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MAIL DATE
8/14/95

Decision 95-08-056

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 electric and gas utilities providing services to master-metered mobile home parks.	)	I.93-10-022 (Filed October 20, 1993)

ORIGINAL

ORDER DENYING REHEARING
AND MODIFYING DECISION (D.) 95-02-090

The proceeding in D.95-02-090 centered on an interpretation of Public Utilities Code Section 739.5, which regulates the rates that master-metered mobile home parks with submetered utility systems may charge their tenants. In D.95-02-090, we concluded that this statutory section expressly limits the recovery of costs of owning, operating and maintaining a submetered system to the reimbursement provided by the submetering discount. (D.95-02-090, p. 1 (slip op.).) Western Mobilehome Parkowners Association ("WMA") and De Anza Properties X ("De Anza") have filed separate applications for rehearing, challenging our interpretation of Public Utilities Code Section 739.5.

Specifically, WMA contends in its rehearing application that: (1) D.95-02-090 misinterprets Public Utilities Code Section 739.5 by limiting the recovery of costs for the ownership, operation and maintenance of a submetered system to the submetering discount; (2) the Commission has improperly infringed on the right of contract in its interpretation of Public Utilities Code Section 739.5; (3) D.95-02-090 overlooks the recovery of costs associated with submetered systems which are not included in the submetering discount, and thus should be recoverable through rent increases; and (4) the Commission's

proposal for the establishment of a reserve for infrastructure improvement is inconsistent with ratemaking principles.

In its application for rehearing, De Anza contends that: (1) D.95-02-090 violates due process because it fails to provide an adequate method for park owners to obtain individualized relief for costs not reimbursed by the discount; (2) the Commission has acted arbitrarily, capriciously and unreasonably by construing that Public Utilities Code Section 739.5 is the sole and exclusive compensation for the submetered utility system; (3) D.95-02-090 results in an unlawful taking; and (4) the Commission has exceeded its jurisdiction by controlling the calculation of rent increases.

Responses were filed timely by the Division of Ratepayer Advocates ("DRA") and jointly by the complainants (DeMascio, Klaus and McDonough) in Case (C.) 91-11-029, C.91-11-030, and C.93-08-017 ("Complainants").

We have reviewed each and every allegation raised in the applications filed by WMA and DeAnza, and find the allegations without merit. As discussed below, we have correctly interpreted Public Utilities Code Section 739.5, and our interpretation has not resulted in an unlawful taking or confiscation, infringement of the right of contract, or due process violation. We have merely lawfully complied with the mandates of this statute. Thus, good cause does not exist for the granting of a rehearing on any of the issues raised by WMA and DeAnza.

However, we do modify D.95-02-090 to eliminate references to our proposed remedy for the establishment of a reserve for infrastructure improvement, for the reasons set forth below.

DISCUSSION:

(1) Statutory Interpretation of Public Utilities Code Section 739.5

In D.95-02-090, we concluded that Public Utilities Code Section 739.5 bars recovery from mobile home park tenants of costs that are in excess of the reimbursement provided by the submetering discount. (D.95-02-090, pp. 1 & 19 (slip op.).) Both WMA and DeAnza allege that the Commission has misinterpreted the statute. They contend that Public Utilities Code Section 739.5 is not the sole means of compensation for the submetered system. However, their allegation is without merit.

The fundamental rule of statutory interpretation is that the intent of the Legislature should be ascertained so as to effectuate the purpose of the law. (People v. Hull (1991) 1 Cal.4th 266, 271; see also, Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.) "In determining this intent [one should] look first to the words of the statute themselves, giving them their usual and ordinary meaning." (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 90; see also, Tracy v. Municipal Court (1978) 22 Cal.3d 760, 764.) " 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation omitted.]" (Moyer v. Workmen's Comp. Appeals Bd., supra, 10 Cal.3d at p. 230.)

Public Utilities Code Section 739.5 specifically states, in relevant parts:

> "[T]he master-meter customer shall charge each user of the service at the same rate which would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation. . . . The [C]omission 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." (Pub. Util. Code, §739.5, subd. (a).)

By looking at the plain words of this statute, it can be seen that the Legislature intended to limit what master-meter customers, including mobile home park owners, could charge their submetered tenants for gas and electricity. The Legislature intended that each tenant would be charged "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." (Pub. Util. Code, §739.5.)

Further, the Legislature also intended that mobile home park owners receive a submetering discount, in the form of a rate "differential," to cover the costs for providing the submeter service, and set forth a cap on the recovery of those costs. As the statute specifies, "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." (Pub. Util. Code, §739.5, subd. (a).)

Accordingly, we concluded that Public Utilities Code Section 739.5 "expressly limits recovery of costs of owning, operating, and maintaining a submetered system to the reimbursement provided by the submetering discount." (See D.95-02-090, pp. 1 & 19 (slip op.).) To conclude otherwise would result in submetered park tenants having to pay more for their utility services, in the form of rent increases, than those nonsubmetered park tenants who receive utility services directly from the gas or electrical corporation. This would be contrary to the statute and the legislative intent because mobile home park owners would be charging their submetered tenants a

different rate than tenants directly receiving service from the utility. The statute requires the "same rate." (Pub. Util. Code, §739.5, subd. (a).) In enacting this statute, the Legislature intended that the tenants be indifferent whether they received utility services under a submetered system or directly from the utility, and thus, the intent was to limit the recovery of costs related to the submetered system to what is provided in the statute. (See D.95-02-090, p. 19 (slip op.).) Therefore, our interpretation comports with the legislative intent set forth in the plain language of the statute.

An acceptance of WMA's and DeAnza's contention that the statute is not the sole means of compensation for the submetered utility system would mean ignoring the plain language of the statute, and reading language into the statute that is not there. The rules of statutory construction do not permit such a reading. (See People ex rel. Pub. Util. Com. v. City of Fresno (1967) 254 Cal.App. 2d 76, 82; see also, Noroian v. Department of Administration (1970) 11 Cal.App.3d 651, 655.) " 'If the words of the statute are clear, [one] should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' [Citations omitted.]" (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698; see also Public Util. Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal.App.3d 437, 444.)

As discussed in D.95-02-090, because the language of Public Utilities Code Section 739.5 is unambiguous, the Commission need not look elsewhere for the legislative intent. (D.95-02-090, p. 20 (slip op.); see also, Neumarkel v. Allard (1985) 163 Cal.App.3d 457, 461.)

Further, in interpreting Public Utilities Code Section 739.5, the Commission has acted reasonably. In its rehearing application, DeAnza alleges that because there is no nexus between the utility company's average cost of delivering the services and an individual mobile home parkowner's costs, the

Commission has acted arbitrarily, capriciously and unreasonably by construing Public Utilities Code Section 739.5 as the sole and exclusive compensation for the submetered utility system. Once again, DeAnza's allegation is without merit.

The Commission has not acted arbitrarily, capriciously and unreasonably. We have merely correctly and lawfully interpreted the statute, and have complied with its mandates.

(2) The Right of Contract

In its rehearing application, WMA contends that the Commission's interpretation of Public Utilities Code Section 739.5 infringes on the right of contract, because the interpretation prevents the park owner from exercising agreed-upon capital improvement provisions in long-term leases that provide for future capital improvements to be paid for as part of the rent. WMA argues that these provisions "are relied upon as the mechanism for funding capital improvements associated with utility replacements/upgrades." (WMA's Application for Rehearing, p. 12.) Thus, WMA claims that the Commission has violated the Contract Clause of the U.S. Constitution.

The threshold question in determining whether there has been such a violation is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " (Energy Reserves Group v. Kansas Power & Light (1983) 459 U.S. 400, 411, quoting Allied Structural Steel Co. v. Spannaus (1978) 438 U.S. 234, 244.) In the instant case, there has not been a substantial impairment of a contractual relationship. Public Utilities Code Section 739.5 does not prohibit mobile park owners from recovering all their capital improvement costs through rents; rather, the statute bars recovery of capital improvement costs that relate to the submetered system and that are costs factored into the calculation of the submetering discount. This includes: investment-related expenses for all initial and ongoing capital upgrade costs, replacement costs, 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. (See D.95-02-090, p. 19 (slip op.).)

Although mobile home park owners may not recover costs in excess of the submetering discount, and thus may not recover all capital costs provided for in the leases, this nonetheless does not constitute a substantial impairment. As stated by the U.S. Supreme Court, "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." (Energy Reserves Group v. Kansas Power & Light, supra, 459 U.S. at p. 411.)

Further, "(i)n determining the extent of the impairment, . . . whether the industry the complaining party has entered has been regulated in the past (is considered)." (Id.) Mobile home park owners are involved in a heavily regulated industry. (See e.g., Health & Saf. Code, §§18200, et seq. (Mobilehome Parks Act); Pub. Util. Code, §§4351-4361 (Enforcement of Federal Pipeline Safety Standards for Mobile Home Park Operators); Pub. Util. Code, §2705.5 (Mobilehome Parks' Submetering Water Service Systems).) Thus, they are well aware that the Legislature can and does enact laws that can legally affect their leases and the benefits of their bargain. Based on the above analysis, there is no substantial impairment of the leases. Thus, the Commission's interpretation of Public Utilities Code Section 739.5 is not an infringement of the right of contract.

(3) Taking

In its rehearing application, DeAnza argues that the Commission's interpretation of Public Utilities Code Section 739.5 results in an unlawful taking or confiscation because the statute leaves some of the costs of individual mobile home park owners uncompensated, and provides no mechanism for recovery of

these unreimbursed costs which exceeds the cap set by Public Utilities Code Section 739.5.

DeAnza argues that without individual relief, a percentage of mobile home park owners would not receive just and reasonable compensation, and thus a taking would occur. De Anza cites to Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805 to support this taking argument. (DeAnza's Application for Rehearing, pp. 3-4.) However, Calfarm Ins. Co. is not controlling in the instant case, because the Commission has set just and reasonable compensation for the recovery of costs for the submetered system in general rate cases ("GRCs") and related GRC proceedings. (See infra, for listing of cases.) Such regulation need not be on an individual basis if individual treatment would be impractical. (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 171.) The Constitution "does not prohibit the determination of rates through group or class proceedings." (Permian Basin Area Rate Cases (1968) 390 U.S. 747, 337.)

An unlawful taking or confiscation occurs if a regulation or rate is unjust and unreasonable. (Duquesne Light Co. v. Barasch (1988) 488 U.S. 299, 307; 20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 292.) Whether a regulation or rate is just and reasonable depends on a balancing of the interests of the regulated entity providing the services and the interests of the consumers of such services. (Federal Power Com. v. Hope Nat. Gas Co. (1943) 320 U.S. 591, 603; see also, 20th Century Ins. Co. v. Garamendi, supra, at p. 293.) The principle of "just and reasonable" does not mandate " ' "that the cost of each company be ascertained and its rates fixed with respect to its own costs." [Citation.] "It is permissible for an agency to use average costs rather than the costs of individual utilities." ' " (Id., citing Aberdeen & Rockfish R. Co. v. United States (5th Cir. 1977) 565 F.2d 321, 327. See also Permian Basin Area Rate Cases, supra, 390 U.S. at pp. 747, 818-819.) As long as the regulation of rates " 'as a whole afford [the regulated firm] just compensation for its over-all services to the public,' they

are not confiscatory. [Citation omitted.]" (20th Century Ins. Co. v. Garamendi, supra, at p. 293.) "That a particular rate may not cover the cost of a particular good or service does not work confiscation in and of itself." (Id.) Further, a regulated entity neither has a constitutional right to a profit nor a constitutional right against a loss. (Id. at p. 294.)

In the instant case, the fact that the mobile home park owners are not always and completely compensated by Public Utilities Code Section 739.5 does not necessarily result in an unlawful taking or confiscation. The statute provides for a recovery in the form of "a sufficient differential to cover reasonable average costs to master-meter customers of providing such submeter services," although the recovery cannot exceed the "average cost that the corporation would have incurred in providing comparable services directly to the users of the service." (Pub. Util. Code, §739.5, subd. (a).) In implementing this statute, we have routinely calculated this differential in the general rate case ("GRC") of each utility. As a whole, it appears that the differentials that we have approved have been sufficient, and have not been challenged as being so low as to destroy the value of the park owners' property. (See Duquesne Light Co. v. Barasch, supra, 488 U.S. at pp. 307-308.) Thus, the differentials have provided just and reasonable compensation.

In the instant case, the mobile home park owners are not complaining that the differentials are so low as to adversely affect the property value, but rather that the differentials do not fully compensate every mobile home park. However, as discussed above, there is no constitutional right of profit or against loss. "That a particular rate may not cover the cost of a particular good or service does not work confiscation in and of itself." (20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th at p. 293.) " The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." (Federal Power Com. v.

Hope Nat. Gas Co., supra, 320 U.S. at p. 601; see also, 20th Century Ins. Co. v. Garamendi, supra, 8 Cal.4th at p. 298, citing FERC v. Pennzoil Producing Co. (1979) 439 U.S. 508, 518.)

As a whole, the differentials have been sufficient, and thus, the park owners have received just and reasonable compensation, under the law, for the use of their property in providing submetered services. Thus, DeAnza's argument of an unlawful taking or confiscation is without merit.

(4) Due Process

DeAnza also contends that D.95-02-090 violates due process because it fails to provide an adequate method for park owners to obtain individualized relief. This contention is without merit.

We have determined that requests for increases or decreases in the mobile home park discount be considered in the GRCs of each utility. (Investigation Into the Rates to be Charged Master Meter Gas and Electric Utility Customers [D.89907] (1979) 1 Cal.P.U.C.2d 172, 180. During previous GRCs and GRC-related proceedings, mobile home park owners, in particular those represented by WMA, have argued for increases in the submetering discount. (See, e.g., Re Southern California Gas Company [D.90-01-015] (1990) 35 Cal.P.U.C.2d 3, 59; Pacific Gas and Electric Company's Electric Rate Design and Allocation of Revenue Requirements [D.82-12-113] (1982) 10 Cal.P.U.C.2d 512, 530; Southern California Edison Company's GRC [D.82-12-055] (1982) 10 Cal.P.U.C.2d 155, 314; Pacific Gas and Electric Company's GRC [D.93887] (1981) 7 Cal.P.U.C.2d 349, 495-496; Southern California Edison Company's GRC [D.92549] (1980) 5 Cal.P.U.C.2d 39, 128-129; Application of Pacific Gas and Electric Company [D.91107] (1979) 2 Cal.P.U.C.2d 596, 665-666; Pacific Gas and Electric Company's GCAC-SAM Rate Increase [D.90935] (1979) 2 Cal.P.U.C.2d 466, 476-477; San Diego Gas and Electric Company's GRC [D.87639] (1977) 82 Cal.P.U.C. 291, 326-327.) Thus, a mobile home park owner has an avenue to pursue its position that the differential provided is

not sufficient, and does not comply with Public Utilities Code Section 739.5. The GRCs are sufficient to provide an opportunity for mobile home park owners to participate, individually as well as in a group. Therefore, due process has not been denied.

Further, the individual proceedings requested by DeAnza would serve no useful purpose, because what the individual mobile home park owner would be requesting in these proceedings is the ability to recoup all its costs, regardless of the cap set forth in Public Utilities Code Section 739.5. The Commission has no authority to ignore this statutory provision.

(5) Rent Increases for Costs Not Barred by Public Utilities Code Section 739.5

In its rehearing application, WMA claims that the Commission has failed to consider recovery of costs associated with the submetered system that are not considered in the calculation of the discount. As examples, it lists costs under the Line and Service Extension Rules of the utilities; costs of installation, repair, upgrade or replacement of any common area electrical facilities; and nonrecovery due to rate limiters. (WMA's Application for Rehearing, pp. 13-14.)

This claim raises the question as to what costs should or should not be covered by the submetering discount. Statutorily, the discount covers reasonable costs of owning, operating and maintaining the submetered system, including "a factor for investment-related expenses for all initial and ongoing capital upgrade costs," and "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." (D.92-02-090, p. 19 (slip op.).)

Thus, if the costs involving the Line and Service Extension Rules of the utilities, and the installation, repair, upgrade or replacement of any common area electrical facilities are required to be considered in calculation of the discount,

then the mobile home park owners are barred from recovery of these costs through a rent increase. This is also the case for the nonrecovery due to rate limiters.

However, if such costs are not statutorily required to be considered in the discount, and directly metered tenants pay for such costs in rents, then submetered tenants should be charged accordingly. The key is that submetered customers are to be treated the same as directly metered customers. As previously discussed, this is the intent of the enactment of Public Utilities Code Section 739.5.

Therefore, the mobile home parks may be permitted to recover costs that are not in any way reimbursed, fully or partially, in the discount, but such recovery should not result in treating the submetered customers differently from the directly metered customers. As to which costs are covered by the statute, the mobile home park owners should raise these particular costs in the next GRCs, so that all parties have an opportunity to litigate the matter in hearings. The record in the instant case is not sufficient to resolve this issue.

(6) A Modification of D.95-02-090

On page 22 of D.95-02-090, the Commission proposed that mobile home park owners could "ameliorate any hardships caused by the deviation of their annual costs from the utility average by establishing a reserve for infrastructure improvement." WMA argues that this proposed remedy of encouraging the park owners to establish a reserve is inconsistent with ratemaking principles, and requests clarification.

We made this proposal, because it appears that there may be instances of surplus received from the differential, and it was suggested by several parties that having a reserve might be the solution for obtaining full recovery of future capital costs. (See DRA's Opening Brief in I.93-10-022, filed December 17, 1993, p. 5, and Golden State Mobilehome Owners League's Opening Brief, filed December 19, 1993, p. 4.)

We made this proposal merely as a suggestion, and did not intend to order the establishment of such an account, especially without more information on how often these instances of surplus have occurred. Therefore, to avoid any confusion or need for clarification, we will eliminate our discussion concerning the establishment of a reserve for infrastructure improvements in D.95-02-090.

CONCLUSION:

For the above reasons, the applications for rehearings filed by WMA and DeAnza should be denied. However, D.95-02-090 should be modified to eliminate our discussion of a reserve for infrastructure improvement.

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IT IS ORDERED:

1. D.95-02-090 is modified to delete the discussion on page 22 concerning the establishment of a reserve for infrastructure improvement. Thus, Lines 3-18 on page 22 shall be deleted.

2. Rehearing of D.92-07-025, as modified herein, is denied.

This order is effective today.

Dated August 11, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

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

Wesley Franklin

Acting Executive Director