

BEFORE THE PUBLIC UTILITY COMMISSION

OR OREGON

WJ8

In the Matter of:)
) CROOKED RIVER RANCH WATER
CROOKED RIVER RANCH WATER) COOPERATIVE POST-HEARING
COMPANY) 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 first post-hearing brief.

DISCUSSION

At the hearing on August 8, 2006, in Madras, Oregon, evidence was presented and arguments were made regarding several different issues. The first issue was whether or not the Crooked River Ranch Water Company is to be considered a cooperative for the purposes of this proceeding. The second issue was the legal sufficiency of the petitions submitted for investigation and regulation to the PUC and lastly, was the constitutionality of ORS 757.063. This brief shall address each one of these issues in turn.

1. The Crooked River Ranch Water Company is a cooperative and should be treated as such for the purposes of the PUC investigation.

PUC staff in both their trial brief and at the hearing has argued that under ORS 757.063 the

Water Company is regulated once the Commission receives petitions from twenty percent or more of the members of the Association. Assuming for purposes of argument in this section of the brief that the Commission received the requisite number of valid petitions from the members of the Association this still does not confer any jurisdiction over the Water Company. This position is confirmed by the Commission's own documents. Their letter of April 28, 2005 to the Water Company is captioned as a "Notice of Intent to Assert Financial and Service Regulatory Authority." Nothing in or about this letter actually confers jurisdiction to the Commission over Water Company regulation and practices.

The Commission staff attempts to justify their position by alleging a violation of ORS 757.480 by the Water Company. However, the Commission has been unable to offer any explanation, to date, as to how the Water Company has disposed of, mortgaged or otherwise encumbered any Company assets. This failure to offer any valid explanation is the result of the fact that the Commission has cited a statute which is not relevant to this proceeding. The Commission has attempted to bring the Water Company under the purview of this statute by ignoring the plain meaning of the statute and the purpose for which the statute was originally enacted.

An examination of the few cases which have interpreted ORS 757.480 shows that the purpose of the statute is not relevant to the actions taken by the Water Company in becoming a cooperative. The three cases which have interpreted the statutes are: Utility Reform Project vs. Oregon Public Utility Commission 171 Or. App. 349 16P3d, 516 (2000); Pacific Northwest Bell Telephone Company vs. Katz 121 Or. App. 48, 853 P2d, 1346 (1993); and Pacific Northwest Bell Telephone Company vs. Eachus 135 Or. App. 41, 898 P2d, 774.

The first of these three cases Utility Reform Project vs. Oregon Public Utility Commission

involved the merger of the Portland General Corporation and the Enron Corporation which in turn involved the purchase of stock in the Portland General Electric Company by the Enron Corporation. This merger was approved by the Public Utility Commission and the dispute in the case centered on the need for appropriate hearings for that merger as it involved the disposition of company assets.

The next of three cases, *Pacific Northwest Bell Telephone Company vs. Katz* involved a decision by Pacific Northwest Bell, a telephone company, under the jurisdiction of the PUC to abandon its production of address-telephone directories and business customer lists. These were products which were revenue producing activities and Pacific Northwest Bell was attempting to abandon them to a non-PUC regulated affiliate so as to justify higher rates to its customers. Once again this case involved the disposition of company assets.

The last case, *Pacific Northwest Bell Telephone Company vs. Eachus* was in simple terms a “rate case” which involved the allowable rates to be charged to customers.

The basic fact is that there is no case law, on point, under these circumstances to prevent the actions taken by the Crooked River Water Company in becoming a cooperative. Arguably the cases which have interpreted ORS 757.480 show that the statute was intended to prevent unilateral actions by companies under the jurisdiction of the PUC to mortgage, dispose of, or encumber company assets as in *Utility Reform Project vs. Oregon Public Utility Commission* and *Pacific Northwest Telephone vs. Katz*. There are two important distinctions to be made from the situations presented in those cases and the case at hand. First of all, those companies were under the jurisdiction of the PUC at the time the company attempted to mortgage, encumber, or otherwise dispose of assets and secondly, the actions taken by the companies in question actually did mortgage, encumber or otherwise dispose of company assets. No such action was taken by the Crooked River Ranch Water

Company in becoming a cooperative.

This is clear from the testimony of Mr. Wes Price, the certified public accountant, for the Crooked River Ranch Water Company. On page 26 of the transcript, from the hearing, lines 14 through 23, Mr. Price testifies that there is no difference in the operation of a water company depending upon whether or not they are registered with the Secretary of State as a cooperative or as a mutual benefit corporation. Mr. Price goes on to testify on page 27, lines 5 through 14, that the IRS does not distinguish between the operation of a mutual benefit and cooperative water company. Additionally, Mr. Price testifies on page 30, line 12 through 18, that when questioned by the board of directors regarding the differences in practical operation of a water company registered with the Secretary of State as a cooperative versus as a mutual benefit corporation that there was no difference between the way the entity would be required to behave. Furthermore, that if there was a need for correction of status with the Secretary of State that correction would be inconsequential in that it would just be a correction on paper to clarify the way in which the water company had been operating all along. Mr. Price goes on to clarify this position on page 31, under cross examination by Mr. Jones, by stating that the change with the Secretary of State from a mutual benefit corporation to a cooperative was merely a clarification.

The PUC has argued that because there was a dissolution of the Crooked River Water Company as a mutual benefit corporation and contemporaneous reformation as a cooperative that somehow involved the mortgage, encumbrance or disposition of assets in violation of ORS 757.480. Mr. Price clarified that when the Crooked River Ranch Water Company was dissolved as a mutual benefit corporation and contemporaneously reformed as a cooperative that no mortgage, encumbrance or other disposition of company assets took place. This was further confirmed by

testimony of the General Manager for the Crooked River Ranch Water Company, Mr. J. R. Rooks, on page 44 of the transcript, lines 18 through 25, where Mr. Rooks testified that the change from a mutual benefit corporation to a cooperative with the Secretary of State did not affect the day-to-day operations of the Water Company nor did it affect eligibility for membership or membership standing with the Company.

The PUC has argued that by dissolving the mutual benefit corporation and contemporaneously reforming as a cooperative the Board of Directors for CRRWC has violated the articles of incorporation. In the CRRWC's dissolution clause it states, "Upon dissolution of the corporation, if the corporation has gains from the sale of an appreciated asset it shall distribute to the extent practical, the gains as well as other funds, to all persons who were members during the period and time which the asset was purchased and owned by the corporation in proportion to the amount of business done by such members during that period."

In making their argument the PUC clearly ignores the plain language of the dissolution clause. In that clause one condition is clearly precedent upon another. "If the corporation has gains from the sale of an appreciated asset..." The undisputed testimony in this case is clear that no asset was sold, disposed of, mortgaged, or otherwise encumbered when the CRRWC was reformed as a cooperative. The allegation that in doing so the Board of Directors somehow breached their fiduciary duties is both insulting and wrong. The testimony in this case is clear that in voting to reform the CRRWC as a cooperative the Board of Directors was merely clarifying the operational status of the company with the Secretary of State. There were certainly no losses to the corporation or its members in doing so.

The bottom line is that the change by the Crooked River Ranch Water Company from a

mutual benefit corporation to a cooperative with the Secretary of State did not violate any applicable laws and as a duly registered cooperative with the Secretary of State, the Crooked River Ranch Water Company is immune from the jurisdiction of the PUC.

2. 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.

ORS 757.063 allows members of an association furnishing water to petition the PUC for a regulation investigation. Oregon Administrative Rule 860-036-0412 further sets forth the guidelines for the petition and those petitions which may be considered by the PUC in the calculation of the 20 percent requirement. Subsection (3) clearly states that, "Petitions must be in writing, state the purpose of the petition, and include the member's name, address, telephone number and signature."

The job of verifying the 20 percent requirement was placed with Kathy Miller the Senior Water Utility Analyst for the PUC who testified on page one of her direct testimony that the CRRWC is subject to the Commission's jurisdiction because the Commission received and verified member petitions, requesting Commission regulation, in excess of the 20 percent threshold established in ORS 757.063. Ms. Miller went on to state in her direct testimony on pages 5-6 that the petitions submitted complied with the OAR requirements. Ms. Miller went on to list those requirements including the telephone number requirement and then stated, "However, Staff will include a petition when it does not list a telephone number."

No explanation for this deviation from the Oregon Administrative Rules was offered in Ms. Miller's direct testimony. On cross-examination at the hearing Ms Miller stated on page 6 lines 21-24, that the Commission does not require a telephone number because some people are hesitant to give it out. When questioned as to her authority to deviate from the plain language requirements of

the Administrative Rules Ms. Miller answered that she had no such authority. As a justification she offered her experience, years with the PUC, history and precedent with that organization. When asked if it was the PUC's precedent to not comply with the letter of the Oregon Administrative Rules Ms. Miller answered that it is the PUC's precedent not to require a telephone number if people do not want to give it.

This cross examination and the answers provided were both revealing and disconcerting. A senior employee with the PUC testified that they have a precedent of non-compliance with Oregon Administrative Rules when there was no authority to do so. The PUC's function, at least in part, is the enforcement of laws which include the ORS and OAR's. In the case at bar the PUC is attempting to enforce particular laws and rules against an Organization which arguably does not wish to be regulated by them. However, the PUC appears to have a double standard in that it does not follow the same rules it seeks to enforce. While this is an affront to justice and the principles Americans hold dear, the bottom line is that the PUC does not have the authority to change the rules as it goes along and the requirements of the law have not been met in this case for the PUC to take jurisdiction over the CRRWC.

It is the position of the CRRWC that non-compliance with OAR 860-036-0412's telephone number requirement is a dispositive issue however other shortcomings with the actual petitions are addressed here as well. OAR 860-036-0412 also requires that the petitions "state the purpose of the petition". Kathy Miller testified in her direct testimony on page's 4-5 that the purpose of the petition had been clearly stated however, an examination of the petitions themselves shows that not all petitions which contain signatures state the purpose of the petition. It is the position of the CRRWC that any petition signatures placed on a sheet of paper which does not contain the purpose of the

petition are not legally sufficient.

This is a rule that is followed by the Oregon Secretary of State for their petition and initiative process and with good cause. Unless the petition purpose is clearly stated on the same page as the signature line the opportunity for misrepresentation is abundant. This misrepresentation occurred as testified to by Mr. Keith Bedell and by Mr. Larry Miller. Mr. Bedell testified that when approached to sign the petition the persons gathering signatures represented that the purpose of the petition was reasons other than those set forth on petition documents. Mr. Miller testified that he observed persons signing blank petitions and the same persons signing the petitions in question on multiple occasions.

Statutory safeguards have been enacted to prevent this type of misrepresentation and fraud. Elections, Chapter 250 of the ORS concerning initiatives and referendums spells out the requirements for valid petitions. Under ORS 250.165(4) & (5) petitions or initiatives require a caption of the ballot title, number of the ordinance or resolution to be referred, if any, and the date it was adopted by the county governing body. Subsection (5) specifies that the reverse side of the cover of an initiative or referendum petition shall be used for obtaining signatures. Subsection (6) goes on to specify that no more than 20 signatures on each sheet shall be counted. The identical requirements are set forth under ORS 255.135 for special district elections.

Elections, Chapter 260, concerning offenses in the election process prohibits certain activities which are alleged to have occurred in this case. ORS 260.555 prohibits those gathering signatures on a initiative, referendum or recall petition from knowingly making false statements regarding the content, meaning or effect of the petition. ORS 260.555 further prohibits the circulation of petitions containing false signatures, multiple signatures by the same person and signatures of those not

qualified to sign.

There is no legal authority to say that the PUC is bound by the provisions of ORS Chapters 250 and 260 however, it is clear that the legislature in enacting those statutes sought to prevent the same type of misrepresentation and fraud which occurred in the gathering of petitions in this case. It is unfortunate that the PUC is not held to these same standards in making the determination of a valid 20 percent. Arguably, they should be, particularly when in this situation they are not following the rules they are supposed to abide by let alone the ones which they should aspire to. The practical reality that ORS 757.063 has created a situation in which the fox is assigned to guard the chicken coop and it is clear from the testimony of Kathy Miller that the fox cannot be trusted.

The standards set forth in the ORS Elections chapters are referenced because they lead into the third and last reason why PUC regulation should be denied and that is the unconstitutionality of ORS 757.063.

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

ORS 757.063 creates an unconstitutional situation where an unelected and unrepresentative portion of a recognized association is allowed to make a decision for the entire association. Once a valid 20 percent of membership of the association signs a petition for regulation investigation the decision on whether or not to be regulated is removed from the majority membership for that organization. On it's face this is clearly unconstitutional not to mention the constitutional implications of who determines the requisite 20 percent, their bias or interest and the standards they are to be held to in making the determination.

The PUC cites Nutbrown v. Munn, 311 Or 328, 346, 811 P2d 131 (1991), for the proposition

that although it is an authority to be exercised infrequently and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional. A closer examination of Nutbrown *supra*, and the cases which have followed it reveals that failure to raise the issue of constitutionality at the administrative level can be a bar to successfully raising that issue on appeal. The line of cases following Nutbrown hold that failure to exhaust administrative remedies can preclude litigation in higher courts. “The governing principles are well established. We have long recognized that the APA establishes a comprehensive pattern for the judicial review of administrative decisions. The various APA statutes governing judicial review provide the sole and exclusive methods of obtaining judicial review.” Eppler v. Bd. of Tax Service Examiners, 189 Or App 216, 75 P3d 900 (2002).

With the issue of the constitutionality of ORS 757.063 properly raised in this case the appropriate course of action for the court is clear. ORS 757.063 allows an unelected and unrepresentative portion of a recognized association to act for the majority. Our country was founded on the principle of democracy. Short of a one person one vote decision making process we have elected officials who represent their constituency in the decision making process. Even then a majority of those elected officials is required to take action. In the case at bar, under ORS 757.063 an unelected and unrepresentative portion of a recognized association was allowed to act for the majority. This violates the US Constitution, Oregon Constitution and the laws of this state. Any action under ORS 757.063 for the PUC to take jurisdiction cannot stand.

CONCLUSION

For the reasons state above the PUC’s attempt to assert jurisdiction over the CRRWC must be denied.

DATED This _____ day of September 2006.

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CERTIFICATE OF SERVICE

I certify that on September 18, 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 18th day of September 2006

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