

BEFORE THE PUBLIC UTILITY COMMISSION

OR OREGON

WJ8

In the Matter of:)
) CROOKED RIVER RANCH WATER
CROOKED RIVER RANCH WATER) COOPERATIVE SECOND POST-
COMPANY) HEARING BRIEF
)
An Investigation Pursuant to ORS 756.515 to)
Determine Jurisdiction)
)
)

INTRODUCTION

Consistent with the schedule adopted in this proceeding, the Crooked River Ranch Water Company hereby submits its second post-hearing brief.

DISCUSSION

The CRRWC has previously filed a pre-hearing brief and first post-hearing brief. All arguments previously submitted are hereinafter incorporated by reference. In it's opening brief the PUC attempts incorrectly interpret the law to it's own benefit, circumvent the law when it's convenient to do so and make legal assertions which are not supported by either law or evidence. What follows is CRRWC's legal arguments over the three issues which remain in dispute.

The Crooked River Ranch Water Company is a cooperative and as a cooperative is exempt from ORS 757.063

The CRRWC is a cooperative and has been recognized as such for the last 27 years by the federal government. As a cooperative the CRRWC is not subject to ORS 757.063. In order for the

CRRWC to be subject to ORS 757.063 upon the receipt of valid petitions from 20 percent of the membership there must be some notification to the CRRWC for the assertion of jurisdiction. In it's opening brief the PUC is trying to convince the court that it said one thing and meant another.

In paragraph one of the letter dated April 28, 2005 it is stated "...if 20 percent or more of an association's members petition PUC for regulation; the Commission must issue an order declaring the association a financially regulated public utility." To date no such order has been issued and this is uncontested by the PUC.

In paragraph two of the same letter it states, "This letter is notification of the Commission's intent to assert its authority and regulate CRRWC for rates and service." In paragraph six of the same letter it states, "If CRRWC does not respond in writing to the Commission within the 30-day period, the Commission will issue an order asserting jurisdiction." The letter is replete with clear and unequivocal messages that there is intent to assert jurisdiction but no order doing so.

In it's most outrageous argument to date the PUC is now alleging that the author of the April 28, 2005 letter, Marc Hellman Administrator of the Economic Research and Financial Analysis Division did not have the authority to send it. This letter was copied to numerous PUC staff members and attorneys including Jason Jones and Michael Dougherty. If the letter was incorrect, as the PUC concedes in making their argument regarding staff authorization, why was isn't it immediately corrected?

Pursuant to ORS 757.055(1):

"The Public Utility Commission may designate by order or rule any commissioner or any named employee or category of employees who shall have authority to exercise any of the duties and powers imposed upon the commission by law. The official act of any commissioner or employee in so exercising any such duties or powers is considered to be an official act of the commission."

The PUC's attempt to blame an administrator for making misstatement is not appropriate or valid. Unless this could be considered an "order upon any investigation the commission causes to be initiated" under ORS 756.055(2)(b). In which case Mr. Hellman didn't have the authority to sign that letter. Either way the CRRWC cannot be bound by the letter even if it did assert jurisdiction.

As the letter obviously did not assert jurisdiction the PUC is estopped to assert a claim in consistent with the position taken by it in the letter. *Dept. of Transportation v. Hewitt Professional Group*, 321 Or 118, 895 P2d 755 (1995). Reliance on the letter by CRRWC was absolutely reasonable under the circumstances.

Assuming for argument's sake that the CRRWC was under PUC regulation pursuant to ORS 757.063 the PUC has once again failed in their opening brief to show how the CRRWC sold, leased, assigned or otherwise disposed of utility property by clarifying it's status with the Secretary of State. Dissolution does not mean disposition of utility property when the company is immediately reformed and ownership of company property never changes hands. In order to be subject to ORS 757.480 some tangible property interest must have changed hands. It is unclear how or why the PUC is unable to grasp this basic concept.

The PUC's investigation into regulation of the Crooked River Ranch Water Company is not proper based upon the rules and laws which control the investigation.

In their Opening Brief the PUC characterizes CRRWC's argument that the PUC violated it's own rules by accepting petitions without telephone numbers as a bold assertion. This more than an assertion it is a statement of fact which remains uncontested. The PUC has not denied that the rule requiring phone numbers was not followed what they have offered is ad-hoc justifications for not following the rules and none of these justifications are supported.

The PUC alleges that OAR 860-036-0412(3) requests the petitions include telephone numbers in order for Staff to more easily confirm the petitions. First of all phone numbers are required under the this rule not requested. Words of common usage typically should be given their plain, natural and ordinary meaning. *PGE v. Bureau of Labor & Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). When OAR 860-036-0412(3) sets forth the petition requirements there is no language to indicate that any of the listed requirements is optional. What the PUC is suggesting is expressly prohibited by statute. ORS 174.010 on statutory construction contains the enjoinder “not to insert what has been omitted, or to omit what has been inserted.” Simply put, the PUC cannot conveniently pick and choose those portions of the rules they adhere to.

Despite the obvious prohibition on deviation from the letter of law contained both in the ORS and Oregon caselaw The PUC attempts to justify their actions by alleging the reason why OAR 860-036-0412(3) requires phone numbers is in order for Staff to more easily confirm the petitions. No evidence whatsoever for the this allegation is offered. While it may be true that telephone numbers are of some assistance to Staff in confirming petitions there is no evidence that this was the intent of the legislature or administrative agency during the rulemaking process No legislative history is offered or testimony from the requisite rulemaking hearings and without any evidentiary support this argument should be disregarded.

The PUC states that under OAR 860-036-001 they have the authority to waive a technical requirement of their own rules. Under *Marbet v. Portland General Electric.*, 227 Or 447, 461, 561 P2d 154 (1977), an administrative agency is allowed to adopt general policy interpreting one of it’s rules as the PUC has proposed here. However, *Marbet* supra, spells out rules for how and when this may be accomplished holding that:

“The Oregon Administrative Procedure Act (APA), like most, is premised on a distinction between two kinds of agency action, rulemaking and the decision of “contested cases” In principle, rulemaking procedure is to be used in stating general agency policy, ORS 183.310(7). “Contested case” procedure is to be used in applying statutory or agency policy to specific parties on particular facts. ORS 183.310(2). When the decision of a concrete case presupposes agency adoption of general standards under which it is to be decided, those standards normally must be adopted by rulemaking procedure before they can be applied in the case.”

In other words, if the PUC wants to eliminate the requirement that a phone number be included on a valid petition they need to do it through a formal rulemaking process not in a contested case such as this.

The court’s holding in *Gouge v. David*, 185 Or 437, 459, 202 P2d 489 (1949), is particularly instructive on how the court reviews administrative agencies policing their own rules and levels of authority holding that:

“A statute which creates an administrative agency and invests it with its powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare.”

The law is clear that the PUC does not have the discretion to disregard it’s own rules in a contested case when it is convenient to do so. On a more philosophical note, we see a situation not unlike congress who has the ability to vote themselves their own raises. The opportunity for abuse of power is readily available and often taken advantage of.

ORS 757.063 is unconstitutional and cannot serve as a the basis for PUC jurisdiction in this case.

The CRRWC is not ignorant of the fact that ORS 757.063 was created by an elected and democratic legislature as suggested by the PUC. The CRRWC has argued that the process created by ORS 757.063 is undemocratic and unconstitutional and therefore so is the law. The Oregon

legislature is responsible for the creation and enactment of law but is by no means the judge of whether or not the laws created are constitutional. The constitutionality of the laws enacted is for the courts to decide and the list of laws overturned by the courts as unconstitutional is so long that the constraints of this proceeding do not allow the CRRWC to list them. ORS 757.063 is and lawfully should be one of those laws.

An undemocratic and unrepresentative process is not the only problem created by ORS 757.063. The CRRWC arguments regarding the constitutionality of ORS 757.063 are more than just a “facial challenge” The briefs previously submitted describe in detail how ORS 757.063 provides for an undemocratic and unconstitutional process. By asserting jurisdiction over the majority of a recognized association without any investigation as to the validity of the claims made by the 20 percent ORS 757.063 deprives the majority of their right to due process in violation of the United States Constitution Amendment XIV and Oregon Constitution Article I, Section 10.

The briefs previously submitted by both the PUC and CRRWC contain the allegations made on a portion of the petitions signed. In attempting to assert jurisdiction it is uncontested that the PUC makes no investigation as to the validity of the statements contained on the petition. The fact of the matter is that there is a considerable amount of evidence submitted at the hearing in this case that the statements contained on the petition signature sheets are false. ORS 757.063 creates a process whereby the PUC can assert jurisdiction and control over an association under false pretenses and in contravention to the due process rights of the majority of the association.

The PUC is empowered under ORS 756.040 to represent the public interest regarding the rates, service and quality of utility service providers. By serving only their own interests and those of a small minority of the membership in the CRRWC the PUC is in violation of their General

Powers under ORS 756.040 as well as their mis-guided attempts to enforce the unconstitutional mandate that is ORS 757.063. This proceeding is the proper forum for this argument and the constitutionality of ORS 757.063 is but one of several grounds on which to deny PUC regulation.

Lastly, the PUC has submitted that the CRRWC has misinterpreted what PUC “regulation” entails. The transcript reveals that any misinterpretation by Mr. Rooks was the result of his reliance on a statement from a PUC administrator, Marc Hellman at a public hearing. It should be noted that Mr. Jason Jones who called Mr. Rooks interpretation “absurd” was present at the meeting on May 16, 2006 when Mr. Hellman informed the CRRWC that if under PUC regulation the PUC could hit the CRRWC in the pocket book. This misinterpretation, if any, is characteristic of the way in which the PUC has gathered and disseminated information throughout this proceeding.

CONCLUSION

The PUC stated in their last brief that the CRRWC is using “desperate attempts to avoid statutorily mandated regulation” What the CRRWC is actually doing is following the laws and rules of this state to protect a majority of their customers and fight an unconstitutional law. The PUC on the other hands is seeking to enforce laws and rules against the CRRWC when they fail to abide by the same laws and rules. The CRRWC asks that the laws and rules of this state be applied in a fair and non-discriminatory manner resulting in the denial of PUC regulation.

DATED This _____ day of October 2006.

GLENN, SITES & REEDER, LLP

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CERTIFICATE OF SERVICE

I certify that on October 3, 2006, I served the foregoing upon all parties of record in this proceeding by electronic filing and by mailing a copy by postage prepaid first class mail.

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Dated this 3rd day of October 2006

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