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MEMORANDUM

TO: Carole J. Washburn, Executive Secretary

FROM: Mary M. Tennyson, Sr. Assistant Attorney General

RE: Ability of the Commission to Assert Jurisdiction over Apartment Owners and Mobile Home Parks as Water Companies

DATE: January 6, 2000

BACKGROUND

In the course of the general rulemaking to consider revisions to the rules governing the regulation of water companies, the Commission proposed to clearly exclude from its jurisdiction those owners/managers of apartment and mobile home parks that supply water to their tenants and charge a fee for the service. Historically, this question has been raised on numerous occasions and Staff has generally responded that such persons are not subject to the Commission's jurisdiction so long as they charge only the cost of the water used, or estimated to be used, by each tenant and include only an additional "reasonable" or "nominal" charge to defray expenses. The amount of such a fee has been debated but never quantified.

In response to the language of the proposed rule, the Commission received numerous comments from apartment renters and their representatives asserting perceived abuses by apartment owners and third-party billing companies in the manner in which tenants are billed by them. In response to these comments, Commission Staff recommended that the portion of the rule that clearly excluded apartment owners and mobile home parks from the assertion of Commission jurisdiction be deleted from the proposed rule to allow further consideration of this issue.

Before proceeding with any formal action, Staff requested an informal opinion on whether the Commission has jurisdiction over apartments and mobile home parks as water companies or water utilities. It is my opinion that the Commission does not have the ability to bring such entities under its jurisdiction for purposes of regulation.

Log & file per Danny K. RMS

ANALYSIS

The issue of whether a state public utility commission can properly assert jurisdiction over the provision of water by a landlord to the tenants of a building or other structure has been raised in several other states. In the majority of those other states the issue has been resolved by the language of the statutes. In most other states the term "public utility" is defined to require that the utility service is being provided "to the public." The Washington public utility laws do not contain this language. In fact, a literal reading of the language of the definition of a water system, water company, and public service company in RCW 80.04.010 would lead to the conclusion that, if a company or person provides water "for hire," and either provides water service to 100 or more persons or meets the dollar threshold set by the Commission, then it is subject to regulation by the Commission regardless of the identity of those receiving the water service.

However, several cases decided by the Washington Supreme Court, the first of which was in 1939, have read into the utility statutes the condition that the business of the company is dedicated or devoted to public use, thus reading into the Washington statute the requirement that exists in the laws of most other states. The test was set out in Inland Empire Rural Electrification, Inc. v. Department of Public Service, 199 Wash. 527, 537, 92 P.2d 258 (1939), as follows:

> A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

Although this case involved an electric utility, the Washington Supreme Court quoted this language and adopted the same reasoning relating to a water company in West Valley Land v. Nob Hill Water Co., 107 Wn.2d 359, 365, 729 P.2d 42 (1986). The Court found that the water company in that case was not a public utility because it was not providing or offering its services to the public in general but only to members of the homeowners association. In other states, the courts have reasoned that when the water provider only provides water to those that the provider selects (as in the case of a landlord) then the water is not being provided to the public in general, and thus the provider is not a public utility. Drexelbrook Associates v. Pennsylvania Public Utility Commission, 418 Pa.430, 212 A.2d 237, 60 P.U.R. 3d 175 (1965). The issue in that case was whether the PUC should approve the transfer of a water system to the landlord. The water system was a public utility subject to regulation by the PUC, and by transferring the water supply system to the owner of the apartment village, the Commission was concerned that it would lose

regulatory control over such a large system.[1] The Pennsylvania Supreme Court, relying on a 1934 case, held that because the company served only those who were selected as tenants–a special class of persons not open to the indefinite public– the service was private in nature and not subject to regulation as a public utility. The Court determined that there was no difference in the ability to assert jurisdiction based on whether the charge for utility service were included in the itemized flat rental or was metered, with a separate charge, and even if the landlord made a profit on the sale of the water to its tenants.

This same reasoning would likely be applied by a Washington court today if the question of the provision of water service by a landlord or mobile home park to its tenants were presented. In each case, even if the provider of water to each apartment unit or space in the mobile home parks charges each unit for its water usage by metering the actual usage or by allocation, so long as the provider is not offering water service to the public in general or outside of the premises, it would not be deemed to have devoted its business to public use, as contemplated in the statutes governing the Commission. The Court in the Inland Empire case also stated that what the company actually does must be examined, not simply the corporate form or the nature of the contract. If the company has not held itself out as serving or ready to serve the general public, it will not be found to be a public service company.

A point that the Washington Supreme Court in Nob Hill found to be significant was that the company only provided water service to its members who had a voice (albeit a diluted one) in the operations of the association. In contrast, the tenants of an apartment building or complex or mobile home park owned by a private entity or an individual normally do not have a vote in the rates or charges for water service. However, this factor is unlikely to be determinative if the issue were raised in court. Unless there is a "holding out" of an offer of service to the general public, I do not believe the Commission can assert jurisdiction under Title 80 RCW over mobile home parks and apartments as public utilities. At least in theory, the individuals do not have to agree to the terms the landlord proposes; they can move to another location. While in actual effect many persons may feel they do not have a practical choice but to agree to the landlord's charges due to the limited availability of affordable rental housing, the lease or rental agreement is a contract, and individuals may negotiate their individual terms.

I do have some concern about the alleged abuses of utility billings by third-party billing companies, and the allegations that some third-party billing companies, are applying payments to the utility charges before applying payment to the rent and thus jeopardizing their compliance with the lease. This sort of practice, as well as the concerns that have been expressed about the methods of apportioning the costs of water service among tenants rather than individually

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[1]Drexelbrook Associates is a partnership that owns and manages a real estate development with 90 buildings containing 1223 residential units, nine retail shops, a club with a dining room, skating rink, tennis courts, and other public areas.

metering use, is most likely best addressed by the Consumer Protection Act, Chapter 19.86 RCW which governs unfair trade acts and practices.

Aside from the analysis of "pubic service company" by the Washington courts, there are many practical obstacles to the Commission asserting jurisdiction over apartments and mobile home parks charging their tenants for water service. Although the landlord distributes the water within its premises, the landlord is not responsible for supplying water in the same sense as a water company. It would be difficult, if not impossible, to employ the rate of return regulation method of setting rates that the Commission uses for the water systems it regulates. The rate of return method is based on the assets of the water system and a return on investment. In most instances, the construction of the water distribution system is part and parcel of construction of the building or park and is not a separately, divisible expense. Normally with water companies there is a clear dividing line of responsibility, with the water company being responsible for problems (such as broken pipes) up to the point of the meter and the customer having responsibility from the meter to the faucet. With an apartment, this formula does not work. It is possible that this method of ratesetting could be used for a mobile home park, if the residents own their own residences, but not if they are rented from the park.

CONCLUSION

It is my opinion that the Commission cannot assert jurisdiction to regulate the rates and practices of the owners or managers of apartments, mobile home parks, or third party billing serviced that they may use, as water companies, because the facilities are not dedicated or devoted to public use, and they are not holding themselves out to supply water service to the public, but only to the limited class of persons that they select as tenants. This is my personal legal opinion as legal counsel assigned to advise the Washington Utilities and Transportation Commission and should not be cited or referred to as an official opinion of the Attorney General's Office. The analysis and conclusions expressed in this Memorandum are mine alone.

MMT:pah

cc: Dixie Linnenbrink
Gene Eckhardt
Danny Kermode