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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1036

In the Matter of)	
)	
CROOKED RIVER RANCH WATER)	
COMPANY)	ORDER
)	
An Investigation Pursuant to ORS 756.515)	
to Determine Jurisdiction.)	

DISPOSITION: NO JURISDICTION ASSERTED; DOCKET CLOSED

On September 11, 2001, the Public Utility Commission of Oregon (Commission) opened an investigation under ORS 756.515 to determine whether the Crooked River Ranch Water Company (CRRWC) is a public utility subject to our jurisdiction.¹ We opened the investigation after receiving complaints that raised the question of whether CRRWC was operating as a members-only water company.

In August 2002, Michael Grant, an Administrative Law Judge (ALJ) with the Commission, held a public comment hearing at the Crooked River Ranch to obtain additional public input. Following the hearing, ALJ Grant adopted a procedural schedule for the docket and granted petitions to intervene from Kay Norberg, Gail Martin, Howard and Barbara Sawyer, Larry Miller, Ivan and Frances Davis, Terri Ludwig and Jim Day.

After discovery and the pre-filing of testimony, ALJ Grant held an evidentiary hearing in Redmond, Oregon on October 21, 2002. The parties filed opening and reply briefs in November 2002.

Based on the record in the matter, the Commission makes the following:

FINDINGS

CRRWC is a non-profit corporation organized as a mutual benefit association for the purpose of providing domestic water to Crooked River Ranch, a planned development community in central Oregon, and other adjacent properties that may be developed by Crooked River Ranch. Crooked River Ranch covers an area consisting of over 11,000 acres, with

¹ See Order No. 01-832.

approximately 2,650 residential lots ranging in size from 1 to 5 acres. About one-third of the lots are undeveloped.

CRRWC currently serves 1,450 members, most of whom receive water through CRRWC's pipe system. About 10 to 20 customers are self-haulers, that is, they haul their own water from a standpipe maintained by CRRWC to their individual cistern.

Any owner of property within the Crooked River Ranch is eligible for membership in the CRRWC provided they are in good standing and have paid appropriate fees. While CRRWC has no written guidelines as to what constitutes "good standing," the company considers a person to be in good standing if bills are paid on time, rules are followed, and no ill-will is shown to the company. New members are responsible for payment of any line extensions necessary to serve their property.

Members of CRRWC are entitled to vote for the board of directors, which consists of five members who are elected to five-year staggered terms. The board of directors manages and controls the business and property of the water company, sets water rates, and appoints a general manager to handle day-to-day operations.

Any member may apply to run for a seat on the board of directors. For consideration, any candidate must complete an application form and submit a resume for review by the board of directors. The board of directors will interview candidates and place all those qualified on the ballot for election. The board has discretion to decide who is qualified. There is nothing in the record to show that the board has abused its discretion.

A landowner in the Crooked River Ranch need not become a member of the water company, and over 325 property owners have installed their own wells. Other property owners have individual cisterns and obtain water from water-haulers located outside Crooked River Ranch.

CRRWC provides service to five properties that are adjacent to but not formally incorporated as part of the Crooked River Ranch. For example, the original ranch house built by the developer was never officially made part of the ranch, even though it lies in the middle of the Crooked River Ranch. The owners of these properties have full membership rights in CRRWC.

CONCLUSIONS OF LAW

The question presented is whether CRRWC is a public utility under ORS 757.005 and, therefore, subject to our jurisdiction. ORS 757.005 defines a public utility as:

Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public.²

² The statute provides certain exemptions, none of which apply here.

The only disputed issue in this case is whether CRRWC provides service “for the public.” CRRWC argues that it is not subject to Commission jurisdiction because it provides service only to its members, not the general public.

Legal Standard

Under ORS 757.005, an entity is a public utility only if it undertakes to furnish service to the general public. The test often stated is whether the entity provides “service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services.”³

This Commission has previously concluded that a members-only water company is not a public utility because its members are, in effect, providing service only to themselves and not the public. In *Brooks Resources Corporation* (Brooks), the Commission investigated a property management company that owned and operated domestic water systems for residents in three residential developments. Initially, the Commission concluded that Brooks was a public utility and subject to jurisdiction.⁴ Following that decision, however, Brooks created three mutual benefit homeowner associations and established them as non-profit corporations. Brooks transferred all of its rights and interest in the water systems to the corporations, which then provided water to the property developments. Based on this new evidence, the Commission found that Brooks’ transfer of the water system to the corporations nullified its prior conclusion. The Commission explained:

In this case, the organizations involved clearly restrict service to mutual members of the water companies that own land in the development to the exclusion of the public in general. Membership is appurtenant to the land. As members, the water users have an equal voice in the operation of the water system and the prices which are charged for the service. The users and members therefore provide their own regulation in their own interest. The membership can be considered as one body politic and therefore not individual members of the public.⁵

The fact that a company is organized as a members-only organization, however, does not, by itself, exempt it from regulation. In *Juniper Utility Company* (Juniper), the Commission investigated another water company created to serve residents within a property development. Due to some factual similarities in that case and *Brooks*, Juniper argued that it was not a public utility. This Commission rejected that argument, noting that Juniper provided service to members and non-members. In addition, the Commission pointed out that members in *Brooks* had an equal voice in the operation of the water systems and set the rates they would pay. In contrast, Juniper unilaterally set rates for its customers, with no meaningful input from them.

³ 25 Op Atty Gen 145, 146 (1951), citing 43 Am Jur Section 571.

⁴ Order No. 76-715.

⁵ Order No. 78-149 at 3.

Based on those differences, the Commission distinguished *Brooks* and concluded that Juniper was a public utility.⁶

These cases establish a two-step analysis for determining whether a purported members-only water company is a public utility under ORS 757.005. First, the Commission must examine whether the company is, in fact, serving only members of the company that own land within its designated service area. If the water company is serving non-members or persons outside its boundaries, it is a public utility because it is serving the public.

If the evidence shows that the water company is only serving resident members, then the Commission must then determine whether the company is structured in a manner that gives members the ability to provide their own regulation in their own interest. This requires an examination of all facts and circumstances connected with the management, operation, and control of the company to determine, among other things, whether members have an equal voice in operating the company and setting rates for service, as well as the ability to challenge company decisions. In this analysis, no one factor is dispositive. The critical question is whether the members are able to protect themselves from unjust and unreasonable practices and are able to receive service at fair and reasonable rates.

Positions of the Parties

Staff and intervenors Ludwig and Day acknowledge that CRRWC is organized as a member-only company. They contend, however, that CRRWC is not acting as a member-only company, but rather that of a public utility providing service to the public.

In support of its claim, Staff points out that CRRWC officers and employees do not have a consistent definition of who is considered a member of the company. Moreover, while the company's by-laws provide that membership is limited to users within CRRWC's service territory, Staff notes that CRRWC's service territory is not defined and claims that the company's organization and operation does not provide any real limits as to what territory it may serve. For these reasons, Staff claims that the organization and operation of CRRWC does not provide any real limits as to whom it may serve. Staff also notes that, unlike the water companies in *Brooks*, CRRWC is not customer owned.

Intervenors Ludwig and Day base their arguments on complaints about the conduct of CRRWC's general manager.⁷ They contend that the general manager improperly

⁶ Order No. 98-529 at 5.

⁷ Ludwig and Day initially raised numerous and various violations of corporate by-laws and other legal standards. These include allegations that the general manager is difficult to work with, rude, verbally abusive, makes threatening remarks and gestures, acts in an arbitrary and subjective manner without regard to written policies, treats members differently depending upon their personal relationship, has misused company property, misappropriated funds, mismanaged the company, violated state contracting laws, and violated Oregon health standards.

At hearing, the ALJ concluded that a large majority of these complaints were not relevant to our determination in this matter. The ALJ clarified that the Commission would consider evidence that relates to whether the company was serving the public. He emphasized, however, that the Commission would not examine alleged violations of by-laws or other rules that did not relate to this issue. We agree with the ALJ's conclusions and adopt them.

denied membership to three landowners at Crooked River Ranch. Mike Drum, a homebuilder, had trouble obtaining service for the home he was building. Ed and Gloria Elliott were terminated as members after they rented their house out and were denied reinstatement due to an apparent conflict with the general manager. Terri Ludwig was denied the right to self-haul water, based on the general manager's belief that Ms. Ludwig's use of a fire hose was not a sanitary means to dispense water.

In response, CRRWC maintains that this case is indistinguishable from the Commission's decision in *Brooks*. CRRWC emphasizes that it too is a members-only organization serving itself and not the general public. CRRWC disputes Staff's arguments and emphasizes that it is privately operated and regulated by its members under its corporate by-laws, providing water to members and properties within Crooked River Ranch.

With regard to the complaints made by Ludwig and Day, CRRWC first points out that the evidence shows that the property Mr. Drum developed has water service, and that the owners of that property are members. Similarly, CRRWC notes that the board of directors reinstated the Elliots as members. CRRWC adds that other complaints about the manner in which the company is operated can be addressed with the board of directors.

Commission Resolution

After reviewing the facts, we conclude that CRRWC is not a public utility subject to our jurisdiction under ORS 757.005. CRRWC is a private, non-profit corporation that provides water to its members within the limited confines of Crooked River Ranch. While the definition of membership in its by-laws is unclear, the evidence establishes that membership in CRRWC is restricted to property owners that either choose to haul their own water or have a connected lot. As in *Brooks*, membership in CRRWC is appurtenant with the land.

Contrary to Staff's assertion, CRRWC does have a defined service territory. As the company notes, the articles of incorporation clarify that CRRWC is "organized for the purpose of providing domestic and irrigation water to portions of Crooked River Ranch, a duly recorded subdivision of Deschutes County, Oregon, and other adjacent properties that may be developed by Crooked River Ranch, a limited partnership." There is no evidence that CRRWC provides service outside this defined area or to non-members.

We agree with Staff that CRRWC is not customer owned. Despite CRRWC's arguments otherwise, the articles of incorporation and by-laws state that members have no financial interest in the corporation.⁸ That fact, however, does not alter our decision. We are satisfied that CRRWC is customer controlled and self-regulated, which overrides the lack of customer ownership. CRRWC members have meaningful input in the company because they elect the board of directors who control its operation, set rates, and choose the management. Moreover, there is no evidence that CRRWC has acted unreasonably or in a discriminatory matter in selecting candidates for election to the board of directors. Thus, like the organizations

⁸ The articles of incorporation provide that "if the corporation should be dissolved, said (sic) system shall revert to Crooked River Ranch, a limited partnership." Similarly, a definitions page to the by-laws states that shareholders "have not (sic) financial interest in The Company, only voting rights."

in *Brooks*, the members of CRRWC are, in effect, providing service only to themselves and not to the general public.

We acknowledge the numerous complaints that raise important questions about the conduct of CRRWC's general manager. We cannot, however, assert jurisdiction simply to provide these complaining parties with a forum. As noted above, our jurisdiction is limited to entities that are providing utility service to the public. While there appear to be some instances where CRRWC's general manager violated corporate by-laws and took inappropriate actions, there is no evidence of a widespread pattern of behavior to support a finding that CRRWC is not acting as a members-only water company. To the contrary, the evidence shows that the board of directors has responded to complaints and taken appropriate action. Other complaints can be similarly addressed by appealing to the board of directors or, if necessary, to the Circuit Court. Remedies exist for these complaints as would exist for any private corporation in Oregon, separate and apart from the Commission.

It is important to note that our conclusion here does not render CRRWC immune from Commission jurisdiction on an indefinite basis. This decision is based on the facts contained in the record that show that CRRWC is operating as a members-only water company and is not serving the general public. Should the nature of CRRWC's operation change, either through its organization or its actions, the Commission will not hesitate to reinvestigate the water company to ensure that CRRWC's members continue to have the ability to provide their own regulation in their own interest.

Finally, we recognize that Staff's investigation was made difficult by the numerous ambiguities in CRRWC's by-laws and lack of written operating policies. The by-laws fail to define CRRWC's service territory, provide conflicting and possibly unnecessary definitions for "membership," "members," and "users." There are no written policies that identify what constitutes "good standing" or what type of equipment must be used to self-haul water. Similarly, there are no standards that govern the board of directors' review of applicants seeking election to the board, nor established guidelines the board uses in determining whether an applicant is qualified for election. Although we are satisfied by our findings on these issues based on evidence as to CRRWC's actions, we strongly advise the company amend its by-laws and establish written policies to more accurately and fully describe the corporation and its operations.

ORDER

IT IS ORDERED that Crooked River Ranch Water Company is not a public utility under ORS 757.005 and, therefore, not subject to our jurisdiction. Docket UM 1036 is closed.

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 from 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.