of "tax,"[6] may a court look to charges' **economic** rather than **legal** incidence?

## INTRODUCTION

Franchise agreements have long been held to be matters of contract between investor-owned entities and municipalities that own rights of way in which they operate. Franchises and franchise fees are expressly authorized by our Constitution and excluded from its definition of the "taxes" which require voter approval. The Court of Appeal's opinion below ("the Opinion") undermines this understanding of settled law — and all municipal franchise agreements.

No court previously suggested a franchise fee is a tax requiring voter approval under 1978's Proposition 13, 1986's Proposition 62, 1996's Proposition 218 or 2010's Proposition 26. Few, if any, franchise agreements are limited to the cost of public services to franchisees or their customers, yet the Opinion newly imposes that limit, citing this Court's decision applying Proposition 13 to regulatory fees in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 ("*Sinclair Paint*"). Thus, the Opinion reads Propositions 13 and 26 to impliedly repeal or to narrow article XI,

---

[6] Cal. Const., art. XIII C, § 1, subd. (e)(4); art. XIII A, § 3, subd. (b)(4).

section 9, subdivision (b)[7] and article XII, section 8[8] without citing those provisions.

The Opinion also suggests that, instead of analyzing a revenue measure's **legal** incidence — on whom legislation imposes the duty to pay — courts may examine its **economic** incidence — who bears that duty in light of the relative market power of the parties to a given transaction. This conflicts with precedent and invites challenge to every revenue measure assessed on payors who have market power to impose it on others.

These conclusions undermine a vital municipal revenue source, fail to harmonize our Constitution's provisions, and muddle the law of public revenues. This Court should grant review.[9]

---

[7] Article XI, section 9 is quoted at page 33 *infra*. Unspecified references in this Petition to articles and sections of articles are to the California Constitution.

[8] This provision is quoted at pages 33–34 *infra*.

[9] It may also be appropriate for this Court to grant review pursuant to California Rules of Court, rule 8.512, subdivision (d) and defer briefing pending decision of *Citizens for Fair REU Rates v. City of Redding* (*Redding*), Case No. S224779, should this Court grant review there. *Redding* applies Proposition 26 to Redding's electricity utility and that city's practice of transferring proceeds of electric rates to its general fund as payments in lieu of property taxes the utility would pay if it were investor-owned. Grant and hold might also be appropriate with respect to a pending case on taxpayer standing

# STATEMENT OF FACTS

## I. THE HISTORY AND IMPORTANCE OF FRANCHISE FEES

### A. Case Law Has Long Afforded Chartered Cities Broad Authority to Set Franchise Terms

Cities and counties have had authority to charge utilities for the privilege of using public resources for the provision of electricity, water, telephone services, gas, and other utilities since the formation of our State. Article XI, section 19 of the 1879 Constitution, as amended in 1884, granted private utilities the right to use municipal rights of way to provide water and light. It partly — and temporarily — displaced the local authority to grant franchises now conferred by its present-day successor in article XI, section 9, subdivision (b) and by article XII, section 8. (See *City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1171 (*Santa Cruz*).)[10] Because electric franchises under that Constitutional

---

under Code of Civil Procedure section 526a. (*Wheatherford v. City of San Rafael*, review granted Sept. 10, 2014, S219567.) *Wheatherford* also involves the distinction between the legal and economic incidence of local taxes.

[10] A useful history of these provisions appears at Grodin, et al., The California State Constitution: A Reference Guide (1993) pp. 194–197 and 209–210.

provision were limited to the provision of "light," utilities negotiated "complementary" franchises which required payment of a fee to use those rights of way to provide gas or electricity for other purposes. (*Ibid.*) Progressive-era amendments to the Constitution repealed this "constitutional franchise" in 1911. (*Id.* at p. 1172.) A further amendment in 1914 shifted to the Public Utilities Commission most power to regulate investor-owned utilities' rates, but the local franchising power remained. (Grodin, et al., The California State Constitution: A Reference Guide (1993) p. 210.)

Even before the 1911 and 1914 amendments to our Constitution, the Legislature enacted the Broughton Act of 1905 to restore municipal power to grant franchises, but required bidding and limited fees to a percentage of receipts from the use of the franchise. (Pub. Util. Code, § 6001 et seq.; see *Santa Cruz, supra,* 82 Cal.App.4th at p. 1172.) The Broughton Act proved difficult to implement and was therefore supplemented by the 1937 Franchise Act, which eliminated the bidding requirement (Pub. Util. Code, § 6201 et seq.) and set the rate at 2 percent of the franchisee's receipts from use of the franchise or 1 percent of gross annual receipts from sales within the franchising municipality. (Pub. Util. Code, § 6231, subd. (c)). Chartered cities, of course, have direct constitutional authority, but are also authorized to implement these two statutes unless their charters provide otherwise. (Pub. Util. Code, §§ 6001, 6205; see *Southern Pacific Pipe Lines, Inc. v. City of Long Beach* (1988)

204 Cal.App.3d 660, 669–670 [general law allows chartered cities to adopt home-rule franchise regulations or to issue franchises under either Broughton or 1937 Franchise Acts].) As article XI, section 9, subdivision (b) and article XII, section 8 require, the Legislature has carefully preserved local autonomy as to franchises to ensure vital funding for local services. (E.g., Pub. Util. Code, § 6350 et seq. [imposing surcharge on utilities operating in city rights of way to replace franchise fees otherwise lost to changes in the regulatory environment such as "unbundling of the gas industry"].)

Franchise fees are typically negotiated between a city and the would-be franchisee and approved by ordinance — a legislative act subject to referendum. (See Cal. Municipal Law Handbook (Cont.Ed.Bar 2014) § 6.62; *County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418, 421 [companies "awarded gas franchises through county ordinances, which were adopted by the County of Kern" and affirming ordinances' validity]; cf. Pub. Util. Code, § 6001.5 [preempting "**the ordinance** of any chartered municipality insofar as **that ordinance** governs the granting of franchises to construct [oil pipeline] facilities..." emphases added].) The 1937 Franchise Act authorizes local franchise awards for any term of years (Pub. Util. Code, § 6264) and cities have long had discretion on that and many other franchise provisions. (See *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363 ["the public body making the grant can prescribe terms and conditions in the granting

and for the acceptance of a franchise" including fees]; *People ex rel. Spiers v. Lawley* (1911) 17 Cal.App. 331, 346–347 [franchise agreement construed as any writing]; *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 (*Santa Barbara County Taxpayer Assn.*) [franchise fees not "proceeds of taxation" subject to Gann Limit of article XIII B (November 1979's Proposition 9): "A franchise is a negotiated contract between a private enterprise and a governmental entity for the long-term possession of land."].)

### B. Franchise Fees Are a Significant Portion of Statewide Municipal Revenues

Franchise fees make up a significant percentage of municipal revenues, and defining franchise fees as taxes requiring voter approval would result in significant revenue losses for many cities. According to data gathered by the State Controller, California cities derived $1.015 **billion** in franchise fees in fiscal year (FY) 2011–2012, the last year for which data are available. (Motion for Judicial Notice ("MJN"), Exh. A at p. MJN00014.) This averages $61.40 per capita. (*Id.* at p. MJN00039.)

Cities' receipts vary greatly from the average, of course. The median city received 5.8 percent of its general fund revenues from franchise fees in FY 2011–2012. (MJN, Exh. A at p. MJN00064.) Many cities relied much more heavily on this source, including:

- Hemet – 41.7% of general fund revenues
- Needles – 29.7%
- Jurupa Valley – 26.2%
- Lodi – 26.0%
- Azusa – 20.0%
- Arvin – 19.3%
- Pittsburg – 19.1%
- Monte Sereno – 17.9%
- Adelanto – 17.4%
- Fort Bragg – 16.8%

(MJN, Exh. A at pp. MJN00064–MJN00076.)

Santa Barbara relies on franchise fees for 4.4 percent of its general revenues — almost $3.7 million in FY 2011–2012. (MJN, Exh. A at pp. MJN00024, MJN00074.)

## II. THE 1989 PUC RULING ON UTILITIES' RECOUPMENT OF FRANCHISE FEES

As the Opinion acknowledges, the Public Utilities Commission (PUC) requires investor-owned utilities subject to its regulation to distinguish some franchise fees from others. (Opinion, p. 3.) PUC Decision 89-05-063 ("the 1989 Decision") acknowledged the impact of Proposition 13 on municipal property tax receipts. (AA2:415–448.[11]) It noted that, since Proposition 13, many cities had

---

[11] Citations to the Appellant's Appendix are in the form:

relied upon other charges — including utility user taxes ("UUT"), business license taxes, and transient occupancy (or hotel bed) taxes — to replace property taxes. (AA2:420.) The 1989 Decision noted that utilities were then recouping franchise fees from service fees on all customers in a utility service area which included the franchise — not just customers in the city which granted the franchise. (AA2:421.) This was perceived as unfair and the PUC therefore initiated the rulemaking which produced the 1989 Decision. (AA2:422.)

The 1989 Decision discusses many charges utilities pay municipalities — including utility user taxes, franchise fees, business license taxes, fees for permits to excavate in rights of way, parking and business improvement district assessments, natural gas storage fees, special taxes, property taxes, and other real-property and business assessments. (AA2:423–431, AA2:445–446 at ¶¶ 1(a)–1(d).) The PUC categorized these fees into classes which serve its regulatory purposes; it did not purport to determine the legal character of revenue measures or to interfere with the home rule power of a chartered city like Santa Barbara under article XI, section 5. In particular, the PUC was concerned with revenue measures which could result in a "significantly higher level of costs" for customers outside the municipality which legislates a measure. (AA2:436.) Accordingly, the 1989 Decision distinguishes utility user

---

AA[Volume]:[page number(s)].

taxes from other revenues a utility pays a city, because 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 the legal nor the economic incidence of the tax. (AA2:438.)

Given its authority to regulate rates to protect consumers from utilities' monopoly pricing power, the PUC is necessarily concerned with the economic incidence of local revenue measures affecting regulated utilities. For the PUC's rate regulation, who ultimately pays a fee or charge matters. However, economic incidence is not a tool used by courts, for the reasons elaborated below. By ignoring case law's focus on legal rather than economic incidence of revenue measures, the Opinion allows PUC regulation of utility rate-making to infringe the home rule power of chartered cities to grant franchises, overlooking that the PUC and chartered cities are legislative equals as to the areas within their respective reaches.

Thus, it is the PUC's policy under the 1989 Decision to require a utility to state a line item on bills of ratepayers within the jurisdiction assessing a charge, fee, or tax that exceeds comparable revenue measures charged by other local governments. (AA2:444 at ¶ 16, AA2:446 at ¶ 3.) As chartered cities — but not general law cities and counties — have constitutional power to exceed the revenue limits of the 1937 Franchise Act, the 1989 Decision has particular implications for chartered cities' franchise fees.

The 1989 Decision requires utilities subject to charges — other than a utility users tax — which a utility or the PUC views as more than charged by other local governments — to seek an advice letter of the PUC. (AA2:445–447.) The PUC makes no distinction among taxes, fees, charges, assessments, or any other levies; it merely requires utilities seek advice letters for:

> Franchise, general business license, or special taxes and/or fees upon the public utility **which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities** within the public utility's service territory.

(AA2:445–446 at ¶ 1(a), emphasis added.) Thus, whether a local jurisdiction assesses a tax as defined in Proposition 218 and 26 or a fee exempt from voter-approval requirements, the PUC requires utilities to list separately on utility bills charges exceeding the average of local charges in the utility's service area. The 1989 Decision thus identifies revenue measures it views to exceed the average in a service area; it does not purport to determine the legal character of measures. Nor could it. The power of a chartered city to impose taxes, assessments and fees and charges of various types assured it by article XI, section 5 (home rule power of chartered cities) and section 7 (police power of all cities and counties). It is not for the PUC to circumscribe that constitutional authority.

## III. SANTA BARBARA'S FRANCHISE FEE

Southern California Edison ("SCE") has held a franchise to use Santa Barbara's rights of way to distribute electricity in the City since at least 1959.[12] (AA2:387–392.) The 1959 franchise agreement expired in 1984. (AA2:389 at § 2.) The City and SCE negotiated a new franchise agreement expiring in 1994. (AA2:394–401.) This agreement, consistently with the 1937 Franchise Act, required compensation of 2 percent "of the annual gross receipts of [SCE] arising from the use, operation or possession" of the franchise, but "in no event" less than 1 percent "of the annual gross receipts derived by [SCE] from the sale of electricity" within the City. (AA2:396 at § 4; see Pub. Util. Code, § 6231, subd. (c); *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1696.[13]) When the franchise expired again in 1994, the parties agreed

---

[12] Jacks argued below that SCE held a constitutional franchise and the City could therefore charge no more than 1 percent of SCE's gross revenues derived from the sale of electricity. The trial court ruled Jacks presented insufficient evidence to prove the claim. (AA3:608–610.) The court also ruled that, as a chartered city, Santa Barbara is not limited to the rates authorized by the Broughton Act and the 1937 Franchise Act. (AA3:609–610.) Jacks does not challenge these rulings on appeal and the Opinion therefore does not address them.

[13] The 1937 Franchise Act led many cities to adopt the 2 percent /

to five short extensions through December 1999 to negotiate a new, long-term agreement. (AA2:344 at ¶¶ 6–7.)

In these negotiations, the City sought to increase the franchise fee from 1 to 2 percent of SCE's gross revenues in the City. (AA2:345 at ¶ 8.) SCE agreed, but only if it could recoup that cost from customers. (AA2:345 at ¶ 9.) Under the 1989 Decision, that required PUC approval and that SCE separately state the 1 percent increase on customers' bills. (*Ibid.*) Based in part on SCE's assurance it would pursue PUC consent to the increase, the parties agreed to a 30-year franchise agreement on December 7, 1999. (AA2:403–413.) Under that agreement, if SCE failed to pay the 2 percent franchise fee — either because the PUC refused to approve it or SCE failed to seek that approval — the City could terminate the franchise. (AA2:407 at § 6(E).) Indeed, if the Opinion stands, it will be sensible for the City to do so.

SCE did not immediately pursue PUC approval of the 1 percent increment given turmoil in the electricity market following California's famously failed experiment with energy deregulation. (AA2:348 at ¶ 17.) The franchise agreement required SCE to pay only the base 1 percent until the PUC approved the 1 percent

---

1 percent language, but the 1 percent formula generally results in higher fees. (See *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1696.) As such, most utilities have paid franchise fees at the same rate for nearly 80 years.

increment. (AA2:406 at §§ 6(A), 6(C).) In November 2004, when energy markets stabilized, the City Council authorized a letter to SCE instructing it to seek PUC approval to recoup the 1 percent increment from customers. (AA2:348 at ¶¶ 18–19.) SCE did so on March 30, 2005 (AA2:468–471), and the PUC gave its approval April 20, 2005 (AA2:479). SCE has paid at the 2 percent rate since and — as the 1989 Decision requires — identified the 1 percent increment on customers' bills. (AA2:350 at ¶ 23.)

# PROCEDURAL HISTORY

## I. THE TRIAL COURT FOUND THE SURCHARGE TO BE A TAX, BUT GRANDFATHERED BY PROPOSITION 26

Thirteen years after the City and SCE agreed on the current franchise, and seven and a half years after SCE began remitting 2 percent, Plaintiffs and Appellants Rolland Jacks and Rove Enterprises, Inc. (collectively, "Jacks") sued.

Jacks filed a First Amended Complaint ("FAC") on September 12, 2012. (AA1:063–080.) The FAC alleges the 1 percent increment in the franchise fee is a tax and unlawful because voters did not approve it. (AA1:076–077.)

The parties brought cross-motions for summary adjudication (and in the City's case, summary judgment) based primarily on stipulated facts. (AA2:343–351.) Jacks sought summary adjudication

of liability. (AA1:081–084.) The City sought summary judgment arguing, inter alia, that the parties to the franchise agreement intended the 1 percent increment to compensate the City for SCE's use of rights of way and that such franchise fees are not taxes. (AA3:500–527.)

The trial court denied both motions, but held that the 1 percent increment was not a tax under Proposition 218's article XIII C, section 2 but consideration for the franchise. (AA3:617.) However, the trial court did find the 1 percent increment to fall within Proposition 26's definition of "tax," rejecting the City's argument from article XIII C, section 1, subdivision (e)(4)'s exemption from that definition for "[a] charge imposed for entrance to or use of local government property ... ." (AA3:617–620.) The trial court noted the parties had not briefed retroactive application of Proposition 26 to the 1 percent increment. (AA3:620.)

Recognizing the implicit invitation to do so, the City moved for judgment on the pleadings, arguing Proposition 26 is not retroactive and could not apply to a franchise fee agreed in 1999 — 11 years before adoption of Proposition 26 in November 2010. (AA3:622–628.) The trial court agreed and granted the motion. (AA1:16–20.) Judgment for the City entered on October 25, 2013, and Jacks timely appealed. (AA1:2–21, AA3:784–787.)

## II. THE COURT OF APPEAL REVERSES, FINDING THE 1 PERCENT INCREMENT "AN ILLEGAL TAX MASQUERADING AS A FRANCHISE FEE"

Division Six of the Second District heard argument and submitted the matter on December 10, 2014. On January 26, 2015, the DCA requested supplemental letter briefs addressing the Third District's January 20, 2015 decision in *Citizens for Fair REU Rates v. City of Redding*, from which a petition for review is also pending.[14] On February 26, 2015, the DCA issued its opinion ("the Opinion"), reversing the trial court and instructing it to grant summary adjudication to Jacks.

The Opinion characterizes the 1 percent increment as "an illegal tax masquerading as a franchise fee." (Opinion, p. 1, citing *In re Estate of Claeyssens* (2008) 161 Cal.App.4th 465, 467 [probate court fee based on value of estate that succeeded estate tax repealed by voters was tax "masquerading" as a fee].) The Opinion distinguishes the case law upholding franchise fees summarized above, including its own decision in *Santa Barbara County Taxpayer Assn.* finding Santa Barbara County's franchise fee not to be a tax within the reach of the Gann Limit, article XIII B. The Opinion concludes those cases

---

[14] The *Redding* case is case number S224779. The Opinion discusses the Court of Appeal's *Redding* decision at length in footnote 4, disagreeing with its suggestion local gas and electricity rates are categorically exempt from Proposition 218.

concerned "traditional franchise fees collected for grants of rights of way rather than, as here, a surcharge collected for general revenue purposes." (Opinion, p. 1.) This is a distinction without a difference — all franchise fees are collected for "general revenue purposes."[15]

The Opinion relies on the "primary purpose" test this Court established in *Sinclair Paint* to distinguish permissible regulatory fees from those made taxes by Proposition 13 and its implementing statute, Government Code section 50076. The Opinion concludes that — because the 1999 franchise agreement distinguished the earlier 1 percent franchise fee from the 1 percent increment and because the 1989 Decision requires the latter to be listed separately on SCE's bills — the increment was not part of the franchise fee, but a tax. (Opinion, pp. 6–9.) The Opinion emphasizes the 1999 agreement states revenues from the 1 percent increment would be "for use by the City Council for general City governmental purposes" (*id.* at p. 7) but overlooks that the earlier franchise fee and the first 1 percent of the current franchise fee are also used for those purposes — as are **all** franchise fees. Thus, rather than discern the legal incidence of the franchise fee by applying the usual rules of statutory construction to the franchise agreement, the Opinion accepts Jacks' argument as to the economic incidence of the 1 percent increment. In so doing, it undermines all franchise fees — whether on electric utilities under chartered city authority or the

---

[15] See footnote 16 below.

franchise acts or on other profit-making beneficiaries of rights of way such as water utilities, oil and gas producers, cable television providers or solid waste franchisees. The Opinion also notes the franchise agreement required SCE to collect and remit any UUT (which would be true whether or not the franchise agreement said so; Pub. Util. Code section 799) and rejected the argument of amicus curiae League of California Cities that SCE voluntarily agreed to the franchise agreement and the City therefore did not "impose" the fee so as to trigger article XIII C, section 2 [Proposition 218] and Article XIII C, section 1, subdivision (e) [Proposition 26]. (*Id.* at pp. 10–11.)

The City sought rehearing. The Court of Appeal invited an answer to that petition and thereafter denied rehearing without change to the Opinion.

# ARGUMENT

## I. THE OPINION UNDERMINES ALL MUNICIPAL FRANCHISE FEES

### A. The Opinion Misapplies *Sinclair Paint*

The Opinion applies *Sinclair Paint*'s "primary purpose" test of purported regulatory fees to bargained franchise fees which should instead be analyzed using the canons of construction. (Opinion, pp. 6–7.)

*Sinclair Paint* instructs courts to examine the "primary purpose" of regulatory fees to determine if they are special taxes requiring voter approval under Proposition 13 (article XIII A, section 4) rather than regulatory fees exempt from that measure. (15 Cal.4th at pp. 879–881, citing *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 166–168 (*United Business*); see also Gov. Code section 50076 [fees which do not exceed cost of regulation are not taxes].) Applying *Sinclair Paint*'s "primary purpose" test to franchise fees is inappropriate.

*Sinclair Paint* tested whether a fee on manufacturers of lead-containing products to fund lead remediation programs was a tax under Proposition 13. (15 Cal.4th at pp. 871–872.) This Court noted "taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted." (*Id.* at p. 874.) Further, "[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges." (*Ibid.*) Thus, the challenged franchise is not a tax under *Sinclair Paint* because SCE receives a specific privilege from the City — use of rights of way — and agreed to pay for that privilege.

Further, in the 18 years since *Sinclair Paint*, no court has applied it to a franchise fee, even though such fees are borne by a variety of litigious industries. Rather, the courts view franchise fees as creatures of contract, not taxes; and to require compensation for

use of rights of way. Lower courts have applied *Sinclair Paint* only to the purported regulatory and service fees for which its test was fashioned. (E.g., *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1043–1044 [fee for services associated with enforcing a tax was itself a tax]; *Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693–694 & fn. 7 [fee on telephone customers to fund 911 services was a tax]; *Northwest Energetic Services, LLC v. Cal. Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 855 [levy on LLCs' total income was tax]; *Morning Star Co. v. State Bd. of Equalization* (2004) 115 Cal.App.4th 799, 9 Cal.Rptr.3d 600, 612 [hazardous materials fee not a tax], revd. on other grounds (2006) 38 Cal.4th 324. )

For example, *California Taxpayers' Ass'n v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 1139 (*CTA v. FTB*) interpreted a statutory penalty on underpayment of corporate taxes according to its terms, not its consequences for State revenues. CTA argued measures which raise substantial revenue are taxes under *Sinclair Paint*'s "primary purpose" test — as the Opinion here concludes. (*Id.* at pp. 1145–1146.) *CTA v. FTB* rejected the argument and analyzed the penalty using "the traditional analytical framework for determining a statute's constitutionality," giving the benefit of the doubt to the Legislature and initially assuming the Legislature properly labeled its enactment a "penalty." (*Id.* at pp. 1146–1147.)

The Opinion misapplies *Sinclair Paint* to examine the City's use of the 1 percent increment rather than the purpose of the

franchise agreement — compensation for private, profit-making use of City rights of way. (AA2:404 at § 2.) Thus, the Opinion empowers courts to disregard the stated purpose of legislation and to strip the City of general fund resources by applying the wrong law.

If the Opinion's logic holds, every franchise fee agreement is a tax, as each is intended to derive revenues from private use of public property, none is limited to the cost of maintaining rights of way, and most are flat percentages unchanged in eight decades. Because franchisees commonly (but not universally) have market power to pass such fees onto customers, the Opinion jeopardizes every franchise fee in the state.

### B. The Opinion Overlooks Proposition 26's Impact on *Sinclair Paint*

Nor does the Opinion analyze the extent to which *Sinclair Paint* survives Proposition 26 — an untested question. Proposition 26 plainly aimed to change *Sinclair Paint* to some extent. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322–1323 (*Schmeer*).) On the other hand, Proposition 26 was also intended to preserve some aspects of *Sinclair Paint*:

> The concluding sentence of the newly added subdivision provides: '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.' (Cal. Const., art. XIII C, § 1, subd. (e).) This language repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax.

(*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996.)

Nor does the Opinion consider the range of revenue measures to which the surviving portions of *Sinclair Paint* apply under Proposition 26 — including its exemption for franchise fees, i.e., "[a] charge imposed for ... use of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4); see also art. XIII A, § 3, subd. (b)(4) [substantively identical exemption for State fees].)

Moreover, applying *Sinclair Paint* here is conclusory — no revenue measure intended as such can survive a test designed to distinguish what are intended as regulatory fees from revenue measures.

### C. The Opinion Overlooks That Most, If Not All, Franchise Fees Fund General Governmental Services

The Opinion describes the 1 percent increment as a "surcharge collected for general revenue purposes." (Opinion, p. 1.) The same

can be said of **any** franchise fee. The Opinion observes by footnote that the City reallocated franchise fees to its general fund in 2009, but overlooks that this is common practice. (Opinion, p. 2, fn. 1.) If the City's general fund pays to improve and maintain rights of way, what other fund should benefit from fees for their use? Because the PUC required SCE to collect part of the franchise fee as a line-item on bills to shield customers outside the City, and because the parties to the franchise agreed the City would use the 1 percent increment for "general City governmental purposes" as it had for decades, the Opinion sees not a fee, but "something else entirely." (Opinion, p. 7.) This despite the plainly expressed intent of the franchise agreement that these funds be consideration for SCE's profitable use of City's rights of way. (AA2:404, § 2.)

The Opinion also overlooks that the City also used the pre-1999 franchise fee to fund general governmental purposes. (AA1:281 [prior 1 percent fee "equates to approximately $500,000 annual revenue to the General Fund"].) All franchisors do likewise.[16]

---

[16] (MJN, Exh. H at p. MJN00217 [defining franchise fee: "[p]ayment to a municipality from a franchisee as 'rent' or 'toll' for the use of the streets and rights of way of a municipality. ... Use of Revenues: Unrestricted"]; see also Cal. State Controller, Cities Annual Report 2011–2012 (Apr. 23, 2014) pp. v–vi [Figure 1], x [including franchises with "other taxes"], at <http://www.sco.ca.gov/Files-ARD-Local/LocRep/1112cities.pdf> [as of Mar. 31, 2015].)

Thus, the Opinion fails to distinguish Santa Barbara's from other franchise fees and endangers essential revenues to every city and county in California.

### D. Proposition 26 Excludes Franchise Fees from Its Definition of "Taxes"

Proposition 26 expressly excludes franchise fees from its definition of "taxes" (Cal. Const. art. XIII C, section 1, subd. (e)(4); art. XIII A, section 3, subd. (b)(4)), but the Opinion questions them under section 2 of that same article — adopted by Proposition 218, which Proposition 26 amends. This, despite the express language of Proposition 218 that fees for electric service are not property related fees within its reach. (Cal. Const., art. XIII D, § 3, subdivision (b).)

Proposition 26 excludes from its definition of the "taxes" which require voter approval under article XIII A, section 4 (Proposition 13) and article XIII C, section 2 (Proposition 218) "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).) Such fees are not limited to cost as are those governed by other exceptions to Proposition 26. (Cf. *id.* at subds. (e)(1)–(e)(3) [exceptions for fees for benefits, services, and regulation limited to cost].[17]) Indeed, what "cost" is relevant to the

---

[17] Proposition 26 has nearly identical definitions of "tax" — and exemptions from that definition — for the State and local

use of a community meeting room? What policy indicates government may not earn a reasonable return on such proprietary activities? When government engages in proprietary activity, it is entitled to do so on the same terms as its for-profit competitors. (McQuillin, The Law of Municipal Corporations (3d Ed. 2014) § 36:2 ["When the legislature empowers a municipal corporation to engage in a business, the corporation may exercise its business powers much in the same way as a private entity."]; see *Ravettino v. City of San Diego* (1945) 70 Cal. App. 2d 37, 47 ["The delegation of power to municipal corporations ... impliedly gives them the right to select lawful and reasonable means whereby that power is to be carried out."].)

Proposition 26 must be interpreted in light of articles XIII A, XIII C, and XIII D, which it amends. The rule is ancient but vital. (*In re Wright's Estate* (1929) 98 Cal.App. 633, 635.) "It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090–91.) Of course, our Constitution is construed as statutes are. (*Schmeer, supra,* 213 Cal.App.4th at p. 1316.)

---

governments. (Compare art. XIII A, section 3, subd. (b)(1)–(5) with art. XIII C, section 1, subd. (e)(1)–(5).) It also provides two exemptions unique to local government. (Cal. Const., art. XIII C, section 1, subd. (e)(6) & (7).)

The reverse is true, as well: Proposition 218 may not be read to nullify any substantive provision of Proposition 26 because the latter amended the former. Thus, the Opinion erred to read article XIII C, section 2's requirement that taxes be voter-approved to defeat Proposition 26's exemption from its definition of "tax" (which Proposition 218 did not define) of fees for use of government property. (Cal. Const., art. XIII C, § 1, subd. (e)(4).) Much less can article XIII A, section 4 and article XIII C, section 2 be read to defeat municipal authority conferred by article XI, section 9, subdivision (b) and article XII, section 8 — nowhere mentioned within either though Proposition 218 did mention, and alter, article II, sections 8 and 9. (Cal. Const., art. XIII C, § 3.)

Further, the Legislature has recently seen fit to protect and expand the opportunities for local agencies to generate revenues from franchise fees. Assembly Bill 2987, passed nearly unanimously in 2006 and signed by Governor Schwarzenegger, enacted the Digital Infrastructure and Video Competition Act of 2006, to allow the PUC to issue a statewide franchise to cable television providers to encourage them to extend service to underserved areas but to require it to preserve local franchise fees. (See MJN, Exh. B at pp. MJN00077–MJN00078; Pub. Util. Code, § 5810, subd. (a)(2)(C); see also *id.* at subd. (b) ["Legislature recognizes that local entities should be compensated for the use of the public rights-of-way and

that the franchise fee is intended to compensate them in the form of a rent or a toll"].)

Thus, changes to the long-standing classification of franchise fees as contracts between sophisticated parties — and thus not "taxes" which require voter approval under Propositions 13, 62,[18] 218, and 26 — would adversely affect cities and counties large and small, rich and poor, everywhere in California. That outcome is contrary to the intent of the Legislature, which has long recognized franchise fees as important local revenues. Proposition 26's exemption of fees on private use of public property suggests this result contravenes the will of California's voters, too.

Thus, the Opinion confuses case law as to the relation of Propositions 218 and 26 and overlooks other provisions of our Constitution authorizing municipal franchises. Review is appropriate to harmonize these constitutional provisions.

## II. CALIFORNIA COURTS NEED GUIDANCE WHETHER A REVENUE MEASURE'S LEGAL OR ECONOMIC INCIDENCE CONTROLS ITS INTERPRETATION

The Opinion deviates from the long-standing rule that the legal character of a revenue measure turns on its legal incidence — on whom the legislator intended to impose it — which can be

---

[18] Government Code section 53750 et seq.

determined in a predictable and stable way using traditional tools of courts: the canons of construction. The Opinion employs an economic incidence test which, applied elsewhere, will require proof as to who has market power to compel another to bear the economic burden of the fee in a given transaction. (Opinion, p. 10 [PUC requirement that SCE recover 1 percent increment as line-item on bills because City's fee exceeds others charged in SCE's service area].)

The Court of Appeal has explained the distinction between legal and economic incidence of a revenue measure:

> The economic incidence of a tax refers to the party or parties who will ultimately bear the economic burden of the tax. The economic incidence of a tax may differ from the legal incidence of the tax, which refers to the party or parties who are responsible for remitting a particular tax to the government. The *Fulton Corp.* court explained this distinction by stating, "It is well established that 'the ultimate distribution of the burden of taxes [may] be quite different from the distribution of statutory liability' [citation], with such divergence occurring when the nominal taxpayer can pass it through to other parties ... ."

(*City of San Diego v. Shapiro* (2014) 228 Cal. App. 4th 756, 784, citing *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 341.)

While legal incidence can be discerned by applying canons of construction to legislation which authorizes or imposes a revenue measure, economic incidence will be disputable in many cases. This is dangerous precedent. Critics of other local government revenues seek to undermine the traditional rule and to gain leverage in municipal finance disputes by arguing who "really" pays one fee or another at one time or another. If we are to exchange a fixed standard that applies the usual rules of statutory construction to determine the legal incidence of a fee for a factual free-for-all of competing expert opinion to determine who bears the economic burden of a fee in light of the relative power of various market participants at various times and places, this Court should say so.

Just a few cases are sufficient to demonstrate the range of disputes which raise this issue. In *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1038–1039, plaintiffs challenged Yorba Linda's redevelopment plan, alleging residency in neighboring Anaheim and payment of sales tax to Yorba Linda. Payment of sales tax did not confer standing because "a sales tax is a levy imposed on the retailer, not the consumer." (*Id.* at p. 1047.) Thus, the legal incidence of the sales tax controlled for purposes of standing even though its economic incidence is commonly on the buyer. It is for this reason this Court pays sales tax even though it is exempt from taxation — the tax is on vendors who have market power to pass the tax on to the Court.

In *Cornelius v. Los Angeles County etc. Authority* (1996) 49 Cal.App.4th 1761, 1764, the plaintiff challenged the Los Angeles County Metropolitan Transportation Authority's affirmative action program. The court found no taxpayer standing under Code of Civil Procedure section 526a, because the sales and gasoline taxes the plaintiff paid were "taxes on the retailer, not the consumer to whom the retailer passes the burden." (*Id.* at p. 1777.)[19]

Pending cases abound that seek standing via the very rule of economic incidence the Opinion applies. In San Diego, pending cases challenge:

- 57 maintenance assessment districts,
- 18 business improvement districts,
- a tourism marketing district,
- the city's downtown business improvement district.

(MJN, Exhs. C–F.) In each case, the plaintiff asserts standing as a "taxpayer and voter organization" with "an interest in open government" even though its members do not pay all the challenged levies.[20] (See MJN, Exh. C at p. MJN00120 [asserting standing as implied third-party beneficiary to assessment district management

---

[19] This question arises anew in *Wheatherford v. City of San Rafael,* case number S219567.

[20] The trial court found SCE was not a necessary party here and allowed plaintiffs to challenge a franchise agreement to which they were not party. (AA3:610.) That finding is not challenged on appeal.

contract]; Exh. D at pp. MJN00127–MJN00128 [status as taxpayer association insufficient for standing to challenge assessment]; Exh. E at p. MJN00156 [organization's assertion it was not required to allege it paid assessment]; Exh. F at pp. MJN00175–MJN00176 [assertion it "shouldn't be necessary" to assert payment of assessment for standing].) A similar standing dispute in a challenge to Ontario's tourism marketing district assessment is pending in the Fourth District. (MJN, Exh. G at p. MJN00201 ["to establish standing [to challenge special district assessment], all Appellant needs to allege is that at least one of its members was qualified to vote and denied that opportunity"].) The First District has noted the danger of such a generous view of standing. (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 476 [allowing non-taxpayers to challenge tax carries "unacceptable risk of paralyzing the financial stability of local governments with a flood of lawsuits"].)

Thus, accepting the Opinion's reliance on the economic incidence of a revenue measure to determine its legal character has profound implications for court dockets and for public finance, both.

## III. REVIEW IS APPROPRIATE BECAUSE THE PUBLISHED OPINION MAKES A NEGATIVE CONTRIBUTION TO THE LAW

### A. The Opinion Ignores the Constitution's Grant of Municipal Franchising Power

Existing law is clear that franchise fees are not taxes — indeed, the Second District so held 26 years ago. (*Santa Barbara County Taxpayer Assn., supra,* 209 Cal.App.3d at p. 950, citing *City and County of San Francisco v. Market St. Ry. Co.* (1937) 9 Cal.2d 743, 748–749.) For a century, municipalities have had wide latitude to set franchise fees by contract. (*Tulare County v. City of Dinuba* (1922) 188 Cal. 664, 670 [franchise receipts "neither a tax nor a license" and "purely a matter of contract" because "obligation to pay is not imposed by law but by his acceptance of the franchise"]; *People ex rel. Spiers v. Lawley* (1911) 17 Cal.App. 331, 346–347 [franchise agreement construed as any writing]; see also *Contra Costa County v. American Toll Bridge Co.* (1937) 10 Cal.2d 359, 363 ["the public body ... can prescribe terms and conditions in the granting and for the acceptance of a franchise"]; cf. *Linnell v. State Dept. of Finance* (1962) 203 Cal.App.2d 465, 469 [parking fee "optional" and therefore not a tax — "a forced charge, imposition, or contribution; [which] operates in invitum, and is in no way dependent upon the will or contractual assent, express or implied, of the person taxed"].)

Our Constitution has made this clear for more than a century. Article XI, section 9 states:

> (a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.
>
> (b) Persons or corporations may establish and operate works for supplying those services **upon conditions and under regulations that the city may prescribe under its organic law.** (Emphasis added.)

Similarly, Article XII, section 8 states:

> A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or **the right of any city to grant franchises for public utilities or other businesses**

**on terms, conditions, and in the manner prescribed by law.** (Emphasis added.)

Thus the Opinion conflates what our Constitution distinguishes — the regulation of business activity at issue in *Sinclair Paint* with the franchising power long recognized by our Constitution.[21] Santa Barbara's voters confirmed the City's franchise power. (AA2:382 at § 1400 [Charter empowers City Council to grant franchises].)

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

### B. The Opinion Allows the PUC to Convert Franchise Fees to Taxes Without Evidence It Could or Would Do So

The Opinion ignores the legislative intent of not only the City's franchise, but also of the PUC's 1989 Decision, allowing the

---

[21] In *Southern Pacific Pipe Lines, Inc. v. City of Long Beach, supra,* 204 Cal.App.3d 660, the Court of Appeal referenced the PUC's implied determination that chartered cities were not bound by the Broughton Act and 1937 Franchise Act and that the utility could pass San Diego's 3 percent rate on to San Diego customers but not non-San Diego customers. (*Id.* at p. 670, fn. 8, citing *In re San Diego Gas & Elec. Co.* (1972) 73 Cal.P.U.C. 623.)

latter to convert the former into a tax as neither legislative body intended.

The PUC's authority to regulate SCE to protect consumers from its monopoly pricing power cannot vitiate a chartered city's franchise power. Yet the Opinion effectively compels the state's minority of chartered cities to limit their franchise fees to the amount statute authorizes general law cities and counties to impose. The 1989 Decision's formula — "the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory" (AA2:445–446 at ¶ 1(a)) — will weight statutory fees more heavily than those of the relatively fewer chartered cities which can charge more. Thus, the Opinion empowers the PUC to strip chartered cities of the power to deviate from the 1 percent rule of the 1937 Franchise Act expressly conferred by Public Utilities Code section 6205 and the constitutional provisions cited above. Yet the PUC has no such power under our Constitution and the PUC expressly disclaimed intent to do so. (See AA2:416 ["Nothing prevents or interferes with the local entity's power or ability to tax; our procedure merely identifies the source and localizes excess costs imposed by a local entity."]; AA2:442 ["The Commission has no jurisdiction to determine the authority of local taxing entities to impose taxes on utility customers, or utilities, or users' taxes on commodities used by a utility to produce its product."].)

The PUC distinguishes the initial 1 percent franchise fee from the 1 percent increment and requires the latter to be separately stated on bills, but the City does not. The City demands — and SCE agreed to pay — **both** as consideration for use of its rights of way. Thus, the Opinion elevates matters of form not of the City's choosing over the substance of what its Council intended and what our Constitution allows.

The stipulated facts state SCE and the City agreed the surcharge was consideration for the franchise. (See AA2:345–346 [Stipulated Fact 10]; see also AA2:406 [2 percent rate "compensation for use of the streets in the City"].) Therefore, the surcharge cannot be a tax. True, the City accommodated SCE's desire to pass the increase through to customers, for which it needed PUC approval; and SCE agreed to pay the increased fee only if it could recoup it from customers. (AA2:345 [Stipulated Fact 9].) But SCE agreed to seek PUC approval and to pay the full 2 percent upon that approval. (AA2:406 [2 percent fee "express condition" of franchise].) And SCE agreed the City could terminate the contract if the 2 percent franchise fee were not approved and paid. (AA2:407 at § 6(E).) Without assurance the City could collect 2 percent of SCE's gross revenues from use of City property, there would be no franchise to dispute here.

The Opinion endangers any charge the PUC opts to require invest-owned utilities to separately state on bills as well as other

levies which can be shown to be economically incident on persons other than the legal obligee — such as sales and use taxes.

The Opinion does not explain why a PUC policy should limit municipal power to negotiate franchise fees in amounts the PUC views as out of the ordinary. It is unlikely the PUC intended that effect, given statutory direction otherwise. (See Pub. Util. Code, § 6205 [1937 Franchise Act franchise rates "shall not be construed as a declaration of legislative judgment as to the proper compensation to be paid a chartered municipality for the right to exercise franchise privileges therein."].) Where does our Constitution empower the PUC to allocate revenue-generating authority between the voters and the city council of a chartered city? Is that not a role for our Constitution and a for City's charter?

## CONCLUSION

Review of the important questions here is necessary to determine whether and how the *Sinclair Paint* test applies to franchise fees and forbids their use for general government purposes, whether courts may look to the economic rather than legal incidence of revenue measures to determine their legal character, whether and to what extent *Sinclair Paint* survives Proposition 26 and how to harmonize Propositions 13, 26, 218 and 26 with our constitutional grant of municipal franchising power.

DATED: April 6, 2015

**ARIEL PIERRE CALONNE, City Attorney**
**TOM R. SHAPIRO, Asst. City Attorney**

**COLANTUONO, HIGHSMITH & WHATLEY, PC**

MICHAEL G. COLANTUONO
RYAN THOMAS DUNN

Attorneys for
Petitioner City of Santa Barbara

## CERTIFICATION OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.504(D)

Pursuant to Rule 8.504, subdivision (d) of the California Rules of Court, the foregoing Petition for Review contains 8,231 words (including footnotes, but excluding the tables and this Certification) and is within the 8,400 word limit set by the rule. In preparing this Certification, I relied upon the word count generated by Microsoft Word 2010.

DATED: April 6, 2015

**COLANTUONO, HIGHSMITH & WHATLEY, PC**

RYAN THOMAS DUNN
Attorney for Petitioner
CITY OF SANTA BARBARA

# ATTACHMENT 1

## (Cal. Rules of Court, rule 8.204(d))

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROLLAND JACKS et al.,

Plaintiffs and Appellants,

v.

CITY OF SANTA BARBARA,

Defendant and Respondent.

2d Civil No. B253474
(Super. Ct. No. 1383959)
(Santa Barbara County)



Appellants are an individual and a hotel who incurred a one percent surcharge on their electricity bills (1% surcharge) collected by Southern California Edison (SCE) and remitted to respondent City of Santa Barbara (City). The City did not seek voter approval of the 1% surcharge. SCE collects it pursuant to an ordinance and franchise agreement with the City. The California Constitution, as amended by Proposition 218, prohibits local governments from imposing new or increased taxes without first obtaining voter consent. (Cal. Const., art. XIII C, § 2.)

We conclude that the 1% surcharge is an illegal tax masquerading as a franchise fee. (See *In re Estate of Claeyssens* (2008) 161 Cal.App.4th 465, 467.) Our decision in *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940 (*SBC Taxpayers*), to the extent it is relevant in the context of Proposition 218, is distinguishable. *SBC Taxpayers* concerned traditional franchise fees collected for grants of rights of way rather than, as here, a surcharge collected for general revenue purposes. Therefore, we reverse and remand.

## FACTS AND PROCEDURAL BACKGROUND

For more than 50 years, SCE has provided electricity to the City pursuant to a series of franchise agreements allowing SCE to use the City's streets and other property. In 1994, as a 10-year franchise agreement was expiring, the City and SCE began negotiating the terms of a possible franchise renewal. Because the negotiations for a new long-term agreement took longer than anticipated, they entered into five one-year extensions in the interim.

The expiring agreement and subsequent extensions required SCE to pay the City a "franchise fee" of one percent of SCE's gross annual receipts for electricity sold within the City (1% franchise fee). During the negotiations, the City proposed increasing the SCE franchise fee from one percent to two percent of SCE's revenue from City customers, the difference being the 1% surcharge, in order to raise revenues for general governmental purposes.[1] In responding to the City's proposal, SCE took into account a 1989 Public Utilities Commission (PUC) decision establishing "Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities" (1989 PUC decision).

The 1989 PUC decision sought to address a growing inequality among utility customers in terms of the benefits they received for the rates they paid. Prior to the passage of Proposition 13 in 1978, local government entities raised revenue—which they in turn spent on local services—primarily through property taxes. Local officials generally could increase local taxes without voter approval. Although local governments within a public utility's service area imposed upon the utility some non-property taxes, including franchise fees, these local taxes tended to average out equally in the aggregate. Thus, the utility could roll these costs into its basic rates applicable to all ratepayers without resulting in inequitable differences where one jurisdiction's taxpayers would be subsidizing the tax revenues flowing to another.

---

[1] In the eventual franchise agreement, half of the 1% surcharge was to be paid to the City's general fund and the other half paid to the City's undergrounding projects fund. In 2009, the City reallocated the 1% surcharge funds entirely to its general fund.

In passing Proposition 13, the voters set property value for tax purposes at 1976 levels and restricted any increase in valuation to no more than one percent per annum. In addition, they eliminated local governments' authority to raise property taxes to secure general obligation bonds. Proposition 62, enacted in 1986, further limited local governments' ability to raise revenue in that it required a majority popular vote for any increase in local general purpose taxes. These changes caused many cities to rely on revenue-producing mechanisms other than property taxes. The PUC became concerned that the increasing number of such mechanisms and amounts that they produced would create inequities among classes of utility ratepayers. In response, it authorized public utilities to seek its approval, via an advice letter, to impose a surcharge on local utility customers when the franchise fees and other specified local taxes and fees "in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory." These surcharges appear as a separate line item on a customer's bill and identify the local government entity responsible for them.

In light of the 1989 PUC decision, SCE proposed and the City accepted an arrangement in which the increase in the franchise fee sought by the City was contingent on the PUC authorizing the additional one percent to be treated as a surcharge. Their agreement was memorialized in December 1999 in City Ordinance No. 5135 and became effective upon SCE's filing its written acceptance.

Under the terms of the renewed franchise agreement, SCE would continue to pay the City the 1% franchise fee for 30 years. SCE's obligation to pay the 1% surcharge would begin 60 days after the PUC's approval of it, which SCE was required to "use all best efforts" to obtain. If the PUC did not approve the 1% surcharge within a specified period of time,[2] or if a legislative, judicial, or PUC decision invalidated the 1% surcharge in part or in whole, then SCE would not have to collect or pay it. In that case,

[2] The agreement originally set a three-year deadline for SCE to obtain approval of the 1% surcharge. Due to uncertainty surrounding California's energy deregulation, the parties subsequently extended this deadline.

the franchise term would become year-to-year until either party terminated it. If the PUC or a court were to order that the 1% surcharge collected from electricity users be returned to them, the City would be solely liable for the repayments.

In November 2005, following the PUC's approval of the 1% surcharge, SCE began billing and collecting it from the City's electricity users and remitting the revenues to the City. The 1% surcharge was expected to generate approximately $600,000 in revenue each year and increase the monthly electricity bill for a typical residential customer by about 54 cents. It was never submitted to or approved by City voters.

Appellants filed a class action complaint. They sought an order declaring that the 1% surcharge is invalid under Proposition 218 as a tax imposed without voter approval, enjoining the City from its further collection, and requiring the City to repay the revenues already collected. Appellants moved for summary adjudication of the liability issues and the City sought summary judgment. The City asserted that the 1% surcharge is part of its franchise fee and, as such, is not a tax. In addition, it argued that the PUC had exclusive jurisdiction to approve the 1% surcharge, that appellants failed to exhaust their administrative remedies by seeking rehearing of the PUC's approval of SCE's advice letter, that their challenge to that approval is time-barred, and that both SCE and the PUC are indispensable parties to this action.

The trial court rejected the City's defenses regarding jurisdiction, exhaustion, timeliness, and indispensable parties, but accepted its argument that the 1% surcharge is part of the franchise fee and does not qualify as a tax under Proposition 218. The 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.[3] Ultimately, however, the court ruled that Proposition 26's definition of "tax" does not

---

[3] Proposition 26 sought to further tighten Proposition 218's restrictions on local revenue-generating measures by defining "tax" broadly to mean "any levy, charge, or exaction of any kind imposed by a local government" that did not fall within one of seven enumerated exceptions. (Cal. Const., art. XIII C, § 1, subd. (e); *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 198, 203 & fn. 6.)

apply retrospectively to the 1999 franchise agreement. Accordingly, the court entered judgment in favor of the City.

## DISCUSSION

The sole issue before us is whether the 1% surcharge is a tax subject to Proposition 218's voter approval requirement or a franchise fee that may be imposed by the City without voter consent.

We review a trial court's grant of summary judgment de novo. (*William Jefferson & Co., Inc. v. Assessment Appeals Board* (2014) 228 Cal.App.4th 1, 9.) Likewise, the determination whether an imposition is a "tax" or a franchise "fee" is a legal question for this court to decide de novo. (*Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 197.) In interpreting Proposition 218, we must liberally construe its provisions "'. . . to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.'" (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448.)

Proposition 218 prohibits local governments from imposing "taxes" without voter approval but does not tell us what "taxes" means.[4] (*Schmeer v. County of Los*

---

[4] In dictum, the Third Appellate District recently suggested that "Proposition 218[] exempt[ed] electrical and gas service from its provisions." (*Citizens for Fair REU Rates v. City of Redding* (2015) 233 Cal.App.4th 402 ["The issue of whether [an electric utility's payment to the city that it recouped from ratepayers] constitutes a tax or a fee arises only after the adoption of Proposition 26 because Proposition 218 previously excluded fees for gas and electrical service from the voter approval requirement"].) This statement of the law is at best inaccurate.

Structurally, Proposition 218 has two parts, set forth in articles XIII C and XIII D of the California Constitution. Article XIII C, with which we are solely concerned here, pertains to voter approval of local government taxes. Article XIII D establishes additional procedures, requirements, and voter approval mechanisms for assessments on real property and property-related fees and charges. (Cal. Const., art. XIII D, §§ 1, 2, subds. (b), (e); *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 931.) Article XIII D, section 3, upon which *Citizens for Fair REU Rates* relies, provides that "*[f]or purposes of this article*, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." (Cal. Const., art. XIII D, § 3, subd. (b), italics added.) This provision merely clarifies that user fees for gas and electricity are not subject to article XIII D's additional requirements for property-related exactions. It says nothing about whether a local revenue measure

*Angeles* (2013) 213 Cal.App.4th 1310, 1320.) The term "has no fixed meaning, and . . . the distinction between taxes and fees is frequently 'blurred,' taking on different meanings in different contexts." (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 (*Sinclair Paint*).) "In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]" (*Ibid.*)

In contrast, the 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.)

"'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.*' [Citation.]" (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038.) In *Sinclair Paint*, the California Supreme Court adopted a "primary purpose" test for determining whether a regulatory fee should be deemed a tax. We will apply the same test to distinguish between legitimate franchise fees and illegitimate taxes masquerading as such. Thus, "if revenue is the primary purpose, and [compensation for the franchise] is merely incidental, the imposition is a tax, but if [compensation for the franchise] is the primary purpose, the

---

labeled an electricity "user fee" but actually a tax is subject to the voter approval requirement of Article XIII C. In fact, it is.

"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.) 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.) Thus, to the extent *Citizens for Fair REU Rates* stands for the proposition that local gas and electricity taxes are categorically exempt from the voter approval requirement of article XIII C, section 2, which Proposition 26 left unaltered, we disagree.

mere fact that revenue is also obtained does not make the imposition a tax." (*Sinclair Paint, supra*, 15 Cal.4th at p. 880.)

To determine the primary purpose of the 1% surcharge, we begin by looking at the substantive provisions of the franchise agreement. (See *Weisblat v. City of San Diego, supra*, 176 Cal.App.4th at p. 1041.) The agreement treats the 1% surcharge differently than the 1% franchise fee. It calls for SCE to pay the 1% franchise fee, leaving the funding source entirely to SCE's discretion. In exchange, SCE gains the right to use City property to sell electricity to City residents. By paying the 1% franchise fee, SCE is guaranteed the franchise for at least three years and, thereafter, until either party terminates it. The agreement's definite term can be extended from three years to a total of 30 years if, after obtaining regulatory approval, SCE collects the 1% surcharge from electricity customers in the City and remits the revenue to the City.

The 1% franchise fee resembles a traditional franchise fee. Its purpose is to compensate the City for allowing SCE a right of way to purvey electricity. The 1% surcharge is something else entirely. Its purpose was "to raise franchise fee revenues for use by the City Council for general City governmental purposes." The franchise agreement became effective, and SCE had the privilege of using the City's property, regardless of whether or not the PUC authorized SCE to impose the 1% surcharge. The only benefit to SCE from acting as the City's agent in collecting the 1% surcharge was to know with certainty how long the franchise would last. 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."

A utility user tax, unlike franchise fees and other local government fees and taxes, is not incorporated into the utility's rate structure and is not subsidized by the utility's customers outside the city. It is "purely a 'pass-along' tax, with the utility acting as a tax collector for the city." (1989 PUC decision, at pp. 6-7.) "Generally, these taxes are levied as a percentage of the utility bill, but from the affected customer's viewpoint they merely result in a higher utility bill for the same level of service received. From the city's viewpoint some of the onus is deflected against the utility since the tax billing does

not appear on the city letterhead." (*Id.* at p. 9.) Utilities may, in their discretion, set forth the utility user tax as a separate line item amount in a utility bill. (*Id.* at p. 32.)

By statute, utilities have a variety of protections against claims that the utility user taxes they collect are illegal. They "have no duty to independently investigate or inquire with the local jurisdiction concerning the validity of the tax ordinance." (Pub. Util. Code, § 799, subd. (a)(1).) They cannot be held "liable to any customer as a consequence of collecting the tax." (*Id.* at subd. (a)(2).) "In the event a local jurisdiction is ordered to refund the tax, it [is] the sole responsibility of the local jurisdiction to refund the tax." (*Id.* at subd. (a)(3).) "[I]n any action seeking . . . to invalidate the tax[], the sole necessary party defendant in the action [is] the local jurisdiction on whose behalf the taxes are collected[,] and the public utility or other service supplier collecting the taxes [cannot] be named as a party in the action." (*Id.* at subd. (a)(4).)

The franchise agreement here specifies that SCE must collect the 1% surcharge from electric utility customers it serves within the City rather than from its entire customer base. The collection is applied to all of SCE's customers in the City equally based on their electricity consumption. Pursuant to the 1989 PUC decision, which the franchise agreement expressly incorporates, the 1% surcharge must be included in customer bills as a separate item identifying the City as the entity responsible for it. If SCE is prevented by law from collecting the 1% surcharge, it must stop collecting and remitting it. If the PUC or a court orders that the 1% surcharge be returned to ratepayers, the City is "solely responsible for such repayment."

In short, the 1% surcharge bears all the hallmarks of a utility user tax. More importantly, its primary purpose is for the City to raise revenue from electricity users for general spending purposes rather than for SCE to obtain the right of way to provide electricity. This constitutes a tax under Proposition 218 and is subject to approval by the electorate.

We have stated that "fees paid for franchises are not taxes, user fees or regulatory licenses," but instead are matters of contract. (*SBC Taxpayers*, *supra*, 209 Cal.App.3d at pp. 949-950; see also *Tulare County v. City of Dinuba*, *supra*, 188 Cal. at

p. 670 [stating that a franchise fee "is purely a matter of contract"].) But we explained the reason for this distinction is that "[f]ranchise fees are paid as compensation for the grant of a right of way." (*SBC Taxpayers*, at p. 949.) In that way, our holding was limited in scope: "franchise fees *collected for grants of rights of way* are not "'proceeds of taxes'" under article XIII B, section 8, subdivision (c) [of the California Constitution]."[5] (*Id.* at p. 950, italics added.) Here, the 1% surcharge is not being collected for a grant of a right of way but rather for revenue purposes.

We decided *SBC Taxpayers* before *Sinclair Paint* clarified that the classification of a revenue-generating mechanism as either a tax or a fee turns on its primary purpose. In the typical case where a franchise contract requires the utility to pay a fee to use city property, without specifying where the revenue must come from, the fee likely will be contractual in nature rather than a hidden tax. This is consistent with *SBC Taxpayers*. Here, however, the franchise agreement does not require SCE to pay the 1% surcharge, but merely to act as the City's agent in collecting it from electricity users in the City. Moreover, the only purpose of the 1% surcharge is to provide the City with additional revenue for general spending. That, in Proposition 218 parlance, is a tax. (Compare *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 927 [in lieu fee—i.e., franchise fee paid by city-owned utility—though subject to Proposition 218, is not a tax when it is levied directly on the utility rather than on the ratepayers and "the utility departments are not required to recover the in lieu fee from ratepayers in any particular manner"] with, e.g., *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 131 [utility user tax, the proceeds of which are deposited in the county's general fund and not earmarked for any specific project, is a general tax for Prop. 218 purposes].)

---

[5] We note that *SBC Taxpayers* involved article XIII B, prior to the enactment of article XIII C by Proposition 218. There is no reason to assume that "proceeds of taxes" in article XIII B means the same thing as "taxes" in article XIII C. (Cf. *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 215 ["Comparing the provisions of article XIII C and article XIII D, it appears to us that the words 'fee' and 'charge,' which appear in both articles, may well have been intended to have a narrower, more restrictive meaning in article XIII D"].)

The City argues that the 1% surcharge is a traditional franchise fee simply because its collection from the taxpayers and remittance to the City is one of SCE's obligations under the franchise agreement. The untenability of the City's position is apparent from the 1999 franchise agreement itself, which obligates SCE to collect and remit any utility user tax that the City imposes. Under the City's reasoning, any such utility user tax, the collection of which being contractual in nature, would also be a franchise fee not subject to voter approval.

The reason that a traditional franchise fee is not normally a tax is not just that it is contractual in nature. It is not a tax because its primary purpose is consideration for the right of way rather than simply to raise revenue. Cities cannot avoid Proposition 218's requirements merely by contracting out the collection of otherwise unlawful taxes.

In this case, three factors support the conclusion that the 1% surcharge is a tax and the 1% franchise fee is not: (1) SCE's ability to use the City's property is contingent on its paying the 1% franchise fee but not the 1% surcharge; (2) SCE is not required to recoup the 1% franchise fee in any particular way from any particular group but is required to collect the 1% surcharge from utility users within the City; and (3) the 1% surcharge exceeds the prevailing rate for franchise fees in SCE's territory.[6]

Amicus curiae League of California Cities (League) argues that the 1% surcharge is not a tax because it was not "imposed" but instead "was freely negotiated between voluntary market participants of comparable market power." There are two basic flaws in this argument. First, the League wrongly assumes that the amount of the agreed-upon franchise fee is "depend[ent] on the relative market power of buyers and sellers." In fact, the market for utility franchise rights bears no resemblance to a competitive market. The City can exercise its monopoly power to impose whatever franchise fee it likes. SCE, while not without market power of its own, has little

---

[6] We do not mean to suggest that the City's hypothetical franchise agreement "providing for a franchise fee of 2%, with no conditions precedent," would necessarily fall outside of Proposition 218's scope. If the prevailing franchise fee within the utility's territory is 1% and the primary purpose for the additional 1% fee is to provide the City with general revenue, then it may be that voter approval is required. Those facts are not before us.

incentive to resist whatever fee the City demands. As a result of the 1989 PUC decision, any portion of the franchise fee exceeding the prevailing rate in SCE's service territory can be passed through to electric customers in the City and billed as a City-imposed surcharge. (See *Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 23 Cal.3d 470, 474 ["As taxes are part of a utility's cost of service, this expense is borne by the ratepayers"].)

Of course, the City's ability to impose exorbitant franchise fees is not unfettered. At some level of taxation, irate voters will express their displeasure at the ballot box. But to allow such a state of affairs would turn Proposition 218 on its head. The point of Proposition 218 is that cities must obtain voter approval of taxes *before* imposing them. Otherwise, cities could impose many taxes that a majority of the electorate opposes but is powerless to repeal due to collective action problems. (See Kousser & McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy* (2005) 78 So.Cal. L.Rev. 949, 956-957; Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (2d ed. 1971) pp. 127-128.)

The other basic flaw in the League's argument is its assumption that the 1% surcharge was imposed on SCE. As we have explained, it was actually imposed on the utility users. SCE is merely a conduit through which the tax revenues flow with no real interest in the tax's validity or amount.

The League also asserts that cities will face a parade of horribles if they cannot rely on franchise fee revenue. It notes that the median California city receives 5.8 percent of its general revenue from franchise fees. 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.[7]

---

[7] In a footnote, the City states that it "disagrees with the trial court's rejection of its jurisdictional defenses" but "will not brief those defenses in the alternative here." We

DISPOSITION

The judgment is reversed and this matter remanded. The trial court is directed to grant appellants' motion for summary adjudication because the City imposed the 1% surcharge without complying with Proposition 218. Costs to appellants.

**CERTIFIED FOR PUBLICATION.**

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

---

decline to consider issues presented only in a footnote (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 160), and in the absence of cogent legal argument or citation to authority, we treat the contentions as waived (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830). We also need not reach any issues regarding Proposition 26 given both our holding that the 1% surcharge is subject to Proposition 218 and appellants' failure on appeal to challenge the trial court's ruling that Proposition 26 does not apply retrospectively.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

---

Huskinson, Brown & Heidenreich, David W.T. Brown, and Paul E. Heidenreich for Plaintiffs and Appellants.

Ariel Pierre Calonne, City Attorney, Tom R. Shapiro, Assistant City Attorney; Jarvis, Fay, Doporto & Gibson, Benjamin P. Fay, Rick W. Jarvis and Andrea Saltzman for Defendant and Respondent.

Colantuono, Highsmith & Whatley, Michael G. Colantuono, and Ryan Thomas Dunn for League of California Cities as Amicus Curiae on behalf of Defendant and Respondent.

**PROOF OF SERVICE**

*Rolland Jacks, et al. v. City of Santa Barbara,*
Appellate Court Case No. B253474
Santa Barbara Superior Court Case No. 1383959

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On April 6, 2015, I served the within document(s):

## PETITION FOR REVIEW

☐ **BY FACSIMILE**: By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☒ **BY ELECTRONIC MAIL**: By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service listed below.

☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ **OVERNIGHT DELIVERY**: By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE**: I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for 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 date of deposit for mailing in affidavit.

Executed on April 6, 2015, at Los Angeles, California

Pamela Jaramillo

Pamela Jaramillo

SERVICE LIST

*Rolland Jacks, et al. v. City of Santa Barbara*
Supreme Court Case No. S _____
Appellate Court Case No. B253474
Santa Barbara Superior Court Case No. 1383959

| | |
|---|---|
| David W.T. Brown<br>Paul E. Heidenreich<br>Huskinson, Brown & Heidenreich, LLP<br>1200 Aviation Blvd, Suite 202<br>Redondo Beach, CA90278<br>Telephone: (310) 545-5459<br>huskinsonbrown@att.net | Attorneys for Plaintiffs and Appellants Rolland Jacks, et al. |
| Ariel P. Calone<br>City Attorney<br>*Tom R. Shapiro, Asst. City Attorney<br>City of Santa Barbara<br>P.O. Box 1990<br>Santa Barbara, CA 93102<br>Telephone: (805) 564-5326<br>Facsimile: (805) 897-2532<br>tshapiro@santabarbaraca.gov | Attorneys for Defendant and Respondent City of Santa Barbara |
| Superior Court Court Clerk<br>for Honorable Thomas P. Anderle<br>1100 Anacapa Street<br>Santa Barbara, Ca 93121 | Re: Case No. 1383959 |
| Clerk of the Court of Appeal<br>Second Appellate District, Division 6<br>200 East Santa Clara Street<br>Ventura, CA 93001 | Re: Case No. B253474 |
| California Supreme Court<br>350 McAllister<br>San Francisco, CA 94102 | Via e-submission/hard copies by Federal Express<br>www.courts.ca.gov/2dca-esub.html |