ALJ / XJV / k47 **

Mailed 5/16/2001

Decision 01-05-058 May 14, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the rates, charges, and practices of water and sewer utilities providing service to mobilehome parks and multiple unit residential complexes and the circumstances under which those rates and charges can be passed to the end user.	Investigation 98-12-012 (Filed December 17, 1998)

TABLE OF CONTENTS

Title **Page**

O P I N I O N

1. Summary

The Commission issued this Order Instituting Investigation (investigation or OII) to explore "concerns raised about the legitimacy of charges for water and sewer services imposed on tenants by the owners of multiple unit residential complexes and mobilehome parks." (Investigation 98-12-012, *slip. op*. at 1.) In this proceeding, we review information obtained about current practices of owners/operators of mobilehome parks (MHPs) and multiple unit residential complexes (multi-unit apartments) that bill tenants for water and sewer services separately from rent. We also review the extent of California Public Utilities Commission (Commission or CPUC) jurisdiction under existing law and limitations on CPUC oversight.

While this proceeding has provided a forum for the expression of varied concerns about the billing practices at MHPs and multi-unit apartments, our decision today offers few answers to these dilemmas. This decision does clarify the pivotal issue, the extent to which CPUC jurisdiction permits this Commission to address and resolve the billing issues presented.

Whether an MHP or multi-unit apartment is a public utility subject to CPUC regulatory control depends on whether it satisfies the statutory definition of a public utility as that definition has been interpreted by the courts. If it is a private entity selling (or reselling) water or sewer services for compensation -- the express statutory requirement-- and it has dedicated its property to public use as required by case law established by

the courts, and it does not qualify for an express legislative exemption from CPUC control, then more likely than not, the MHP or multi-unit apartment would be determined by the Commission to be a public utility, subject to its control. With one limited exception, if a MHP or multi-unit apartment selling or reselling water or sewer services is not deemed a public utility, the Commission has no jurisdiction to regulate its rates and services.

2. Origins of This Investigation

The recent interest in water and sewer issues has been stimulated by changes in billing practices at some MHPs and multi-unit apartments and complaints about these changes. Landlord and tenant perspectives vary regarding the reasons (and motives) for these changes. The water issues are the most complex and have generated a large number of inquires, both before and after the issuance of this OII. Questions from tenants at MHPs and multi-unit apartments predominate among the many letters, e-mail inquiries, and telephone calls the Commission has received. Some consumers merely seek basic information, which they allege the owner/operator has not divulged, such as the reason for assessing certain water charges and the basis for calculating them. Other consumers assert that they are being assessed improper, or illegal, charges for water service.

Under existing law, the Commission directly regulates as public utilities about 150 water corporations and about nine sewer system corporations. Information provided by CPUC-jurisdictional water corporations to the Water Division indicates that these water corporations constitute less than 2% of the water providers in California and, in the aggregate, provide 20% of the potable water delivered to end use

customers in California. The remaining 80% of potable water comes from other water providers, such as municipal public utilities, municipal utility districts, public utility districts, mutual water companies and a limited number of private water sources, none of which this Commission regulates. Commission-regulated sewer corporations serve approximately 2,000 service connections, an extremely minor percentage of the total in California.

3. Procedural Background

The OII, issued in late December 1998, categorized this proceeding "quasi-legislative," as that term is defined in Pub. Util. Code § 1701.4. The preliminary scoping memo set a timetable for Class A and B water utilities to respond in writing to eight questions about water and sewer service at multi-unit apartments and MHPs and for the Water Division to analyze the responses and submit a report.

The preliminary scoping memo in the OII focused on five aspects of the broad charge to explore concerns raised about the legitimacy of water and sewer charges imposed on tenants:

- Assessing the frequency & legality of current practices of MHPs and multi-unit apartments in charging tenants for water and sewer services.
- Exploring the applicability and enforceability of Pub. Util. Code § 2705.5, which governs water submetering, as it concerns the resale of water.[1]
- Examining Rule 19, which is part of the tariff for all CPUC-regulated water utilities, and considering whether any revisions

[1] Unless otherwise indicated, all subsequent citations to statutes refer to the Public Utilities Code.

are needed to make it a more useful for monitoring and enforcing § 2705.5.

- Determining whether non-certificated private entities can resell sewer services under existing law.
- Determining the need for other Commission rules or for legislation to deal with any problems identified.

The OII named Commissioner Duque the Assigned Commissioner and charged him to hold a prehearing conference (PHC) after the Water Division report had been filed and to establish all further procedures.[2]

Water Division filed its report on April 8, 1999. On May 14, Commissioner Duque requested written PHC statements and held the PHC on June 25 in San Francisco. At the request of PHC participants, Commissioner Duque set two public participation hearings (PPHs) outside of the bay area (Sacramento on July 21 and Anaheim on August 18) and scheduled a workshop in San Francisco on September 15. Water Division served as the workshop coordinator and facilitator, subsequently issued a draft workshop report for comment by the participants, and issued a final workshop report on December 1, 1999.

By ruling dated March 15, 2000, Commissioner Duque requested briefs on specific legal and policy issues, as the workshop report recommended. Concurrent initial briefs were filed on April 24 and reply briefs, on May 15.

The parties who actively participated in the workshop and filed briefs include: the Ratepayer Representation Branch of the Commission's Water Division; for MHP tenants – California Mobilehome Resource and

[2] On July 18, 2000 this proceeding was reassigned to Commissioner Lynch.

Action Association (CMRAA) and Golden State Mobilehome Owners League (GSMOL); for MHP owners / operators – Manufactured Home Communities, Inc. (MHC) and Western Manufactured Housing Communities Association (WMA); for apartment owners / managers / billing agents – CA Housing Council, CA Apartment Association, National Submetering and Utility Allocation Association, National Water and Power, and Viterra Energy Services Incorporated (collectively, the apartment lobby, as their interests were generally presented jointly). No apartment tenants organization appeared; however, the Commission has received numerous letters and other communications from apartment tenants during the course of this proceeding.[3]

4. Overview – The Major Issues

The facts and the applicable legal arguments presented to the Commission in this proceeding focus on three basic situations: charges for water service at submetered MHPs; charges for water service – and particularly, the method for allocating charges -- at multi-unit apartments which are not submetered; and charges for sewer service. In each of these scenarios, the owner / operator of the MHP or multi-unit apartment is the customer of the water or sewer provider and the tenant (the end use residential consumer) is not.

[3] The record compiled in this quasi-legislative proceeding includes all written statements and comments in connection with the PHC; the PHC transcript; the PPH transcripts; written materials submitted in connection with the workshop, including all written comments enclosed with the final workshop report; and correspondence the Commission has received from members of the Legislature and the public.

The California Department of Housing and Community Development web site indicates that there are 5, 640 MHPs in California (www.hcd.ca.gov). CMRAA provided a somewhat lower estimate in this proceeding (5,000 MHPs) and indicated that this lower figure represents close to 400,000 spaces. We have no useful approximation of the percentage of MHPs (or total spaces) located within the service territories of CPUC-regulated water and sewer utilities. Data on multi-unit apartments tend to be the product of estimates but at least one estimate suggests as many as 15 million Californians reside in them.[4] We have been unable to independently verify estimates of the number of such apartments or the number of tenants they house.

4.1. MHP Issues

The history at De Anza Santa Cruz Mobile Home Park (De Anza), a 200 site MHP subject to local rent control, illustrates the major controversy surrounding MHPs. (See, *Application of MHC for a Certificate of Public Convenience and Necessity* [*Application of MHC*], Decision (D.) 98-12-077 (1998) xx Cal. PUC 2d xx.) De Anza, owned by MHC since 1994, receives water and sewer services from municipal systems owned and operated by the City of Santa Cruz[5]. Prior to 1993, water and sewer costs at De Anza were rolled into the monthly rent charge. *Application of MHC* relates that in 1993, new owners (not MHC) installed submeters for each site and in

[4] See "Landlords, Tenants Spar In Big Water-Fee Fight," Wall Street Journal, July 28, 1999, p. CA-1.

[5] As we discuss more fully below, we question whether a MHP served by a municipal water authority is subject to § 2705.5. In all other regards, however, the rate dispute at DeAnza typifies the tensions at all MHPs subject to local rent control ordinances. Since DeAnza is familiar to the Commission and to the parties, it provides a useful example.

conformance with Civ. Code § 798.41, a part of the Mobilehome Residency Law, removed utility charges from rent and began billing separately for utility services, including water and sewer.[6]

The owners allocated sewer charges among spaces on a "pass through" basis (i.e. a pro rata allocation of the actual charges billed by the City). The resulting water bill per space included volumetric charges at the municipal water system's baseline rate of $0.65 per hundred cubic feet (Ccf), a $7.80 "readiness to serve" charge, and a 7% tax. These were the same charges at the same rates the municipal water system imposed on any residential customer located outside the MHP who received water directly from the municipal water system. De Anza paid a higher total volumetric charge than the tenants were billed (since $1.55 per Ccf, rather than the baseline rate, applied above 400 Ccf), but De Anza's paid a single "readiness to serve" charge of $217.50. Thus, the total submeter receipts exceeded, by about $1,500 per month, the amount the municipal water system billed De Anza.

---

[6] Civ. Code § 798.41 provides that management of rent-controlled MHPs may separately bill tenants for "utility service fees and charges assessed by the utility for services provided to or for spaces in the park," including water and sewer services. The separately billed utility charges are not to be considered rent under local rent control laws if management first removes the utility charges from rent as prescribed. The approved methodology requires that:

> … at the time of the initial separate billing of any utility fees and charges the rent chargeable under the rental agreement or the base rent chargeable under the terms of a local rent control provision is simultaneously reduced by an amount equal to the fees and charges separately billed. The *amount of this reduction* shall be equal to the *average amount charged to the park management for that utility service for that space during the 12 months immediately preceding* notice of the commencement of the separate billing for that utility service. (Civ. Code § 798.41(a), emphasis added.)

The rent control board hearing officer agreed with the tenants that Civ. Code § 798.41 does not permit the levy, on a per space basis, of a "readiness to serve" charge and "tax" and that these amounts constituted a windfall de facto rent increase. The only allowable water charges, the hearing officer concluded, were actual submetered usage, plus a pro rata share of the "readiness to serve" charge, and tax, that De Anza actually paid. Ultimately, the Sixth District Court of Appeal, in an unpublished opinion, revised the refund calculation to ensure recovery of all of De Anza's volumetric charges but otherwise agreed with the hearing officer.[7]

Meanwhile, MHC filed an application at the CPUC in which it expressly stated its intention to dedicate both its submeter water system and its sewer system to public service, acquire public utility status and then levy the water rates authorized by the CPUC. After evidentiary hearings, the Commission granted a Certificate of Public Convenience and Necessity (CPCN) to MHC, albeit with some stated reluctance. The Commission concluded that the financial and management resources available to MHC placed it in a different league than other, troubled Class D water utilities.[8] Nonetheless, Commission and legislative policy of recent years has encouraged consolidation of very small water and sewer

[7] Pursuant to Rule 977 of the California Rules of Court, a decision of a court of appeal that is not certified for publication shall not be cited or relied on by a court or party in any other action or proceeding, with several exemptions not applicable here. However, many MHP owners/operators and tenants are aware of the decision and it has been widely discussed. A summary of the decision appears in *Application of MHC*, which reports the progress through the courts of the appeal of the rent control board's determination.

[8] Class D is the class designation given to the smallest water corporations regulated by the Commission. They are water utilities with 500 or fewer service connections.

utilities with larger, more stable entities -- not the creation of additional small utilities – and the Commission expressed concern that other MHP owners might follow MHC's example.[9] (*Application of MHC*, supra, D.98-12-077 at p.31.) Though the Commission's CPCN proceeding is closed, De Anza's history is still being written. GSMOL reports that the City of Santa Cruz has refused to grant De Anza permission to resell municipal water and sewer services under the tariffed rates approved by the Commission in *Application of MHC* and that the dispute between the two is pending in the federal courts.

4.2. Issues at Multi-Unit Apartments

From the standpoint of the apartment lobby, increases in water costs, coupled with the absence of any conservation incentive when consumption is not metered, necessitate removing water costs from rent and separately allocating water costs among rental units. By comparison to MHPs, few multi-unit apartments are submetered and water charges (like sewer charges) typically have been subsumed in rent. The apartment lobby argues that it would be a costly proposition to install separate, direct

[9] We note, for example, recent enactment of the Public Water System Investment and Consolidation Act of 1997 (Pub. Util. Code §§ 2718-2720). Section 2719 contains the Legislature's express findings that: "Increasing amounts of capital are required to finance the necessary investment in. . .infrastructure"; that increased replacement or upgrading of infrastructure is required "to meet increasingly stringent state and federal safe drinking water laws and regulations governing fire flow standards for public fire protection"; and that "[p]roviding water corporations with an incentive to achieve…scale economies" which are achievable in the operation of public water systems, "will provide benefits to rate payers." To the extent §§ 2718-2720 provide incentives to water utilities to merge or to encourage larger utilities to purchase smaller ones to achieve economies of scale, the benefits to customers are clear. The customer benefit of a merger between large companies is less apparent. (See *Joint Application of California Water Company, Dominguez, et al., for Approval of a Plan of Merger*, D.00-05-047 (2000) xx Cal PUC 2d xx.)

meters or submeters at existing multi-unit apartments using the metering technologies currently required by law. The apartment lobby also argues that unmetered water usage promotes waste and that a proxy for metered consumption is necessary to promote conservation and cover increased water costs. Typically, landlords use apartment square footage or number of tenants per unit as proxies for usage and impose a separate water charge on that basis. These proxies are generally known as "RUBS", or Ratio Utility Billing Systems. Apartment tenants complain the proxies are flawed and assert that owners are looking for additional profit centers and in some cases, for a way to circumvent the rent increase limitations imposed by local rent control ordinances.

5. Basis of CPUC Jurisdiction

Where a MHP or a multi-unit apartment obtains water or sewer service from a Commission-regulated public utility, and then separately bills for that service, many consumers and some of the parties to this proceeding presume the Commission has jurisdictional oversight of that activity, without limitation. Many consumers, as well as some parties, also assume CPUC jurisdiction where the water provider to the MHP or multi-unit apartment is part of that non-jurisdictional group that supplies 80% of California's potable water. They reason, under both scenarios, that in reselling the utility service to an end use consumer, the MHP or multi-unit apartment owner/operator is performing a public utility function as a de facto public utility. As explained more fully below, many of these assumptions are not supported by our analysis of applicable law. Instead, CPUC jurisdiction over landlord-tenant disputes regarding water and sewer billing practices is quite limited.

To provide a context for our discussion of the positions of the parties on the application of CPUC jurisdiction, in the next two subsections we identify the relevant statutes and court interpretations of public utilities law that together comprise the controlling law on CPUC jurisdiction. Later in this decision we examine the application of these laws to submetered water service at MHPs, water allocation methodologies at non-submetered multi-unit apartments, and to sewer service charges at both.

5.1. The Statutes – CPUC Jurisdiction

The CPUC's power to regulate water and sewer corporations as public utilities relies on legislative grants, pursuant to sections 3 and 5 of Article XII of the California Constitution, which expand upon direct constitutional grants conferred by other provisions of Article XII.[10]

Section 216 of the Public Utilities Code is the general definitional statute that describes categories of pubic utilities. With respect to water, it provides, in relevant part:

> (a) "Public utility" includes every …water corporation … where the service is performed

---

[10] Section 3 provides, in relevant part:

> "*Private corporations and persons* that own operate, control or manage a … system for … furnishing water ... to or for the public … *are public utilities* subject to the control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other person are public utilities." (Cal. Const., art. XII, § 3, emphasis added.)

Section 5 provides, in relevant part:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission …" (Cal. Const., art. XII, § 5.)

> for, or the commodity is delivered to, the public or any portion thereof.
>
> (b) Whenever any … water corporation … *performs a service for, or delivers a commodity* to, the public or any portion thereof *for which any compensation or payment whatsoever is received*, that … water corporation … is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part. (§ 216, emphasis added.)

Pursuant to § 241, water corporation means "every corporation or person owning, controlling, operating, or managing any water system for compensation" within California. Section 204 defines corporation as "a corporation, a company, an association, and a joint stock association" but, notably, does not include a municipal corporation.

Section § 2701 contains the most detailed definition of a CPUC-regulated water utility:

> *Any person, firm, or corporation … owning, controlling, operating, or managing any water system* within this State, *who sells, leases, rents, or delivers water* to any person, firm, corporation, municipality, or any other political subdivision of the State, whether *under contract or otherwise*, *is a public utility*, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, *except as otherwise provided in this chapter*. (§ 2701, emphasis added.)

A statutory exception to CPUC jurisdiction, suggested in §2701 above, that is directly applicable to MHPs and multi-unit apartments is § 2705.5, which provides in relevant part:

> *Any person or corporation* … that maintains a mobilehome park or a multiple unit residential complex and *provides … water service to users through a submeter service system is not a public utility* and is not subject to the jurisdiction, control, or regulation of the commission *if each user* of the submeter service system *is charged at the rate which would be applicable if the user were receiving the water directly from the water corporation.* (§ 2705.5, emphasis added.)

As such, § 2705.5 provides a "safe harbor" from public utility status and attendant regulation by the CPUC to qualifying MHPs and multi-unit apartments.[11] Legislative history, cited by GSMOL, shows that § 2705.5 was enacted in 1983 in response to questions about whether MHPs that were submetering water to their tenants could do so without obtaining a CPCN and submitting to regulation by the CPUC as public utilities. (See GSMOL initial brief, Ex. B-D.) As enacted, the statute codified an exemption or safe harbor – in other words, nonpublic utility status -- for MHPs that charged the same rate as the user would receive from the "serving public utility water company." (Stats. 1983, ch. 339.) On the advice of Legislative Counsel in the 24th Report on Legislation Necessary to Maintain the Codes (March 1, 1984), the term "water company" was

[11] The Code enumerates other exemptions. For example, statutory exceptions from regulation by the CPUC as a public utility apply to: certain surplus and emergency sales from private water supplies not otherwise dedicated to public use that the owner primarily uses for private domestic, industrial and irrigation purposes (§ 2704); mutual water companies that provide water only to their stockholders at cost (§ 2705; see also §§ 2725-2729); entities that supply water exclusively to a water conservation district (§ 2706).

deleted and replaced by the term "water corporation," which appears in the current statute. (Stats. 1984, ch 144, sec. 169.)[12]

Section 2705.6 addresses the practices of MHPs that own the water supplies and facilities used to serve their tenants. Although it provides such MHPs with an exemption from public utility status, it authorizes the Commission to exercise jurisdiction over the MHP's water rates and services **"**if a tenant complains." Section 2705.6 provides in relevant part:

> A mobilehome park that provides water service only to its tenants from water supplies and facilities that it owns, not otherwise dedicated to public service, is not a water corporation. However, that mobilehome park is subject to the jurisdiction of the commission to the extent that, if a tenant complains about the water rates charged or service provided by the mobilehome park, the commission shall determine, based on all the facts and circumstances, whether the rates charged are just and reasonable and whether the service provided is adequate. (§ 2705.6)

Questions about the charges and services provided by an MHP that owns its water supplies and facilities were not raised in this proceeding.[13] Although we have no statistics on MHPs that own their water sources, we suspect that they are few in number.

---

[12] The Legislative Counsel's report states that all recommendations are nonsubstantive changes, and with respect to § 2705.5, points out that "water corporation" is the term used in § 241. (March 1, 1984 Leg. Counsel Report, pp. 2, 56-57 [see selected pages included with GSMOL initial brief, Ex. I]).

[13] However, a complaint under § 2705.6 is now pending before the Commission. (See *Matthews v. Meadows Management, et al.*, C.99-08-040.)

5.2. Case Law – CPUC Jurisdiction

When considering the Commission's jurisdiction over the charges of MHPs or multi-unit apartments for water and sewer service, one cannot rely solely on the words of the controlling statutes. The following two subsections on dedication of property to public use and on municipal utilities demonstrate how the courts have clarified, and in some instances, expressed the implicit limitations in the Commission's governing authority.

5.2.1. No Public Utility Status Without Dedication of Property to Public Use

Were we to construe Public Utilities Code § 216, § 241, and § 2701 in isolation, the narrow language of these statutes would appear to confer broad Commission jurisdiction over the delivery of water by landlords to tenants for compensation. However, in 1912, the California Supreme Court enunciated a requirement of common law, not express in these statutes today or as previously codified, that conditions public utility status on the dedication of utility property to the public use. (See *Thayer v California Development Co.* (1912) 164 Cal. 117.) The Court later explained that the act of dedication occurs if an entity:

> held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his own system, as counterdistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. (*Van Hoosear v Railroad Commission* (1920) 184 Cal. 553, 554.).

By 1960, in *Richfield Oil Corp. v Public Utilities Commission,* the Court expressed doubts about the applicability of the dedication doctrine to modern public utility status. However, the Court left the doctrine intact. The Court concluded that "the Legislature by its repeated reenactment of the definitions of the public utilities without change has accepted and adopted dedication as an implicit limitation on their terms." (*Richfield Oil Corp* (1960) 54 Cal.2d 419, 430.)

Whether or not dedication has occurred is a factual question. *(Haynes v. MacFarlane* (1929) 207 Cal. 529, 532.) Where dedication has occurred, it may be either express or implied and in the latter case, "it may be inferred from the acts of the owner and his dealings and relations to the property." (*Cal. Water & Tel. Co. v. Public Util. Com.* (1959) 51 Cal.2d 476, 494; see also *Yucaipa Water Co. No. 1 v. Public Utilities Com.* (1960) 54 Cal.2d 823.) The California Supreme Court's 1921 decision in *Story v. Richardson* remains the preeminent authority on application of the dedication requirement in the context of a landlord-tenant relationship. (*Story v. Richardson* (1921) 186 Cal. 162.) In that case, the Supreme Court held that an office building owner was not acting as a public utility though he maintained boilers, pumping engines, hot water heaters, and other equipment in the office building basement for the purpose of supplying tenants with light, heat, and hot water service. (*Id*. at 166.) The owner was "not engaged in the sale and distribution of electricity to the public at large or any portions thereof" the Supreme Court said, emphasizing that the equipment within the building was designed "primarily and pre-eminently for supplying service to the tenants of the building" and that the

owner used his property "solely in a private enterprise." (Id. at 166, 167, 168.)[14]

Over the years as the Commission examined the issue of implied dedication in the landlord-tenant setting, it has scrupulously followed the Supreme Court's *Story v. Richardson* decision. In *Barnes v. Skinner*, the Commission held that owners of a tract of land containing rental homes had not dedicated their facilities to public use by providing water and sewage services, for a fee, only to their tenants. (D. 85492 slip op. at 8-9; (1976) 79 CPUC 503.) Shortly thereafter, in a commercial context, the Commission held that owners of a regional shopping center who resold electricity to their tenants had not dedicated their property to public use. *(Bressler v. Bayshore Properties, Inc*. (1977) 81 CPUC 746, 748.) Subsequently (and prior to the enactment of § 2705.6 which creates a statutory exemption), the Commission held that owners of a MHP who used a well that they owned to provide water to park tenants had not dedicated their facilities to public use. (*Fowler v. Guenther* (1988) 27 CPUC 2d 591, 594.) The Commission declined to address "whether the existence of a landlord-tenant relationship will be sufficient in all situations to prevent the Commission from asserting jurisdiction." (*Id*. at 595.) Most recently, the Commission concluded that it had not erred in failing to assert jurisdiction over commercial building owners who had installed certain telecommunications facilities for use by their tenants. (*OIR into*

[14] Perhaps it is worth noting that in 1921, unlike today, the tenant's cost of utility services was traditionally bundled into the rent. It is unclear whether today's Court would see the *Story v. Richardson* "private enterprise" differently if water and sewer services were billed separate from rent and in an amount in excess of a simple pass through of the landlord's utility costs.

Competition for Local Exchange, D.00-03-055, slip op. at 11 [modifying D.98-10-058 and denying rehearing].)

While it is not the task of this proceeding to definitely determine, based on the unique facts of water or sewer service at any given MHP or multi-unit apartment, whether that service is legal, one guideline is clear: existing statutes which define public water and sewer utilities must be interpreted in light of the common law doctrine of dedication.

As determined in the Commission decision on the *Application of MHC*, discussed in section 4.1, express dedication of property to public use meets the dedication requirement for public utility status. In this proceeding, with the single exception of MHC, no MHP or multi-unit apartment owner (or owner's representative) has expressly dedicated water or sewer facilities to public service. In fact, the apartment lobby and others vigorously argue that the dedication requirement cannot be implied or inferred from the landlord's simple acts of providing tenants with water and sewer service, and subsequently billing for those services. Therefore, they contend they are not public utilities and cannot be subjected to CPUC jurisdiction.

5.2.2. Municipal Utilities Are Not Public Utilities Subject To CPUC Jurisdiction

In his jurisdictional analysis of public utility law, Witkin succinctly opines: "[*t]he Commission's jurisdiction* extends only to regulation of *privately owned utilities*; in the absence of express statutory provision, it has no jurisdiction over *municipally owned utilities.*" (Witkin, 8 Summary of California Law, 9th Edition, Constitutional Law § 892, p. 436, emphasis in original.)

In a case brought by Inyo County (Inyo), the California Supreme Court held that absent an authorizing statute, the CPUC lacked jurisdiction to regulate the rates the Los Angeles Department of Water and Power (LADWP), a municipally owned public utility, charged for water service outside the corporate border in Inyo. Inyo had argued that, in making sales outside its municipal border, LADWP was acting as a private corporation and therefore, the rates established for Inyo residents were subject to CPUC jurisdiction and control. The Supreme Court noted that § 10005 expressly permits a municipal corporation to sell outside the corporate limits, and no statute grants the CPUC authority to regulate the rates for such sales. (*County of Inyo v. Pub. Util Comm.*, (1980) 26 Cal.3d 154, 166 [*Inyo County*].) The Supreme Court opined, however:

> Possible legislation conferring PUC jurisdiction over municipally owned water corporations, selling beyond municipal borders or *even within such borders*, would fall clearly within the scope of present article XII, section 5. (*Id*. at 164, emphasis added.)

The Legislature has not conferred upon the Commission authority over municipal utility water or sewer sales; neither has is it conferred such authority over sales by municipal utility districts or public utility districts.[15] Since municipal entities are not Commission-regulated public utilities, one must consider whether MHPs or multi-unit apartments that do not dedicate their facilities to public use but do resell the water or sewer services

[15] Division 5 of the Public Utilities Code, Section 10001 et seq., governs utilities owned by municipal corporations; Division 6, Section 11501 et seq., governs municipal utility districts; and Division 7, Section 15501 et seq. governs public utility districts.

provided to them by a municipal utility can be public utilities subject to CPUC jurisdiction. The Commission has not previously considered this question.

6. Application of the Submeter Exemption

When the Legislature passed § 2705.5 in 1983, it exempted from the Commission's control MHPs and multi-unit apartments with a submetered water service system if the submetered customers are charged the same rate that they would have been charged if served directly by the water corporation.[16] Six years earlier, in 1976, the Legislature passed a similar, but more detailed, exemption statute governing submetering of gas and electricity at MHPs and multi-unit apartments.

While these exemption statutes may benefit tenants by imposing a cap on their rates, it appears that the Legislature only intended that tenant end-users be indifferent to whether the water corporation or the MHP billed them for their water service. As shown by the legislative history of § 2705.5 (see section 5.1) the statutes were designed to provide qualifying MHPs and multi-unit apartments a "safe harbor" from public utility status and attendant CPUC regulation.

The information available to us in this proceeding indicates very few apartments in California have submetered water service and the record registers no concerns from either landlords or tenants (with the exception of submetered hot water—See Complaint 98-03-023, *DiResta v Esprit de Sol Apartments*). However, the issue is a contentious one at MHPs. The two

[16] See relevant text of § 2705.5 in section 5.1 of this decision. There is no comparable exemption for sewer service.

primary disagreements between the parties concern: (1) whether the statutory reference in § 2705.5 to "water corporation" is confined to the definition contained in § 216 or whether it means any water supplier, including those not subject to CPUC-regulation; and (2) what is the "rate" charged to submetered customers that qualifies for the § 2705.5 exemption from CPUC jurisdiction. After discussing these disputes between the parties, we note the differences in Commission control provided by the comparable water and energy exemption statutes.

6.1. "Water Corporation"

The meaning of the term "water corporation," is significant because it determines which entities are eligible for the § 2705.5 exemption. For example, if "water corporation" means any water supplier, then every MHP and multi-unit apartments that has submetered water service could consider seeking the § 2705.5 exemption. If, on the other hand "water corporation" is limited to the definition expressed in § 216, then the "water corporation" which serves the MHPs must be a CPUC-regulated utility and only MHPs served by a CPUC-regulated water utility qualify for the § 2705.5 exemption. For the reasons explained below, we conclude the Legislature intended the narrower interpretation - that § 2705.5 applies only to those MHPs that obtain water from CPUC-regulated water utilities.

First, as known by the legislative history, the 1984 amendment to § 2705.5 expressly changed the language describing the water service provider from "public utility water company" to "water corporation," thereby limiting the application of the exemption. The term "water corporation is defined in Part 1, § 216 and §241 of the Public Utilities Code

as a public utility subject to CPUC jurisdiction. It is that meaning that must be used to construe the § 2705.5 statutory exemption.

Second, we cannot ignore the message of *Inyo County*. (See Section 5.2.2 of this decision.) There the Supreme Court was clear that no matter how much the behavior of a municipal utility looks like that of a public utility, this Commission has no jurisdiction over the actions of the municipal entity unless and until such time as the Legislature says so. The Supreme Court noted that there is no constitutional restriction that precludes the Legislature from conferring Commission jurisdiction over municipally owned water corporations. The fact that the Legislature has not expressly conferred such jurisdiction on the Commission is a strong indication that it does not intend that we have that authority.

We cannot agree with CMRAA's proposal that the existing statutory framework leaves the Commission with discretion to routinely oversee the rates charged by all MHPs served by non-jurisdictional water providers. We believe that the proposal violates *Inyo County*.[17] Where a MHP receives water service from a provider the CPUC does not regulate, disputes about submetering rates may be within the purview of the governing board of the water provider, the local rent control authorities, or the civil courts. However, we conclude that such disputes are not presently subject to the authority of this Commission.

---

[17] For example, when the Commission assumes jurisdiction for the purpose of deciding if an MHP qualifies for the § 2705.5 exemption, the Commission must look to the rates that the MHP's water provider would charge if it were serving directly the MHP's tenant. If the MHP's water provider were a municipal entity, the Commission would be required to scrutinize the municipal entity's rates to determine whether the MHP was charging the exemption-qualifying rate. We believe that the Legislature would have expressly conferred such "quasi-jurisdiction" on this Commission if the Legislature wanted us to have it.

The sole exception that would engender CPUC jurisdiction under existing law is the hypothetical situation where the MHP has dedicated its property to public service. Where dedication has occurred, the MHP then would be required to qualify in all other respects for authority to operate as a public utility by satisfying this Commission that it should be granted a CPCN. Otherwise, the MHP would have to cease and desist its activity.

6.2. "Rate"

To be eligible for the § 2705.5 exemption from CPUC regulation, a MHP must charge the rate "which would be applicable if the user were receiving the water directly from the water corporation."[18] Parties disagree about what the exempting "rate" should include. The parties most concerned about this question tend to represent MHPs subject to rent control ordinances or the tenants of these MHPs.

CMRAA, WMA and MHC all agree that at MHPs with submetered water systems, the owner/operator should be free to bill tenants at the "prevailing rate," which they define as the sum of all rate elements the water corporation would charge the tenant as a directly-served end user: applicable volumetric rate, customer service charge (sometimes referred to as "readiness to serve charge"), and any taxes. GSMOL strongly opposes this interpretation. Instead, it contends that the § 2705.5 rate should be confined to each tenant's submetered volumetric rate plus a pass through, on a pro rata basis, of other charges the water corporation directly bills to the MHP.

[18] Whether or not it expressly applies to § 2705.5, the definition of "rates" in § 210 is not helpful here. It merely states that rates "includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise." (§ 210.)

GSMOL argues that tenants already pay the costs of installation, operation and maintenance of submeter water systems because these costs are imbedded in rent. This is so, claims GSMOL, because the Civ. Code § 798.4 formula (in the Mobilehome Residency Law) requires an MHP, before separately billing for utilities, to deduct from rent only the "average amount charged to the park management for that utility service for that space during the 12 months immediately preceding." (See footnote 5 above which more fully quotes Civ. Code § 798.41.) While CMRAA, WMA and MHC acknowledge that their proposal exceeds a straight pass through to tenants of a pro rata share of the master meter bill, they argue it serves as a reasonable proxy for the total costs of submeter operation and maintenance, thereby enabling the owner/operator to recover the capital and operational costs of the water system, including meter reading and billing. They argue that GSMOL's proposal forces MHPs to submeter water at a loss, particularly if a rent control ordinance applies.

Moreover, according to MHC, GSMOL's proposal results in a subsidy to MHP tenants, because their total water bills are less than those paid by other residential customers (whether resident of MHPs or not) who receive water directly from a water corporation. CMRAA points out that the Commission used a similar prevailing rate proxy in the 1970s before it adopted specific submetering discounts for individual electric and gas corporations. CMRAA asks us to note that Civ. Code § 798.38 requires management of MHPs with submeter systems to "post in a conspicuous place, the prevailing residential utilities rate schedule as published by the serving utility." And WMA adds that Civ. Code § 798.41 presents no bar since the Legislature did not intend Civ. Code § 798.41 to be a rate setting statute.

The positions of CMRAA, WMA, and MHC are not entirely aligned, however. Drawing from Nevada's MHP laws, CMRAA argues the Commission should require MHPs to establish individual escrow accounts and deposit in them the "differential" over master meter costs which prevailing rates would yield.[19] MHC argues the Commission should hold that MHPs, which charge prevailing rates, are not exempt from CPUC regulations but are, in fact, public utility water corporations. The CPUC should call these entities "Class M" public utilities and then establish a "light-handed" regulatory regime for ratesetting and other purposes limited to advice letter procedures.

It is well established the Commission has exclusive ratemaking authority over public utility matters delegated to the Commission by the Legislature. The rules of statutory construction require us to harmonize § 2705.5 with Civ. Code § 798.41 if possible, and to seek to avoid interpretations which would require us to ignore one statute or the other. (*See Fuentes v Worker's Comp. Appeals Bd*. (1976) 16 C 3d 1, 7, citing other cases.)

In *Application of MHC*, supra, the Commission recognized that since its enactment in 1978, the landlord-tenant relationship between MHP owners/operators and their tenants has been extensively regulated by the Mobilehome Residency Law, Civ. Code § 798 et seq. The Commission explained that the statutory framework "recognizes that unlike other renters, mobile home owners cannot easily relocate should their tenancy be terminated. Accordingly, their tenancy is considered "different" and

[19] CMRAA refers to Nevada Resource Code § 704.940

the relationship is to be treated differently." (*Application of MHC*, supra, D.98-12-077 at p. 3.) The Commission pointed out that Civ. Code § 798.31 (part of the 1978 enactment) expressly provides that mobilehome owners shall be charged no fees other than for rent, utilities, and incidental reasonable charges for services actually rendered to them. Civ. Code § 798.41, enacted in 1990 and amended in 1992 to authorize MHPs to remove "utility fees and charges" from rent and bill for them separately, severs those costs from rent control restrictions.

We have no reason to conclude that the Legislature intended Civ. Code § 798.41 or other provisions of the Mobilehome Residency Law to provide MHP tenants with water at a subsidy below the costs to other residential water users or to require MHPs to submeter water at a loss. The record here, however, does not establish that the prevailing rate is a fair proxy for the average costs of in-park submeter water systems. Far too little is known about the actual basis for the rent levels charged at individual MHPs, whether subject to rent control or not. In the latter case, as GSMOL points out, the rent formula typically is structured to allow some increase in MHP net operating income based on increases in the CPI. Some rent formulas provide that the base year rent is the last year of rent prior to rent control, and rebuttably presumed to meet capital and operational costs.

The question of whether a MHP is charging its tenants the "rate" that qualifies for the § 2705.5 exemption can only be determined on a case by case basis. Because the "rates" of water corporations vary in numerous ways, there is no formula that we can provide beyond the clear language

of the statute – "the rate which would be applicable if the user were receiving the water directly from the water corporation." [20]

As a general rule, the "applicable rate" is the specific rate or the total of several rate components that can be found in the Commission-authorized tariffs of the water corporation that provides water service to the MHP. Pursuant to Rule 19, upon written request, a water corporation must provide the MHP owner/operator with a copy of the rates it would charge if the water corporation served each MHP tenant directly. However, we caution that the water corporation's statement of "prevailing rates" is not a conclusive determination of the "applicable rate."

It is this Commission's obligation to determine the "applicable rate." That rate may not include each rate component that the water corporation charges its residential customers directly. Special rates such as surcharges or taxes collected by the water corporation for a specific purpose may fall into this category. For example, it is reasonable to conclude that a local tax which the water corporation is obliged to charge its direct customers but which the MHP is not required to collect from submeter customers is not a component of the "applicable rate" that can be charged to each submeter customer. Instead, it is reasonable to charge submetered customers only a pro-rata share of the tax actually charged to the MHP by the water corporation. Using this method, the tax is paid, as intended, to the local

[20] For example, as a general rule the rates of the largest water corporations (Class A) vary based on the size of the customer's water meter. Once the water meter size is identified, then "rates" include a service charge which includes up to 50% fixed costs and a commodity (or volumetric) charge that includes the balance of the fixed costs. In contrast, the charges of smaller CPUC-regulated water utilities (Classes B, C and D) are based on different generic and, sometimes, individual considerations.

government; the MHP does not reap a financial benefit from the tax collection, nor, does the MHP suffer a tax-induced financial loss.

Because the "applicable rate" is based on the capital and operation costs of the serving water corporation, that rate may not be sufficient each and every month or year to compensate the MHP for the ongoing capital and operation costs incurred in construction, repair and service of the submeter system. On the other hand, when the "applicable rate" more than compensates the MHP for the full cost of submetered water service, the MHP reaps a financial benefit, some of which may be needed in the future to repair an aging submeter system. The § 2705.5 exemption guarantees the MHP a safe harbor from regulation. It does not guarantee consistent cost protection.

The decision to seek the § 2705.5 exemption is that of the MHP. Submetered customers have no such discretion. Therefore, it is incumbent on this Commission to insure that the "applicable rate" does not cost the submetered customer more than he/she would pay if served directly by the water corporation. In examining the water charges at a given MHP, we must consider whether the MHP's rent structure includes recovery of water expenses –specifically capital and operation costs associated with the submeter system.[21] Consistent with our discussion above, we conclude that the MHP owner/operator may not have it both ways. Either these charges must be removed from rent altogether, and then the submeter

[21] Interpretation of the Civil Code § 789.41 by rent control authorities may vary. Therefore, a MHP's compliance with that statute may not provide for removal from the rent of all capital and operation costs associated with the submeter system.

customer may be charged the same rate applicable to any other residential customer (i.e., the "prevailing rate"), or the submeter customer may be charged only for volumetric submeter usage plus a pro rata allocation of any other charges billed to the master meter.

6.3. Comparing the Water and Energy Submeter Exemption

Superficially, § 2705.5 parallels § 739.5, the 1976 statute which governs the submetering of gas and electricity at MHPs and multi-unit apartments. Under § 739.5(a), the same general exemption from regulation as a public utility applies where the MHP owner/operator who is the "master meter customer" charges "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." However, § 739.5(a) establishes a submeter discount for MHP owners/operators, designed to cover, at least partially, the costs of the operation and maintenance of the electric and gas submeter system, as follows:

> 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. (§ 739.5(a), emphasis added.)

The Commission interpreted this portion of the statute in its 1995 decision, *Rates, Charges, and Practices of Electric and Gas Utilities Providing Services to Master-metered Mobile Home Parks* (*Rates, Charges and Practices at MHPs*), holding that a MHP was prohibited from surcharging its tenants to

recover any costs greater than the utility's average costs, even if those costs were reasonably incurred. (*Rates, Charges and Practices at MHPs*, (1995) 58 CPUC 2d 709, 718.) The Commission noted that the electric and gas MHP discount:

> … includes a factor for investment-related expenses for all initial and *ongoing* capital upgrade costs. Also included in the discount are depreciation of the average installed cost of the equivalent distribution system which the utility has installed in its directly metered parks, return on investment, income taxes on the return, and property (ad valorem) taxes. (*Id*. at 717, emphasis in original.)

When comparing the gas/electric submeter exemption provisions with those of the water exemption, it appears that the energy version affords landlords more protection and the Commission more control. Not only does § 2705.5 not provide for a MHP water discount, but it does not provide any other explicit means or method for the MHP owner/operator to recover the costs of installation of the submeter water system, its operation, or maintenance. The gas/electric exemption statute provides the Commission with an intermediary regulatory oversight position distinguishable from the water submeter exemption where the Commission only has the authority to decide whether an entity is a public utility or is exempt from our control.

Recently, the Legislature has enacted another difference in the treatment of energy submetering law by prohibiting the submetering of gas and electric services at MHPs (and multi-unit apartments) constructed after 1997 in the service territories of CPUC-regulated gas and electric corporations. Section 2791(c) provides that new construction must have

individual gas and electric meters for all spaces (and units) and be served directly by the public utilities. There is no comparable legislative restriction applicable to water service.

No parties, including the Class A and B water utilities identified as respondents in this proceeding, argue for a submeter discount. We may wish to explore this issue at some later date. Several factors make calculation and imposition of a water submeter discount difficult, however. One is the larger number of Commission-regulated water corporations (ranging from Class A companies with more than 10,000 service connections to Class D companies with fewer than 500), compared to the relatively few and typically very large gas and electric corporations. The attendant difficulty of calculating an "average" utility cost to serve as a differential benchmark is readily apparent. A related problem is how to fairly resolve the revenue allocation issues which a submeter discount would pose. The non-MHP customer base for most water corporations, if not all, is considerably smaller than for gas and electric corporations. Creation of a discount could require a reallocation of revenue requirement among the other customers.

7. Water Service at Multi-Unit Apartments

Section 2705.5 does not apply to multi-unit apartments which are not submetered and there is no other statute in the Public Utilities Code that establishes nonpublic utility status for landlords who do not submeter but do bill tenants for water.[22] Likewise no statute establishes nonpublic

[22] Search of the provisions of the Civil Code which govern landlord/tenant relations reveals Civ. Code § 1940.9, which requires a landlord to make certain

Footnote continued on next page

utility status for landlords who separately bill tenants for hot water or filtered water (that is, water that is in some way different than the commodity supplied to the landlord by the water corporation).

Therefore, we begin with the basic jurisdictional conclusion discussed in section 5.2.1. of this decision. In the hypothetical situation where the apartment water system has been dedicated to public service, the landlord must obtain a CPCN from this Commission for authority to operate as a public utility, and the Commission must establish water rates, before tenants can be billed for water service. Were the Commission to conclude a multi-unit apartment was illegally billing for water service (that is, where the landlord's actions permitted dedication to be inferred) then the Commission would have authority to issue a cease and desist order. If no dedication has occurred (this is a factual question --see section 5.2.1) then the matter is a landlord/tenant issue subject to local rent control authorities if a rent control ordinance applies, or to the jurisdiction of the civil courts.

The apartment lobby argues at length that we should determine, as a generic rule, that the provision of water by a landlord as an accommodation to apartment tenants should never be considered public utility service. We do not believe existing law permits us to draw that conclusion -- dedication is a factual question. However, we do question whether future case-by-case examination of the facts pertinent to potentially numerous individual complaints filed at the CPUC by multi-

---

disclosures when an apartment does not have a separate gas or electric meter. The statute does not apply to water.

unit apartment tenants provides a feasible governmental solution.

The record developed in this proceeding does not permit us to conclude to what extent landlords may be relying upon the dedication doctrine as a shield and then levying unfair water charges on their tenants. We heard from a number of outraged apartment tenants, at the Anaheim PPH and elsewhere, who clearly believe they are being unfairly billed, often by billing agencies with whom the landlord has contracted to impose a "RUBS" regime. Some of the most moving public input and correspondence we received has focused on this issue. Water conservation undisputedly is an important state policy in California, as it is in much of the arid western United States. We cannot conclude, based on the anecdotal information in the record that any of the "RUBS" methodologies proposed are fair or that they actually result in water conservation.

In many instances, the issues of water allocation at nonsubmetered multi-unit apartments may prove to be landlord/tenants disputes over which this Commission has no jurisdiction. We do believe this investigation has yielded two outcomes of value: (1) an analysis of the existing law governing these issues, including the doctrine of dedication, that could serve to limit CPUC jurisdiction despite what may appear to be a need for proactive consumer protection; and (2) an identification of the key considerations for shaping policy in this area – reasonableness of charges, administrative feasibility, and water conservation.

Providing for some economic means of submetering, or directly metering, each unit in existing multi-unit apartments might relieve some of the existing problem. Several parties advised that new, electronic metering technologies are being developed which could be used in existing units, though others have cautioned that accuracy has not been

proven. Jurisdictional issues bear upon the law governing metering of water (as well as gas and electricity). The CPUC's General Order 103 sets the standards for water meters and for meter reading applicable to CPUC-regulated water corporations. The standards for submeters at multi-unit apartments (or MHPs) fall within the province of local weights and measures jurisdictions and/or the Division of Measurement Standards (DMS) within the California Department of Food and Agriculture, under Bus. & Prof. Code § 12100 et seq. DMS uses the specifications, tolerances, and other technical requirements adopted by the National Conference on Weights and Measures, which is sponsored by the National Institute of Standards and Technology (NIST).

8. Sewer Service

Section 230.6 defines "sewer system corporation" to mean "every corporation or person owning, controlling, operating, or managing any sewer system for compensation" within California. However, the definition of "sewer system" in § 230.5 specifically excludes CPUC-regulation of sewer facilities on the property of a single owner. That statute provides:

> Sewer system" includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including any and all lateral and connecting sewers, interceptors, trunk and outfall lines and sanitary sewage treatment or disposal plants or works, and any and all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. *"Sewer system" shall not include a*

> *sewer system which merely collects sewage on the property of a single owner*. (§ 230.5, emphasis added.)

Therefore, we agree with GSMOL that the jurisdictional conclusion we must draw is that where a MHP is owned by a single owner, in-park sewer facilities are not subject to regulation by the CPUC. The same conclusion would apply to multi-unit apartment sewer systems, where a single individual or entity owns the apartments. That is the clear impact of existing law.

In all other situations -- where the MHP or multi-unit apartment is owned by more than one person or entity -- the dedication doctrine must influence our interpretation of § 230.5. Absent establishment of the fact of dedication, these sewer services cannot be deemed public utilities subject to our jurisdiction. Non public utility sewer charge and services disputes must be resolved elsewhere, by local rent control boards or the civil courts, for example.

9. Other Matters

Rule 19, entitled "Service to Separate Premises and Multiple Units, and Resale of Water," is included in the tariffs of public utility water corporations regulated by the CPUC. Section B.2.b. of Rule 19 recognizes that submetering water at MHPs and multi-unit apartments in accordance with § 2705.5 is a lawful activity. Section C. of Rule 19 prohibits the resale of water by utility customers except in limited situations not relevant to the MHP and multi-unit apartment issues explored in this proceeding. After considering the positions of all parties, including the public utility water corporations, and reviewing relevant jurisdictional law, we conclude that amendment of Rule 19 will not provide solutions to the problems identified.

10. Conclusion

As a general rule, the Commission has exclusive and primary jurisdiction over the establishment of rates for water and sewer services provided by private entities. Essentially, the Commission has the authority that the Legislature says it has. To the extent that the courts have interpreted public utility laws, then Commission jurisdiction is governed by controlling case law.

Based on existing statutory and case law, the Commission has no jurisdiction over municipal entities that provide water or sewer service. Neither does the Commission have jurisdiction over entities expressly exempted by statute from CPUC regulatory control. As noted in the OII, we have previously recognized that the Commission has no rent control jurisdiction. (See *Rates, Charges, and Practices MHPs* 58 CPUC2d at 718.) The absence of rent control jurisdiction, however, does not mean that those with rent control authority or the owners of MHPs or of multi-unit apartments are free to ignore Commission rulings concerning utility rates where our jurisdiction to regulate these rates is clear. (See *Rainbow Disposal Co. vs. Escondido Mobilehome Rent Review Board*, (1998) 64 Cal.App.4th 1159, 1167.)

As we look to the future, we emphasize that under existing law, whether an individual MHP or multi-unit apartment is a public utility subject to our regulatory control must be determined on a case by case basis. Incident to our ability to determine what entity is a public utility, we also are authorized to determine whether a MHP or a multi-unit apartment qualifies as legally exempt from CPUC control. Today, we conclude that the statute that exempts MHPs and multi-unit apartments from CPUC jurisdiction when they submeter water services does not apply

when the primary utility provider is a municipal entity. Similarly, in most instances the CPUC lacks jurisdiction to regulate the non-submetered water or sewer service that is provided to the MHP or mulit-unit apartment by a municipal entity.

As we review the parameters that determine our jurisdictional reach, it appears that CPUC jurisdiction is decidedly limited when it comes to the protection of tenants from allegedly unfair charges targeted for water or sewer service imposed by landlords whose practices are not presently being scrutinized by any other governmental entity. Similarly, we lack authority to address the alleged plight of landlords who reportedly are unable to recover the rising costs of water and sewer services when they are rolled into rent. The Commission has no intermediate regulatory authority over these circumstances. The Commission only has the jurisdiction to determine whether or not a MHP or multi-unit apartment is a public utility.

It is entirely possible that a private entity, which does not qualify for public utility status, may nonetheless charge tenants water or sewer rates that, in other circumstances, might be considered unfair or unreasonable. By the same token, if a MHP or multi-unit apartment is determined to be a public utility, the regulatory laws that control the development of rates will result in charges that are legally just and reasonable but may be higher than the tenant would pay if the primary utility provider were charging them directly for water or sewer service. [23]

[23] The regulatory formula for establishing rates allows for reasonable expenses, including the use fee paid to the Commission, depreciation of facilities and a fair rate of return on the capital investment. Thus, the same formula that is

Footnote continued on next page

Finally, we are concerned that in deciding that a MHP or multi-unit apartment is a public utility, the Commission would be adding to the number of small water corporations. That practice seems contrary to recent legislative policy which appears to promote the elimination of small utilities through merger or sale to their larger counterparts. (See footnote 8.) There can be no doubt that small utilities do not benefit from the economies of scale that, in larger organizations, could produce just and reasonable charges that are more customer friendly. Furthermore, increased awareness and concern about contamination create additional problems and costs for small water utilities. As we know from the proceeding initiated by our Water Quality OII (I.98-03-013), virtually all MHPs and numerous multi-unit apartments that resell water service qualify as public water systems subject to the panoply of Safe Drinking Water laws and regulations administered by the Department of Health Services. (See Health & Saf. Code § 116275(h).)

Comments on Draft Decision

The draft decision was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. The revised draft decision was also mailed for comment.

---

employed to set the rates of the water company that sells water to the MHP or multi-unit apartment will again be used to set the rates that will be charged to the end user tenants. The tenant is likely to pay more to a MHP or multi-unit apartment with public utility status than it would be required to pay the water provider for that MHP or apartment if the primary water provider charged the tenant directly. At a minimum, the primary water provider's rates would only include the CPUC user fee of 1.4% of its gross revenues and would not include an additional CPUC user fee 1.4% of the gross revenues of the MHP or multi-unit apartment.

Findings of Fact

1. The facts and the arguments about applicable law focus on three basic situations:

   a. charges for water service at submetered MHPs;

   b. charges for water service – and particularly, the method for allocating charges -- at multi-unit apartments which are not submetered; and

   c. charges for sewer service.

In each of these scenarios, the owner/operator of the MHP or multi-unit apartment is the customer of record of the water or sewer provider and the tenant (the end use residential consumer) is not.

2. The recent interest in these water and sewer issues has been stimulated by changes in billing practices at some MHPs and multi-unit apartments and complaints about these changes.

3. The history at De Anza, which is subject to local rent control, illustrates the major controversy surrounding MHPs: whether water and sewer charges may be billed at the "prevailing rate" of the utility provider (i.e. what the provider would charge a directly served end use customer, including volumetric rate, customer charge, and any tax) or only on a "pass through" basis (i.e. a pro rata allocation of the actual charges billed by the provider).

4. By comparison to MHPs, few multi-unit apartments are submetered and water charges (like sewer charges) typically have been subsumed in rent.

5. Owners/operators of some unsubmetered multi-unit apartments, or their billing agents, have begun charging tenants directly for water or sewer service using a proxy for metered usage known as "RUBS", or Ratio Utility Billing Systems. Typical "RUBS" methodologies employ apartment

square footage or number of tenants per unit as the basis for computing water and sewer charges.

6. The CPUC regulates about 150 water corporations as public utilities; these water corporations provide only 20% of the potable water supply delivered to end use customers in California. The remaining 80% come from other water providers, such as municipal public utilities, municipal utility districts, public utility districts, and a limited number of private water sources, none of which the CPUC regulates.

7. The CPUC regulates about nine sewer system corporations as public utilities; these sewer system corporations provide approximately 2,000 service connections in California.

8. Unlike § 739.5 which governs the submetering of gas and electricity at MHPs, § 2705.5 does not provide for a MHP discount for submetering water. Neither does § 2705.5 provide any other explicit means or method for the MHP owner/operator to recover the costs of installation of the water submeter system, operation, or maintenance.

9. As enacted in 1983, § 2705.5 codified an exemption from public utility status for MHPs that charge the same rate as the user would receive from the "serving public utility water company."

10. Several factors, enumerated in section 6.3 of this decision, make calculation and imposition of a water submeter discount difficult.

11. Recovering water and sewer costs from MHP tenants on a "prevailing rate" basis provides the MHP owner/operator with a surplus over the master meter bill. The differential is primarily attributable to imposition of a customer charge on a per space basis, plus applicable tax.

12. Though MHP water and sewer charges have been removed from rent in accordance with the formula in Civ. Code § 798.4 (part of the

Mobilehome Residency Law), costs of installation, operation and maintenance of submeter water systems may be imbedded in rent.

13. Charging MHP tenants a pro rata allocation of the master meter water and sewer charges may result in a subsidy to them, because their total bills are less than those paid by other residential customers (whether resident of MHPs or not) who receive water directly from a water corporation.

14. The record does not establish that the prevailing rate is a fair proxy for the average costs of in-park submeter water systems since far too little is known about the actual basis for the rent levels charged at individual MHPs, whether subject to rent control or not.

15. The Legislature bans the submetering of gas and electricity at future MHPs and multi-unit apartments (i.e. new construction). No comparable ban prohibits submetering of water services at new MHP and multi-unit apartment construction.

16. Though water conservation is an important state policy, the anecdotal information in the record does not allow us to conclude that any of the "RUBS" methodologies proposed are fair or that they result actually result in water conservation.

17. New, electronic metering technologies are being developed which may provide an economic means of submetering – or directly metering – water service to individual units in existing multi-unit apartments and the Legislature may wish to study this subject.

18. Case by case examination of dedication of water or sewer facilities at MHPs and multi-unit apartments is not a feasible governmental solution to the generic problems identified in this proceeding. Moreover, should the still relatively small number of formal

complaints filed at the Commission become a steady stream, the fiscal consequences upon the Commission could be considerable.

19. As a general rule, the "applicable rate" under § 2705.5 is the specific rate or the total of several rate components that can be found in the Commission-authorized tariffs of the water corporation that provides water service to the MHP. However, as discussed in greater detail herein, a water corporation's statement of "prevailing rates" is not a conclusive determination of the "applicable rate".

20. Hearings are unnecessary, since the proceeding can be resolved on the initial pleadings and the parties' briefs.

Conclusions of Law

1. Existing statutes which define water and sewer public utilities must be interpreted in light of the common law doctrine of dedication.

2. The language governing public utility water corporations (§ 216, § 241, and § 2701 of the Public Utilities Code), construed in light of the dedication doctrine, does not confer broad Commission jurisdiction over the delivery of water by landlords to tenants for compensation.

3. Legislative history establishes that the 1984 amendment of § 2705.5 to replace "serving public utility water company" with "water corporation" was a nonsubstantive code maintenance amendment made to conform the language with the definition in § 241.

4. Section § 2705.5 exempts from regulation by the CPUC, as public utilities, MHPs which obtain water from § 241 water corporations.

5. The Public Utilities Code does not grant the Commission discretion to routinely assume oversight of the rates charged at all MHPs served by water providers which are not § 241 water corporations.

6. Where a MHP receives water service from a provider the CPUC does not regulate, disputes about submetering rates are within the purview of the municipal or district board which governs that provider, local rent control authorities, or the civil courts – unless the MHP has dedicated its property to public service. Such MHP would be required to obtain a CPCN from this Commission for authority to operate as a public utility, or cease and desist.

7. Section § 2705.5 does not apply to multi-unit apartments which are not submetered.

8. No statute in the Public Utilities Code establishes nonpublic utility status for multi-unit apartment landlords who do not submeter but do bill tenants for water.

9. No statute in the Public Utilities Code establishes nonpublic utility status for apartment landlords who separately bill tenants for hot water or filtered water (that is, water that is in someway different from the water supplied to the landlord by the water corporation).

10. Where a multi-unit apartment water system has been dedicated to public service, the landlord must obtain a CPCN from this Commission for authority to operate as a public utility, or cease and desist. If no dedication has occurred, then water service disputes are landlord/tenant issues subject to local rent control authorities if a rent control ordinance applies, or to the jurisdiction of the civil courts.

11. Under § 230.5, which defines "sewer system", where a MHP or multi-unit apartment is owned by a single owner, the sewer facilities are not subject to regulation by the CPUC.

12. Where the MHP or multi-unit apartment legally is owned by more than one person or entity, the application of the dedication doctrine

provides two possible results. Where dedication has occurred, the MHP or multi-unit apartment must obtain a CPCN, or cease and desist. Absent dedication, sewer service disputes are landlord/tenant matters, subject to the jurisdiction of local rent control boards, in some cases, or the civil courts.

13. Amendment of Rule 19 in the tariffs of CPUC-regulated water corporations will not provide solutions to the problems identified in this proceeding that cannot be addressed because the CPUC lacks jurisdiction.

14. The Commission should confirm the preliminary quasi-legislative categorization in Resolution ALJ 176-3010 and confirm that no hearings are necessary.

15. In order to provide guidance to the parties, this order should be effective today.

O R D E R

IT IS ORDERED that this proceeding is closed.

This order is effective today.

Dated May 14, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ Henry M. Duque
Commissioner

I dissent.

/s/ Richard A. Bilas
Commissioner