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Decision 02-01-043 January 9, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Robert Hambly, for Himself and, On Behalf of the Residents of Los Robles Mobilehome Park, Complainant, vs. Hillsboro Properties, a California Limited Partnership, and the City of Novato, Defendants	Case No. 00-01-017 (Filed January 14, 2000)

ORDER DENYING REHEARING OF DECISION 01-08-040

On August 24, 2001, the Commission issued D.01-08-040 (the Decision) in a mobilehome park complaint case filed by Robert Hambly, a tenant,[1] against Hillsboro Properties (Hillsboro), the owner of the Los Robles Mobilehome Park (Los Robles), and the City of Novato (Novato). Hambly claimed that Hillsboro assessed the Los Robles tenants annual rent increases which, though approved by Novato under its rent control authority, resulted in higher charges for submetered natural gas and electric service than allowed under P.U. Code Sec. 739.5[2] After two days of public hearing and the submittal of

[1] Complainant Hambly was represented by the Golden State Mobilehome Owners League (GSMOL). Western Mobilehome Parkowners Assoc. (WMA) intervened in support of defendant Hillsboro. Hillsboro's 213 space mobilehome park is located in Pacific Gas & Electric Co.'s (PG&E) service area.

[2] Unless otherwise stated, all statutory references are to the Public Utilities Code. The relevant subsection of Sec. 739.5 is 739.5(a), which provides:

> "The commission shall require that, whenever gas or electric service, or both, is provided by a master-meter customer to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-meter customer shall charge each user of the service at the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electric corporation. The commission shall require the corporation furnishing service to the master-meter customer to establish uniform rates for master-meter service at a level which will provide a sufficient differential to cover the reasonable average costs to master-meter customers of providing submeter service, except that these costs shall not exceed the average cost that the corporation would have incurred in providing comparable services directly to the users of the service."

briefs, we concluded that Hambly was correct; and we ordered that Hillsboro calculate and pay refunds to the tenants consistent with the methodology set out in the Decision, subject to later review by Hambly and the Commission.

In his complaint, Hambly requested refunds for himself and the other tenants of Hillsboro for utility expenses which he claimed were wrongfully included in the rent. By stipulation the parties agreed that some expenses related to the maintenance and operation of Hillsboro's submeter systems had not been included in Hillsboro's rent increase petitions or, if they were, they were removed by rent control hearing officers. This reduced the dispute to two issues:

1. Whether Novato's rent control ordinance results in higher gas and electricity charges for the submetered tenants than the rates applicable to such tenants directly served by PG&E?

2. Whether two common area expense items, (a) the costs for trenching and conduit required for overhead street lighting; and (b) costs for installation, maintenance and repair of electric service pedestals, are included within the master–meter discount?

With regard to the first issue, the Decision concluded that Hillsboro's cost methodology utilized in its rent increase applications to Novato failed to identify common area gas and electricity usage in kilowatt hours or therms. Instead, Hillsboro's master-meter bill from PG&E was accepted as the expense component which was subtracted from the income component (the submetered receipts from Hillsboro's tenants). Because the difference in dollars does not provide an accurate measure of gas and electric common area usage; and because Hillsboro, which should have knowledge of this usage, failed to produce evidence to substantiate its theory for estimating the value of the discount, the Decision concluded that Hillsboro's rent increase application methodology was flawed. It also concluded that submetered gas and utility receipts from the tenants should be excluded as an item of gross

income in Hillsboro's rent increase applications; and that its operating expenses should exclude the master-meter bill from PG&E but include common area usage measured in therms or KWhs and then multiplied pursuant to PG&E's mobilehome park master-meter rate schedules which were operative during the time periods involved. And for the years that it is not possible to determine the volume of common area usage because Hillsboro is unable to document the necessary master-meter bill charges, the Decision adopted a 10 percent proxy recommended by the tenants.

The second issue was also resolved against Hillsboro. The Decision concluded that both trenching and electric service pedestal expenses should have been excluded from Hillsboro's rent increases. This conclusion was based on a prior Commission decision (D.95-08-056, 61 CPUC 2d 225), which denied rehearing of the Commission's 1995 proceeding that reviewed the application of Section 739.5 and the calculation of the master-meter discount.[3] That decision recommended that mobilehome park owners should seek determination in their particular utility's next general rate case of which costs related to common area plant are deemed to be included in the master-meter discount. Neither Hillsboro, WMA, or any other mobilehome park owners followed this recommendation insofar as PG&E was concerned, despite the fact that they could have done so in Phase II of PG&E's 1996 general rate case (GRC). Given that the park owners, including Hillsboro and WMA, had ignored the 1995 OII Decisions, the Decision concluded that Hillsboro acted at its own peril when it incurred these costs and "slept on its right" to seek Commission approval of them as common area costs eligible for recovery in the master-meter discount. Therefore, without a Commission determination revising the discount to include these particular common area costs in the discount, Hillsboro's attempt to recover them through rent increases was invalid under Section 739.5(a). Accordingly, Hillsboro was ordered to calculate reparations for payment to its tenants as directed by the Decision.

[3] See Re: Rates Charges, and Practices of Electric and Gas Utilities Providing Services to Master-metered Mobile Parks, D.95-02-090, (1995) 58 CPUC 2d 709; rehrg. denied D.95-08-056, 61 CPUC 2d 225, hereinafter referred to as the 1995 OII Decisions.

Hillsboro and WMA each filed an application for rehearing. WMA contends that the Decision constitutes a misreading of the 1995 OII Decisions; that it is not supported by substantial evidence in the record; and that previous Commission decisions authorize park owners to collect common area costs through rent increases. Hillsboro joins in the contention that the Decision lacks evidentiary support and also argues that the Commission has unlawfully interfered in Novato's rent control jurisdiction.

We have reviewed the contentions submitted in both applications for rehearing and conclude that they lack merit as discussed below:

A. WMA's Application

1. Alleged Misinterpretation of Prior Commission Decisions

WMA denies that it slept on its rights with regard to failing to seek a Commission determination that trenching and pedestal costs were not included in the master-meter discount calculation. It argues that the Decision errs in citing Phase II of PG&E's 1996 GRC as a proceeding in which mobilehome park owners and/or WMA could have raised the issue relating to these costs. It maintains that there was no "generic proceeding" involving the major utilities in which this issue was presented for resolution. It further claims that the only proceeding in which this issue has been resolved by the Commission is SDG&E's "rate design window" proceeding (A.91-11-024), in which the Commission approved a settlement that confirms Hillsboro's treatment of these costs. Since under this short term settlement park owners in SDG&E's service area can collect trenching and pedestal costs in the rent, WMA contends that the Commission has issued inconsistent decisions. Therefore, in WMA's view, the Decision has made a generic or general change in treatment of these costs in a single complaint case without providing any notice to all possible interested parties. Accordingly, WMA maintains that the Decision contains legal error and must be reversed to conform with the SDG&E decision.

WMA's contention overlooks recent Commission history dealing with the operation of Section 739.5(a). Pursuant to this section, master-meter customers, such as a mobilehome park like Hillsboro, receive service at a discount. The park must charge its submetered tenants at the same rate which would be applicable as if the tenants were receiving service directly from PG&E. The discount is designed to provide a sufficient differential to cover the reasonable average costs of providing submeter service, based on the costs the utility avoids. The Commission has complete jurisdiction over utility rates, including the discount; and the section imposes on the Commission the duty to require the master-meter customer to charge each tenant "the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation." In the 1995 OII Decisions the Commission held that tenants of a master-metered park shall not be subject to rent surcharges for ongoing repairs or replacement of the submetered utility system. Park operators are to recover such costs through the discount. They were directed by the Commission in the 1995 OII Decisions to raise the question of which costs were not included in the master-meter discount calculation and seek adjustment in the serving utility's next GRC. With respect to PG&E's master-meter rate tariff, neither WMA or any other park owners did so. Hillsboro's vice president, who also is a member of WMA, admitted during the hearing that Hillsboro never petitioned for such an adjustment or sought one in a GRC. (Tr. p. 16) Therefore, it is clear that WMA and Hillsboro have failed to seek adjustment of the discount from the Commission.

Nor is WMA correct that it could not raise this issue in PG&E's 1996 GRC resolved by D.97-12-044 (1997) 77 CPUC 2d 171. Review of that decision shows that rate design issues were discussed. Some changes in rates were considered appropriate and reasonable but could not be implemented because of the rate freeze imposed under deregulation. However, new residential rate schedules were evaluated. (See 77 CPUC 2d at 188) Indeed, master-meter gas discounts were updated through an agreement between WMA and PG&E. WMA could have sought a similar agreement and a determination by the Commission that trenching and pedestal costs were properly recoverable in rent payments on

a temporary basis. No change in the master-meter electric rate would have been necessary. However, WMA failed to do so.

Finally, WMA's reliance on our decision in the SDG&E "rate design window" proceeding as a binding precedential decision upholding its position on recovery of these costs in rents is mistaken. The settlement with SDG&E incorporated in Appendix B of D.00-12-058 is effective for only two years; and expressly provides that the mobilehome space discount is "not calculated on a specific Commission mandated methodology." It further provides that the parties recognize that a "consistent, reliable methodology to compute and update the space discount" should be adopted in the future, expressly referring to SDG&E's next rate design proceeding or some other proceeding the Commission conducts for resolution of this issue. (See D.00-12-058, App. B: Joint Recommendation on Master-Meter Issues, subparagraph (3).) Therefore, contrary to WMA's assertion, there is no basis to conclude that this temporary settlement applicable only to SDG&E's service territory constitutes a decision binding on non-parties, such as PG&E and its master-meter customers. A final Commission decision in a proceeding is binding only on the parties involved in it. Hickey v. Roby, (1979) 273 Cal App. 2d 752.

2. Lack of Evidentiary Support

Next, WMA contends that the Decision is not supported by the evidence. It states that the testimony of Hillsboro's subpoenaed witness from PG&E demonstrates that PG&E understood that trenching and pedestal costs were not its responsibility and that they have always been considered to be excluded from the master-meter discount.[4] Rather, the discount is based on PG&E's avoided costs of serving the mobilehome park tenants directly. Therefore, in WMA's view, collection of trenching and pedestal costs in the rent was lawful. However, this view also fails to adhere to the recent decisions on this subject. As the

[4] WMA has also attached to its rehearing application a PG&E exhibit from its 1993 Test Year GRC (App. No. 91-11-036) and an exhibit of a Southern Gas Co. witness in its 1996 Biennial Cost Allocation Proceeding (App. No. 96-03-031) to support this contention, even though neither one was introduced during the proceeding. Neither exhibit was available for cross-examination by the complainant, or for review and analysis by the Administrative Law Judge or the Commission. These extra record exhibits are not entitled to any consideration in determining this application for rehearing.

Decision notes, Hillsboro failed to follow the Commission's direction in the 1995 OII Decisions and secure its authorization to charge its tenants for the trenching and pedestal costs. The PG&E witness's testimony and exhibit only established that parkowners do not currently recover through the discount the common area costs involved in this case, i. e., Hillsboro's trenching and pedestal costs. Because the Decision recognizes that these costs are not included in the discount, it is consistent with this evidence. And this evidence does not alter in any manner the fact that, as the Decision found, both Hillsboro and WMA failed to seek and secure Commission authorization to charge its tenants for these costs. One or both could have done so in PG&E's 1996 GRC. Also, we recognized that although some adjustment of the discount would be appropriate, the record in this case was inadequate to revise the discount. (D.01-08-040, p. 20.)

B. Hillsboro's Application

1. Alleged Disregard of Evidence

Hillsboro relies on the same testimony of the PG&E rate analyst that WMA cites in its application; namely that the trenching and pedestal costs are not at this time included in the discount calculation. It then argues that the Commission has erred by avoiding the "real issue" of whether these costs are statutorily required to be in the discount. Since the Commission has failed to decide this issue, Hillsboro concludes there is no such requirement. As a result, it asserts that Novato has authority to allow recovery of them in the tenants' rent.

As we have stated above, this argument completely ignores our directive in the 1995 OII Decisions that park owners should seek changes in the costs included in the discount by participation in future utility rate proceedings. Neither Hillsboro or WMA have done so insofar as PG&E is concerned. Instead, Hillsboro has sought recovery of these costs from Novato. This is contrary not only to the 1995 OII Decisions but other specific mobilehome decisions, including most recently one in PG&E's service area. (See Steiner v. Palm Springs Mobilehome Properties, D.97-07-009 (1997) 73 CPUC 2d 369; rehearing denied D.97-11-033, (1997) 76 CPUC 2d 528; pet. for writ of review denied S066434

(1998); and Home Owners Assoc of Lamplighter v. Lamplighter Mobile Home Park, D.99-02-001, dated February 1, 1999 in C.98-02-045). The Lamplighter case involved virtually the same situation as involved with Hillsboro in that the park owner applied a rent surcharge to recover costs for undergrounding electric and telephone service lines located inside the park. The park was also subject to local rent control.[5]

Like WMA, Hillsboro misunderstands the Commission's responsibilities and authority under Section 739.5(a). We have concluded that under this statute a mobilehome park owner cannot charge, in the form of a rent increase, for capital improvements to or maintenance of the submetered system beyond what it receives through the submetering discount that is approved by the Commission. As stated in the Lamplighter decision:

> "In a 1995 decision that followed a generic investigation the Commission concluded that tenants of master-metered parks shall not be subject to rent surcharges for ongoing utility system repair and replacement (D.95-02-090). The Commission also stated that there is no dispute that the Commission has complete jurisdiction over utility rates, including the mobile home park discount. Further, §739.5 of the PU Code confers upon the Commission responsibility to require that 'the master-meter customer shall charge each user of the service at the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation'"(D.99-02-001, mimeo p.4).

Therefore, Hillsboro's position that it is free to seek recovery of its trenching and pedestal costs through a rent increase is erroneous. There is no doubt that under these decisions that Hillsboro, either by itself or through WMA, was obligated to seek revision of the discount in an appropriate PG&E rate proceeding.

Next, Hillsboro complains that the evidence of its witness on the method to adjust the rent increase formula was undisputed; and therefore should be adopted. This

[5] Although WMA's petition to intervene in Lamplighter was denied because it was filed late, WMA did actively monitor the proceeding and was listed as an Interested Party. (See Ruling Denying WMA's Petition to Intervene, dated February 1, 1999, mimeo, p. 2.) Therefore, WMA had knowledge of our interpretation of Section 739.5(a).

witness (St. John) proposed a correction to the rent increase calculation to neutralize the operation of the net operating income (NOI) formula to prevent inflating the master-meter discount. Although he concluded that operation of the NOI formula in Novato's rent-control ordinance resulted in higher gas and electric charges for submetered mobilehome tenants, he proposed solving this problem by removing the value of inflation on the discount from past rent increases. Hambly's witness (Barr) agreed with St. John that mathematically this method would correct the inflation problem; but he also stated that even if it was adopted he could not determine if this proposal achieves full compliance with Section 739.5 because Hillsboro was not able to provide the common area usage in volumetric terms, i.e. in kwhrs and therms. Consequently, we rejected this method because Hillsboro failed to provide the volumetric data underlying the master-meter gas and electricity bills; and because the difference between the submetered receipts and the master-meter bill, on a dollar basis, fails to provide an accurate measure of gas and electric common area usage.

A review of the record casts doubt on the accuracy of Hillsboro's proposal. For instance, its witness did not agree that submetered expenses and income was subject to a separate regulatory regime from rent control (TR. 138). He admitted that a breakdown of volumetric usage was possible but rejected such an approach as not being a good idea. (TR. 146-47). He admitted that he had not read any of the Commission's decisions dealing with submetered discounts in mobilehome parks. (TR. 137-38). This testimony casts reasonable doubt that his simplistic inflation adjustment would fully comply with the requirements of Section 739.5.

As a result, rejection of Hillsboro's proposal based on the dollar difference reasonably falls within the Commission's discretion, given the doubt that this method would fully comply with the purpose and intent of Section 739.5. Our interpretation of Section 739.5 that it requires that the tenants not pay any amount greater than what they would pay if they were served directly by the utility is entitled to great weight. (Yamaha Corp. of America v. State Board of Equalization (1998) 19 Cal. 4th 1, 11). It has been upheld on judicial review in the Steiner case, supra. Our conclusion to reject the proposed inflation

adjustment was primarily based on the fact that Hillsboro failed to produce the common area volumetric usage data. Hillsboro's failure to produce information, which it should have, justifies the inference that its simple inflation adjustment might not result in full compliance with the requirements of Section 739.5(a).

The question raised by this argument appears to be that there is insufficient evidence to support the conclusion to reject Hillsboro's proposed solution. There is contradictory evidence on this issue in that Hambly's witness Barr expressed doubt that Hillsboro's witness St. John's proposal constituted full compliance with Section 739.5. In addition, Hillsboro's witness demonstrated a lack of knowledge of the Commission's regulatory role regarding mobilehome energy rates and of the relevant decisions dealing with them.

Review of decisions made by constitutionally created agencies is generally limited to a determination of whether or not the agency's decision is supported under the substantial evidence test. (Strumsky v. San Diego Co. Emp. Retirement Assn. (1974) 11 Cal.3d. 28, 35.) In such cases the reviewing court does not reweigh the evidence or exercise its independent judgement to draw a conclusion from the record. Rather, it renders a determination about whether the agency's conclusions are reasonable and sufficiently supported. Furthermore, the discussion in Witkin, California Procedure, Appeal (vol. 9), section 363, page 413, states, "The test is not whether there is substantial conflict, but whether there is substantial evidence in favor of the respondent. If this substantial evidence is present, no matter how slight it may appear in comparison with contradictory evidence, the judgement will be affirmed." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 364, pp. 414-415 (citations omitted). Thus, conflicts of evidence are to be resolved in favor of the findings of the administrative agency. The fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (Molina v. Munro (1956) 145 Cal.App. 2d 601, 604.) Under this standard, Hillsboro's application does not demonstrate legal error.

2. Oversight Jurisdiction over Novato's Rent Control Ordinance

Hillsboro claims that the Decision interferes with Novato's rent control authority by ordering it to adopt a specific formula for its NOI calculation. This is incorrect. The fault here lies with Hillsboro, which has tried to "end run" the Commission's authority by seeking recovery of submeter system costs from Novato. The Decision only suggests it adjust its rent increase NOI methodology to eliminate utility related expenses and income, and thereby clearly separate the regulatory regimes over mobilehome master-meter rates and the determination of rent under Novato's rent control ordinance. The ordering paragraphs apply only to Hillsboro, over which the Commission has sole jurisdiction insofar as master-meter rates and the application of Section 739.5 are concerned. (See Steiner, supra, 73 CPUC 2d at 376).

3. Calculation of Refunds

Hillsboro asserts that there is no evidence in existence to run the refund calculations prescribed in the Decision; and therefore, refunds should be based on its witness St. John's calculations. Even if this assertion is correct, it does not constitute legal error. Ordering Paragraph 5 requires Hambly and Hillsboro to meet and confer regarding the refund inputs and methodologies called for in the Decision. If there is no satisfactory resolution, the Decision provides for additional proceedings to be held as determined by the Administrative Law Judge. (Ordering Paragraphs 6 and 7). Therefore, granting rehearing at this time is not required.

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Accordingly, we conclude that the applications for rehearing must be denied.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.01-08-040 is denied.
2. This proceeding remains open for the determination of refunds.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners