SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

MARK COZIAR, on behalf of himself and all others similarly situated,

Plaintiff,

v.

OTAY WATER DISTRICT; and DOES 1 through 200, inclusive,

Defendants.

Case No. 37-2015-00400000-CU-MC-CTL

Phase II (Remedies) Trial

STATEMENT OF DECISION

DEPT: 67
JUDGE: Hon. Eddie C. Sturgeon

Complaint Filed: July 14, 2015
Trial Date: December 17, 2020

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Statement of Decision

In 1996, voters passed Proposition 218, which added Article XIII D to the California Constitution, to curb state and local government authority to generate revenue through taxes and other exactions. Proposition 218 requires water districts to calculate the actual costs of providing water at various levels of usage. When customers dispute the method used to allocate such fees, Proposition 218 requires the water district to prove, by substantial evidence that withstands independent review, that it has complied with the Constitution's substantive proportionality requirement.

Here, a certified class of single-family residential customers of Defendant Otay Water District, from July 2014 to the present, challenged the method Otay Water District used in 2013 and 2017 to allocate fees for residential water. After a trial on liability, this Court determined that Otay Water District had failed to prove by substantial evidence that withstands independent review that its tiered rates correspond to the actual cost of providing service at a given level of usage. Thus, the case proceeded to the remedial phase.

The Court has now given due consideration to the parties' evidence and argument at the remedies phase of trial. The Court makes the following findings at the remedies stage and will enter judgment accordingly.

The Court accepts the methodology for calculating an overcharge that the City of San Diego ultimately proposed in *Patz v. San Diego,* which is to calculate a uniform rate that could have been charged in lieu of the tiered rates charged during the class period. As the City of San Diego explained there, the use of uniform rates is widely accepted in the industry. A uniform rate is appropriately derived from the total revenue requirement instead of the customer class revenue requirement calculated using peaking factors. To calculate the amount of the refund, those rates can be compared to the tiered rates actually charged to the customer class. The Plaintiff Class and its expert also agrees with this approach. In fact, in *Patz,* this Court accepted the calculations known as "alternative 2" which were prepared by Plaintiff's expert and adopted by the City of San Diego. The Court has before it the same methodology, prepared by the same expert, and similar

"alternative 2" calculations based on the record in this case. The Court finds them acceptable here as well.

Applying this approach to the record here, Plaintiff's expert has calculated the resulting uniform rates per hundred cubic feet (HCF) as follows:

Six Month Time Period FY 2015 – FY 2021	Uniform Rate
July – December 2014	3.51
January – June 2015	3.62
July – December 2015	3.48
January – June 2016	3.51
July – December 2016	3.76
January – June 2017	4.21
July – December 2017	4.61
January – June 2018	4.10
July – December 2018	4.28
January – June 2019	4.43
July – December 2019	4.36
January – June 2020	4.50
July – December 2020	4.48
January – June 2021	4.52

Those uniform rates are then compared to the actual rates used to calculate the overcharge for each billing period through June 2021.

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Calculation of Single Family Residential Overcharge	11-22 hcf			Over 22 hcf		
	Units	Overcharge / Unit ($)	Overcharge ($)	Units	Overcharge / Unit ($)	Overcharge ($)
July – December 2014	1,181,000	0.26	307,060	590,500	2.29	1,352,245
January – June 2015	966,300	0.33	318,879	483,200	2.46	1,188,672
July – December 2015	934,000	0.47	438,980	311,300	2.60	809,380
January – June 2016	733,900	0.52	381,628	244,600	2.69	657,974
July – December 2016	724,700	0.56	405,832	252,100	2.89	728,569
January – June 2017	669,000	0.66	441,540	232,700	3.29	765,583
July – December 2017	800,700	0.52	416,364	367,000	3.29	1,207,430
January – June 2018	682,100	1.34	914,014	312,600	2.93	915,918
July – December 2018	1,180,800	1.16	1,369,728	495,200	2.75	1,361,800
January – June 2019	1,005,800	1.22	1,227,076	421,800	2.87	1,210,566
July – December 2019	878,100	1.29	1,132,749	386,400	2.94	1,136,016
January – June 2020	748,000	1.41	1,054,680	329,100	3.13	1,030,083
July – December 2020	690,900	1.43	987,987	297,300	3.15	936,495
January – June 2021	576,300	1.52	875,976	248,000	3.27	810,960
Total for Six Months			10,272,493			14,111,691
Grand Total Overcharges						**24,384,184**

In *Patz v. City of San Diego,* the plaintiff class members argued that the Court should only consider the amounts charged above the uniform rate in calculating a refund. Here, that would result in a refund of $24,384,184 to single-family residential customers through June 2021.

Six Month Time Period FY 2015 – FY 2021	Class-wide Overcharge
July – December 2014	1,659,305
January – June 2015	1,507,551
July – December 2015	1,248,360
January – June 2016	1,039,602
July – December 2016	1,134,401
January – June 2017	1,207,123
July – December 2017	1,623,794
January – June 2018	1,829,932
July – December 2018	2,731,528
January – June 2019	2,437,642
July – December 2019	2,268,765
January – June 2020	2,084,763
July – December 2020	1,924,482
January – June 2021	1,686,936

Six Month Time Period FY 2015 – FY 2021	Class-wide Overcharge
Totals:	24,384,184

In *Patz,* this Court instead considered reductions to these overcharges in light of amounts that were undercharged to particular individuals. Applying this approach here, which recognizes that a comparable reduction was made in *Patz* where similar breakpoints were used, total "net" overcharges are reasonably estimated to be $18,105,256.60 through June 2021. (Rebuttal Decl. of David P. Vondle p. 7 ("Vondle Rebuttal") (laying out the methodology to approximate the proportionate discount using the dollar amounts from a different alternative calculation), attached as Ex. A to Phase II (Remedies) Trial Reply Brief of Plaintiffs and Class; AR005955 (Otay's 2013 Cost of Service Study setting tier breakpoints similar to San Diego's); AR006053 (Otay's 2017 Cost of Service Study showing usage tier breakpoints and prices similar to San Diego's).)

In this case, the Court finds that the more reasonable estimate during this time period, based on the above methodology and in view of historical billing, is $18,105,256.60. Further, the Court notes that Otay continues to charge single-family residential customers for water based on rates this Court has found do not comply with Proposition 218. As it did in *Patz v. City of San Diego,* the Court remedies these continuing violations by increasing the award after June 2021 by $208,762.50 in overcharges each month thereafter until Otay imposes water rates consistent with the requirements of California Constitution Article XIII D, section 6(b)(3).

The Court otherwise rejects Otay's argument that single-family residential customers owe Otay $4.24 million. (Defendant Otay Water District's Phase II Opposition to Damage Brief pp. 14-15, Feb. 25, 2022 ("Otay's Damages Brief").) Otay's belief that it is owed more than $4.2 million is based on an incorrect understanding of the law. *First,* Otay maintains that it has not violated Proposition 218 and there is insufficient evidence to show otherwise, meaning that no overcharge amount can be determined. This Court, however, has already found that Otay failed to prove its compliance with Proposition 218. The Court will not reconsider that finding. It is settled law that where the fact of damages is clear, as it is here, the amount of damages need not be calculated with

absolute certainty. (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 317; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745-746.) California law vests the trial court with discretion "to select the formula most appropriate to compensate the injured party," (*United States Liab, Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 599), "requir[ing] only that some reasonable basis of computation of damages be used ... even if the result reached is an approximation." (*GHK Assoc. v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) "The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment does not bar the recovery." (*Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 174.)

Here, this Court has already determined the fact of the class's damages. (*See* Statement of Decision Phase I pp. 2-5 ("Statement of Decision"), Mar. 4, 2021.) Now the Court adopts a reasonable methodology for computing overcharges based on the evidence before the Court. (*See GHK Assoc.*, 224 Cal.App.3d at 873.) This methodology is even supported by another water district—the City of San Diego. Consequently, there is a reasonable basis for the calculation of overcharges based on the best evidence available under the circumstances. (*Stott v. Johnston* (1951) 36 Cal.2d 864, 876.) Whether an approximation is high or low, the only question is whether it is reasonable. (*See, e.g., Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 402; *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340.) Here, the amounts awarded are reasonable and supported by the record.

In fact, Otay's own rate-setting report laid out that "[b]lock 1 pricing is normally set just below the average cost of water and block 2 is set just above the average cost of water." (Statement of Decision, p. 14; AR005957.) Taking Otay at its word, Otay's own estimation of the actual cost of water delivery demonstrates that the overcharges in this care are significant. (*See, e.g., GHK Assoc.*, 224 Cal.App.3d at 873.) Indeed, that cross-check shows that this Court's ultimate award is reasonable, if not conservative.[1]

[1] Even if mathematical exactitude were required for Plaintiff to show overcharges (it is not), Otay's failure to calculate the actual cost of water delivery precludes it from arguing that such precision is required. (*See Long Beach Drug Co.* 13 Cal.2d at 174; *Stott*, 36 Cal.2d at 876.) Also, Otay has not presented any alternative methodology—unlike the City of San Diego. Thus, Otay has no alternative that accounts for this Court's liability finding for this Court to consider.

In any event, the Court finds that individual class member refunds will be determined during the refund allocation phase, with any adjustments to be made in light of customer billing upon this Court's consideration. No class members will receive more or less than he or she was overcharged during the class period, as an adjustment may be made during the allocation phase if such an adjustment is warranted. For this reason, Otay is wrong to suggest that an award cannot be made at this stage. There is sufficient evidence before the Court to award relief, and (again) an adjustment may be made during the allocation phase based on individual customer billing if the Court deems it appropriate. Instead, an adjustment may be inevitable because Otay Water District continues to charge pursuant to rates that do not comply with Proposition 218, and historically rates have increased slightly each year.

Second, Otay maintains that undercharges and overcharges must be considered for all customers *as a group*. Under this approach, Otay calculates that it is owed about $4.2 million. This approach is wrong. It would mean that a single-family residential customer who was overcharged would not receive a refund simply because his neighbor was undercharged. Under Proposition 218, water rates must reflect the "cost of the service attributable" *to a given parcel.* (Cal. Const., art. XIII D, § 6, subd. (b)(3).) The Court in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, *as mod.* (May 19, 2015), explicitly underscored this point, noting that "[i]f the phrase 'proportional cost of the service attributable to *the* parcel' (italics [in original]) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really is an ascertainable cost of the service that can be attributed to a specific—hence that little word 'the'—parcel. Otherwise, the cost of service language would be meaningless. Why use the phrase 'cost of the service to the parcel' if a local agency doesn't actually have to ascertain a cost of service to that particular parcel?" (*Id.* at 1505.) Accordingly, the Court rejects Otay's approach of discontinuing overcharges to a given parcel based on undercharges to an entirely separate parcel. To the contrary, consistent with *Capistrano*

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and a proper understanding of Proposition 218, the overcharge must be ascertained based on a cost of service to a particular parcel. Notably, this approach was supported by another water district, the City of San Diego, as sound.

Lastly, consistent with *Patz,* the Court will award pre-judgment and post-judgment interest, and it will order Otay Water District to impose future water rates consistent with the requirements of California Constitution Article XIII D, section 6(b)(3), and may use tiers, a uniform rate, or any other method, provided Otay Water District complies with California Constitution Article XIII D, section 6(b)(3). Also, the Court will retain jurisdiction including jurisdiction to hear a request for attorney's fees under the common fund doctrine and/or pursuant to Code of Civil Procedure section 1021.5, costs, expenses, and service awards, if any, to enforce the Judgment, and to address pre-judgment interest calculations. The Court will grant an extension of time for good cause, including to promote efficiency, to file a motion for attorney's fees, costs, expenses, and service awards. Any such motion may be filed within 60 days after the expiration of the time for filing a notice of appeal or, if a notice of appeal is timely filed, within 40 days of the date the Court of Appeal sends a copy of the remittitur to this Court, whichever is later. Otay Water District will notify the class of this Judgment within 60 days after the expiration of the time for filing a notice of appeal or, if a notice of appeal is timely filed, within 40 days of the date the Court of Appeal sends a copy of the remittitur to this Court, whichever is later.

A separate judgment will be entered in due course.

IT IS SO ORDERED.

Dated: June 15, 2022

Eddie C. Sturgeon

EDDIE C. STURGEON
Judge of the Superior Court