Christopher Matthew Spencer,
Petitioner and
Plaintiff,

v.

City of Burbank, et al.,
Respondents and
Defendants,

Judge Mary Strobel
Hearing: September 12, 2017

BS 162779

Tentative Decision on Petition for Writ of Mandate: GRANTED

Petitioner Christopher Matthew Spencer ("Petitioner") seeks a writ of administrative mandate pursuant to Code of Civil Procedure section 1085 restraining Respondent City of Burbank ("Respondent" or "City") from including in its electric utility rates a 5% surcharge to be transferred to the City's General Fund and a 1.5% surcharge to be transferred to the City's Street Lighting Fund. Petitioner also seeks declaratory relief and an injunction under Code of Civil Procedure section 526a compelling the City to restore to Fund 496 all improperly transferred funds. The City opposes the Petition and Complaint.

I. Statement of Facts

A. Overview of Measures Related to Voter Approval of Taxes

Since 1978, California voters have passed four ballot measures concerning voter approval of taxes. Proposition 13, passed in 1978, added Article XIII A to the Constitution, which provided in relevant part that cities may only impose "special taxes" by "a two-thirds vote of . . . qualified electors . . . ." (Cal. Const. art. XIII A, § 4.)

Proposition 62, passed in 1986, added a new article to the Government Code (§§ 53720-30) prohibiting any local government from imposing any special tax without approval by two-thirds of voters or any general tax without approval by a majority of voters. (§§ 53722, 53723.)

Proposition 218, passed in 1996, added Articles XIII C and XIII D to the Constitution. Article XIII C provides that "No local government may *impose*, *extend*, or *increase* any general tax" without approval by a majority of voters. (§ 2(b), emphasis added.)

Propositions 13, 62, and 218 did not define the word "tax." As a result, courts generally interpreted those measures as applying to charges "imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted." (*Bay Area Cellular Telephone Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 693 ("*Union City*").) In other words, those propositions did not apply to "user fees" charged "only to the person actually using the service" in an amount "generally related to the actual goods or services provided." (*Id.* at 694 [citing *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 596–597, 77].)

Proposition 26, passed in 2010, added subdivision (e) to section 1 of Article XIII C, which defines the word "tax" as follows:

> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> **(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.**
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
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> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
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> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

(Cal. Const., art. 13C, § 1, emphasis added.)

B. *Burbank City Charter*

The City of Burbank's original charter was adopted in 1927. (City RJN Exh. A.) Section 33 of the 1927 Charter created the Public Service Department, which was charged with operating the City's utilities and provided that any funds held by a utility in excess of 15 percent of the book value could be transferred to the City's general fund. (*Ibid.*)

In 1951, the City's voters voted to amend section 33 removing the provision allowing transfer of funds in excess of fifteen percent of a utility's book value and replacing it with a provision stating: "[t]he Council, annually, *may* cause to be transferred to the general fund of the City a sum not to exceed five per cent (5%) of the gross revenues of the Public Service Department for each fiscal year." (City RJN Exh. B. p. 4758, emphasis added.)

In 1958, the City's voters voted to amend section 33 to read: "An amount not to exceed Two Per Cent (2%) of the Department's gross sales of electricity (exclusive of wholesale sales of electricity to other public or privately owned utilities) shall, in the Council's discretion, be deposited or transferred to the City's General Fund, to pay bills incurred by the City for lighting its public streets, and an amount not to exceed Five Per Cent (5%) of the Department's gross sales of water and electricity, in lieu of taxes (exclusive of wholesale sales to other public or privately owned utilities) shall be deposited or transferred to the City's General Fund if, in the discretion of the Council it is so ordered." (City RJN Exh. C p. 5383.)

In 2007, the City's voters voted to amend Section 33, renumbering it as Section 610, modernizing the language, and removing the use restriction on the 2% transfer. (City RJN Exh. E p. 55.) This current version of Section 610 reads:

> There shall be a Utility Department to be known as Burbank Water and Power and a General Manager appointed by the City Manager.
>
> The Department shall supervise the construction, reconstruction, operation and maintenance of all public utilities now or hereafter owned and operated by the City, including, but not limited to, the generation, purchase, distribution and sale of electric energy, water, gas, and telecommunications services and may, with the approval of the Council, lease or rent any property connected with any of its utilities and fix the rental charges thereof.

All funds received by the City related to the Department shall be deposited in the City Treasury to the credit of the Department. **An amount not to exceed two percent (2%) of the Department's gross sales of electricity (exclusive of wholesale sales of electricity to other public or privately owned utilities) shall, in the Council's discretion, be deposited or transferred to the City's General fund, or pay bills incurred by the City for lighting its public streets, and an amount not to exceed five percent (5%) of the Department's gross sales of water and electricity, in lieu of taxes (exclusive of wholesale sales to other public or privately owned utilities) shall be deposited or transferred to the City's General Fund at the discretion of the Council.**

Funds not immediately needed by the Department may be temporarily loaned to other departments of the City pending collection of tax receipts or other funds owing to such other department. (Previous Section 33; amended and renumbered by Charter Amendment approved by the voters on April 10, 2007.)

(RJN Exh. E p. 55, emphasis added.)

C. Burbank's Electric Rate Setting

Bob Liu, the CFO of Burbank Water and Power ("BWP") declares that BWP provides electric service for the entire City of Burbank. (Liu Decl. ¶ 6.) BWP sets its electric rates to achieve cost recovery for forecast electric retail service costs, including generating and purchasing power and fuel, operations and maintenance expenses, debt service, capital requirements, and maintaining adequate reserves. (*Ibid.*) Since at least 1989, the City has also included in its electric service rates a component that is equivalent to 5% of its gross sales of electricity, to fund a 5% transfer to the General Fund under Section 610. (*Id.* ¶ 2.) The City also includes a surcharge on every electric customer's bill, currently equivalent to 1.5% of the charges for electricity. (*Id.* ¶ 4.) Amounts collected through this surcharge are transferred to Street Lighting Fund 129, which BWP administers. (Pet. Appx. C (Liu Tr.) 60:22-24, 112:25-113:8.) Prior to 2007, this additional surcharge was set at 1.25%, but since 2007 has remained at 1.5%. (Liu Decl. ¶ 4.)

D. City's 2016-2017 Electric Rates

The City sets its electric rates through the passage of resolutions. On May 24, 2016, the Burbank City Council passed a Resolution 16-28,840, which increased electric rates for the 2016-2017 fiscal year by 2.1%. (City RJN Exh. K.) On June 7, 2016, the City

Council passed Resolution 16-28,846, which adopted a citywide fee schedule for 2016-17, including new electric rates incorporating the 2.1% increase. (City RJN Exh. M.)

Petitioner seeks a writ of mandate restraining the City from continuing to impose a 6.5% surcharge[1] on its electric rates.

II. Standard of Review

Code of Civil Procedure section 1085(a) provides in relevant part:

A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.

"There are two essential requirements to the issuance of a traditional writ of mandate: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (*California Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy . . . ." (*Pomona Police Officers' Ass'n v. City of Pomona*, (1997) 58 Cal.App.4th 578, 583-84.)

"When there is review of an administrative decision pursuant to Code of Civil Procedure section 1085, courts apply the following standard of review: '[J]udicial review is limited to an examination of the proceedings before the [agency] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.' [Citations.]" (*Pomona Police Officers' Ass'n*, *supra*, 58 Cal.App.4th at 584.)

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[1] The term "6.5% surcharge" refers collectively to (1) the component in the City's electric rate equivalent to 5% of its gross sales of electricity that funds a 5% transfer to the General Fund; and (2) the 1.5% surcharge that funds a transfer to the Street Lighting Fund.

III. Analysis

Petitioner contends that the 5% component included in the City's electric rates to fund a 5% transfer to the General Fund and the 1.5% surcharge added to each electric customer's bill (collectively the "6.5% surcharge") are charges made by the City that "exceed the reasonable costs" to the City of providing electricity to its retail customers and thus fall within Article XIII C § (1)(e)'s definition of a "tax." As a result, Petitioner argues the City has a clear, present, ministerial duty to refrain from imposing the tax until it is approved by a majority of the electorate.

The City responds that it should be permitted to continuing imposing the 6.5% surcharge because (1) Proposition 26 does not retroactively apply; (2) the 6.5% surcharge was approved by the City's electorate; and (3) the 6.5% surcharge is part of the reasonable costs of service.

A. *While Proposition 26 is Not Retroactive, the 6.5% Surcharge is Subject to Voter Approval*

The City contends that Proposition 26 does not preclude imposition of the 6.5% surcharge because it does not apply retroactively. The City cites *Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 206, a case in which the appellate court found that, "[t]he framers of Proposition 26 made no provision directing that it would impose new requirements for the validity of existing local government assessments, fees, or charges." (*Id.* at 206.) Citing *Brooktrails*, the court in *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 187 held that "Proposition 26 does not apply to local taxes that existed prior to its November 3, 2010, effective date."

Petitioner concedes that Proposition 26 does not apply retroactively, but argues that that by adopting the 2016-2017 fee schedule, the City imposed, extended and increased the 6.5% surcharge requiring the City to submit the surcharge to the electorate pursuant to Art. XIII C, § 2(b).

1. The 2016-2017 Fee Schedule Imposed or Reenacted the 6.5% Surcharge

Article XIII C § 1(e) defines "tax" as any levy, charge, or exaction of any kind imposed by a local government unless such charge is "imposed for a specific government service . . . which does not exceed the reasonable costs to the local government of

providing the service." Petitioner contends that the 2016-2017 fee schedule adopting electric rates imposes a "tax" by including in its electric service rates the 6.5% surcharge.

The City responds that the 6.5% surcharge was not "imposed" in the 2016-2017 fee schedule because a tax is "imposed" upon its initial legislative adoption. The City relies on *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182. In that case, a group of Sunset Beach residents petitioned to prevent annexation of Sunset Beach by Huntington Beach or, alternatively, to require a vote by Sunset Beach residents to approve the application of two taxes levied on taxpayers in Huntington Beach. (*Id.* at 1185.) Petitioner argued that under Proposition 218, voter approval was required prior to imposition of the two taxes. (*Id.* at 1194.) The court rejected this argument explaining that "[t]he word 'impose' usually refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation." (*Id.* at 1194.) In that case, the two taxes – a utility tax and property tax – were both enacted prior to the annexation of Sunset Beach.

The City points out that the 1.5% surcharge has been in existence since 2007 and the 5% surcharge has been part of the City's electric rates for the past 28 years. The City argues that because these surcharges have been consistently applied since 2007, they were not "imposed" by the City's fee schedule. However, the City fails to point to any legislative enactment for either the 5% surcharge or the 1.5% surcharge. There is no ordinance imposing the fee. The City calculates and imposes the electric fees annually through adoption of a resolution. The City relies on Charter section 610 which allows a discretionary transfer of a portion of gross sales of electricity to the General Fund. Section 610 contains no requirement that those transfers be funded by a surcharge on utility users accomplished either through including the transfer within the calculation of the electric rate, or by adding a surcharge on to the utility bill.

Barratt American Inc. v. City of Rancho Cucamonga (2005) 37 Cal.4th 685 is instructive. In that case, a real estate developer filed a petition for writ of mandate challenging the city's building permit and plan review fees. (*Id.* at 692-93.) Petitioner alleged that the fees violated the Mitigation Fee Act which prohibits such fees from exceeding the reasonable cost of service. (*Ibid.*) The City argued that the 2002 fee schedule enacting the challenged fees was not subject to a validation action because it did not change the fees which were first imposed in a 1999 fee schedule. (*Id.* at 702.) The Supreme Court held that petitioner could challenge the 2002 fee schedule because that fee schedule reenacted the previous building permit and plan review fees. (*Id.* at 703.) The court explained, "[a]lthough the *amount* of the permit and plan review fees remained

the same, [the 2002 fee schedule] changed the *duration* of the fee by extending its applicability, and by implication its validity." (*Id.* at 703.)

The Court of Appeal subsequently cited to this reenactment rule in *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 187. In that case, petitioner filed a writ of mandate challenging fees charged for copies of official records by the Yolo County Clerk Recorder's Office. (*Id.* at 156-157.) From 1951 through 1992, former Government Code section 27366 established a statutory copy fee. (*Id.* at 158.) In 1993, the Legislature amended section 27366, repealing the statutory copy fee and requiring boards of supervisors to set fees "in an amount necessary to recover the direct and indirect costs of providing the product or service . . . ." (*Ibid.*) Pursuant to that mandate, the County Board began setting fees by means of a "master fee resolution" (MFR). (*Id.* at 159.) On May 19, 2009, the County Board adopted MFR 09-71 setting the copy fees at the challenged rate of $10 for the first page and $2 for each subsequent page. (*Id.* at 160.) Petitioner alleged that the Recorder's copy fees constituted a "special tax" within the meaning of Proposition 26 and that the County violated a mandatory duty to enact special taxes only by vote of the electorate in setting copy fees pursuant to the MFR. (*Id.* at 185.) The County argued that because the challenged rates were first established by an MFR adopted on May 19, 2009, eighteen months prior to the adoption of Proposition 26, the copy fees were grandfathered in. (*Id.* at 187.) Petitioner countered that the Board adopted a master fee resolution every year as part of the County's budget process. (*Ibid.*) Citing *Barratt, supra,* 37 Cal.4th at 702-704, the court stated:

> We cannot discern, on the record before us, whether the copy fees were established by means of a single legislative act (the MFR) which predates the adoption of Proposition 26, such that they are grandfathered in, or whether they were annually reenacted by master fee resolution following the adoption of Proposition 26, such that they are not.

(*Id.* at 187.) Nevertheless, assuming for the sake of argument that the fees were not grandfathered in, the court found that the fees were reasonably related the County's direct and indirect costs. (*Id.* at 188.)

In this case, the City fails to demonstrate that either the 5% surcharge or 1.5% surcharge were established by means of a single legislative act predating the adoption of Proposition 26. On the contrary, the evidence suggests that those surcharges are annually reenacted each time the City adopts a new fee schedule. As a result, the Court finds that the 6.5% surcharge was "imposed" or reenacted with the adoption of the 2016-2017 fee schedule.

2. The 2016-2017 Fee Schedule Extended the 6.5% Surcharge

Petitioner also argues that the City extended the 6.5% Surcharge by adopting the 2016-2017 fee schedule. The Omnibus Act defines "extended" for purposes of Article XIII C as follows: " 'Extended,' when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date." (Gov. Code, § 53750(e).) The City points out that (1) there is no sunset provision or expiration date in the provisions of Section 610 of the City Charter and (2) the City has continuously collected the 6.5% surcharge since before Proposition 26 was adopted. Thus, according to the City, the continued collection of the 6.5% surcharge does not constitute an "extension" of a tax subject to Proposition 26.

The Court finds that Section 610 does not authorize the City to impose any tax. That section merely authorizes the City to transfer certain percentages of BWP's gross sales to the General Fund and Street Lighting Fund. Thus, the fact that Section 610 contains no sunset provision or expiration date is not determinative. As discussed, the Court finds that the 6.5% surcharge is a component of the City's fee schedule that has been annually reenacted with the adoption of each new fee schedule. This means that the adoption of each fee schedule "extends" the effective period of the surcharge.

3. The 2016-2017 Fee Schedule Did Not Increase the 6.5% Surcharge

Petitioner also argues that the 6.5% Surcharge is subject to Proposition 26 because the 2016-2017 fee schedule increased electric fees and charges by a rate of 2.1%. The Court is not persuaded by this argument. The Omnibus Act defines "increased" for purposes of Article XIII C as follows:

> (h)(1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:
>
> (A) Increases any applicable rate used to calculate the tax, assessment, fee, or charge.
>
> (B) Revises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.
>
> (2) A tax, fee, or charge is not deemed to be "increased" by an agency action that does either or both of the following:

(A) Adjusts the amount of a tax, fee, or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.
(B) Implements or collects a previously approved tax, fee, or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel.

(Gov. Code, § 53750(h); see also *Sunset Beach, supra,* 209 Cal.App.4th at 1195 [" '[I]ncrease' most often refers to a change in the amount of an existing tax *rate* a taxpayer owes, as figured on some sort of base (e.g., instead of paying 25 percent on $X net income, you pay 27 percent on $X net income)."].)

Here, while the City increased its electric fees and charges by 2.1%, it did not change the 5% or 1.5% rate of the surcharges funding the transfers under Section 610. Thus, the Court finds that the City did not increase the 6.5% surcharge for the purposes of Proposition 26.

B. The 6.5% Surcharge Was Not Voter Approved

The City argues that it should be permitted to continue imposing the 6.5% surcharge because the surcharge was already approved by a majority of the electorate. The City contends that the voters approved the surcharge in 1951, 1958, and most recently, in 2007 when they adopted amendments authorizing transfers from BWP to the General Fund. According to the City, the language in Section 610 reflects the voters' intent that the amounts transferred be passed on as charges to BWP's retail customers. However, Section 610 does not include any language expressly authorizing the City to tax consumers. Moreover, Section 610 does not mandate transfers to the General Fund. Rather, Section 610 permits up to 2% of BWP's gross sales of electricity and up to 5% of BWP's gross sales of water and electricity to be transferred *in the Council's discretion.* The placement of this clause suggests that the Council has discretion whether or not to transfer a percentage of BWP's sales to the General Fund.[2]

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[2] The City argues that an intent to authorize a charge on utility users for the fund transfer must be implied from the language of the Charter, because a charge on users would be the only source of moneys to effectuate the transfer to the General Fund. This position appears at odds with the City's later contention that BWP has significant non-rate revenue including from lease of fiber optic cable, from lease of land for a power plant, from

Accordingly, the Court finds that the voters did not approve a 6.5% surcharge on electric rates when they adopted the amendments to the City Charter.

C. The 6.5% Surcharge is Not Part of the Reasonable Costs of Service

The City alternatively argues that voter approval of the 6.5% surcharge is not necessary because the surcharge is part of the reasonable costs of service and thus is not a "tax" as defined by Article XIII C § 1(e)(2). The City contends that because the Charter requires the City to make the 2% and 5% transfers, the cost of complying with that statutory mandate is part of the reasonable cost of service. As discussed, however, Section 610 does not mandate 2% and 5% transfers because it provides that any such transfers are to be made at the Council's discretion. Even if such transfers were mandated, Section 610 does not require the costs of the transfers to be passed on to retail customers.

In addition, the evidence submitted to the Court suggests that the 6.5% surcharge is not part of the reasonable cost of providing services. The City's Financial Services Director, Cindy Giraldo, testified that the 5% transfer to the General Fund is not earmarked for any particular purpose and is used to meet the city's general governmental expenses. (Benink Decl. Exh. D 48:4-14, 52:7-11.) Liu testified that the 1.5% transfer to the Street Lighting Fund is used to replace, maintain and upgrade street lights and to pay the electric service charges for those lights. (Benink Decl. Exh C at 112:25-113:8, 113:12-20, 115:6-14.) This testimony demonstrates that the transferred funds are used to pay for other governmental services and are not related to BWP's provision of electricity to retail customers.

Further, as pointed out by Petitioner, Article XIII C § 1, subd. (e)(2) only exempts charges that do not exceed the reasonable costs "to the local government" of providing the service. Burbank cannot characterize its charge to its own department as part of the reasonable costs of providing the service.

Accordingly, the Court finds that the 6.5% surcharge is not part of BWP's reasonable costs of service.

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sale of wholesale electricity, and from arranging delivery of electricity for the cities of Colton and Cerritos. (Opposition, p. 24, citing Liu Decl. ¶¶8, 9.)

D. Scope of The Remedy

Petitioner seeks a writ of mandate directing the City to (a) cease imposing the 6.5% surcharge; (b) cease transferring amounts collected through the 6.5% surcharge to the General Fund and Street Lighting Fund; and (c) restore to Fund 496 all transfers of "illegal taxes" since June 7, 2016. The City argues that the statute of limitations prevents Petitioners from challenging any City electric fees that were in effect more than 120 days prior to the filing of suit. The City also argues that there are practical implications on the scope of relief the Court could award. The City requests an opportunity to submit post-hearing briefing on the issue of the scope of relief. The Court grants the City's request and directs the parties to submit post-hearing briefs on this issue only.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the petition for writ of mandate. The Court also GRANTS the City's request to submit additional briefing on the issue of the scope of relief to be awarded.