

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.

FILED
PUBLIC UTILITES COMMISISON
DECEMBER 17, 1998
SAN FRANCISCO OFFICE
I.98-12-012

ORDER INSTITUTING INVESTIGATION**I. SUMMARY**

This investigation addresses 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. This investigation is limited to water and sewer services provided to multiple unit residential complexes and mobilehome parks. It will consider the rates, charges and practices of utilities providing water and sewer services to such facilities and the manner and circumstances under which water and sewer charges legally can be passed on to end users. All Class A and Class B water companies and the California Water Association are named as respondents to this proceeding. To as large an extent as possible, notice of this proceeding will be provided to known owners and tenants of multiple unit residential complexes and mobilehome parks, to their respective professional organizations, to private agencies which specifically collect for water and sewer services, to public agencies that have expressed interest in this issue, to the County District Attorneys and to local rent control boards.

II. BACKGROUND

A. Jurisdiction

Pursuant to Article XII of the California Constitution and provisions of the California Public Utilities Code (see for example, sections 216, 451, 734, 2110, 2701, and 2705.5), the California Public Utilities Commission (Commission) has jurisdiction over privately-owned water and sewer system utilities and the rates charged for water and sewer service.

Section 2701 of the Public Utilities Code provides:

“Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, 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 (footnote omitted) and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter.”

In 1983, the Legislature exempted from the Commission’s control, mobilehome parks and multiple residential unit complexes with a submetered water service system provided that submetered customers are charged the same rate as they would have been charged if served directly by the water corporation.¹

Public Utilities Code, section 2705.5 provides:

“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

¹ There is no comparable exemption applicable to charges for sewer services.

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.”

On January 5, 1984, by adoption of Resolution W-3160, the Commission included the provisions of section 2705.5 in Rule 19 of all water utilities’ tariffs. In addition, Rule 19 provides that utilities “have no responsibility for monitoring or enforcing the provisions” of section 2705.5 but they are required to provide, “on a continuing basis, copies of the current rates applicable” to section 2705.5 submeter service when a written request for such rates is received from the owner or operator of a mobilehome park or multiple unit residential complex. Further, Rule 19 prohibits customers which are not covered by the section 2705.5 exemption from reselling any of the water received from the utility “[e]xcept by special agreement (sic) with the utility”. This prohibition was established by the Commission before the Legislature enacted section 2705.5. Section 2707 of the Public Utilities Code authorizes the Commission to hold hearings and issue process and orders for the purpose of determining the status of any person “owning, controlling, operating, or managing any water system or water supply within the state”.

B. Complaints and Inquiries

The Commission has received periodic inquiries about the application of section 2705.5 and the propriety of different practices by which end users or tenants are charged for water or sewer service. Those inquiries have escalated in the past year and have included questions from legislators, public agencies and newspapers.

Recently, Commission Staff has received several informal complaints from tenants of apartment complexes who claim that bills, ranging from \$20 to \$40 monthly for water and sewer service, are being charged by apartment owners or

their authorized billing agency. Often, these charges are imposed in accordance with rental agreements signed by tenants. Although some of the apartment complexes, about which tenants complain, have submetered systems, others do not. One complaint notes that the amount billed by the landlord varies from month to month depending on the actual usage of water by the entire apartment complex, not the usage of the individual tenant. Some tenants complain that the apartment owner's actions are illegal because the rates charged do not conform with the provisions of section 2705.5 and, in other respects, are unfair and unreasonable. Others complain that the charges are unethical attempts, on the part of owners, to avoid rent control statutes and limits imposed on their rent increases by rent control boards. The often repeated inquiries are "Does the Commission have jurisdiction over the apartment owners or billing companies that demand that tenants pay for water and sewer service?", or "What is the Commission doing about these charges for utility services?"

C. Commission Water Division's Preliminary Investigation

The Commission Water Division (Water Division or Staff) conducted a preliminary investigation of issues related to these inquiries. It proceeded with the following understanding: (1) Water Service - If the apartment owners and their billing agents are providing water service for remuneration, pursuant to sections 216 and 2701 of the Public Utilities Code, they are public utilities, subject to the jurisdiction of the Commission, unless they are exempt under the provisions of section 2705.5; (2) Sewer Service - Any apartment owner or its billing agent charging for sewer service is a public utility subject to the jurisdiction of the Commission since the Public Utilities Code does not authorize any private entity to charge for sewer service.

The informal inquiry into several complaints revealed that none of the apartment complexes which charged for water or sewer charges were certificated

public utilities. None of the apartment complex owners volunteered that they had executed water resale agreements with the water corporation that provided water to the complex. Consequently, apartment owners and their billing agents were advised of Staff's conclusion that any rates demanded for water services which did not conform with section 2705.5 and all sewer service rates were unlawful. Ultimately Staff discovered only one apartment complex, Creekside Village (Creekside), that was legally charging for water in compliance with section 2705.5. Although Creekside apparently charged tenants for sewer service at the rate the sewer company would have charged if it served the tenants directly, Staff noted that Creekside, as a non certificated private entity, is not permitted to resell sewer service.

Although Staff wrote to several apartment owners and billing agents advising them of the law and requesting their compliance, only one response was received. An attorney representing National Water and Power LLP (National), a billing agency collecting money for water and sewer service on behalf of an apartment complex, responded to Staff's assertion that the tenant billings which had been reviewed revealed improper charges. Staff had noted that the water rates were incorrect (inconsistent with the provisions of section 2705.5) and that tenants could not be charged for the meter fee, the new account fee or for sewer service. National's attorney contended that the apartment complex was not subject to the jurisdiction of the Commission. Citing Commission decisions, Matthews vs. Lakeside Water Company (1991),(D.91-10-035) and Fowler & Arnold vs. Ceres West Investors (1987), (D.87-11-020), the attorney claimed that the apartment complex owner, like defendants in Matthews and Ceres, had not dedicated facilities to the public and therefore, was not operating a public utility subject to Commission jurisdiction. National's attorney wrote:

“Both Ceres and Matthews were decided after the enactment of Section 2705.5. Both make reference to the statute. Both found that the landlord was not a public utility because it had not dedicated facilities to

the public. Ceres found that only after a threshold finding of dedication would the Commission then examine whether the exemption set forth in Section 2705.5 defeated public utility status.”

Consistent with National’s position, National refused Staff’s requests that it stop billing for sewer service, that it confine charges for water to the rate permitted by section 2705.5 and that it remedy past transgressions by refunds to tenants.

Although Staff has been advised that several formal complaints related to these issues will be filed in the near future, presently, only one such complaint is pending. On March 11, 1998, Gina Guillamun DiResta filed a formal complaint (C. 98-03-023) against Esprit del Sol Apartments (Esprit del Sol). She charged that Pacific Billing Service, on behalf of Esprit del Sol, was billing for hot water usage at a rate much higher than it was paying Santa Fe Irrigation District for water and that it was billing incorrectly and unjustly because it was billing her for ten times the amount of hot water that had actually been used.

Esprit del Sol responded to the DiResta complaint by asserting that the Commission has no jurisdiction over this matter. It claims that it makes no charge for water but that it heats, stores and delivers, upon demand through a submeter system, hot water, for which it does charge. Esprit del Sol argues that the hot water it provides is different from the water which it receives from the District, and therefore section 2705.5 does not apply. Although this case has been submitted for decision, the Commission has not issued its decision.

In discussions with the Department of Health Services (DHS) Staff learned that recently both DHS and the United States Environmental Protection Agency (EPA) have received numerous questions regarding water delivered through a submetered system to tenants of apartment complexes and mobilehome parks. For DHS and EPA the inquiries relate to whether or not submetering of water to tenants constitutes selling water within the context of the Federal or State Safe Drinking Water Act.

While the focus of the inquiries directed to DHS and EPA are different, Staff noted that the recent increase in such inquiries to these agencies mirrored its own experience. Staff concluded that it was reasonable to expect an ever-increasing number of complaints and inquiries about the propriety of charges to end users in multiple unit complexes. The preliminary investigation showed that there are several different practices and methods employed to charge tenants for water and sewer services. Staff observed that the defenses raised by National and by the defendant in the DiResta complaint provoked serious questions. The disregard of our Staff's admonitions by several landlords moves us to consider a formal proceeding to, among other things, determine the parameters and applicability of section 2705.5, the enforceability of apparent unlawful deviations from the statutory exemption and the legality of the heretofore unprecedented sewer service charges.

III. DISCUSSION

At the outset, it is important to note that the Commission has previously determined that it has no rent control jurisdiction (Re Rates, Charges, and Practices of Electric and Gas Utilities Providing Services to Master-metered Mobile Home Parks (1995), 58 CPUC2d 709, 718. The absence of rent control jurisdiction, however, does not mean that those agencies which do have rent control authority or the owners of multiple unit residential complexes and mobilehome parks are free to ignore Commission rulings concerning utility rates. (See Rainbow Disposal Co. vs. Escondido Mobilehome Rent Review Board, (1998) 64 Cal.App.4th 1159, 1167.) The Commission has exclusive and primary jurisdiction over the establishment of rates for water and sewer services provided

by private entities. The exemption from Commission control provided by section 2705.5 appears to underscore the Commission's jurisdiction over rates for utility service in circumstances where, for example, an apartment house owner is a consecutive seller (or reseller) of the utility commodity. One might reasonably assume that section 2705.5 reflects the Legislature's interest in water conservation, its concern for fair treatment of landlords and most certainly its concern that tenants be protected from possible monopolistic abuse in the form of unregulated or free market rates.

We have not previously had occasion to explore in depth the parameters of section 2705.5, its jurisdictional implications and the practical realities of enforcement. A previous Commission investigation (I.93-10-022) of rates, charges and practices of energy service provided to submetered systems in mobilehome parks did focus on section 739.5, a statute which is similar to section 2705.5. Both statutes impose a cap on the amount a landlord can charge for submetered utility service and both caps are tied to rates established by the Commission. However, there are some important differences. While we can review the energy decisions interpreting section 739.5, they are not necessarily dispositive of the issues involving water or sewer services.

In its evaluation, staff correctly notes that the defenses raised by National and those argued in the DiResta complaint provoke interesting questions which are discussed more fully below. The answers to these questions must be forthcoming in this proceeding.

In the DiResta complaint, the defendant apparently claims that because he/she treats (heats, and stores) the water received from the Santa Fe Irrigation District before selling it to tenants, the District's commodity is sufficiently changed to render it no longer subject to section 2705.5 or to the jurisdiction of this Commission. Does the water identified in section 2705.5 have to be in the identical state as received from the primary water provider else the

statute can not apply? If landlords run the water received from its water service utility through a water softener or through a charcoal filter before dispersing it to the submetered tenants, does section 2705.5 apply? In circumstances where landlords heat, or otherwise treat, the water dispersed to tenants, can the Commission develop guidelines to insure that the facility is not treated as a public utility, that the tenants continue to receive the protection of the rates anticipated by section 2705.5 and the landlords are able to recover legitimate costs arising from the heating of the water?

Ms. DiResta's apartment building receives its water from an irrigation district, a public agency. Does section 2705.5 apply to multiple residential unit complexes or mobilehome parks that receive water from a mutual or municipal water organization, or is its application limited to the customers of Commission regulated water companies? Is a water district or mutual water company a "water corporation" as referenced in section 2705.5? Clearly, the DiResta complaint raises several issues that are targeted for consideration in this proceeding. Because our determination in the DiResta complaint case will benefit from this investigation and because it is preferable for the Commission's decisions on like matters to be consistent, we shall stay the complaint proceeding, and any similar findings, pending our determinations in this investigation.

We intend to explore the proposition that the dedication of facilities to the public is a necessary component to being a public utility and to being subject to the jurisdiction of this Commission. We need also to resolve the notion that we lack jurisdiction if the Commission cannot establish an entity's public utility status. Certain aspects of Rule 19 reflect the Commission's exercise of its jurisdiction over the certificated utility and its customers. That is true of many tariffs and we know that tariffs carry the force of law (Dyke Water Co. v. Public Utilities Com. (1961) 56 Cal2nd 105, 123).

In this proceeding we need to interpret the strong inference of section 2705.5 that if the exemption from Commission control is not triggered by a submetered water service system's compliance with the statute, then it is a public

utility and/or it is subject to the Commission's jurisdiction and control. If the failure or refusal to dedicate facilities to the public will shield that water system from the Commission's jurisdiction, then is section 2705.5 enforceable?

There are further questions which we must address in this proceeding. How widespread is the practice of charging tenants or end users residing in multiple unit residential complexes or mobilehome parks for water or sewer services? Absent a submetering system, is it permissible to charge for water service on a non-utility basis? Is it ever permissible for non certificated private entities to charge for sewer service? Where there are submetered systems, who pays the cost of installing and maintaining the system and are those costs recoverable? Does Rule 19 require reevaluation to render it more useful as a monitoring or enforcement rule with respect to section 2705.5?

Because we are charged with the responsibility of following and enforcing provisions of the Public Utilities Code and because the practices related to the delivery of water and sewer services and the establishment of rates for those services is one of our primary responsibilities, it is necessary that we clarify the issues relevant to the resale of water and sewer services. Based on information gathered by the Staff, we find good cause to institute an investigation into the activities of multiple unit residential complexes, mobilehome parks and their respective billing agents with respect to the charging and collection of money from tenants or end users for water or sewer services.

IV. PRELIMINARY SCOPING MEMO AND CATEGORIZATION

This investigation shall be conducted in accordance with Article 2.5 of the Commission's Rules of Practice and Procedure (Rules)² As required by Rule

² The Rules of Practice and Procedure are posted on the Commission's web site at www.cpuc.ca.gov. Article 2.5 of the Rules implements many of the reforms contained in Senate Bill 960 (Stats. 1996, ch. 856).

6(c)(1), this order includes a preliminary scoping memo³ as set forth below.

The scope of this rulemaking is to examine the practices employed by multiple unit residential complexes, mobilehome parks, and their respective billing agencies, to charge tenants or end users for water or sewer services. We will assess the frequency of these practices and determine whether they are legal. We will determine whether it is permissible for non certificated private entities to resell sewer services. With respect to the resale of water, we will explore the parameters of section 2705.5 of the Public Utilities Code, its jurisdictional implications, and the enforceability of apparent unlawful deviations from the statute. In addition, we will examine the application of Rule 19 and consider whether this Rule requires revision to make it a more useful as a monitoring or enforcement tool in implementing section 2705.5 Further, we shall determine whether it is necessary or desirable to develop other rules to facilitate the determination of our role in implementing the law as we shall explain or interpret it in this proceeding with respect to the service and charging of end users in multiple unit residential complexes or mobilehome parks for water or sewer services.

Pursuant to Rule 6(c)(1), we preliminarily determine the category of this investigation proceeding to be “quasi-legislative” as the term is defined in Rule 5(d).⁴ Consistent with this categorization, we expect to enunciate our policy governing the charges for water or sewer services to end users in multiple unit residential complexes and mobilehome parks based on written comments received from parties, and “legislative facts”⁵ which we may receive during a formal

³ Rule 5(m) defines “scoping memo” as an order or ruling describing the issues to be considered in a proceeding and timetable for resolving the proceeding.

⁴ Rule 5(d) defines “quasi-legislative” proceeding as those that establish policy or rules affecting a class of regulated entities.

⁵ Rule 8(f)(3) defines “legislative facts” as general facts that help decide questions of law, policy and discretion.

hearing. Although we do not anticipate the need for an evidentiary hearing, parties shall have the opportunity to set forth their position on this topic in their comments.

By statute, this proceeding is scheduled to be closed 18 months from its inception, tentatively June 17, 2000. The timetable for Comments of interested parties will be determined at the Prehearing Conference which will be held following: (1) the filing by Class A and Class B water utilities of their answers to questions contained in Appendix B and, (2) the submission by the Water Division of a report evaluating the utility filings and the development of a comprehensive list of persons or agencies potentially interested in this proceeding to be used in notification of the scheduled Prehearing Conference. Following the receipt of comments and motions requesting an evidentiary hearing, if any, the assigned Commissioner shall issue a ruling that finalizes the category, scope and schedule of this proceeding. After the issuance of this ruling, parties may file and serve an appeal to the Commission regarding the assigned Commissioner ruling on category (Rule 6.4). Commissioner Henry M. Duque and Administrative Law Judge (ALJ) Jean Vieth are assigned to this proceeding.

IT IS ORDERED that:

1. An investigation on the Commission's own motion is instituted into the practices, and rates employed by the owners of mobilehome parks and of multiple residential unit complexes and of their billing agents in connection with charging tenants for water or sewer service.

2. The Commission shall consider appropriate changes to water and sewer utility tariff rules that will better define conditions, if any, under which owners of multiple residential unit complexes and mobilehome parks, can pass on water or sewer charges to end users.

3. The category of this investigation is preliminarily determined to be quasi-legislative. It shall be limited to water service and to sewer services provided to multiple unit residential complexes or to mobilehome parks.

4. All Class A and Class B water utilities and the California Water Association are hereby made respondents to this investigation.

5. The Executive director of the Commission shall serve a copy of this order on all Class A and Class B water utilities, to all Commission regulated sewer services, and to the California Water Association. (See Appendix A)

6. Within 45 days from the effective date of this order, the Commission regulated Class A and Class B water utilities are to make initial filings addressing questions as set forth in Appendix B

7. The Commission Water Division is directed to provide copies of this Order Instituting Investigation (OII) to persons who have inquired or complained about the charging of tenants of multiple unit residential complexes or mobilehome parks for water or sewer services. In addition the Commission Water Division shall forward a copy of this OII to members of a list which Water Division shall develop of known owners and tenants of multiple unit residential complexes and mobilehome parks, their respective professional organizations, agencies that provide billing and collection functions with respect to the charging of tenants for water or sewer services, public agencies that have expressed interest in the issues identified herein, county District Attorneys and Rent Control Boards.

8. Within 45 days of the utilities filings provided for in paragraph 6 of this order, the Commission Water Division shall provide a report evaluating and summarizing the utilities findings.

9. A Prehearing Conference shall be held after the Water Division submits the report provided for in paragraph 8 of this order. The Commission Water Division shall also provide to the assigned Administrative Law Judge a copy of the list identified in paragraph 7 of this order so that notice of the prehearing conference can be sent to each person or organization on that list.

10. At or promptly following the Prehearing Conference, the Assigned Commissioner shall issue a Ruling establishing a timetable for the filing of Comments by parties.

11. The Executive Director shall serve a copy of this Order on all parties in Case (C.) 98-03-023. This case shall be stayed pending issuance of a Commission decision of in this Investigation. The appearances filed in C.98-03-023 shall be appearances for this proceeding.

12. The Executive Director shall serve this order on the service list for Investigation 93-10-022.

13. The Executive Director shall cause this order and the appendices to this order to be posted on the Commission's web site.

14. Interested persons may obtain this order and its appendices by downloading these documents from the Commission's web site, or by obtaining a hard copy of these documents by contacting the Commission's Central Files Office (telephone: 415-703-2045) or the Public Advisor's Offices (telephone: Los Angeles (213-897-3544) San Francisco (415-703-2074).

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

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(WTA 346)		(WTA 60)	(WTA 168)
Apple Valley Ranchos Water Co. Leigh K. Jordan P.O. Box 7002 Downey, CA 90241	California Water Service Co. Francis S. Ferraro 1720 North First Street San Jose, CA 95112	San Jose Water Co. Fred R. Meyer 374 West Santa Clara St. San Jose, CA 95196	
(WTA 87)	(WTA 330)	(WTA 339)	(WTA 339)
Citizens Utilities Co. of Calif. L. J. D'Addio P.O. Box 15468 Sacramento, CA 95851	Dominquez Water Corporation J. S. Tootle P.O. Box 9351 Long Beach, CA 90810	Suburban Water Systems Robert L. Kelly 1211 East Center Court Dr. Covina, CA 91724	
(WTA 314)	(WTA 337)	(WTB 61)	(WTB 61)
Park Water Co. Leigh K. Jordon P.O. Box 7002 Downey, CA 90241	San Gabriel Valley Water Co. Michael Whitehead 11142 Garvey Avenue El Monte, CA 91734	Del Oro Water Co., Inc. Robert S. Fortino Drawer 5172 Chico, CA 95927	
(WTA 345)	(WTA 133)	(WTB 136)	(WTB 136)
Santa Clarita Water Co. W. J. Manetta, Jr. 22722 W. Soledad Canyon Road Santa Clarita, CA 91380	Southern California Water Co. Joseph F. Young P.O. Box 9016 San Dimas, CA 91773	Fruitridge Vista Water Co. Robert C. Cook, Jr. 1108 Second Street, Ste. 204 Sacramento, CA 95814	
(WTA 342)	(WTB 327)		
Valencia Water Co. Robert Diprimio 24631 Ave. Rockefeller Valencia, CA 91355	County Water Co. John A. Erickson 11829 E. 163 Street Norwalk, CA 90650		
(WTB 206)	(WTB 135)		
Alco Water Service Robert Adcock 249 Williams Road Salinas, CA 93905	Elk Grove Water Works J. B. Jones 9257 Elk Grove Blvd. Elk Grove, CA 95624		
(WTB 331)	(WTA 210)		
East Pasadena Water Co. Shirley King 3725 East Mountain View Ave. Pasadena, CA 91107	California American Water Co. John Barker 880 Kuhn Drive Chula Vista, CA 91914		
(WTB 75)	(WTA 162)		
Hillcrest Water Co., Inc. Caryl Morrison 707 No. George Washington Blvd. Yuba City, CA 95993	Great Oaks Water Co. Betty B. Roeder P.O. Box 23490 San Jose, CA 95153		

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(157-SWR)

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Leigh Jordan
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California Water Association
Ms. Sharun Carlson
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Cerritos, CA 90703

(END OF APPENDIX A)

APPENDIX B

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APPENDIX B

Over the past three years, in each of your districts:

1. Identify with specificity complaints received about the charging of tenants or end users for water or sewer service in multiple unit residential complexes or mobilehome parks.

2. To the extent you are able to discern from your computer records, identify by name and address each multiple unit residential complex or mobilehome park which you serve with water or sewer service. With respect to each person or entity identified, answer the following questions if you know:

- a) What utility commodity is provided?
- b) Is there a submetered service system for water?
- c) What rate is charged to the tenant or end user for the water service?
- d) Is a billing agency used to charge and/or collect for water service? Identify the billing agency?

3. Does Tariff Rule 19C apply to the charges for water service imposed on end users by multiple unit residential complexes and mobilehome parks? Explain your answer.

4. Identify parties to any Tariff rule 19C agreements for resale of water which have been executed by your company with multiple unit residential complexes or with mobilehome parks. Provide a copy of each such agreement. To the extent that you claim protection of such agreements pursuant to section 583 of the Public Utilities Code, designate each portion of the agreement about which you claim such protection.

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5. Does your company meter directly tenants of multiple unit residential complexes or mobilehome parks? Have you been asked to do so? Are you interested in doing so? Explain your response.

6. Are you aware of whether any entities that you serve resell water in violation of Tariff Rule 19C? Advise what actions, if any, you have taken to promote their compliance with the rule. If Rule 19C is being violated, how would you become aware of such violation?

7. Where there are submeter water systems in multiple unit residential complexes or mobilehome parks, who is responsible for installing, maintaining and repair of the submeter system?

8. According to your rates, if a landlord charges for water through a submeter system, is there a financial difference between what the landlord pays you via the master meter and what he/she receives via the submeter system from tenants? What is that difference? Who does it benefit?

End of Appendix B