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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

PACE, the Suburban Bus Division)
of the Regional Transportation Authority,)
)
Complainant,)
)
v.)
)
COMMONWEALTH EDISON COMPANY,)
)
Respondent.)

Docket No. 00-0280

**MEMORANDUM OF LAW IN SUPPORT OF
COUNT II OF PACE'S COMPLAINT**

Now comes Pace, the Suburban Bus Division of the Regional Transportation Authority (hereinafter referred to as "Pace") by and through its Attorney, Ellen L. Champagne, in support of Count II of its Complaint alleging that Pace is exempt from the municipal utility tax charged by Respondent, Commonwealth Edison Company (hereinafter referred to as "ComEd"), submits the following memorandum of law:

A. Introduction.

Count II of the Complaint filed by Pace alleges that it is exempt from municipal taxes and therefore, exempt from the municipal utility tax charged by ComEd on its electric bills. Although Respondent has not filed an answer to the Complaint, Pace was requested to submit a memorandum of law in support of the municipal utility tax issue, Count II.

B. Law and Argument.

1. ComEd is authorized by statute to pass the municipal utility tax on to its customers other than those customers exempted by municipal ordinance.

The Illinois Municipal Code authorizes municipalities to tax the privilege of using or consuming electricity “acquired in a purchase at retail and used or consumed within the corporate limits of the municipality”. 65 ILCS 5/8-11-2. The Public Utilities Act allows ComEd to pass this tax onto its customers as an additional charge unless the customer is exempted by sub-paragraph (f) of the Municipal Code. The Public Utilities Act provides in pertinent part as follows:

§ 9-221. Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, **other than customers who** are certified business enterprises under paragraph (e) of Section 8-11-2 of the Illinois Municipal Code or **are exempted from those taxes under paragraph (f) of that Section**, to the extent of such exemption and during the period in which such exemption is in effect, in addition to any rate authorized by this Act . . . 220 ILCS 5/9/221

Sub-paragraph (f) of the Municipal Code provides as follows:

(f) A municipality that imposes taxes upon public utilities or upon the privilege of using or consuming electricity under this Section and whose territory includes part of another unit of local government or a school district may by ordinance exempt the other unit of local government or school district from those taxes. 65 ILCS 5/8-11-2.

There is no dispute that ComEd is authorized by law to impose an additional charge on its customers’ electric bill for municipal utility taxes as long as the customer is not a unit of local government or school district which the municipality by ordinance exempts from this tax.

2. Pace is a “unit of local government” that is exempted by the respective municipal ordinances from this tax.

A. Pace was created as a “unit of local government” by the Regional Transportation

Authority Act. It provides in pertinent part as follows:

Section 1.04. Establishment of Authority. A regional transportation authority shall be established upon a favorable vote at the referendum held as provided in Section 1.05 of this Act. Upon its establishment the Authority shall be a **unit of local government, body politic, political subdivision and municipal corporation.** 70 ILCS 3615/1.04 (Emphasis added.).

Section 3A.01. Suburban bus division. There is established within the Authority the

Suburban Bus Division as the operating division responsible for providing public transportation by bus and as may be provided in this Act.¹ 70 ILCS 3615/3A.01.

B. The respective municipal ordinances exempt Pace from the Municipal Utility Tax charged by ComEd.

A review of the applicable municipal ordinances which relate to the municipal utility tax uniformly provide the following general exemption:

“No tax authorized by this Section is imposed with respect to any transaction in interstate commerce or otherwise to the extent to which the business may not, **under the Constitution and statutes of the United States, be made the subject of taxation by this State or any political subdivision thereof; . . .**” (Emphasis added.) (See Group Exhibit A attached hereto - Markham, Evanston, Waukegan, South Holland, Des Plaines, Melrose Park.)

The Illinois General Assembly in the Regional Transportation Authority Act exempted Pace from state and local taxes as follows:

§4.08. Exemption from Taxation. The Authority and the Service Boards shall be exempt from all State and unit of local government taxes and registration and license fees other than as required for motor vehicle registration in accordance with the “Illinois Vehicle Code”, as now or hereafter amended. All property of the Authority and the Service Boards is declared to be public property devoted to an essential public and governmental function and purpose and shall be exempt from all taxes and special assessments of the State, any subdivision thereof, or any unit of local government. 70 ILCS 3514/4.08.

Pace is likewise exempt from federal taxation by virtue of it being declared by law to be a municipal corporation whose property is public property devoted to an essential public and governmental function and purpose. Since 1985 Pace has qualified under the Internal Revenue Code as tax-free municipal corporation. (See IRS Form 637 attached hereto as Exhibit B.)

In addition to the exemption found in the municipal ordinances, the specific exemption

¹In 1985, Pace assumed its operating name as Pace and filed a trademark for its use, although its legal name remains the Suburban Bus Division of the Regional Transportation Authority.

provided to Pace by the General Assembly in the RTA Act, Section 4.08, exempts it from **all** state and **unit of local government taxes** other than as required for motor vehicle registration under the Motor Vehicle Code. If the General Assembly had intended Pace to be subject to municipal utility taxes, it would have so stated, as it did with respect to registration under the Motor Vehicle Code. Illinois courts have repeatedly held that a tax imposed or expressly authorized by the General Assembly, such as the municipal utility tax, is presumptively and validly applied, unless the General Assembly has expressly exempted such units by statute or by preemptive legislation. *Waukegan Community School v. City of Waukegan, et al.*, 95 Ill. 2d 244, 258, 447 .E.2d 345, 69 Ill. Dec. 128 (1983). The General Assembly legislated in the Regional Transportation Authority Act that Pace was to be exempt from **all** local municipal taxes.

C. ComEd admits in its response to Pace's Informal Complaint that the municipal tax charges should be removed from Pace's bills.

ComEd issued a response to the Informal Complaint filed by Pace in a letter dated April 7, 2000, and directed to Mike Gibson of the Illinois Commerce Commission, which states in pertinent part as follows:

2. Assessment of Applicable Municipal Taxes and Charges. Pursuant to the information that Pace has provided in its Informal Complaint, ComEd is currently adjusting Pace's accounts to remove the charges related to the application of municipal taxes and charges from future bills. (See letter from ComEd representative, Robert L. Jacobs, attached hereto as Exhibit C.)

This letter represents an admission by ComEd that said municipal taxes were incorrectly applied to Pace's electric bills.

D. Conclusion.

Based on the foregoing, Pace respectfully requests this Commission to grant the relief prayed

for in Count II of its Complaint against ComEd.

Dated: November 30, 2000

Respectfully submitted,

Pace Suburban Bus

By 
Ellen L. Champagne

Ellen L. Champagne
General Counsel, Pace Suburban Bus
550 West Algonquin Roa
Arlington Heights, Illinois 60005
(847)228-2367

Proof of Service

I, Ellen L. Champagne, attorney, certifies that she served a true and correct copy of this Memorandum of Law in Support of Count II of Pace's Complaint by UPS overnight mail on the 30th day of November, 2000, to the Illinois Commerce Commission and to Hopkins and Sutter, Robert Feldmeier.


Ellen L. Champagne

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EXHIBIT A

THE CITY COUNCIL OF THE CITY OF MARKHAM, ILLINOIS

Ordinance No. 93-O-1475

AN ORDINANCE IMPOSING A
MUNICIPAL UTILITY TAX

BE IT HEREBY ORDAINED BY THE CITY COUNCIL OF THE CITY OF MARKHAM, ILLINOIS, as follows:

Section 1. A tax is hereby imposed on all persons engaged in the following occupations or privileges:

A. Persons engaged in the business of distributing, supplying, furnishing or selling natural gas, or its derivatives, for use and consumption within the corporate limits of the City of Markham, Illinois and not for resale, at the rate of five (5%) per cent of the gross receipts therefrom.

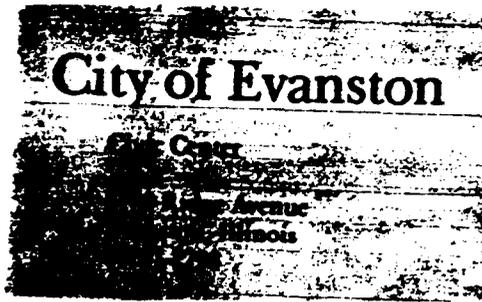
B. Persons engaged in the business of distributing, supplying, furnishing or selling electricity for use or consumption within the corporate limits of the City of Markham, Illinois, and not for resale, at the rate of five (5%) of the gross receipts therefrom.

Section 2. No tax is imposed by this ordinance with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made subject to taxation by this State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas or electricity be subject to taxation under the provisions of this ordinance for such transaction as are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1 of the Illinois Municipal Code.

Section 3. Such tax shall be in addition to the payment of money or value of products or services furnished to this municipality by the taxpayer as compensation for the use of its streets, alleys or other public places or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business.

Section 4. For the purposes of this ordinance the following definitions shall apply:

A. "Gross receipts" means the consideration received for the distributing, supplying, furnishing or selling gas, and electricity for use or consumption and not for resale,



am. 4-0-66

3-2-9: MUNICIPAL UTILITY TAX:

3-2-9-3: EXEMPTION: No tax authorized by this Section is imposed with respect to any transaction in interstate commerce or otherwise to the extent to which the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas or electricity, or engaged in the business of transmitting messages be subject to the taxation under the provisions of this Section for such transactions as are or may become subject to taxation under the provisions of the "Municipal Retailers Occupation Tax Act" authorized by 65 Illinois Compiled Statutes 5/8-11-1 of the Illinois Municipal Code, as amended¹. (Ord. 4-0-66)

- (2) *Gas.* Persons engaged in the business of distributing, supplying, furnishing, or selling gas for use or consumption within the corporate limits of Waukegan and not for resale, at the rate of five (5) percent of the gross receipts therefrom.
- (3) *Electricity.* Persons engaged in the business of distributing, supplying, furnishing or selling electricity for use or consumption within the corporate limits of Waukegan, and not for resale, at the rate of five (5) percent of the gross receipts therefrom.

(b) Such tax shall be in addition to the payment of money, or value of products or services furnished to this municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business. (Ord. No. 81-0-138, §§ 1, 3; Ord. No. 81-0-149, § 1)

Sec. 34-83. Exclusions.

No tax is imposed by this division with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made subject to taxation by this state or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas or electricity, or engaged in the business of transmitting messages be subject to taxation under the provisions of this division for such transactions as are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1 of the Illinois Municipal Code, approved May 29, 1961, as amended. (Ord. No. 81-0-138, § 2; Ord. No. 81-0-149, § 2)

Sec. 34-84. Basis.

This division shall take effect after publication and the tax provided for herein shall be based on the gross receipts,

ORDINANCE #90-8

AN ORDINANCE AMENDING "THE CODE OF THE VILLAGE OF
SOUTH HOLLAND, ILLINOIS, "ADOPTED DECEMBER 7, 1987,
CHAPTER 18, ENTITLED "TAXATION"

WHEREAS, the Village of South Holland is a Home Rule Municipality within the purview of Article VII, Section 6(a) of the Illinois Constitution (1970), and the said Village, therefore, may exercise any power and perform any function pertaining to its government and affairs; and

NOW, THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of South Holland, County of Cook and State of Illinois, that the Code of the Village of South Holland, Illinois, be and the same is hereby amended by the adoptions of this ORDINANCE ADOPTING A MUNICIPAL UTILITY TAX, which, from and after its effective date, shall be a new Article III. Municipal Utility Tax of Chapter 18 of said Code, and shall read as follows:

CHAPTER 18

ARTICLE III. MUNICIPAL UTILITY TAX

Section 18-25.2 No tax is imposed by this Ordinance with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the Constitution and Statutes of the United States be made subject to taxation by this State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas or electricity, or engaged in the business of transmitting messages be subject to taxation under the provisions of this Ordinance for such transactions as they are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1 of the "Illinois Municipal Code", approved May 29, 1961, as amended.

assembled on the 6th day of August, 1990, on motion of
Trustee Ryzstalski, seconded by
Trustee Docter, carried on the aye votes of Trustees
Ryzstalski, Docter, DeYoung, Tenchler
Voting nay none Absent Wasson, M. Carthy

Richard F. Jamin
Village Clerk Pro-Tem

Approved:

Richard F. Jamin
Village President

Passed 8/6/90

Approved 8/6/90

Published in pamphlet form 8/6/90

CITY OF DES PLAINES

ORDINANCE M - 78 - 94

AN ORDINANCE AMENDING TITLE V "BUSINESS REGULATIONS" OF THE CITY CODE OF DES PLAINES, TO ADD A NEW CHAPTER 40 "MUNICIPAL UTILITY TAX"

BE IT ORDAINED by the City Council of the City of Des Plaines, Cook County, Illinois, in the exercise of its home rule powers, as follows:

SECTION 1: That Title V "Business Regulations" of the City Code of Des Plaines, as amended, be further amended to add thereto a new Chapter 40 "Municipal Utility Tax", to read as follows:

CHAPTER 40

MUNICIPAL UTILITY TAX

5-40-3: Exemptions: No tax is imposed by this Chapter with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the Constitution and Statutes of the United States, be made subject to taxation by this State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas or electricity be subject to taxation under the provisions of this Chapter for such transactions as are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1 of the Illinois Municipal Code.

PASSED this 7 day of December, 1994

APPROVED this 8 day of December, 1994

VOTE: AYES 6 NAYS 1 ABSENT 1

[Signature]
Mayor

Attest:

[Signature]
City Clerk

Published in pamphlet form this 8 day of December, 1994

[Signature]
City Clerk

[Signature]
David R. Wiltse, City Attorney

AN ORDINANCE CREATING A #200
MUNICIPAL UTILITY TAX

BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE
VILLAGE OF MELROSE PARK, COOK COUNTY, ILLINOIS, as follows:

SECTION 3: Exceptions to Tax. No tax is imposed by this Ordinance with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not under the Constitution and Statutes of the United States, be made subject to taxation by the State or any political subdivision thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas, telephone or electricity, or engaged in the business of transmitting messages, be subject to taxation under the provisions of this Ordinance for such transactions as are or may become subject to taxation under the provisions of the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1 of the Illinois Municipal Code.

SECTION 8: Effective Date. This Ordinance shall be in full force and effect from and after its passage, approval and publication as provided by law, except that the tax created under this Ordinance shall not be collected prior to the date set forth in Section 1 herein.

PASSED this 23rd day of April, 1984.

AYES: Custardo, Dobro, Kuhlman, Naples, Oldenburg,
Provenzano

NAYS: None

ABSENT: None

APPROVED this 23rd day of April, 1984.

[SEAL]



President, Village of Melrose Park,
Cook County, Illinois

ATTEST:



Village Clerk

—pace—

EXHIBIT B

Section 130.2080 Sales to Governmental Bodies

- a) Sales made on or after March 21, 1963, to a governmental body (Federal, State, local or foreign) are exempt from the Retailers' Occupation Tax.
- b) For the foregoing purposes, the date of sale is considered to be the date of delivery to the purchaser.
- c) The purchase of meals, fuel and other tangible personal property by corporations in Illinois are taxable sales at retail, unless otherwise exempt, notwithstanding the fact that the stock of such corporations may be owned exclusively or in part by foreign governments.

(Source: Amended at 8 Ill. Reg. 19062, effective September 26, 1984)

[Form 637]

1061-11

Form **637** Registration for Tax-Free Transactions
 (Rev. September 1984) Department of the Treasury Internal Revenue Service
 Under Chapters 31 and 32 of the Internal Revenue Code
 (This Application Should Also Be Used by Producers and Importers of Gasoline, Reduced Rate Producers of Gasoline, and Sellers and Buyers of Piggyback Trailers)

No. 36-85-0065
OMB No. 1545-0014

Please type or print	Name of individual, corporation, partnership, association, etc. SUBURBAN BUS DIVISION	Social Security or employer identification number 36 330 6845
	Name under which business is operated SUBURBAN BUS DIVISION	Telephone number 826-4377
	Business address (number and street) 300 North State Street	Will you be required to file Form 720? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	City, State, and ZIP code Chicago, Illinois 60610	File this application in duplicate with your District Director of Internal Revenue.

Application is hereby made for a Certificate of Registry in the name(s) of the applicant(s) above.
 The applicant is a:

Manufacturer Producer Importer Wholesaler Jobber Selling or buying subject to contract
 Retailer Other (specify) **MUNICIPAL CORPORATION**

The applicant affirms that use of articles bought or sold tax-free or at a reduced tax rate is to be for the purpose specified in applicable provisions of law and regulations and understands that misuse of this certificate will lead to its revocation and/or the penalties provided by law.

See item 2 on page 2 and check the applicable letter(s). I qualify as:
 a b c d e f g h i j k n o p q and/or other (specify) **TAX**

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct, and complete.

Signature **[Signature]** Title **Executive Director** Date **6-10-85**

Paperwork Reduction Act Notice — We ask for this information to carry out the internal Revenue laws of the United States. We need it to ensure that taxpayers are complying with these laws and to allow us to figure and collect the right amount of tax. If you want to register for tax-free or reduced-tax-rate transactions, you are required to give us this information. District Director's Validation. — A Certificate of Registry for the above applicant is approved and issued under the number shown.

By **J. P. Stalpa** District Director of Internal Revenue Date **7-2-85**

JUL 10 1985

DEF. 40 100.
SOS-ISL-CODE UNIT.

—pace—

EXHIBIT C

April 7, 2000



Mr. Mike Gibson
Consumer Services Division
Illinois Commerce Commission
527 E. Capitol Avenue
P. O. Box 19280
Springfield, Illinois 62794-9280

RE: Informal Complaint of Pace

Dear Mr. Gibson:

This correspondence will serve as Commonwealth Edison Company's ("ComEd") response to the informal complaint submitted to the Commission by Pace on February 23, 2000. Pace raises four issues: 1) the improper assessment of state electricity taxes to its accounts; 2) the improper assessment municipal taxes and charges to its accounts; 3) the application of an improper rate to its facilities at 3500 W. Lake St., Melrose Park, Illinois (Account # 02720-25000); and 4) lack of meter readings at its facilities at 900 E. Northwest Highway, Des Plaines, Illinois (Account Nos. 46384-60003, 21471-68001). Each issue will be addressed in turn below.

1. Assessment of State Electricity Excise Tax

ComEd is currently adjusting Pace's accounts to remove the charges related to the application of the Electricity Excise Tax from future bills. 35 ILCS 640/2-2. As evidenced by the letter from Mark A. Ross, Director-Taxes for ComEd, to Deb Knapik of Pace, ComEd is aware that Pace is exempt from this tax. (See Pace Informal Complaint, Group Exhibit B).

With respect to Pace's claim for refunds, with interest, for prior amounts paid under the current Electricity Excise Tax or its predecessors, ComEd continues to investigate the matter at this time. As you are aware, ComEd acts only as a collecting agent for such taxes. As such, ComEd did not retain the sum at issue for its own use, but rather forwarded the money to the state.

In addition to the fact that ComEd did not retain the tax monies for which Pace now seeks a refund, ComEd is also reviewing the applicable statute of limitations for Pace's claim. Pursuant to the Illinois Code of Civil Procedure, Section 5/13-224, Pace's claim for such a refund may be limited to the prior 3 years. Section 5/13-224 addresses "Recovery in Tax Actions" and provides in relevant part that:

the prevailing party shall not be entitled to recover an amount exceeding such taxes or charges paid, plus interest, where applicable, during a period beginning 3 years prior to the date of filing an administrative claim as authorized by statute or ordinance or court complaint, whichever occurs earlier.

