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Decision 88 03 082 MAR 23 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

GILBERT FOWLER and RICK ARNOLD, Complainants, v. HENRY GUENTHER and JAMES A. COLSEN, both dba CERES WEST MOBILEHOME PARK, Defendants.	Case No. 86-03-008 (Filed March 6, 1986)
GILBERT FOWLER and RICH ARNOLD, Complainants, v. Ceres West Investors, a California Limited Partnership: Paul R. Olson; David H. Pitzen; Jennifer L. Pitzen; Henry Nishihara; Michael Sheehan; Shannon Sheehan, dba Ceres West Mobilehome Park, and Does I-X, Defendants.	Case No. 87-03-017 (Filed March 10, 1987)

ORDER MODIFYING DECISION (D.) 87-11-020
AND DENYING REHEARING

A petition for rehearing of D.87-11-020 has been filed by Gilbert Fowler and Rick Arnold. We have carefully considered the allegations raised in the petition and are of the opinion that the decision should be modified and rehearing denied. Decision 87-11-020 is accordingly modified as follows:

1) Pages 7, 8, 9, and 10 of the discussion are deleted and the following language is substituted:

jurisdiction (Richfield Oil Corporation v. Public Utilities Commission, 54 C.2d 419, (1960).

In S. Edwards Associates v. Railroad Commission, 196 C.62, at 70 (1925), the California Supreme Court applied this "dedication" principle to a case involving the Commission's determination that a water company was a public utility, and stated that: "The test to be applied...is whether or not those offering the service have expressly or impliedly held themselves out as engaging in the business of supplying water 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 from his system....'" A number of subsequent cases reaffirm the validity of this test of public utility status (see e.g., Yucaipa Water Company No. 1 v. Public Utilities Commission, 54 C.2d 823, at 827 (1960)).

The facts in this case lead us to conclude that the provision of water to defendant's tenants does not constitute dedication of defendant's property to public use.

We refer first to Commission precedent to determine this issue. In applying the statutory definitions of the Public Utilities Code and the Richfield Oil Company, supra, "dedication to public use" analysis, over the years "the Commission has consistently drawn the line short of persons who do not 'hold themselves out as providers of public utility service.'" (D.85-11-057, Slip opinion at p. 76). We have previously considered under substantially similar facts, the specific issue whether one who provides water services to his own tenants is a public utility. In Barnes v. Skinner 79 CPUC 503 (1975) we concluded that a landlord's provision of water service only to his own tenants who rented houses on his tract of property would not constitute public utility operation subject to the jurisdiction of this Commission. As we stated in that decision:

"Such service would employ the landlord's property solely in a manner wholly subsidiary and ancillary to a private enterprise, and would not serve to invest the wholly private nature of that arrangement with the unrestricted offer of service which is essential to a public use. That a business may be effected with a public interest does not in and of itself make it

into a "public utility". The Public Utilities Code defines a "public utility" as including every "...water corporation, sewer system corporation...where the service is performed for or the commodity delivered to the public or any portion thereof", and states further that "any person, firm...owning...any water system...who sells...water to any person...is a public utility..." However, years ago the California Supreme Court in Del Mar Water etc. Co. v. Eshleman ((1914) 167 C. 666, 680) stated "Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility and thus take property for public use without condemnation and payment." Consequently, definitions of public utilities contained in the Public Utilities Act must be construed as applicable only to properties as have, in fact, been dedicated to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto."

In the Barnes decision we relied on the decision of the California Supreme Court in Story v Richardson (1921) 186 C. 162. In that case the Court concluded that the landlord's provision of hot water, electricity, and heat to tenants of his 12 story office building and electricity and steam to an adjoining building did not constitute public utility service. The court reasoned that the landlord was not engaged in the sale and distribution of electricity to the public at large or any portion thereof but only to occupants of his own building and under contract to the occupants of an adjoining building. The decision reiterated that the essential feature of a public use is that it is not confined to privileged individuals but is open to the general public. The court found no such general offer on the part of the landlord.

Two years after the Barnes decision, in Bressler v Pacific Gas & Electric Company 81 CPUC 746 (1977), we held that a landlord reselling electricity to his commercial tenants in a regional shopping center was not serving the public and thus was not a public utility. In a subsequent Commission decision, California Hotel and Motor Association v Pacific Telephone &

Telegraph 84 CPUC 352 (1978) we rejected the staff's arguments and held that hotels and motels were not public utilities simply because they provide telephone service to their guests. As we stated in that case:

> If the staff were correct in its assumptions, there would be many other "public utilities" in other areas never thought of as such before. Many apartment houses sub-meter electricity and gas to their tenants. While we have protected the tenants by requiring certain conditions and limitations in the electric or gas utility's sub-metering tariffs, we have never held such apartment houses to be public utilities, nor should we. Apartment houses are in the business of renting to tenants, and the furnishing of electricity and gas is simply part of the rental business.

The determination that the instant defendants are not operating as a public utility is also supported by the decision of California Water and Telephone Company v Public Utilities Commission, (1959) 51 C.2d 478. That decision ruled that a finding of dedication to public use requires evidence of an unequivocal intent to dedicate. The facts of this case do not disclose such unequivocal intent. We therefore, do not find that defendants have held themselves out as offering utility service to the public and therefore dedicated their property to a public use to the extent necessary to support a determination that they are operating a public utility subject to our jurisdiction.

Even if we found that defendants had dedicated their water system to public use, our assertion of jurisdiction would not be a foregone conclusion. We would first need to evaluate defendant's claims that PU Code Sections 2704 and 2705.5 provide them with an exemption from our regulation. Although a review of these claims is not essential to our resolution of the present case we believe a brief discussion of the issues may nonetheless be useful to the parties.

PU Code Section 2704 provides that "[a]ny owner of a water supply not otherwise dedicated to public use and primarily used

for domestic or industrial purposes by him or for the irrigation of his lands," is not subject to the jurisdiction of the Commission even though he sells water to others under certain circumstances. Here, defendants' water supply is not primarily used for domestic or industrial purposes by defendants or for the irrigation of their lands, but rather is used primarily for domestic consumption by the tenants of the mobilehome park. Since defendants do not meet any of the fundamental "primary use" standards of Section 2704, we would not even reach the question whether their water sales are exempt under one of the circumstances set forth in Section 2704.

Under PC Code Section 2705.5, "[a]ny person...that maintains a mobilehome park...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 system is charged at the rate which would be applicable if the user were receiving the water directly from the water corporation." There is nothing in the express language of the section that suggests that it would apply to a mobilehome park supplying water from its own well, rather than receiving it from a utility.

We, therefore, find that defendants' water system is not subject to our jurisdiction. This holding is confined to the facts of this case only. The issue of dedication shall be handled on a case-by-case basis. We do not reach the question whether the existence of a landlord-tenant relationship will be sufficient in all situations to prevent the Commission from asserting jurisdiction.

Finally, we note that even though we find that defendants' water system is not subject to our jurisdiction, the Mobilehome Parks Act (Health and Safety Code Section 18200 et. seq.) permits city or county authorities to regulate the "construction and use of equipment and facilities located outside of a manufactured home,"

2) Finding of Fact No. 6 is modified to state:

> "6. Complainants have failed to demonstrate that defendants have unequivocally held themselves out as offering utility service to the public."

IT IS FURTHER ORDERED:

Rehearing of D.87-11-020, as modified herein, is denied.

This order is effective today.

Dated MAR 23 1988 at SF, CA.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

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