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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Charles Paul Varvayanis,

Complainant,

vs.

Odd Fellows Sierra Recreation  
Association,

Defendant.

CASE (C.) 16-10-005  
(Filed October 6, 2016)

**MOTION TO DISMISS VERIFIED COMPLAINT**

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**January 5, 2017**

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**MOTION TO DISMISS VERIFIED COMPLAINT**

Pursuant to Rule 4.4 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, Defendant Odd Fellows Sierra Recreation Association, a California corporation (“Odd Fellows”), files its Motion to Dismiss the Verified Complaint (the “Complaint”) of Complainant Charles Paul Varvayanis’ (“Complainant”) as follows:

**I. BACKGROUND**

Complainant had four lots according to Odd Fellows' records (namely #09.006, #09.007A, #09-014 and #24.041) as of May 31, 2012. It is worthwhile to note that while Complainant had previously legally merged three of his lots (#09.006, #09.007A, #09-014), Odd Fellows did not recognize such mergers for the purpose of billing for water and other services (such other services being described below).

On June 6, 2012, Complainant was billed \$1,024 for each of his four lots for FY2012 for water AND for (1) maintenance and repair of the streets and roads within the subdivision (the "Park Roads"), including without limitation, filling ruts and holes, repairing cracks, clearing the adjacent drainage ditches/culvert of debris, repainting lines and resealing and overlaying certain surfaces of the Park Roads, keeping the Park Roads accessible during times of inclement weather; (2) garbage disposal; (3) use of Park access gate; (4) use of lake, recreation hall, picnic area, baseball field, playground, and other similar types of areas within the subdivision and

maintenance and repair of such improvements; (5) pine needle disposal; (6) services of an onsite caretaker to assist in providing the aforementioned service; (7) and certain other services. Odd Fellows did not initially separate their invoices for water and other the services referenced above.

On November 30, 2012 during the initial prehearing conference call with ALJ Minkin in C12.03.017, Odd Fellows noted that the bill for water service only was approximately \$540 and agreed to separately invoice the lot owners for water. The foregoing was memorialized by ALJ Minkin in her "Administrative Law Judge's Ruling Memorializing Procedures Agreed to By Parties" filed on December 5, 2012 in C12.03.017.

On December 7, 2012, Odd Fellows filed a "Report of the Odd Fellows Sierra Recreation Association" in C12.03.017 stating that the bill for water was \$571.60 for FY2012.

On December 11, 2012, Odd Fellows credited Complainant \$571.60 on each of his original June 6, 2012 invoices (thereby reducing the balance due for such original invoices to \$452.40 (\$1,024-\$571.60)). The next day, December 12, 2012, Odd Fellows invoiced Complainant \$571.60 for water for each of his four lots.

During FY2012, Odd Fellows' board of directors voted to recognize merged lots as one lot for billing purposes retroactively for FY2012 and thus recognized Complainant three separate lots that had been previously legally merged as noted above (#09.006, #09.007A, #09-014) as one for billing purposes (under lot # 09-007A). Odd Fellows therefore credited Complainant \$1,024 for Odd Fellows' June 6, 2012 invoices of \$1,024 to Complainant for lot #09.014 and lot #09.006 (meaning that Complainant owed \$571.60 for water for lot #24.041 and lot #09.007A and \$452.40 for other services for lot #24.041 and lot #09.007A).

On March 14, 2013, Complainant paid \$571.60 for water for lot #24.041. On March 19, 2013, Complainant paid \$571.60 for water for lot #09.007A.

On April 4, 2013, Complainant paid \$452.40 for the other services provided by Odd Fellows as described above (other than water) for lot #09.007A. On April 5, 2013, Complainant paid \$452.40 for the other services provided by Odd Fellows as described above (other than water) for lot #24.041.

The Commission issued its Decision No. 16-01-047 (the "Original Decision") on January 29, 2016 in A.13-09-023.

The Original Decision conditionally granted Sierra Park Water Company, Inc. ("Water Company") a certificate of public convenience and necessity conditioned on certain transfers by

Odd Fellows described in Ordering Paragraph 1. Odd Fellows subsequently made such required transfers to Water Company and Water Company is operating as a public utility.

As pertinent to the Complaint, the Original Decision also ordered certain refunds to be made by Odd Fellows. Ordering Paragraph 3.b on page 37 of the Original Decision originally specifically provided as follows:

*3.b Odd Fellows must make a full refund of \$109,432, allocated proportionately to the improved and unimproved lots as otherwise shown in the Division of Water and Audits Staff Report, its adjusted share prior to spinning-off Water Company. Odd Fellows must make the refund over five years (for a total of twenty payments by the dates set forth in Ordering Paragraph 3.a above by paying Water Company who, in turn, must refund customers as proposed in the Division of Water and Audits Staff Report. Additionally, Odd Fellows must refund to the Water Company no later than June 30, 2016, \$1,200 to reflect the \$600 per year it received from the Water Company for the use of easements on six miles of pipe for Fiscal Years 2013 and 2014, and any monies received from Water Company for the six miles of pipe easements for Fiscal Year 2015.*

On June 29, 2016, Odd Fellows filed a Petition for Modification of the Original Decision with the Commission specifically seeking a modification of Ordering Paragraph 3.b of the Original Decision (the "Petition for Modification of the Original Decision"). Water Company also filed a separate Petition for Modification of the Original Decision with the Commission on June 10, 2016.

Odd Fellows' Petition for Modification of the Original Decision specifically provided as follows on pages 3 and 4:

*As set forth above, Ordering Paragraph 3.b specified a specific dollar amount to be refunded by Odd Fellows: \$109,432, allocated \$94,957 for improved lots and \$14,475 for unimproved lots for FY 2012. (Decision, p. 20 and p. 37.) These specific dollar amounts were "backcast" by the Water Division for FY 2012 (See Decision, p. 17; Attachment A to Decision, p. 25, Table 3, dollar amounts stated in 3rd and 4th Rows in Column labeled "Total.")*

*Odd Fellows recognizes that the Water Division was attempting to determine a reasonable rate for water for FY 2012 by "backcasting". However, Odd Fellows did not*

*bill \$825 for water for improved lots or \$759 for water for unimproved lots in FY 2012 as set forth in Attachment A to Decision, p. 25, Table 3. **Instead, Odd Fellows actually billed \$571.60 for water for all (improved and unimproved) lots for FY 2012.**<sup>1</sup> As Odd Fellows did not collect (or bill) \$825 for water for improved lots or \$759 for water for unimproved lots, if Odd Fellows were to refund \$109,432, this would result in a windfall of \$253.40 for improved lots and \$187.40 for unimproved lots for FY2012!*

*Furthermore, Odd Fellows did not collect all amounts it billed for FY2012 (at a rate of \$571.60). The Decision recognizes that fact in stating customers who did not pay the actual rates charged “would not be entitled to a refund.” (Decision, p. 24.)*

*Finally, the Decision also recognizes that “the actual refund amount” may be “less than what we order” because customers who did not pay in full would not be entitled to a refund. (Decision, p. 24.)*

*Unfortunately, the foregoing are not reflected in Ordering Paragraph 3.b. As a result, under current Ordering Paragraph 3.b, despite the clear intent of the Decision, customers will receive windfalls unless Ordering Paragraph 3.b is revised. This would lead to an unfair result.*

*Odd Fellows therefore requests that Ordering Paragraph 3.b be revised to make it clear refunds need be made subject to the amount actually collected for each customer for water for FY 2012. Odd Fellows kept very detailed records of all payments made by customers for FY 2012 and therefore is able to determine the customers who fully paid the amount billed (\$571.60), made partial payments or made no payments at all.*

Odd Fellows also attached its proposed calculation of refunds to customers if its Petition for Modification of the Original Decision was granted (See Appendix B to Petition for Modification of Original Decision). Such calculations were for refunds only to customers who paid in full (\$571.60) as set forth in Odd Fellows’ Petition for Modification of the Original Decision.

On July 19, 2016, the Commission issued a Proposed Decision Granting Petitions to Modify Decision 16-01-047 and Clarifying Ordering Paragraphs 3.a and 3.b.

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<sup>1</sup> See February 14, 2013, Joint Scoping Memo Ruling of Assigned Commissioner and Administrative Law Judge filed in C-1203017, p. 4., subparagraph 3. See also, “Report of the Odd Fellows Sierra Recreation Association” filed on December 7, 2012, in C-1203017, p. 2-3. Footnote in quoted text.

No comments were filed by Complainant or any other person in response to the Proposed Decision Granting Petitions to Modify Decision 16-01-047 and Clarifying Ordering Paragraphs 3.a and 3.b and thus on August 19, 2016 the Commission issued its Decision Granting Petitions to Modify Decision 16-01-047 and Clarifying Ordering Paragraphs 3.a and 3.b (the “Decision to Modify”).

The Decision to Modify specifically modified paragraph 3.b of the Original Decision as follows:

*3.b. Odd Fellows must make a refund to all customers whom made payments in excess of reasonable rates only, of up to \$109,432, allocated proportionately to the improved and unimproved lots as otherwise shown in the Division of Water and Audits Staff Report, as its adjusted share prior to spinning-off Water Company. Odd Fellows must make the refund over five years (for a total of twenty payments) by the dates set forth in Ordering Paragraph 3.a above by paying Water Company who, in turn, must refund customers as proposed in the Division of Water and Audits Staff Report). **Odd Fellows may prepay all or any portion of the refund payments then due in full at any time.** Additionally, Odd Fellows must refund to the Water Company no later than June 30, 2016, \$1,200 to reflect the \$600 per year it received from the Water Company for the use of easements on six miles of pipe for Fiscal Years 2013 and 2014, and any monies received from Water Company for the six miles of pipe easements for Fiscal Year 2015.*

As set forth above, Water Company and not Odd Fellows is operating as a public utility pursuant to the Original Decision. Odd Fellows has not collected any amounts for water from the lot owners other than for FY2012.

As also set forth above, Odd Fellows billed \$571.60 for water for FY2012 not \$825 for improved lots and \$759 for unimproved lots. This is further bolstered by Complainant’s “Verified Post-Teleconference Brief” in which Complainant actually cites from page 31 of Original Decision as follows:

*“In its comments to the revised proposed decision Odd Fellows also now*

*questions the Water Division's computation of water rates, although it did not question them in its comments to the initial proposed decision. 23 The Water Division requested cost information from Odd Fellows and the Water Company prior to writing its report, but had issues with the accuracy and usefulness of the unsegregated information it received. (See Final Report at 14-16.) **The Water Division therefore used the best available information such as Budget Reports that came from the Water Company's Board of Director Minutes. Once it determined Fiscal Year 2013 financials, the Water Division then backcast or deflated this amount using approved inflation factors to determine the Fiscal Year 2011 and 2012 revenue requirement. We therefore make no changes to the Final Report in response to Odd Fellow's comments.***" (emphasis added)

As clearly set forth above, the Water Decision "backcast or deflated" budget reports from the Water Company (not Odd Fellows) to "determine the Fiscal Year.... 2012 revenue requirement". This of course had nothing to do with how much Odd Fellows billed for water for FY2012.

After the Decision to Modify was issued, Odd Fellows continued to calculate refunds as shown on the spreadsheet attached as Appendix B to its Petition to Modify Decision. As referenced above, such calculations were for refunds only to customers who paid in full for water for FY2012 (\$571.60). Those who did not pay at all or only partially paid were rebilled as if the rate adopted by the Commission for FY2012 (\$514) was already in place.

As set forth above, Complainant paid \$571.60 for water for FY2012 for each of his two lots. Odd Fellows therefore determined that Complainant had "**made payments in excess of reasonable rates**" (\$514) and was therefore owed a refund. His refund was determined to be \$57.60 (\$571.60-\$514) per lot or \$2.88 per quarter.

Therefore, on or about March 25, 2016, Odd Fellows' agent sent Complainant an initial refund of \$2.88 for each of the two lots owned by Complainant. Complainant received such refunds.

On or about June 24, 2016, Odd Fellows' agent sent Complainant a second refund of \$2.88 for each of the two lots owned by Complainant.

On or about July 15, 2016, Complainant informed Mr. Del Wallis, President of Odd Fellows, that he had not received the June 24, 2016 refund checks from Odd Fellows in the amount of \$2.88 each and asked Odd Fellows to reissue such checks to Complainant.

On or about August 17, 2016, Odd Fellows' agent informed Complainant that they could put a stop payment on the June 24, 2016 refunds checks previously sent to Complainant, that the fee for such stop payment would be \$24.00 for each check and that Odd Fellows' agent could reissue such refund checks once the stop payment fees were paid by Complainant.

On or about September 28, 2016, Odd Fellows' agent sent Complainant a third refund of \$2.88 for each of the two lots owned by Complainant. Complainant received such refunds.

## **II. ARGUMENTS**

Complainant's Verified Complaint sets forth three separate causes of action, one separate and two related. Complainant's Verified Complaint should be dismissed for the reasons hereinafter set forth:

### **A. First Cause of Action**

Although it is not entirely clear in the Complaint, Complainant appears to claim in the First Cause of Action that Odd Fellows owes him a quarterly refund of \$15.57 for March, June and September 2016 for each of his two lots based on the Original Decision and not the quarterly refund of \$2.88 that Odd Fellows has been paying pursuant to the Decision to Modify. As set forth above, Complainant has received a total of three (3) quarterly refund checks for March, June, September 2016. Complainant is therefore seeking recovery of **\$76.14** (( $\$15.57 - \$2.88 = \$12.69$ ) x 6) in the first cause of action. However, Complainant completely ignores the Petition to Modify and the Decision to Modify in his Complaint.<sup>2</sup>

As the Commission knows, the Decision to Modify modified Ordering Paragraph 3.b of the Original Decision all as set forth above. What is intriguing however is that Complainant in his "Verified Post-Teleconference Brief" filed in this matter on December 21, 2016 states as follows regarding the Decision to Modify: "*The Modified Decision changes nothing in respect to the Complainant and as a result has no effect on the Complainant. It is worthwhile noting that the Original Decision was the result of a full commission decision of all five commissioners.*"

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<sup>2</sup> Complainant of course also fails to reference in his Complaint that he paid \$571.60 for water for FY2012 as set forth above.



This is the first time that Complainant has recognized the Decision to Modify. It is also clear from Complainant's own statements that he does not believe that the Decision to Modify is binding on him.

Complainant is essentially trying to modify the Original Decision as modified by the Decision to Modify without filing a petition to modify in A.13-09-023.

Rule 16.4 governs the process for the filing and consideration of petitions for modifications. Complainant has not complied with the requirements of Rule 16.4 and instead has filed the instant Complaint. Complainant cannot sidestep the requirements of Rule 16.4 by filing a separate complaint seeking the Commission to order amounts which are not supported by Decision to Modify.

Furthermore, Odd Fellows is not subject to the jurisdiction of the Commission because Odd Fellows is not a public utility under Public Utilities Code §§ 2704 and 2706(b). Furthermore, pursuant to Rule 4.1(a)(1) of the Commission's Rules of Practice and Procedure, Complainant does not have the right to file this Complaint against Odd Fellows as Odd Fellows is not a "public utility".

Finally, Complainant is pursuing separate complaints in a separate jurisdiction for identical relief. Specifically, on October 7, 2016, Complainant filed a complaint against Odd Fellows in Tuolumne County Superior Court, Case No. SC19463. The Tuolumne County Superior Court complaint was filed after this Complaint. In the Tuolumne County Superior Court complaint, Complainant alleges that he is owed \$81.78 because he claims that "CPUC Decision 16-01-047 dated January 28, 2016 orders 20 payments of \$15.57 totaling ~\$311.33 per lot. I have two lots. The Defendant has paid me 2 x \$2.88 (3/25/2016) 2x \$0.00 (6/24/2016) and 2 x. \$2.88 (9/25/2016)." This matter is set for trial on January 6, 2017, well in advance of the evidentiary hearing currently set in this matter. As such, Defendant has submitted himself to the jurisdiction of the Tuolumne County Superior Court to render a decision in this matter.

As a result of the foregoing, the First Cause of Action should be dismissed.

**B. Second Cause of Action**

In the Second Cause of Action, Complainant claims that Odd Fellows fraudulently withheld two (one refund check per lot) refund checks from Complainant in the amount of \$2.88 each for a total of **\$5.76**.

Odd Fellows is not subject to the jurisdiction of the Commission because Odd Fellows is not a public utility under Public Utilities Code §§ 2704 and 2706(b). Furthermore, pursuant to Rule 4.1(a)(1) of the Commission's Rules of Practice and Procedure, Complainant does not have the right to file this Complaint against Odd Fellows as Odd Fellows is not a "public utility".

Furthermore, Complainant is pursuing separate complaints in a separate jurisdiction for identical relief. Specifically, on October 7, 2016, Complainant filed a complaint against Odd Fellows in Tuolumne County Superior Court, Case No. SC19463. The Tuolumne County Superior Court complaint was filed after this Complaint. In the Tuolumne County Superior Court complaint, Complainant alleges that he is owed \$81.78 because he claims that "CPUC Decision 16-01-047 dated January 28, 2016 orders 20 payments of \$15.57 totaling ~\$311.33 per lot. I have two lots. The Defendant has paid me 2 x \$2.88 (3/25/2016) **2x \$0.00 (6/24/2016)** and 2 x. \$2.88 (9/25/2016)." (emphasis added) This matter is set for trial on January 6, 2017, well in advance of the evidentiary hearing currently set in this matter. As such, Defendant has submitted himself to the jurisdiction of the Tuolumne County Superior Court to render a decision in this matter.

As a result of the foregoing, the Second Cause of Action should be dismissed.

### **C. Third Cause of Action**

In the Third Cause of Action, Complainant claims that Odd Fellows fraudulently demanded stop payment fees of \$24.00 for the two refund checks referenced in the Second Cause of Action and that the "...WTD 440 Tariff Book does not authorize stop payments...". Complainant is not actually seeking recovery of any amount from Odd Fellows as Complainant has not actually paid a stop payment fee to Odd Fellows.

Odd Fellows is not subject to the jurisdiction of the Commission for the claims brought by Complainant in the Third Cause of Action because Odd Fellows is not a public utility under Public Utilities Code §§ 2704 and 2706(b). Furthermore, pursuant to Rule 4.1(a)(1) of the Commission's Rules of Practice and Procedure, Complainant does not have the right to file this Complaint against Odd Fellows as Odd Fellows is not a "public utility". As a result of the foregoing, the "WTD 440 Tariff Book" is not applicable to Odd Fellows.

Furthermore, the Third Cause of Action must be dismissed as Complainant has not actually paid a stop payment fee to Odd Fellows.

As a result of the foregoing, the Third Cause of Action should be dismissed.

**III. CONCLUSION**

For the above-stated reasons, Odd Fellows requests that the Commission dismiss the Complaint.

Respectfully submitted,

DAMBACHER, TRUJILLO & ASSOCIATES, a professional  
law corporation

By: /s/ Timothy T. Trujillo  
TIMOTHY T. TRUJILLO, ESQ.

Attorneys for Defendant Odd Fellows Sierra Recreation  
Association