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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

WA 36

In the Matter of the Application of)
WILLAMETTE WATER COMPANY for) ORDER
an Allocation of Current and Expanded)
Service Territory)

DISPOSITION: MOTION DENIED

On February 9, 2000, Willamette Water Company (WWC) applied to the Public Utility Commission of Oregon (Commission) for the designation of an exclusive service territory. The Eugene Water and Electric Board, the City of Eugene (City) and the Lane County Local Government Boundary Commission participated as parties. On December 5, 2000, all parties agreed to a 180-day abeyance for processing the application. On June 22, 2001, the City filed a motion requesting that the Commission dismiss WA 36 for lack of jurisdiction or, in the alternative, to proceed with a hearing on the application. On July 27, 2001, Staff filed a response, opposing the City's motion. The Commission has not received a response from WWC.

Oregon Laws, Chapter 695 (the Act)

The City's motion requires the Commission to construe certain provisions of Oregon Laws 1999, Chapter 695, (the Act) and Oregon Revised Statutes 758.300 to 758.320. Under Oregon law, statutory construction involves a three-pronged analysis.¹ First the text and context of the statute are examined. *Id.* at 611. If the meaning of the statute is clear from the text and context further inquiry is unnecessary. *Id.* If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will consider the legislative history. *Id.* Finally, when after considering the statute's text, context and legislative history the legislative intent is still uncertain, resort to general maxims of statutory construction is appropriate. *Id.* at 612.

The Act mandates that water utilities apply for an order from the Commission designating the territory that it served adequately and exclusively on the

¹ *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d. 1143 (1993).

effective date of the Act (October 23, 1999), as its exclusive service territory. The Act requires that the application be filed by February 20, 2000. The utility may also apply for designation of territory that it expects to serve within six months of the date of application. The Commission also has authority over designated territories with regard to modifications to size, or the assignment, or transfer of the territory. ORS 758.300 to 758.315

In addition, the Act provides the Commission with a framework for processing the applications. The Act allows the Commission to conduct a hearing and conduct an investigation for any application. The Act is silent about any timeline the Commission must use when conducting its hearing or investigation.

Territories in Lane County

The City asks the Commission to dismiss the current proceedings for lack of jurisdiction in favor of the Boundary Commission. The City argues that Oregon law gives the Boundary Commission sole authority to make allocations of exclusive water service territory within Lane County. The City notes that ORS 199.464 grants the Boundary Commission the authority to allocate service territories to private community water systems within Lane County. (See Appendix A.) As a result, it concludes that the Commission does not have authority to designate exclusive service territories within Lane County.

The City also argues that the legislative history of the Act indicates that the Legislature did not intend to include water utilities in Lane County in the Public Utility Commission's jurisdiction. Specifically, the City argues that witnesses giving testimony in the Senate's Committee on Business and Consumer Affairs indicated that Lane County would not be included.

In response, Commission Staff asserts that the Commission and the Boundary Commission have concurrent jurisdiction. The Act provides the Commission's authority to approve applications for exclusive service territories for water utilities. ORS 199.464 grants the Boundary Commission authority to approve the allocation of service territories to private community water systems in Lane County. Where there is an overlap, Staff argues, the statutes must be read to give the agencies concurrent jurisdiction.

Moreover, Staff points out that despite testimony in the Senate Committee and the text of early versions of the legislation, the legislature did not enact a law exempting Lane County from the application requirements of the Act.

We agree with our Staff that we have concurrent jurisdiction with the Boundary Commission. Our Staff and the Boundary Commission Staff have analyzed the statutory schemes and found, "While the authority granted each Commission is

similar, there are many differences.”² To give full meaning to both provisions of Oregon law both agencies must approve the designation of exclusive territory before the water utility can claim an exclusive right to serve customers within the territory.

We are aware of the toll our decision may have on water utilities that must seek approval from two governmental bodies. We have already taken actions, which will facilitate interagency cooperation and reduce costs to water utilities that must file two applications. Our Staff and the Boundary Commission Staff have prepared a joint application form for water utilities operating in Lane County. (See Appendix B.) This form should simplify the application process. In addition, we direct our Staff, wherever possible, to engage in joint proceedings with the Boundary Commission.

As for WWC’s application, we will proceed to process the application. However, we encourage WWC to refile its application on the joint form so that the Boundary Commission and the Public Utility Commission can process its application simultaneously. To do otherwise has the potential to waste the resources of all the parties and to create confusion over the rights of WWC to exclusively serve territory granted by the Public Utility Commission, but not the Boundary Commission.

Allocating Territories Served on the Effective Date of the Act

In the alternative, the City urges us to deny the abeyance and proceed to hearing without delay. It asserts that the Act does not give us authority to allow WWC to file a new or amended application and that we must process the application originally filed. The City further claims that our evaluation of the initial application should be limited to those facts existing on the effective date of the Act. In addition, it asserts that we must deny that portion of the application requesting extension of its service territory unless WWC can demonstrate that it was exclusively and adequately serving adjacent territories within six months of its application. If the abeyance is allowed it should be the last one.

The City argues that the Commission's jurisdiction to designate exclusive service territory for water utilities exists for only a limited time period. Specifically, the City claims that the text of the authorizing law limits the Commission's jurisdiction to designate exclusive service territory to applications filed within 120 days from October 23, 1999, the effective date of the Act.³ According to the City, February 20,

² Commission Staff and Boundary Commission Staff described the differences in “Joint Application for Exclusive/Expanded Service Territory and Allocation of Service Territory,” Lane County Local Government Boundary Commission and Public Utility Commission of Oregon, filed June 14, 2001, attached as Appendix B.

³ Chapter 695, Oregon Laws 1999, sec. 2 provides in part:

(1)(a) A water utility providing water service shall make application within 120 days of the effective date of this 1999 Act (October 23, 1999) to the Public Utility Commission for an order designating the territory that it served adequately and exclusively on the effective date of this 1999 Act as its exclusive service territory. The applicant may also include any adjacent territory that the water utility plans to serve in the six months following the date of application if such adjacent territory is not being served by another water utility and the applicant demonstrates that it is more

2000, which was 120 days from October 23, 1999, was the last day by which applications could be filed. As a result, it argues, WWC cannot refile or amend its application.

While we agree that the statute requires a water utility to apply for a designated territory by February 20, 2000, there is nothing in the text stating that the Commission cannot entertain an application filed after that date. The deadline expedites processing applications and provides the Commission a mechanism to force recalcitrant water utilities to comply with the law. It is not a limit on Commission jurisdiction.⁴

As Staff points out, the City might have an argument if the statute stated that a water utility *may* file for designated territory by a date certain. That might be construed as a limited one-time opportunity for a water utility to seek exclusive service territory. As it appears in the statute, however, the language is not subject to the restrictive reading suggested by the City.

Further, if the legislature intended our authority to be temporary, there are clearer and more precise ways to accomplish that action. For example, the legislature could have included an effective date or sunset clause to specify that the Commission's jurisdiction is temporary.

From the City's argument, we cannot conclude that the text of the Act makes temporary our authority to grant exclusive service territory to water utilities.

The City also claims the placement of the statute in the Oregon Revised Statutes shows the legislature intended the Commission's jurisdiction to be temporary. The City relies on the Legislative Counsel's decision to include portions of the Act governing initial applications as a note in the Oregon Revised Statutes. The Preface to Oregon Revised Statutes indicates that some statutory language is set forth in a note because the material is temporary.

We note that the City cites no cases to suggest that the Legislative Counsel's placement of material in the Oregon Revised Statutes should be relied upon for assistance in construing the meaning of the law. More apt is the note following ORS 758.300, which indicates that the codified provisions of the Act were not added to or made a part of Oregon Revised Statutes by legislative action. In fact, the Legislative

economical and feasible to serve by an extension of the facilities of another water utility or community water supply system.

⁴ We note that, during legislative deliberations, the Commission testified, "We would extend the statutory requirement of 120 days and make sure that we have an easy flow of workload[.]" Testimony of Roger Hamilton, Senate Business and Consumer Affairs (SB 712), April 4, 1999, Tape 103, side 2 at 090.

Counsel notes state that the placement of those provisions was editorial.⁵ Similarly, the placement of the provisions, which were not codified, should also be considered editorial.

In addition, ORS 174.540 states that printed statute additions, such as title heads, chapter heads, division heads, and subsection heads or titles, as well as explanatory notes do not constitute any part of the law. Absent a more compelling showing by the City, we see no reason to presume that the Legislative Counsel's placement of sections or its decisions on numbering sections should be accorded more weight.

We also reject the City's claim that differences between the Act and statutes on designating territory for electric and gas utilities demonstrate that the legislature intended to grant the Commission only temporary authority to grant designated territories for water utilities. While the City cites differences in timelines, standards for approval, and processing fees, it does not explain why these differences lead to the conclusion that the legislature intended to terminate the Commission's authority to entertain applications as of February 20, 2000.

Even if there were a question of statutory interpretation, we are obligated to read our statutes consistent with ORS 756.062(2), which states:

The provisions of [the laws administered by the Commission] shall be liberally construed with a view to the public welfare, *efficient facilities*, and substantial justice between customers and public *** utilities. (Emphasis added.)

The importance of efficient facilities in designating allocated territories to water utilities is clear from the introductory passages of Chapter 695, Laws of 1999.⁶ We will construe the territory allocation law for water utilities in accordance with this statutory directive.

Finally, we also note that despite its extensive analysis of the legislative language and history, the City provides no explanation why the legislature would consider "elimination and future prevention of duplication of water utility facilities (to

⁵ See note following ORS 758.300. See also Preface to Oregon Revised Statutes, page viii, Section entitled "Not added to and made a part of."

⁶ Chapter 695, Oregon Laws 1999, states in part:

Whereas the elimination and future prevention of duplication of water utility facilities is a matter of statewide concern; and
Whereas, in order to promote the efficient and economic use and development and the safety of operation of water utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in this 1999 Act all persons and entities providing water utility service.

be) a matter of statewide concern” for water utilities operating on February 20, 2000, but of no consequence for water utilities created after that date.

We conclude that we have the authority to allow WWC to file a new or amended application if the instant application is dismissed or denied.

Allocating Adjacent Territory To Be Served Within Six Months of the Application

We further conclude, however, that, thus far, WWC has failed to show that it could have served the expanded territory requested in the application within six months of the date of its application. The City notes that the Act limits the territory that is subject to the initial application in two ways. Water utilities must apply for an order designating territory that it is adequately and exclusively serving on the date of the effective date of the Act. In addition and subject to certain conditions, the water utility may include in its initial application adjacent territory that it plans to serve within six months following the date of application.

The Commission's rules set forth the information that the water utility must include in its initial application to demonstrate that its plan to serve the expanded territory is achievable within six months of the application. A key requirement is:

Evidence demonstrating adequate existing or proposed capacities of the system and facilities to serve the proposed expanded territory in terms of estimated average daily customer demand, customer peak demand, and daily pumping capacity per water source in gallons or cubic feet. If development will be in phases, separate this information by phases [.]⁷

WWC has not met that requirement. On December 6, 2000, the ALJ issued a memorandum directing WWC to file a statement, by May 15, 2001, specifying the water resources that it has available to serve the territory requested in its application. WWC did not file the required statement. Instead, at a conference on June 4, 2001, WWC informed the ALJ that it is negotiating a sale with Emerald People’s Utility District. On June 8, 2001, WWC filed a letter with the ALJ requesting an abeyance for an additional six months to conclude those negotiations.

The Commission does not have jurisdiction to consider applications for expanded authority when the utility does not have plans to serve that territory within six months of the application. Since WWC filed its application on February 9, 2000, the statute requires it to file plans to serve that territory by August 9, 2000. WWC failed to submit the information required by the Commission rules to demonstrate compliance with that requirement.

⁷ OAR 860-036-0915(5)(o).

As a result, the request for abeyance, as it applies to the expanded territory, is denied. Within 14 days of the date of service of this order, WWC shall file a statement, with affidavits, showing why the Commission should not issue an order dismissing the portion of the application for expanded territory on the grounds that WWC failed to have achievable plans to serve the territory by August 9, 2000. The statement shall comply with the requirements of the Commission's administrative rules. If WWC fails to submit the statement, the portion of the application for expanded territory will be dismissed.

We note that a dismissal of the portion of the application for expanded territory is without prejudice. Once the application for currently served territory is granted, WWC may petition, under ORS 758.305(3), to expand its service territory to unserved areas.

ORDER

IT IS ORDERED that:

1. The Commission and the Boundary Commission have concurrent jurisdiction to designate exclusive service territory to water utilities in Lane County.
2. The Commission has authority to consider new and amended applications for exclusive serve territory to water utilities, even if the application or amendment is made after February 20, 2000.
3. The abeyance is granted for that portion of WWC's application encompassing territory that it was serving on October 23, 1999, the effective date of the Act.

4. The abeyance is denied for that portion of WWC's application that encompasses adjacent territory. Within 14 days of the date of service of this order, WWC shall file a statement, with affidavits, showing why the Commission should not issue an order dismissing the application for expanded territory on the grounds that the application failed to show that WWC had achievable plans to serve the territory on August 9, 2000.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ORS 199.464

199.464 Commission approval for exercise of additional district function, to extraterritorially extend district or city sewer or water line or to establish privately owned community water system. (1) Approval or disapproval under this section shall be based on the policy stated in ORS 199.410.

(2) Without the approval of a boundary commission, a district with territory in the jurisdiction of the commission may not initiate an additional function of the district. Any proposal by a district to initiate an additional function shall be referred immediately to the boundary commission that has jurisdiction of the territory in which the district lies. The district shall take no further action on the proposal unless the commission approves the proposal as proposed or modified.

(3) Except for lines which provide no extraterritorial service, without the approval of a boundary commission, a city or district with territory in the jurisdiction of the commission shall not extend a water or sewer line extraterritorially to an extent not effected on October 5, 1973. Tentative plans for such extraterritorial extension shall be submitted to the boundary commission that has jurisdiction of the territory in which the extension is proposed. If the commission disapproves the plans, no further action may be taken.

(4) Except as provided in subsection (5)(d) of this section, within territory subject to the jurisdiction of a boundary commission, no person may establish a community water supply system or a privately owned sewerage system or privately owned disposal system or extend a water line or sewer line without commission approval. Tentative plans for such approval shall be submitted to the boundary commission that has jurisdiction of the territory for which the establishment or extension is proposed. However, extension by a city or district of water lines or sewer lines shall be governed by subsection (3) of this section and the requirements of this section shall not apply to establishment of a city-owned or district-owned community water supply system within its boundaries.

(5)(a) A community water supply system within the territory subject to the jurisdiction of a commission may apply to the commission for allocation of service territory. If the territory is allocated to a community water supply system, no other community water supply system may serve within the territory without approval of the commission and the approval may not be given so long as the existing system is reliable and has an adequate quality and quantity of water.

(b) In condemning all or part of the properties and allocated service territory of a private community water supply system through eminent domain, the acquisition price shall be fair market value.

(c) No part of the acquisition price for all or part of a community water supply system acquired by eminent domain shall be specially assessed against the property within the acquired service territory, or its owners on a special benefit assessment basis.

(d) A community water supply system to which service territory has been allocated under this subsection may extend or establish water lines within the territory without further approval of the commission.

(6) Action which under this section requires approval by a boundary commission but is taken without that approval may be enjoined, upon suit in a court of competent jurisdiction, by the boundary commission in whose territorial jurisdiction the action is taken.

(7) As used in this section:

(a) "Water line" includes every water line except a line connecting a community water supply system with the premises of the water user unless the line provides for extraterritorial extension of service.

(b) "Sewer line" includes every gravity sewer line that is eight inches or more in diameter and all force lines regardless of size, except a line connecting a sewer system with the premises of the user unless the line provides for extraterritorial extension of service.

(c) "Community water supply system" means a source of water and distribution system whether publicly or privately owned which serves more than three residences or other users where water is provided for public consumption including, but not limited to, a school, farm labor camp, an industrial establishment, a recreational facility, a restaurant, a motel, a mobile home or manufactured dwelling park, or a group care home.

(d) "Sewerage system" is that system described by ORS 468B.005 (5).

(e) "Disposal system" is that system described by ORS 468B.005 (1), except for individual subsurface disposal systems.

(f) "Tentative plans" submitted to the boundary commission for approval shall include:

(A) For the establishment of a water system or extension of a water line:

(i) The source of the supply and quantity of water available.

(ii) The transmission, distribution and storage system size and location.

(iii) The proposed number of service connections, a map, and a legal description indicating the proposed service area.

(B) For the establishment of a sewer system or extension of a sewer line:

(i) The location of the treatment facility and outfall or other method of disposal.

(ii) The size and location of the collection system.

(iii) The proposed number of service connections, a map, and a legal description indicating the proposed service area.