SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF YOLO

YOLO RATEPAYERS FOR AFFORDABLE PUBLIC UTILITY SERVICES and JOHN R. MUNN, Plaintiffs/Petitioners, vs. CITY OF DAVIS, CALIFORNIA Defendant/Respondent.	Case No. CV 13 187 FINAL STATEMENT OF DECISION AND ORDER REGARDING WATER AND SEWER RATES

In accordance with Code of Civil Procedure section 632 and California Rule of Court 3.1590, the Court issues this statement of decision[1] and order following the bench trial and hearing in this Proposition 218 case. As required by Rule of Court 3.1590, the Court previously circulated a proposed statement of decision, and received comments from the plaintiffs in response. The

[1] The purpose of a statement of decision is to provide the Court's "ultimate findings." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125.) A statement of decision "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." (*Ibid.*)

Court then ordered further briefing to allow a rejoinder from the defendant, and further response by plaintiffs.

Having considered[2] all of the evidence and legal arguments provided by the parties, the Court finds that the water and sewer rates adopted by the City of Davis meet the proportionality standards of the California Constitution, and therefore the plaintiffs'[3] claims are denied.

1. Factual and Procedural Background

For decades, the City has been drawing its water from a series of wells, but in recent times the quality and quantity of this water has been declining. In response, the City drilled deeper to reach better water, but hydrological studies indicate that even with these deeper wells, the City still may need an alternative source of water to provide its residents with an adequate supply that meets applicable quality standards.

The City looked east, to the Sacramento River, for this alternative supply, and after years of study and consultation, decided with the City of Woodland to construct a system that would bring river water to Yolo County's two largest cities. This project is known as the Surface Water Project.

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[2] In response to the plaintiffs' comments, the Court has expanded its discussion on certain points, including the discussion on pages 6-7, 10-11, 13, and footnote 12. The conclusion and order have not changed.

[3] Because they have filed both a complaint for declaratory relief and a petition for mandamus, the Yolo Ratepayers for Affordable Public Utility Services and John R. Munn are both plaintiffs and petitioners. For simplicity's sake, this decision will refer to them as plaintiffs.

Davis and Woodland formed a joint powers agency, the Woodland-Davis Clean Water Agency (WDCWA), to implement and oversee the Surface Water Project. The project includes an intake structure to siphon water from the Sacramento River, pipelines to bring the water to a new treatment plant, and further pipelines to deliver the treated water to Woodland and Davis. The City of Davis plans to exclusively use surface water from the project, except in the summer, when it may be necessary to supplement that supply with groundwater to meet peak demands. The Surface Water Project generated controversy, and the City created a committee, the Water Advisory Committee, to advise the City on water policy, including water rates. The Committee recommended that the City proceed with the Surface Water Project, but with less water delivered to Davis, and with commensurately lower costs. The City also put the Surface Water Project (but not the rates) to an advisory vote, and it was approved by the voters.

The City hired a consulting firm, Bartle Wells Associates, to conduct a water rate study. That study is the primary factual support for the City's claim that its rates are proportional, and it is found in the Administrative Record from pages W2027 to W2175. The water rate study notes that there are two types of costs associated with the operation of a water system. First are the fixed costs, such as the costs of constructing and maintaining water mains and pipelines, and certain administrative and billing costs. These costs do not vary with usage, so the water agency incurs them regardless of how much water its customers use.

Second are the variable costs, such as the cost of chemicals to treat the water, and the cost of electricity to pump it. These costs do vary with usage, so the more water used by customers, the more the water agency pays for these costs.

Like the two types of costs, traditionally there have been two types of charges to water users. The first type is a fixed charge, which is simply a charge that does not change no matter how much water a customer uses. The second type is a volumetric (or variable) charge, which does increase or decrease based on how much water the customer uses. Often, to create an incentive for conservation, volumetric charges are tiered, with users paying more per unit of water after a certain level of use.

Traditionally, users have paid both a fixed charge and a volumetric charge for their water. Water agencies traditionally use the revenue they receive from the fixed charges to recover their fixed costs, and they use the revenue they receive from the volumetric charges to recover their variable costs. The City has used such a traditional rate structure in the past.

At issue in this case are the water rates recently enacted by the City. For the period from May 1, 2013 to December 31, 2014, the City has adopted a traditional water rate structure, albeit with higher rates than before, to begin to pay for the Surface Water Project. This rate structure is referred to as the Bartle Wells rate structure, after the consulting firm that recommended it.

For the period beginning January 1, 2015, the City has enacted a new water rate structure dubbed the Consumption-Based Fixed Rate (CBFR) structure. This rate structure, which was developed by two members of the Water Advisory Committee, has three components: a fixed distribution charge, [4] a variable volumetric charge, [5] and a quasi-variable supply charge.

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[4] The distribution charge is used to recover the costs of the water mains, pipelines, and tanks, fire-flow devices, meters, and administration. The supply charge is used to recover the costs of the wells, surface water supply, and planning and environmental costs.

[5] The volumetric charge is used to recover all costs that vary with water usage.

The supply charge is unique to the CBFR rate structure. The supply charge is calculated for each parcel on a yearly basis, and is based on that parcel's water use during the previous six-month peak period from May to October. This charge is thus quasi-variable because it is fixed for a period of time, and because it appears that new residents will inherit, for the first year, the supply rate established by their predecessors. The supply charge is used to pay certain fixed charges relating to water supply and treatment, including many of the costs of the Surface Water Project. Thus, the chief innovation of the CBFR structure is that certain fixed charges are recovered through a quasi-variable charge, whereas with a traditional rate structure, fixed costs are entirely recovered through a fixed charge. (In both cases, variable costs, such as the cost of chemicals and electricity, are recovered through variable charges.) By reducing the fixed component, CBFR promotes conservation and gives users greater control over their water bill.

Both structures impose rates that are significantly higher than the City's rates before May 1, 2013. The primary reason for this increase is simple: the City has decided to implement the Surface Water Project to meet its water needs, and the funding for this project will come from the ratepayers. The question for the Court is not whether these rates *in toto* are too high (that is a policy question for the City's leaders and its voters), but whether they are divided in such a way that makes them illegal under Proposition 218.

The present lawsuit was filed on March 22, 2013, and it includes multiple causes of action, but the only causes of actions at issue now are the second cause of action (declaratory relief regarding the Bartle Wells rates), the third cause of action (declaratory relief regarding the CBFR rates), the fourth case action (mandamus for both water rate structures), the eighth cause of action (declaratory relief for sewer rates), and the ninth cause of action (mandamus for sewer

rates). The remaining causes of action, dealing with other issues, have been bifurcated by agreement of the parties and order of the Court, and will be tried separately.

2. The Proportionality Requirement of Proposition 218

The relevant portion of Proposition 218 provides that "[t]he amount of fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIIID, § 6, subd. (b)(5).) At first blush, this provision would appear to require the City to show, on a parcel-by-parcel[6] basis, that its rates are proportional to the costs for that parcel, since the provision refers to the "proportional cost of the service attributable to the parcel."

But the Court of Appeal[7] has rejected this interpretation, and found instead that "proportionality is not measured on an individual basis," but instead is "measured collectively, considering all rate payers." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601.) Thus, proportionality may be established by "grouping similar users together" and then charging members of the group according to their usage. (*Ibid.*)

The plaintiffs argue that *Griffith* is flawed because (1) it misreads prior authority (*City of Palmdale vs. Palmdale Water District* (2011) 198 Cal.App.4th 926), (2) it impermissibly relies on *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th

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[6] A parcel-by-parcel analysis is not the same as a user-by-user analysis, but they are related, since the usage patterns for a parcel are determined by the residents of that parcel.

[7] Since trial courts must follow decisions from all California appellate districts, it is of no consequence that *Griffith* was decided by the Court of Appeal, Sixth District, while Yolo County is in the Third District. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 ["[d]ecisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state"]

421, a case that did not involve Proposition 218, and, (3) most important of all, it is inconsistent with the plain language of the Constitution.

These arguments fail, for the simple reason that a trial court must follow applicable decisions of higher courts, and in *Griffith* the Court of Appeal unambiguously rejected parcel-by-parcel analysis. As the California Supreme Court has held in *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455:

> Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. . . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

Thus, this Court will follow *Griffith's* ruling that agencies need not show proportionality on a parcel-by-parcel basis, but instead may divide users into groups, and divide costs proportionally among those groups.

Rates are disproportional if an agency charges groups different amounts without good reason. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal. 926.) In *City of Palmdale*, a water district charged irrigation users more per unit of water than other users, and the Court of Appeal struck down the rates because the agency "fail[ed] to identify any support in the record for the inequality." (*Id.* at 936.) So the *City of Palmdale* case stands for the proposition that there must be a record-supported reason for any price discrimination among user groups.

It is important to note that Proposition 218 requires rates to be *proportional* to the cost of service, not *equal* to it, and so the fact that one rate structure is proportional to the cost of service (and thus legal) does not mean that all other rate structures are disproportional to the cost of service

(and thus illegal). This is so because "[a]pportionment is not a determination that lends itself to precise calculation," and so agencies still retain discretion to consider policy matters, such as the need for water conservation,[8] in setting rate structures. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601.)

The Court's duty is to determine whether the rates are constitutional, and it is for the City's elected policymakers to determine if they are fair and promote good public policy. The increased water rates will undoubtedly burden many Davis residents who are already struggling to pay their bills, but the elected City Council members and voters themselves, not the Court, must balance that burden against the need to address the declining quality of the City's water supply.

Also, while the Administrative Record[9] shows that the City has studied the water problem in great depth, and has solicited public input in excess of the legal requirements, these facts are legally irrelevant. Illegal rates cannot be saved by study or public participation, and legal rates do not need them, beyond the procedural requirements of Proposition 218.

The City bears the burden of showing that its rates comply with Proposition 218. (Cal. Const., art. XIII D, subd. (b)(5) ["[i]n any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article"].)

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[8] At the hearing on this matter, the plaintiffs agreed that the City may consider the need for water conservation in setting rates. The California Constitution explicitly recognizes the need for conservation of water. (Cal. Const., art. X, § 2.)

[9] The Court denied the plaintiffs' request to submit extra-record evidence, and it likewise hereby exercises its discretion to deny the City's request that it take judicial notice of the M-1 Manual, since that Manual was not part of the Administrative Record.

The plaintiffs identify a number of alleged disproportionalities in the City's water and sewer rates, and each challenge is addressed separately below.

3. Do the City's Water Rates Meet the Proportionality Requirement of Proposition 218?

3.1. Do Both Rate Structures Impermissibly Fail to Provide a Proportional Special Benefit?

In their opening brief, the plaintiffs argued that the new rates violate a provision of Proposition 218 that prohibits an assessment "on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (Cal. Const., art. XIIID, § 4, subd. (a).) The plaintiffs claimed that no special benefit has been shown, because the new water rates assume future growth, but the City may not grow in the future as much as assumed.

As the City points out, the plaintiffs have misidentified the applicable portion of Proposition 218, since water rates are not assessments, but instead are property-related fees, and thus no "special benefit" need be shown. (Cal. Const., art. XIII D, subd. (b)(5).) The plaintiffs concede this error and have withdrawn the "special benefit" argument.

3.2. Bartle Wells Rates (Effective from May 1, 2013 to December 31, 2014)

3.2.1. May the City Charge More Based on Meter Size?

For residential water users, the fixed charge for the Bartle Wells rates is based on the size of the parcel's water meter, so that users with a one-inch diameter meter pay a higher fixed charge than those with a 3/4-inch[10] diameter water meter. The plaintiffs argue that there is no valid reason to

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[10] In their opening brief, the plaintiffs argued that the City impermissibly lumped parcels with a 5/8-inch meter into the same category as those with a 3/4-inch meter. In response, the City cited pages in the Administrative Record showing that there are no parcels with a 5/8 inch meter, and plaintiffs do not dispute this in their reply brief.

set fixed charges based on meter size, because a user with a smaller meter may well end up using more water than a user with a larger meter, and so all single-family residential users should be charged the same fixed charge.

The Administrative Record shows that there are two reasons to charge a higher fixed charge to users with a larger meter. First, a user with a larger meter has the capacity to use more water, and the new system must have the ability to meet potential peak-period demand. (See W2087). The greater the potential demand, the bigger the system, so it is proportional to charge those parcels with greater capacity a higher *fixed* charge. It would not be proportional to recover variable costs based on a parcel's potential demand, and the City does not do so. But because the City incurs fixed costs regardless of usage (that is what makes them fixed, after all), it is proportional to recover fixed costs based on capacity for use. (*Paland v. Brooktrails Township Community Services District Board of Directors* (2009) 179 Cal.App.4th 1358, 1371.)

Second, the water rate study shows that parcels with bigger meters do in fact tend to use more water. (W9392 – 9393). The correlation is not perfect, because some users with smaller meters use more water than others with larger meters. But as noted above, the Court of Appeal has interpreted Proposition 218 to eschew individual proportionality analysis and to instead focus on groups of similar users. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601; *Paland v. Brooktrails Township Community Services District Board of Directors* (2009) 179 Cal.App.4th 1358.)

The plaintiffs argue that the potential for greater use is an insufficient basis for a higher fixed charge, because the evidence suggests that few if any residential users consume anywhere close to their full potential, regardless of their meter size. This argument has some force, and if there

were no evidence that those with larger meters actually tend to consume more water, then meter size might be an impermissible basis for a higher fixed charge. But the evidence shows that those with larger meters do tend to use more water, and this fact, coupled with the potential for greater use, means that it is not disproportional to charge those with larger meters a higher fixed component.

3.2.2. Are Low-Volume Water Users Paying More Than Their Proportional Cost of Service?

The plaintiffs argue that the Bartle Wells rate structure overcharges low-volume water users because they pay more per unit of water than high-volume users. The plaintiffs rely on *City of Palmdale v. Palmdale Water District* (2011) 198 Cal. 926, where the Court of Appeal struck down higher rates for irrigation users, because there was no evidence in the record justifying the price discrimination.

Here, unlike in *City of Palmdale,* the City has demonstrated a basis for its allocation of costs to the ratepayers. In particular, the Rate Study has calculated the costs to provide water, including the Surface Water Project, and allocates those costs into various categories. The variable costs are then recovered through the volumetric charge, and the fixed costs are recovered through the fixed charge. (See W2037, W2039-2040, W2045, W2050, W2070 – 2095).

It is true, as plaintiffs note, that low-volume users will pay more per gallon, sometimes much more, than high-volume users. This phenomenon is not unique to Davis, but is true of any traditional water rate structure with a fixed fee. Indeed, this phenomenon is not unique to water rates, but is common in any situation where fixed costs are recovered through a fixed fee.

For instance, consider two people who each rent a moving truck for one day for $50, plus $.30 per mile. The first person drives 250 miles on that day, and thus pays a total of $125, which equates to $.50 per mile. The second person only drives 10 miles, and thus pays a total of $53, which equates to $5.30 per mile.

The second driver pays more than 10 times more per mile than the first, and the reason for this disparity is the fact that many of the costs associated with renting an automobile, such as the costs of acquisition, insurance, registration, and some maintenance, are not directly variable with the number of miles driven.

Thus, it is not disproportionate to charge a fixed amount to recover fixed costs, even though this means that low-volume users pay more per unit, because the City incurs "readiness to serve" costs that arise from potential demand. (*Paland v. Brooktrails Township Community Services District Board of Directors* (2009) 179 Cal.App.4th 1358, 1369 – 1371.) To promote conservation and to ease the burden on low-volume users, the City may recover some fixed costs through volumetric charges, and it has done so through the new CBFR rate structure. But the law does not prohibit the City from using a traditional rate structure that recovers all fixed costs through a fixed charge.

3.2.3. Does the Tiering Structure Violate Proportionality?

The plaintiffs make two[11] arguments against the tiers established through the Bartle Wells rate structure. First, they note that the City Council did not adopt the cut-off points and rates recommended by Bartle Wells, but instead set higher cut-off points, thereby allowing residents to

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[11] The plaintiffs do not argue, as some others have, that it is impermissible to use a tiering structure that charges higher-volume users more per unit than lower-volume users, so that issue is not before the Court.

use more water before incurring higher charges. The plaintiffs argue that there is no evidence in the record to justify this deviation from the consultant's recommendation.

The Court does not fully understand the plaintiffs' argument on this point. The plaintiffs insist that they are not arguing that the City Council is legally required to follow their consultant's recommendations, and of course, that argument would be bootless, since a consultant's report is not the law, and since the City Council has not ceded its policy-making discretion to unelected contractors.

The plaintiffs may be claiming that the water rate study cannot support the as-adopted tiers because the study did not recommend them or consider them. But, as the plaintiffs concede, the City retains some policy discretion in establishing a rate structure, and so long as it remains within the parameters established by *Griffith*, it can adjust the tiering break-points to modulate the conservation signal for policy reasons, as it has done here.

The plaintiffs' second argument is that irrigation users pay more than their proportional cost. Single-family residential users pay $1.37 per ccf for the first 18 ccfs, $1.37 for the next 11 ccfs, and $2.33 for any amount above 29 ccf per month. In contrast, irrigation users pay $2.37 per ccf, regardless of volume.

While irrigation users do impose higher costs on the system because of their higher peak-period demand, the plaintiffs argue that much of the water in the first residential tier is also used for irrigation, and almost all of the water in the second and third tiers is used for irrigation. In particular, the plaintiffs argue that most residential water use after 5 ccf per month is for

irrigation. So, the plaintiffs ask, why do single-family users pay less for their irrigation water than do those who have an irrigation account?

The City answers by denying that irrigation users pay more than the proportional share. In setting rates, the City proceeded in the manner approved by *Griffith*: it divided the users into groups of similar uses, and then apportioned to each group its costs. The Administrative Record supports the City's assertion, and shows that the irrigation users, as a group, are paying their share of the total costs, based on their high peaking-demand impact. (W2081 – 2082). As a group, irrigators pay more per unit than single-family users because they place higher relative peak-period demands[12] on the system, and peak-period demand is pivotal in determining the City's water needs and costs.

The plaintiffs seem to be arguing that there should parity among *uses*, not just users, so that if a homeowner is irrigating, he or she should pay the same rate as an irrigator. But this is not what the law requires: *Griffith* allows the City to place users into groups, and then allocate costs proportionally among those groups. Plaintiffs' suggestion of instead dividing the costs among uses may be constitutional too, but the fact "[t]hat there may be other methods favored by plaintiffs does not render defendant's method unconstitutional." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601.)

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[12] The ratio between peak-period (Jul./Aug.) demand and low-period (Jan./Feb.) demand for irrigators is 21.8 (205,218 ccf/9,398 ccf), while that ratio for single-family residential users is only 3.2 (682,622 ccf/211,655ccf). (See W2080.)

3.2.4. Are Multi-Family Residences With a Separate Irrigation Meter Paying More Than Their Proportional Cost of Service?

The Plaintiffs argue that those multi-family residences that have a separate water meter for irrigation pay more than their proportionate share, because they are charged at the higher irrigation rate. This is a variant of the argument addressed above, namely that Proposition 218 requires a justification for price discrimination among uses. But *Griffith* allows the City to divide the costs among user groups, and then allocate costs to those groups in accordance with the respective cost each group imposes on the system. No law has been cited that would require the City to go further and allocate costs *within* each group based on the purpose for which the water is used.

3.3. CBFR Rates (Effective Starting January 1, 2015)

3.3.1. Are the CBFR Rates Disproportional Because They Differ From the Bartle Wells Rates?

Plaintiffs argue that because the Bartle Wells rate structure recovers 40% of the system's costs through fixed charges, and the CBFR rate structure recovers only 13% through fixed charges, one or both of these rates structures must be unconstitutional. Put another way, the plaintiffs argue that there is a temporal disproportionality, because later users are paying a much higher percentage through variable or quasi-variable charges than earlier users.

This argument is based on the assumption that if one rate structure is proportional, any structure that significantly deviates from that structure must be disproportional. This assumption might be warranted if the language of Proposition 218 required that parcels pay an amount *equal* to the cost of service, but that is not what Proposition 218 says, and no case has interpreted Proposition 218 to mean that only one rate structure is legally permissible.

To the contrary, in *Griffith* the Court of Appeal seems to acknowledge that more than one rate structure may pass constitutional muster. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601.) Thus, the constitutionality of each rate system must be independently assessed.

It is legal to recover all fixed costs from a fixed fee, as the City has done through the Bartle Wells rate structure, even though that means that low-volume users pay more per unit, because fixed costs are, by definition, not variable with usage. But it is also legal to recover some fixed costs on a variable basis, as the City has done through the CBFR rate structure, especially when a new system is being constructed, and the cost of that system depends on the capacity of water it must provide.

3.3.2. May the City Charge More to Users Whose Parcel Contains a Larger Meter?

As explained above, meter size is proportional to costs, because those with larger meters create both a higher potential demand (which the City must be prepared to accommodate), and because the data shows that those with larger meters tend to use more water.

3.3.3. Are Steady Users Paying Less Than Their Proportional Cost of Service?

The plaintiffs argue that the CBFR rates are disproportional because steady users (those who use water at the same clip throughout the year) pay less than typical users (who use more water in the summer). In particular, the plaintiffs construct a hypothetical situation in which a resident uses one extra ccf in the summer, which then causes the resident's supply charge to be increased in the next year, thereby increasing the resident's bill even further.

This hypothetical underscores a distinctive feature of the CBFR, which is that the rate is quite sensitive to changes in summer water use. This sensitivity promotes conservation, as does any system in which the rates increase with the volume.

In setting rates, may a water agency take into account the need to conserve water? The California Constitution recognizes the importance of water conservation, and at oral argument the plaintiffs agreed that the City may take into account the need for water conservation. (Cal. Const., art. X, § 2; Transcript, 58: 22 - 25). So this is not a case, like some others, where the plaintiffs are arguing that Proposition 218 forbids agencies to encourage water conservation by establishing tiers that result in higher per-gallon rates for heavy water users.[13]

Instead, the plaintiffs argue that the CBFR rates discriminate between users, by penalizing users who use more water in the summer. But there is a good reason, supported by the Administrative Record, to charge more for summer water: the system must be built to handle peak capacity, and that capacity is determined by summer usage.

As explained in the water rate study, the City is setting rates according to the "Commodity-Demand Method," which is one of the two cost-allocation methods recommended by the American Water Works Association. (W2074). Under this method, costs are allocated to customers based on peak demand. (*Ibid.*) In particular, costs are divided into four categories, the most relevant of which here are the "demand costs." (*Ibid.*) Demand costs "include capital-related system costs designed to meet peak requirements and the associated operation and maintenance expenses." (*Ibid.*)

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[13] Also, because it is building a new supply system, it is proportional for the City to charge heavy summer users more, because the size and cost of the new system is dependent on peak-period demand.

The water rate study includes detailed cost breakdowns showing annual demand costs totaling $7,340,593, or 43% of the total costs. (W2076) The study also calculates "peaking costs" for each customer class. (W2081). The plaintiffs do not identify specific challenges to any of these calculations or allocations.

So "steady" users, who do not increase their use in the summer, do pay less than typical users, but this variance does not violate proportionality because peak-period demand imposes more costs on the system than off-season demand.

4. Do the Sewer Rates Violate Proposition 218 By Using Winter Water Use as a Proxy?

The City's sewer rates have two components: a flat monthly fee, and a variable charge (subject to a cap) based on winter water use. The plaintiffs challenge the latter, arguing that winter water use does not correlate well with sewer use. The plaintiffs rely on a study that analyzed winter water use in El Macero, near Davis. That study showed that El Macero residents use significant amounts of water in the winter for irrigation, and the plaintiffs infer that other users must also irrigate in the winter. Thus, plaintiffs argue, it is disproportional to use winter water use to establish sewer charges, since much of the water used in the winter does not end up in the sewer system.

Winter water use is an imperfect proxy for wastewater discharge rates, especially in dry winters like the present one where many users are irrigating because nature is not. It is a better proxy than year-round use, but is it so imperfect that it violates the proportionality requirement of Proposition 218?

Winter water use is a traditional proxy for wastewater discharge, and no case has been cited that rules it illegal or questions it.[14] This lack of precedent can perhaps be explained by the Court of Appeal's recognition that "[a]pportionment is not a determination that lends itself to precise calculation" and that "proportionality is not measured on an individual basis." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601.)

Implicit in the plaintiff's argument is the claim that the City should find a better proxy for wastewater discharge rates, or measure those discharges directly.

This leads to the question: to comply with Proposition 218, must the City take steps to acquire data that it does not currently have, such as by installing wastewater meters in all structures within the City? Data acquisition has costs, but does Proposition 218 require agencies and their taxpayers to absorb these costs in the name of proportionality?

It would be anomalous if Proposition 218, which was adopted to limit local government's taxing and spending abilities, were interpreted to require agencies to buy -- and taxpayers to pay for -- new data collection devices or techniques to ensure proportionality. No case has so interpreted Proposition 218, and the language of Proposition 218 does not contain this requirement.

The Court concludes that Proposition 218 may be satisfied if the agency's rate structure and user categorizations are supported by the available data, so long as that data shows that the parcels have been divided into groups of similar users, and that there is a sound reason supporting any

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[14] In *Boynton v. City of Lakeport* (1972) 28 Cal.App.3d 91, 95 the Court of Appeal noted in *dicta* that "the amount of water consumed would bear a high correlation with the amount of sewage-bearing water discharged." This case pre-dates Proposition 218, and the defendant in that case was not using consumption as a basis for sewer rates.

disparity in how the groups are charged. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601; *Paland v. Brooktrails Township Community Services District Board of Directors* (2009) 179 Cal.App.4th 1358.)

Also, the Court interprets Proposition 218 to require agencies to recover variable costs using a variable charge, at least where the agency has the means to measure usage and therefore to apportion the variable costs.[15] When an agency lacks the means to directly measure usage, it may rely on the best-available proxy measurement, even if that measurement is imperfect. Here, the Court finds that it is not illegal for the City to use winter water usage as the best-available proxy measurement for wastewater discharge, since the City has not installed meters or other means to measure sewer use, and since Proposition 218 does not require it to do so.

5. Conclusion and Order

The City's water and sewer rates are proportional, and thus pass muster under Proposition 218. The Court thus finds in favor of the City on the second, third, fourth, eighth, and ninth causes of action, and **denies** the plaintiffs' claims on these causes of action. This case has not been completed, because there remain other causes of action to adjudicate, so no costs are awarded at this time.

IT IS SO ORDERED.

Dated: 17 March 2014

Dan Maguire

JUDGE OF THE SUPERIOR COURT

[15] The Court does not opine on whether Proposition 218 allows an agency that has not installed water meters to charge all users in a given category the same flat fee per month.