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Decision 91-10-035 October 23, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Donna Matthews, Complainant, vs. Lakeside Water Company, Meadows Management Company, Defendants.	ORIGINAL Case 90-12-035 (Filed December 14, 1990)

Donna Matthews, for Tenants Rights Committee of the Golden State Mobilehome Owners League, complainant.
Frederick B. Sainick, Attorney at Law, for Meadows Management Company, defendant.

O P I N I O N

Donna Matthews (complainant or Matthews) owns a mobilehome and leases space for it in the Plantation on the Lake mobilehome park (the park) in Calimesa. The park has been owned and operated since 1986 by Meadows Management Company (Meadows), a general partnership. Meadows provides water to tenants from a well located on the property. No water is offered to persons outside the park.

When it purchased the property on which the park is located, Meadows also acquired an entity called Lakeside Water Company (Lakeside), that had been established by the previous owners as a mutual water company serving the mobilehome tenants. Lakeside charged tenants a flat rate of $15 monthly for unrestricted use of water, and that rate was continued by the new owners.

Late in 1989, Meadows announced that it would install a water meter for each tenant and change the monthly fee to a $7.50 fixed charge plus 50 cents per 100 cubic feet (Ccf) of water used. The rate was designed to match that of the area's major water purveyor, Beaumont/Cherry Valley Water District. The park's owners said the change was made in order to conserve water and to discourage overuse by some of the tenants. Water use declined after installation of the meters, and monthly water bills for most tenants dropped below $15.

In addition to the monthly charge, Meadows charged each tenant a $100 flat fee for the meter and installation, or an optional $145 plus interest if paid at the rate of $2 per month. Again, this fee matched the $145 meter charge of Beaumont/Cherry Valley. The actual cost to Meadows of the meters and their installation was about $147 per lot.

At the time of this changeover, Meadows was advised by the Water Utilities Branch (Branch) of the Commission Advisory and Compliance Division that Lakeside's status as a mutual water company was questionable. Generally, a mutual water company may sell water only to shareholders. (Consolidated Peoples Ditch Co. v. Foothill Ditch Co. (1928) 205 Cal. 54.) Although, technically, Lakeside's sales were only to Meadows, the sole shareholder, for all practical purposes the park's owners were operating the water system to serve park tenants.

After consulting with counsel, Meadows in December 1989 filed to dissolve Lakeside and began supplying water directly to tenants in what the owners deemed to be an incidental part of their business.

Complainant, stating that she is acting in her capacity as chairperson of the Tenant Rights Committee of the local chapter of a mobilehome tenants' organization, filed this complaint in December 1990. She urges that the Commission declare the park's water service to be a public utility, find that the dissolution of

Lakeside was improper without Commission approval, and roll back the fee for meters and the monthly service charge.

Hearing on the complaint was postponed by agreement of the parties until August 15, 1991. A full day of hearing was conducted at that time in San Bernardino. Complainant was assisted at hearing by another park resident, Dean Scott, and by attorney Charles Nutt, acting in an unofficial capacity. Defendant was represented by attorney Frederick B. Sainick. The Commission heard testimony from four witnesses, and it received 18 exhibits into evidence. The complaint was deemed submitted at the close of hearing.

Motion to Dismiss

Defendants on July 2, 1991, filed a motion to dismiss on the basis that complainant had failed to state a cause of action in view of prior Commission decisions. A motion to dismiss is in the nature of a demurrer and challenges the pleadings on their face. (Barragan v. Banco (1986) 188 Cal.App.3d 283, 299.) The complaint, liberally construed, alleges that current and former owners of the water service, by their actions, held themselves out to serve water to the general public within the context of Section 2701 of the Public Utilities Code (PU Code). The allegations state a cause of action that has been recognized by this Commission in the past.[1] The motion to dismiss is denied.

Discussion

We turn then to the merits of the complaint. Essentially, Matthews alleges that Lakeside Water Company had by 1989 become a public utility, that its liquidation without

1 See, e.g., Yucaipa Highlands Estates v. Western Heights Water Co. (1987) 24 CPUC2d 4 (mutual water company through its operations had become public utility subject to Commission jurisdiction); Burns, et al. v. Dino Bozzetto (1988) 27 CPUC2d 279 (resort's water service deemed to be a public utility).

Commission approval was unlawful, and that, therefore, the water system continues to operate as a de facto public utility. Matthews also believes that while the park owners have the right to install meters, they have no right to charge for meters or to assess a monthly $7.50 service fee for water. Meadows responds that its charges for water are less than those of the nearest water district, that the status of Lakeside is no longer relevant, and that the park's water service is not now and never has been dedicated to the service of the general public.

The latter defense is determinative. We have found on virtually identical facts that where an owner supplies water from its well to mobilehome park tenants, and the service is incidental to the primary business of running the park, there is no dedication of the water system to public use without persuasive evidence to the contrary. (Fowler and Arnold v. Ceres West Investors, et al., Decision (D.) 87-11-020 (1987), as modified by D.88-03-082 (1988).) In Ceres West, we reasoned as follows:

> By operating a water system and selling water to their tenants, defendants appear to be operating a public utility, as defined by PU Code § 2701, which is subject to our jurisdiction unless it falls within the statutory exemptions set forth in the PU Code. In addition to falling within the statutory definition, however, an alleged public utility must be found to have held itself out as willing to supply service to the public or any portion thereof and have thus dedicated its property to public use before we can find it to be a public utility subject to our jurisdiction. (Richfield Oil Corporation v. Public Utilities Commission, 54 C.2d 419 (1960).)
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> 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).)

* * *

In applying the statutory definitions of the Public Utilities Code and the Richfield... 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 [of] 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...." [Y]ears 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 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.
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> 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... did not constitute public utility service....[I]n 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 ...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. D.88-03-082, pp. 1-4.

The determination that Meadows is not operating as a public utility is also supported by California Water and Telephone Co. v. Public Utilities Commission (1959) 51 Cal.2d 478. That decision held that a finding of dedication to public use requires evidence of an unequivocal intent to dedicate. The facts of this case disclose no such unequivocal intent. Indeed, the record shows that the park's owners have acted promptly to try to bring

themselves within the rationale of our Ceres West decision or within other regulatory exclusions.[2]

Contrary to complainant's view, there is nothing wrong with lawfully seeking to avoid regulation by the Commission. In fact, if it can be demonstrated that consumers are adequately protected without such regulation, the Commission itself "always considers the fact that ordinarily it prefers that proliferation of new small uneconomical water utilities be curbed." (Jones v. Mt. Charlie Water Works, D.87-09-032, p. 12; see also Resolution M-4708.) In Yucaipa Highlands Estates v. Western Heights Water Co. (1987) 24 CPUC 2d 4, we found that a mutual water company by its actions had become a public utility, but we gave it 180 days to correct those actions and reinstate its non-regulated status.

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2 In setting rates that are less than those of the nearby Beaumont/Cherry Valley Water District, Meadows sought to comply with the exemption of PU Code § 2705.5, which states:

> Any person or corporation, and their lessees, receivers, or trustees appointed by any court, that maintains a mobilehome park or a multiple unit residential complex and provides, or will provide, 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.

The Meadows water system is not a submetered system. While the intent of Section 2705.5 appears applicable to defendants, there is nothing in the express language of this exemption that applies to a mobilehome park supplying water from a well located on the property.

By the same token, complainant has failed to show that defendants acted unlawfully in dissolving Lakeside Water Company in 1989. While Branch questioned whether Lakeside was operating as a mutual water company at that time, it made no determination and recommended no hearing on Lakeside's status. Instead, it concluded that the park's water system was probably exempt under Ceres West but was made "uncertain" by Lakeside's status. In a letter to park owners, Branch invited them to "review...your method of serving the residents of the mobilehome park to determine if any changes can be made so that your operation is clearly exempt from Commission regulation." (Exhibit 14.) The owners dissolved Lakeside to eliminate the "uncertainty" of their non-regulated water service.

Beyond offering the comments by Branch, complainant has presented us with no evidence to show that the dissolution of Lakeside was improper or that it was detrimental in any way to park tenants.

Finally, complainant has not persuaded us that the park's fees for water service are unreasonable. The record shows that the park is charging less for water than would be charged by the local water district, and that residents generally are paying less for water now than they were paying under the flat rate system. The record further shows that meters were installed pursuant to tenants' leases and that the charge for meters was less than the owners' cost of purchasing and installing them.

If there were any doubt about the reasonableness of the park's water service as it is now being operated, that doubt would be resolved by the testimony of the president of the homeowners' association at the park. He presented a petition, signed by 205 residents, urging that further government regulation of the water service is not necessary because "[water quality is] excellent, the service is more than adequate, and our rates already are lower than those of communities in the surrounding area." (Exhibit 16.)

Finally, although we find that defendants' water system is not subject to our jurisdiction, we note that the Mobilehome Parks Act[3] permits city or county authorities to regulate the "construction and use of equipment and facilities located outside of a manufactured home, mobilehome, or recreational vehicle used to supply gas, water, or electricity thereto..." (California Health and Safety Code § 18300(g)(2).) Thus, defendants' water supply operation is subject to outside scrutiny.

Because defendants have not dedicated their mobilehome park water system to public use, we conclude that the water system is not a public utility. The complaint should be dismissed.

Findings of Fact

1. Meadows is a California general partnership organized in 1984. Its general partners are Rondell B. Hanson and James Krueger.

2. In December 1986, Meadows purchased certain real property that included within its boundaries the Plantation on the Lake Mobilehome Park (park).

3. The park in 1986 contained 318 spaces for mobilehomes. Less than half the spaces were occupied. Meadows is in the process of expanding the park to accommodate 505 spaces.

4. When Meadows acquired the property, it also acquired all of the outstanding stock of Lakeside, a company organized by the previous owners of the park. Lakeside provided water to tenants of the park by means of a well located on the property.

5. Following purchase of the property, Meadows continued the prior practice of charging tenants of the park a flat rate of $15 per month for water.

6. By written notice on or about August 16, 1989, Meadows notified tenants that, effective November 1, 1989, water meters

3 California Health and Safety Code §§ 18200, et seq.

would be installed and a charge for water would be imposed based upon consumption.

7. Hanson and Krueger determined that the park was in the sphere of influence of the Beaumont/Cherry Valley Water District. It was their understanding that if outside water service were to be extended to the park, it would be provided by that water district.

8. Rates for water usage and meter installation for Beaumont/Cherry Valley Water District for a single-family dwelling were $7.50 per month fixed charge and 50 cents per 100 cubic feet of water. Minimum cost for installation of 3/4 inch water meters was $145. In or about February 1991, Beaumont/Cherry increased its rates to $15 per month fixed charge and 60 cents per Ccf of water.

9. In November 1989, Meadows began billing for water usage at a monthly rate of $7.50 fixed charge and 50 cents per Ccf of water used. That rate remains in effect today. In addition, Meadows charged each tenant $100 for meter installation. Tenants were given the option of paying $2 per month for meter installation (to be paid off over time at $145 plus 12% annual interest).

10. Actual cost of installing water meters at 166 lots at the park was $24,345.57, or an average of $146.66 per lot.

11. During the first five months following conversion to meters, the average charge per lot for water (excluding the $2 monthly meter charge) was $12.28 per month. During the first eight months of 1991, the average charge per lot for water use (excluding the meter charge) was $12.92.

12. In November 1989, representatives of the Branch interviewed park management in response to a tenant complaint about the conversion to meters.

13. On December 11, 1989, Branch advised Meadows that the status of Lakeside as a mutual water company was in question because it supplied water to tenants rather than to shareholders.

14. In or about January 1990, Meadows dissolved Lakeside and began supplying water directly to tenants as part of the park's management operation.

15. Neither Lakeside nor Meadows at any time has sold water to persons or entities located outside the park property.

16. Complainant Matthews leases Space No. 109, a corner lot, in the park.

17. Matthews in early 1990 brought a small claims court action against the park and its owners contesting the $100 meter charge. The action ultimately was decided against her in Riverside County Superior Court (Case No. 20-47-99).

18. Matthews' use of water during the first eight months of 1991 exceeded the average for other tenants. Her monthly water bills ranged from a low of $10.40 to a high of $19.24 and averaged $15.09. This higher water use was due in part to a park requirement that landscaping be maintained on corner lots.

19. Matthews does not dispute the right of park management, under its lease agreement, to install meters at homeowner sites. Matthews believes that park management does not have the right to charge tenants for meters and installation.

20. Matthews believes that Lakeside was a public utility, rather than a mutual water company, and as such could not be dissolved by Meadows without Commission approval.

21. Matthews is chairperson of the Tenant Rights Committee of the Golden State Mobilehome Owners League, Chapter 1613 (GSMOL #1613).

22. There are at least two tenant organizations in the park. One is the GSMOL #1613. The other is the Plantation on the Lakes Homeowners Association (Homeowners Association).

23. Homeowners Association has 150 members. Members have authorized Homeowners Association to represent them in dealings with park management.

24. The president of the Homeowners Association is Jack Rexroat.

25. The Homeowners Association has sent a petition signed by 205 residents of the park to the California State Legislature opposing efforts to have water service at the park regulated by the Commission.

26. The Homeowners Association believes that Commission regulation of the park's water service is unnecessary because, in its view, its water quality is excellent, service is more than adequate, and rates are lower than those of neighboring communities.

Conclusions of Law

1. Defendant's motion to dismiss should be denied because complainant has stated a colorable claim of public utility status.

2. Complainant has failed to demonstrate that defendants have unequivocally held themselves out as offering utility service to the public or have otherwise dedicated their property to public use.

3. The relief requested should be denied, and the complaint should be denied.

O R D E R

IT IS ORDERED that the relief requested is denied and the complaint is dismissed. Case 90-12-035 is closed.

This order becomes effective 30 days from today.

Dated October 23, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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

NEAL J. SHULMAN, Executive Director

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