

GLENDALE WATER & POWER AND PROPOSITIONS 218 AND 26



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County of Los Angeles CIVIL GRAND JURY

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March 5, 2013

The Honorable Charlaine Olmedo, Supervising Judge
Clara Shortridge Foltz Criminal Justice Center
Los Angeles Superior Court
210 West Temple Street, Department 100
Los Angeles, California 90012

Dear Judge Olmedo:

In compliance with California Penal Code Section 933(a), the 2012-2013 Los Angeles County Civil Grand Jury hereby submits an Interim Report on the City of Glendale and Propositions 218 and 26. This investigation was prompted by a Citizen's Complaint received by the Civil Grand Jury and our deliberations on the complaint resulted in a majority of the jurors voting to do a full investigation. We are submitting an Interim Report because the issues addressed by the Civil Grand Jury in this investigation are relevant and significant to a special election scheduled by the City of Glendale for April 2, 2013. The City of Glendale special election is proposing a revision of the City Charter that the Civil Grand Jury believes may result in subsequent actions by the City that are in conflict with Propositions 218 and 26. Therefore, the maximum utility of this investigation would best be served by publishing the investigation at this time. The Interim Report will also be included in the final report by the Civil Grand Jury submitted to you in June.

I would like to express the Civil Grand Jury's thank you to Jennifer Lehman, Principal Deputy County Counsel, who provided a valuable and significant review of this report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frederick Piltz".

Frederick Piltz, Foreperson
2012-2013 Los Angeles County Civil Grand Jury

GLENDALE WATER & POWER AND PROPOSITIONS 218 AND 26

EXECUTIVE SUMMARY

In response to a letter from a concerned citizen, the 2012/2013 Los Angeles County Civil Grand Jury (hereinafter “Grand Jury”) initiated an investigation into whether the City of Glendale (sometimes hereinafter “the City”) could be in violation of Article XIII C and Article XIII D of the California Constitution, specifically Propositions 218 and 26, by charging excessive rates and transferring monies from Glendale Water & Power (sometimes hereinafter “GWP”), to the City’s General Fund without the requisite two thirds majority vote of the citizens of Glendale. As a local government within Los Angeles County, the City is within the oversight jurisdiction of the Grand Jury.

The City takes the position that because provisions of the City Charter adopted in the 1940’s authorize a transfer to the City’s General Fund of up to 25 per cent of the operating revenues of Glendale Water & Power, it need not comply with Propositions 218 and 26 which require that utility rates not exceed the cost of providing the service. The Grand Jury is concerned that the City may be erroneously interpreting the requirements of the applicable provisions of the California Constitution and Propositions 218 and 26 and is thus unnecessarily exposing itself to potential legal expense should its actions be challenged. The Grand Jury is also concerned that a proposed Special Election in April 2013 to clarify certain provisions of the City Charter will not immunize the City from its Constitutional compliance obligations.

RECOMMENDATIONS

1. **The City of Glendale obtain an independent legal opinion** from outside legal counsel specializing in municipal tax law regarding its compliance with Propositions 218 and 26.
2. **The City of Glendale hold a special election** and obtain the authorization by two thirds of those voting approving the utility rates charged by Glendale Water & Power and the transfer of funds from Glendale Water & Power to the City’s general fund.
3. **The City of Glendale consider alternate sources** of revenue if it is unable or unwilling to obtain the requisite authorization of the City’s voters as suggested in 2 above.

METHODOLOGY

The Grand Jury received and reviewed a letter and supporting documents from a concerned citizen regarding the City’s transfer of revenues from GWP to the City’s general fund. The Grand Jury met with this concerned citizen as well as several senior representatives of the City of Glendale. The Grand Jury also telephonically interviewed a representative of the Howard Jarvis

Taxpayers Association regarding application of Propositions 218 and 26. The Grand Jury also reviewed a January 6, 2010 report of the Sacramento County Grand Jury, various appellate and trial court decisions interpreting Propositions 218 and 26, Implementation Guides for Proposition 218 and Proposition 26 produced by the League of California Cities, and other materials provided to it by the City of Glendale.

BACKGROUND

Glendale Water & Power provides water and electric service to property owners and citizens of Glendale. Under certain provisions of the City's Charter, the City is permitted to transfer up to 25 per cent of the "Operating Revenue" of the GWP "surplus fund" to the City's general reserve fund. No apparent effort has been made to determine the impact of these transfers on GWP's ability to fund needed repairs and enhancements to its infrastructure. Moreover, the City proposes through an April 2, 2013 special election requiring only a simple majority vote to amend and "clarify" its Charter provisions by deleting reference to and need for a GWP "surplus fund" and other special accounts and to just maintain a general revenue fund and to establish a budgeted item appropriation from GWP equaling 25 per cent of its operating revenues. For the fiscal years 2007/2008 through 2010/2011, the City transferred to its general fund from GWP electric revenues totaling approximately \$75.6 Million and from water revenues approximately \$16.6 Million.

California Voters adopt Propositions 218 and 26

On November 5, 1996, California voters adopted Proposition 218. Called the "Right to Vote on Taxes Act," the proposition addressed a wide range of issues relating to raising and spending public funds, but specifically provided that cities may not charge ratepayers more for the cost of providing utility services nor use revenue from ratepayers for non-utility purposes. Under its provisions, fees for electrical or gas services were exempted. Further, increases in rates required approval of a two thirds majority vote. See also *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914 (charter-authorized payment in lieu of taxes by water, sewer and trash utilities violated Prop. 218 unless cost justified) and *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637 (franchise fee charged to water, sewer and trash utilities violated Prop. 218 unless cost justified).

On June 8, 2010, California voters adopted Proposition 26, the Supermajority Vote to Pass New Taxes and Fees Act. Under Proposition 26, gas and electric service fees imposed by public utilities constitute taxes unless they are imposed pursuant to legislation which predates its adoption or complies with one of its exceptions such as 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." Under Proposition 26, the City's transfer of electric revenue to its

general fund is evidence that the electric fees exceed the reasonable cost to provide the service and would be impermissible unless legislation predating adoption of Proposition 26 permitted the transfer.

FINDINGS

The City argues that Propositions 218 and 26 do not apply

In a memorandum dated July 30, 2012, the City has taken the position that a transfer of revenues from GWP is mandated by the City Charter. The City also asserts that GWP rates have been implemented in accordance with a formula that allows up to a 25 per cent transfer to the City General Fund. Finally, the City argues that its transfer of GWP revenue is “grandfathered” and pre-dates the adoption of Propositions 218 and 26.

The Grand Jury is concerned that this analysis is too simplistic and overlooks the City Charter provision that limits the transfer from the “surplus fund” account. The Grand Jury is also concerned that reliance on a 70 year old Charter provision that permits a transfer from operating revenues with no methodology for calculating rates does not satisfy the requirements of Proposition 218 or Proposition 26. Further, the proposed “clarifications” of the City Charter to be submitted to a vote of the citizens of Glendale will not, in the view of the Grand Jury, comply with the requirements of Propositions 218 and 26.

The City of Los Angeles lost in court making a similar argument as the City of Glendale

An argument similar to that asserted by the City was made by the City of Los Angeles in *City of Los Angeles v. All Persons Interested In The Matter of the Validity Of The Transfer Of \$29,931,300 From The Water Revenue Fund To The Reserve Fund (Fiscal Year 2006-2007)* LA Sup. Ct. Case No. BC369238. In its Final Statement of Decision filed July 2, 2009, the court held that Proposition 218 prohibited the City of Los Angeles and its Department of Water and Power from transferring surplus revenue derived from water service fees to Los Angeles for non-water related purposes and that Proposition 218 prohibited Los Angeles and its Department of Water and Power from charging fees for water or water-related services in amounts that generate revenues greater than necessary to provide water-related services to its customers. In so ruling, the Court specifically rejected Los Angeles’ argument that its city charter provisions authorizing such transfers from the Department of Water and Power exempted it from compliance with Proposition 218. The Grand Jury understands that a trial court decision may not be cited as authority in a court filing, but the Grand Jury does find this holding as indicative of the judicial trend in interpreting Propositions 218 and 26.

Fiscal challenges do not justify ignoring constitutional requirements

GLENDALE WATER & POWER

While the Grand Jury understands the fiscal challenges facing cities such as Glendale, it is not permissible for the City to use Glendale Water & Power as its “piggy bank” to satisfy budgetary shortfalls. Rather, the City should consider alternate revenue sources and or submit its rate structure for GWP to the citizens of Glendale for their approval by a two thirds majority vote in compliance with Propositions 218 and 26.

REQUIRED RESPONSES

City of Glendale