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5 IN THE COURT OF APPEALS OF THE STATE OF OREGON

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8 JUDY BEDSOLE AND FISHMILL LODGES

9 PETTITONERS

10
11 V.

12 THE OREGON PUBLIC UTILITY
13 COMMISSION, AND COMMISSIONERS
14 SUSAN ACKERMAN, JOHN SAVAGE,
AND STEVEN BLOOM

15 RESPONDENTS
16
17
18

Public Utility Commission # Order 16-075
related to Order 15-364

CA A _____

PETITION FOR JUDICIAL REVIEW

ORS 183.482

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21 https://appellate.courts.oregon.gov/_layouts/fba/PasswordRecovery.aspxThe Parties to
this Review and their Counsel are:

22 Petitioner

Respondent

23 Fish Mill Lodges and Judy Bedsole
24 Commission

The Oregon Public Utility

25
Attorney

Ann Fisher

Attorneys

PETITION FOR JUDICIAL REVIEW- 1

RECEIVED
MAY 2 2016

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10 DATED THIS April 28, 2016

11 RESPECTFULLY SUBMITTED,

12 s/Ann Fisher

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19 CERTIFICATE OF SERVICE

20 I certify that on April 28, 2016 I served a true copy of this Petition for Judicial
21 Review, by depositing into the US Mail, first class postage prepaid and certified,
22 to

23 Oregon Attorney General
24 Office of Solicitor General
25 400 Justice Building
1162 Court Street, NE
Salem, OR 97301-4096

And
Public Utility Commission of Oregon

1 Attn. Michael Dougherty
2 PO Box 1088
3 Salem OR 97308-1088

4 CERTIFICATE OF FILING

5 I certify that on April 28, 2016 I filed the original of this Petition for Judicial
6 Review with the Appellate Court Administrator by means of Efile.

7 Dated April 16, 2016.

8 s/Ann Fisher

9 Ann L. Fisher
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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1489, UM 1528, UCR 121, UCR 122, UCR 123, UCR 133, UCR 135

In the Matters of

JUDY BEDSOLE AND FISH MILL LODGES
WATER SYSTEM,

Application for Abandonment of Utility and
Other Above-Referenced Dockets Relating to
the Operation and Maintenance of the Fish
Mill Lodges Water System.

ORDER

DISPOSITION: PETITION FOR RECONSIDERATION DENIED: MOTION
TO STAY DENIED AS MOOT

In this order we deny a the petition for rehearing, reconsideration, and clarification of Order No. 15-364, filed by Judy Bedsole and Fish Mill Lodges Water System (Fish Mill). For reasons discussed below, we find petitioners have failed to establish grounds to support their motion. We also deny as moot petitioners' motion to stay the enforcement of Order No. 15-364.

I. INTRODUCTION

In January 2016, Bedsole and Fish Mill made two filings in response to our Order No. 15-364. In that order we, among other things, transferred ownership of Fish Mill to Summit Water Association LLC and removed our regulatory jurisdiction over the water system.

In the first filing, made on January 5, 2016, Bedsole and Fish Mill filed a petition for rehearing, reconsideration, and clarification of Order No. 15-364 (Petition). Later, on January 11, 2016, they filed a motion to stay enforcement of the order pending a decision on their petition.¹

On January 20, 2016, our Staff and Bonnie Lucas, a customer of the utility, filed separate responses opposing the requests.

¹ In their January 11 filing, Bedsole and Fish Mill seek the stay of "Order No. UM 1489." We interpret the request as seeking a stay of Order No. 15-364, which is the subject of their earlier filed petition.

On February 8, 2016, Bedsole and Fish Mill filed a supplement to their original petition (supplement).

II. BACKGROUND

We provide a brief summary of the complicated procedural history of these dockets. Fish Mill is a fishing resort located on the central Oregon coast. The utility provides water service to the resort and to three residential customers located along the easement to the spring.

Because Fish Mill provides water services to the public, it is deemed a public utility subject to Commission regulation.² Due to the small number of customers it served and the rates that it charged, Fish Mill was initially subject to only to service regulation.

In August 2007, Fish Mill filed a petition asking that it also be rate regulated by the Commission.³ We granted Fish Mill's request in Order No. 07-391, docket WJ 16, and later approved new rates for the company.

Over the next several years numerous disputes arose between Fish Mill and its residential customers. Fish Mill also experienced problems with water quality, and drilled a new well on its property for the purpose of servicing the resort – bypassing its own water system.

These events culminated with Fish Mill's application to abandon service to its residential customers, claiming financial hardship and alleging customer abuses. Customers also filed various complaints against Fish Mill, and Staff initiated civil proceedings seeking penalties against Fish Mill.

Ultimately these various matters were settled with a stipulation between the owners of Fish Mill, including Bedsole, Staff, and the utility's customers. The stipulation, which we approved in Order No. 12-027, contained a number of conditions, including that we appoint a regent to operate and repair the water system and provide emergency funds of \$5,000 for repairs, and that the customers form an entity to take over the system and repay the funds over time. The terms and conditions of the stipulation were filed and recorded with Lane County on August 17, 2015 (Recording No. 2015-041159).

After conditions set forth in the stipulation were satisfied, we subsequently approved, in Order No. 15-364, Staff's unopposed motion to effectuate the remaining terms of the stipulation. These included the release of the regent from its responsibility to operate the system and the transfer of the system to a new entity, Summit Water Association LLC. (Summit)⁴ We did not modify the stipulation or Order No. 12-027.

² See ORS 757.005.

³ See former ORS 757.061(6)(a) (now ORS 757.061(3)(c)).

⁴ Summit is owned by the three residential (non-affiliated) customers of Fish Mill.

III. THE PETITION

A. Claim for Relief

Bedsole and Fish Mill allege various legal deficiencies in Order No. 15-364 and request the right to brief these issues more fully. The alleged legal deficiencies include the adoption of the stipulations "without considering their legal ramifications," a lack of subject matter jurisdiction over water rights and real property, lack of jurisdiction over Bedsole and Fish Mill as a public utility, and fundamental unfairness.⁵

Petitioners ask that the order be modified in four respects to clarify that: (1) the order is not intended to interfere with petitioners' water rights granted by the Water Resources Board with respect to their own properties; (2) Petitioners have the right to take service for use on their non-contiguous property or to serve petitioners properties; (3) Petitioners are not obligated to pay for more than their equal share of Summit's costs, and will have no economic obligations if they cease to use Summit; and (4) the Commission retains jurisdiction over Summit to assure that petitioners can continue to receive service.

If their clarifications are not adopted, petitioners ask that the matters be reopened to reexamine the basis for our jurisdiction to approve such actions. Petitioners claim that they will incur irreparable injury if their requests are not granted.

B. Responses

At the outset, both Staff and Lucas argue that the petition appears to be more of an attack on the stipulation adopted in Order No. 12-027 than on Order No. 15-364, which merely gave effect to the earlier order. As such, they claim the petition is nearly four years too late.

As to the merits, Staff and Lucas point out that the stipulation was signed by petitioners, and that all parties were represented by counsel. They also note that the Commission did not create water rights or take property rights. Rather, the parties agreed to a stipulation in which the petitioners agreed to transfer the water system and necessary water rights and property rights to a new entity, so that the customers would be able to maintain water service.

Finally, Staff and Lucas argue that no clarification of the order is necessary. They state that the stipulation is unambiguous with regard to the rights of petitioners with respect to their water rights and their right to take service from Summit. They state that plain terms of the stipulation provide petitioners with contract rights to service so that continuing

⁵ "The Commission incorporated conditions that result in leaving petitioners unable to provide water to their own properties, no perpetual right to continue to have service through the 'Summit' water organization, no ability to use their own water rights, and yet assigns a disproportionate share of costs going forward to them." (Petition at 2).

Commission jurisdiction is not necessary to safeguard petitioners' status as Summit customers.

C. Supplement to Petition

In their supplement to their petition, Bedsole and Fish Mill argue that we were without authority to regulate their water system for two reasons: (1) it was not a water utility under our regulatory scheme, and (2) the water being delivered to the specified lots could not be sold to the public either directly or indirectly – or sold at all, based on their reading of their water certificate. Because we did not have subject matter jurisdiction, petitioners claim that we had “no authority to cancel, create, limit, or diminish water rights or to modify real property deeded easements (or real property rights generally).”⁶

Petitioners also assert that the Commission never had jurisdiction over Fish Mill. Although they asked the Commission to help sort out rights, petitioners contend that their request did not, and could not, confer subject matter jurisdiction on this Commission. In their view, the water system is simply the result of a private arrangement wrongfully identified as a water utility: “[t]he arrangement was never thought of as a utility, was never formed to be a utility, and never evidenced an intent by this arrangement to be anything more than a private agreement reflecting a sharing of water rights.”⁷

Petitioners claim that the stipulation settling these matters was entered into under “regulatory compulsion” and is inconsistent with state law. In their view, we are without authority to accept the stipulation or to require that petitioners agree to the terms.

They ask that we clarify that Order No. 15-364 was not intended as a taking, to be punitive in nature, or to prevent them from operating their business. To that end they ask that we hold that nothing in these dockets is intended to limit their ability to use the water right associated with their property, that Summit allow them to take water service at no charge (except as necessary to share in the costs of maintaining the system), that Summit must obtain its own water rights, that they have no continuing obligation to Summit, and that we retain “sufficient” jurisdiction over Summit to assure that they can continue to use its services.

D. Commission Resolution

As specified in OAR 860-001-0720(3), we may grant an application for rehearing or reconsideration that is filed within 60 days of the date an order is served if the applicant shows that there is:

- (a) New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order;

⁶ Supplement to Petition at 2.

⁷ *Id.* at 3.

- (b) A change in law or policy since the date the order was issued relating to an issue essential to the decision;
- (c) An error of law or fact in the order that is essential to the decision; or
- (d) Good cause for further examination of an issue essential to the decision.

Here, petitioners claim that Order No. 15-364 contains an error of fact or law. They contend that we lacked subject matter jurisdiction because the water system was not a public utility for the reasons that (1) Fish Mill is a private business and could not consent to regulation by the Commission; and (2) Fish Mill lacks authority under its water right certificate to sell water to the public. Petitioners' claim is unfounded.

First, our jurisdiction over Fish Mill was not based on consent. At all times relevant here, Fish Mill was a public utility, as defined by ORS 757.005(1)(a)(A). Fish Mill owned, operated, managed, or controlled all or a part of plant or equipment for the furnishing of water directly or indirectly to the public. Fish Mill was serving three neighboring residential customers, all of which were located in the exclusive service territory that Fish Mill sought and we approved in Order No. 00-739, Docket UW 64.

Petitioners may be confused by the voluntary change in Fish Mill's regulatory status in 2007. Under the statutory framework governing water utilities, Fish Mill was initially subject to service, but not rate regulation. As noted above, however, Fish Mill subsequently petitioned to be fully rate regulated. We approved that request in Order No. 07-391, and explained the change in regulatory status as follows:

[Fish Mill] is a public utility pursuant to ORS 757.005 and ORS 757.061(5), located near Westlake, Oregon, serving less than 500 customers. As a public utility, Fish Mill is subject to the Commission service regulation and annual fee.

On August 16, 2007, the Commission received a written petition from Fish Mill requesting full utility rate regulation. Pursuant to ORS 757.061(6)(a)⁸ and OAR 860-036-0420, upon receipt of such petition, the Commission will issue an order within 30 days of the filing date asserting regulation. Therefore, with the issuance of this order, Fish Mill will become a financially regulated water utility subject to all Commission rate and service regulation.⁹

Accordingly, Fish Mill may have consented to rate regulation. It did not, however, consent to public utility status. It was a public utility as a matter of law.

⁸ ORS 757.061(6)(a) was subsequently renumbered as ORS 757.061(3)(c).

⁹ *In the Matter of Fish Mill Lodges Water System*, Assertion of Jurisdiction, Docket WJ 16, Order No. 07-391 at 1 (Sept 10, 2007).

Second, petitioners claim that Fish Mill could not have been a public utility because its water supply certificate (Certificate 68612) prohibited the sale of water to the public (or at all)¹⁰ is unavailing. Fish Mill did not “sell” water to its customers. It took water from its source and “furnished” the water to its customers as contemplated by its certificate. In its rates Fish Mill did not charge for the water. Its rates were based on the company’s cost of furnishing the water to its customers. The existence of regulatory structures for administration of the State’s surface water resources does not preempt the regulation of water utilities.

Petitioners have also failed to establish grounds for clarification of Order No. 15-364. To support a request for clarification, a party must cite to provisions in an order that are fatally vague or ambiguous and propose changes that correct those deficiencies. A request for clarification may not seek to change the result of the order. Moreover, where the subject order is the result of a stipulation or settlement, a request for clarification should be submitted on behalf of all signatories to the stipulation or settlement. In this case other parties to the stipulation oppose the request for clarification.

That the petition is an impermissible attack on the stipulation approved in Order No. 12-027 is by itself sufficient grounds to deny the petition. However, Staff and Lucas have shown that all of the concerns expressed by petitioners are addressed and resolved within the terms of the stipulation so that rehearing, reconsideration, or clarification is not required in any event.

The stipulation was negotiated among parties represented by counsel and was signed by all parties, including petitioners. Settlements such as this one are specifically authorized in OAR 860-001-0350. The stipulation was adopted in Order No. 12-027. Order No. 12-027 is final in every respect but for the issue of whether the parties to the stipulation satisfied their obligations so as to allow the Commission to endorse the stipulated findings on page 24 of the stipulation (Appendix A), which it did in Order No. 15-364.¹¹ Petitioners did not object to the approval of the stipulation in Order No. 12-027, did not seek reconsideration of that order, nor did they object to Staff’s motion for the final order that was granted in Order No. 15-364. Petitioners do not allege that any party has not fulfilled its obligations under the stipulation. Their last-minute objection to the underlying stipulation is untimely and without merit.

¹⁰ Water Certificate 68612 was partially canceled by the Oregon Water Resources Department on December 27, 2008 (Special Order Vol. 76, pp. 817-18.) The water certificate in effect after December 30, 2008, was No. 85238.) The effect of the partial cancellation was to reduce the permissible use of water from domestic use for nine houses to three houses. The allowed use for a twelve cabin motel did not change.

¹¹ Under ORS 183.310(6)(b):

‘Final order’ means final agency action expressed in writing. ‘Final Order’ does not include any tentative or preliminary agency declaration or statement that:

(A) Precedes final agency action; or

(B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

IV. MOTION TO STAY

Having denied petitioners request for rehearing, reconsideration, and consideration of Order No. 15-364, the request for a stay is moot and should be denied.

V. ORDER

IT IS ORDERED that:

1. The petition for rehearing, reconsideration, and clarification of Order No. 15-364 filed by Judy Bedsole and Fish Mill Lodges Water System is denied.
2. The request for a stay of Judy Bedsole and Fish Mill Lodges Water System is moot and is denied.

FEB 29 2016

Made, entered, and effective _____.

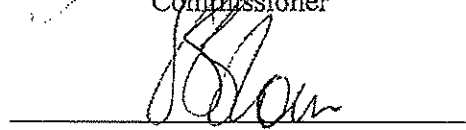


Susan K. Ackerman
Chair



John Savage
Commissioner





Stephen M. Bloom
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.