

## Aaron Starr

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**From:** Timothy Bittle [mailto:tim@hjta.org]  
**Sent:** Tuesday, February 14, 2017 4:56 PM  
**To:** Aaron Starr  
**Cc:** kris@hjta.org; jon@hjta.org; Sitzer Brittany  
**Subject:** Re: Violation of HJTA v. City of Fresno (2005)?

Dear Mr. Starr,

Thank you for your inquiry regarding Oxnard's utility rate-setting methodology which includes, among other things, the utilities' "share" of the City's public safety budget and a "return on investment" for the City's governmental buildings.

You asked whether these items are lawful to include when the City sets the fees that utility customers pay for utility services such as water and sewer. In our opinion, these items are not lawful components of utility fees.

One of the provisions of Proposition 218, article 13D, section 6(b)(5), states: "No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners."

By including in its utility fees a charge for public safety, the City is violating Proposition 218 by imposing a fee for police, fire, and other public safety services which are expressly identified as general governmental services that are available to the public at large, not just those paying the fee.

Even if it were lawful to charge a fee for public safety services, we question the HF&H approach for apportioning a percentage of the public safety budgets to the utility enterprises. Under the HF&H approach, the utilities' percentage represents the value of the utilities' real property and capital assets compared to the value of all public and private property in the City.

The HF&H approach is skewed by the fact that much, if not most, of the property owned by the water and sewer enterprises consists of miles of buried pipeline which are rarely the subject of police or fire calls. As HF&H admits, fees are not taxes; they are charged in return for one's actual use of a service. Therefore a fairer apportionment of public safety costs would be based on the number of police and fire calls by the utilities compared to all police and fire calls in the City. But, as I said earlier, we don't believe any fee for police or fire is lawful.

The HF&H study also assigns to the utility enterprises their share of the "rate of return" it believes the City is entitled to receive from its investment in governmental buildings. (This presumably is above and beyond their share of the maintenance and operation costs for building space actually occupied by the enterprises or by other city offices utilized by the enterprises.) In our opinion, this too is unlawful.

In *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, the City of Roseville included in its enterprise budgets an "in-lieu franchise fee" which an independent study justified as, among other things, "a reasonable economic return to the general fund" which had originally paid for the streets and other public property benefitting the enterprises. (Id. at 640.) In striking down the fee, the Court of Appeal ruled, "not one of these factors aligns with an identified cost of providing utility service, as required by Proposition 218; instead, they all ask, 'What will the market bear?'" (Id. at 648.)

Roseville's argument (that its general fund was entitled to receive from its utility customers a "return" on its investment in public property benefitting the utilities) was based on an old case, *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172. The Court said reliance on Hansen was "problematic" because it predated Proposition 218 which now limits utility rates to the recovery of "actual costs." (Id. at 649.)

For these reasons, we believe the City of Oxnard is mistreating its utility customers by padding their rates with amounts that are not actual costs the City incurs to furnish water or sewer services. Please let us know whether the City agrees to delete these amounts from its utility enterprise budgets. Thank you.

Timothy A. Bittle  
Director of Legal Affairs  
Howard Jarvis Taxpayers Association