



1 As discussed below, the Company is not a cooperative formed under ORS chapter 62 for  
2 purposes of ORS 757.063. In addition, the Company has failed to provide any reasoning, other  
3 than mere assertion, for one to conclude that the 20 percent petition threshold is unconstitutional.

4 Finally, the Commission's role is not to judge the subjective intent of petitioners but,  
5 instead, is to validate whether the 20 percent threshold has been mathematically achieved.

## 6 DISCUSSION

### 7 1. The Company is not a cooperative for purposes of ORS 757.063.

8 The Commission should reject the Company's claim that it is a cooperative because it  
9 files its taxes pursuant to Internal Revenue Code (IRC) 501(c)(12). The tax filing under IRC  
10 501(c)(12) has no relevance to the Company's status as a Nonprofit Corporation subject to  
11 regulation by the Commission. Simply calling yourself a cooperative is not dispositive,  
12 especially when the record indicates otherwise.

13 The Company is registered in Oregon as a Nonprofit Cooperation, Secretary of State file  
14 No. 120921. The Company originally filed its Articles of Incorporation as a Nonprofit  
15 Corporation pursuant to Oregon Revised Statutes 61, Nonprofit Corporations.<sup>1</sup> In fact, the  
16 Secretary of State Form No. 11-N, 9-74, for Chapter 61 specifically stated that (emphasis added):

17 "The corporate name cannot contain any word or phrase which indicates or implies  
18 that it is organized for any other purpose other than one or more of the purposes  
19 contained in its articles of incorporation; *and cannot contain the word*  
*"cooperative."*<sup>2</sup>

20 According to the Secretary of State's Business Registry, the Company is listed as a  
21 Domestic Nonprofit Corporation (DNP), Mutual Benefit with Members. This classification is  
22 distinct and distinguishable from a cooperative, which would be listed as a "DCOOP,"  
23 Cooperative, in the Secretary of State's Business Registry.

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26 <sup>1</sup> ORS 61 was repealed in 1989 and replaced with ORS 65, Nonprofit Corporations, Corporations and Partnerships.  
<sup>2</sup> Articles of Corporation, Crooked River Ranch Water Company, filed April 27, 1977.

1           Although the Company is able to file taxes under IRC 501(c)(12), the Internal Revenue  
2 Service (IRS) has never distinguished the terms “mutual” or “cooperative” for purposes of IRC  
3 501(c)(12).<sup>3</sup> Additionally, the IRS does not require a cooperative to organize under a state  
4 cooperative statute to file under I.R.C. 501(c)(12).<sup>4</sup> As a result, the Company is able to file its  
5 taxes under IRC 501(c)(12) because it is a Mutual Benefit Domestic Nonprofit Corporation and  
6 not because it is a cooperative.

7           The Company’s Bylaws do not classify it as a cooperative and as recently as April 28,  
8 2006, the Company filed an amendment to its Bylaws with the Secretary of State pursuant to  
9 Chapter 65, Nonprofit Corporations, Corporations and Partnerships.

10           *Crooked River Ranch Water Company Bylaws*

11           Article 1 of CRRWC’s Bylaws states (italics added):

12           “The *corporation* is organized for the purpose of providing domestic and irrigation  
13 water to portions of Crooked River Ranch, a duly recognized subdivision in  
14 Deschutes County, Oregon, and adjacent properties that may be developed by  
15 Crooked River Ranch, a limited partnership. *This corporation is also organized for  
16 the purpose of obtaining a tax exemption.*”<sup>5</sup>

17           This article clearly demonstrates that CRRWC is a corporation and not a cooperative. It  
18 also appears, through the language of the Bylaws, that when the corporation was organized, it  
19 was organized in a manner to file as a mutual benefit corporation under IRC 501(c)(12).

20           Additionally, the Company’s Bylaws do not include any articles that demonstrate that net  
21 earnings are distributed to members as required of a cooperative, and there is no indication that  
22 the Company has ever distributed its earnings to members. Pursuant to ORS 62.415,  
23 Apportionment and distribution of net proceeds or net losses (emphasis added):

24           (1)The net proceeds or savings of a cooperative *shall be apportioned, distributed  
25 and paid periodically to those persons entitled to receive them, at such times and in  
26 such reasonable manner as the bylaws shall provide;* except that net proceeds or

24           <sup>3</sup> GENERAL SURVEY OF I.R.C. 501(c)(12) COOPERATIVES AND EXAMINATION OF CURRENT ISSUES,  
25 Michael Seto and Cheryl Chasin, 2002 EO CPE Text, page 175. The report can be found at [www.irs.gov/pub/irs-tege/eotopice02.pdf](http://www.irs.gov/pub/irs-tege/eotopice02.pdf)

26           <sup>4</sup> *Ibid*, page 183.

26           <sup>5</sup> Crooked River Ranch Water Company Bylaws, Article I, Purpose.

1 savings on patronage of the cooperative by its members shall be apportioned and  
2 distributed among those members in accordance with the ratio which each  
3 member's patronage during the period involved bears to total patronage by all  
4 members during that period. *The bylaws may contain any reasonable provisions for  
the apportionment and charging of net losses.* For the purposes of this section work  
performed as a member of a workers' cooperative shall be deemed to be patronage  
of that cooperative.

5 The Bylaws distribution of assets and earnings during dissolution is additional proof that  
6 the Company is not a cooperative. The Bylaws state in Article VII, Dissolution (emphasis  
7 added):

8 *"No part of the net earnings of the corporation shall inure to the benefits of any  
9 member, trustee, officer, or private individual, except that reasonable compensation  
10 may be paid for services rendered to or for the corporation affecting one or more of  
its purposes, and no member, trustee, officer or private individual shall be entitled  
11 to share in the distribution of any corporate assets on dissolution of the corporation.  
If the corporation should be dissolved, said system shall revert to Crooked River  
Ranch, a limited partnership."*<sup>6</sup>

12 Under dissolution of a cooperative, proceeds would go to the members of the cooperative  
13 and not to a partnership or corporation. Pursuant to 62.665, Procedure for dissolution (emphasis  
14 added):

15 (1) The cooperative shall proceed to collect its assets, convey and dispose of such  
16 of its properties as are not to be distributed in kind to its members or shareholders,  
17 pay, satisfy and discharge its liabilities and obligations and do all other acts  
18 required to liquidate its business and affairs, and, after paying or adequately  
providing for the payment of all its obligations, *distribute the remainder of its  
assets either in cash or in kind, among the persons entitled to the same by law, the  
articles and the bylaws.*

19 It is clear from the Company's Bylaws and the statutes relating to cooperatives,  
20 that it is not a cooperative. The Company was organized as mutual benefit corporation  
21 to, among other things, take advantage of a certain tax code. A filing under IRC  
22 501(c)(12) does not make the Company a cooperative.

23 In its Opening Brief during UM 1036, the Company asserted that it was not subject to the  
24 jurisdiction of the Commission because it is a *non-profit company* that serves only its members.<sup>7</sup>

25 <sup>6</sup> *Ibid*, Article VII, Dissolution.

26 <sup>7</sup> UM 1036, In the Matter of CROOKED RIVER RANCH WATER COMPANY, an Investigation Pursuant to ORS  
756.515 to Determine Jurisdiction, Staff's Response Brief.

1 There was no mention of, or indication, that the Company was a cooperative. Additionally, in  
2 Commission Order No. 03-116 (UM 1306), dated February 13, 2003, the Commission found that  
3 CRRWC was a corporation. The order states (emphasis added):

4 “CRRWC is a *non-profit corporation organized as a mutual benefit*  
5 *association* for the purpose of providing domestic water to Crooked River Ranch, a  
6 planned development community in central Oregon, and other adjacent properties  
7 that may be developed by Crooked River Ranch.”<sup>8</sup>

8 The Commission UM 1306 Order goes on to state (emphasis added):

9 “We agree with Staff that CRRWC is not customer owned. Despite  
10 CRRWC’s arguments otherwise, the articles of incorporation and by-laws state that  
11 *members have no financial interest in the corporation.*”<sup>9</sup>

12 Additionally, the Commission UM 1036 Order states (emphasis added):

13 “It is important to note that our conclusion here does not render CRRWC  
14 immune from Commission jurisdiction on an indefinite basis. This decision is  
15 based on the *facts contained in the record that show that CRRWC is operating as a*  
16 *members-only water company* and is not serving the general public. Should the  
17 nature of CRRWC’s operation change, either through its organization or its actions,  
18 the Commission will not hesitate to reinvestigate the water company to ensure that  
19 CRRWC’s members continue to have the ability to provide their own regulation in  
20 their own interest”<sup>10</sup>

21 Although the nature of the Company’s operation has not changed, ORS 757.063 was  
22 adopted during the 2003 Legislative Session allowing members of an association to petition the  
23 Commission for regulation.

24 Commission Order No. 04-154 (AR 471), dated Mach 17, 2004, adopted, among other  
25 things, the rules concerning members of an associations rights concerning the jurisdiction  
26 petition process. The Company submitted comments concerning regulation of an association  
during the rule making process. The Commission AR 471 Order states:

“CRRWC does not feel that all of its customers should be subject to  
regulation if a petition is submitted by only 20 percent of its customers. New  
OARs 860-036-0412 and 860-037-0407 allow 20 percent of association members  
to submit a petition to the Commission asking that their water company be

<sup>8</sup> Commission Order 03-116 (UM 1036), dated 2/13/06, page 1.

<sup>9</sup> Commission Order 03-116 (UM 1036), dated 2/13/06, page 5.

<sup>10</sup> *Ibid*, page 6.

1 regulated. No other requirements need be met for the Commission to assert  
2 authority over the water company to regulate its rates.”<sup>11</sup>

3 As discussed above, the Company realized that when ORS 757.063 was codified, its  
4 members could petition for regulation. The record does not indicate that the Company was a  
5 cooperative. If the Company was a cooperative, it is likely that the Company would not have  
6 been concerned about the outcome of AR 471.

7 In summary, the Company’s Bylaws, history of filings under ORS Chapters 61 and 65 (and  
8 not Chapter 62), and record with the Commission indicates that the Company is a nonprofit  
9 corporation and not a cooperative. As a result, the Commission should reject this argument.

10 **2. The Commission should rule on the constitutionality of ORS 757.063**

11 The Company simply states that the 20 percent petition threshold is unconstitutional  
12 because it allows 20 percent of the members to make a decision for the association. The  
13 Company does not offer any support or reasoned basis why ORS 757.063 is unconstitutional. If  
14 the Commission determines that the 20 percent threshold has been met, it still does not make  
15 decisions for the association. Rather, the Commission only regulates the Company’s rates and  
16 service.

17 The Commission should presume acts of the Legislature constitutional. While  
18 administrative agencies have the power to declare a statute unconstitutional, their authority  
19 should be exercised infrequently and always with care. *See Nutbrown v. Munn*, 311 Or 328, 346,  
20 811 P2d 131 (1991). Regardless, the constitutionality of the ORS 757.063 is entirely a legal  
21 matter and is inappropriate for the evidentiary hearing.

22 **3. The Commission’s only role is to calculate whether 20 percent or more of the members  
23 have petitioned for regulation.**

24 The Company suggests that the Commission should consider whether individuals that  
25 signed the petitions were misled. However, the statute only directs the Commission to calculate  
26 whether 20 percent or more of the members of the association filed a petition requesting that the

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<sup>11</sup> Commission Order 04-154 (AR 471), dated March 17, 2004, page 2.

1 association be subject to regulation. *See* ORS 757.063(1). In this case, the petitions represent  
2 that those who signed are requesting that the association be subject to regulation. The statute  
3 does not require or provide that that the Commission should consider the subjective intentions of  
4 the individuals who signed the petitions. In fact, the Commission rules do not allow a petitioner  
5 to withdraw his or her petition once submitted. *See* OAR 860-036-0412(8).


6 According to the plain, unambiguous language of ORS 757.063 and OAR 860-036-0412,  
7 the subjective beliefs of members who sign petitions is irrelevant. The petitions themselves state  
8 that they are requesting Commission regulation and that is all that is required. Further, OAR  
9 860-036-0412(8) provides that petitions filed with the Commission may not be withdrawn or  
10 rescinded. The only factual issue relevant at the evidentiary hearing is whether the Commission  
11 has received petitions from 20 percent or more of the members of the association. Evidence  
12 regarding the subjective belief of petitioners is irrelevant and should not be allowed at the  
13 evidentiary hearing.

14 For the foregoing reasons, Staff respectfully requests that the Administrative Law Judge  
15 issue a ruling determining that the only issue appropriate for the evidentiary hearing is whether  
16 20 percent or more of the members of the association have petitioned the Commission for  
17 regulation.

18 DATED this 6<sup>th</sup> day of July, 2006.

19 Respectfully submitted,

20 HARDY MYERS  
21 Attorney General

22   
23 \_\_\_\_\_  
24 Jason W. Jones, #00059

25 Assistant Attorney General  
26 Of Attorneys for staff of the Public Utility  
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1 **CERTIFICATE OF SERVICE**

2  
3 I certify that on July 6, 2006, I served the foregoing upon all parties of record in this  
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid  
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

6 **GLENN SITES & REEDER LLP**

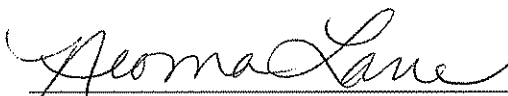
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