

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1381

THE PUBLIC UTILITY COMMISSION)
OF OREGON,)
)
Complainant,)

v.)

ORDER

CROOKED RIVER RANCH WATER)
COMPANY; and JAMES R. ROOKS,)
Director, RANDOLPH M. SCOTT,)
Director, BRIAN ELLIOT, President,)
RICHARD A. KEEN, Vice President, and)
RICHARD MILLER, Secretary/Treasurer,)
in their capacities as the CROOKED)
RIVER RANCH WATER COMPANY)
BOARD OF DIRECTORS,)
)
Defendants.)

DISPOSITION: MOTION FOR SUMMARY DISPOSITION
GRANTED IN PART

I. INTRODUCTION

On July 1, 2008, the Staff of the Public Utility Commission of Oregon (Staff) filed a motion for summary disposition in this matter.¹ Staff argues that summary disposition should be granted where the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact.

On July 10, 2008, Crooked River Ranch Water Company (Crooked River) filed a motion for an extension of time to reply to Staff’s motion. As grounds for the extension of time Crooked River cited a petition for mandamus that it filed in Jefferson County Circuit Court directed at the Commission and its Staff. On July 10, 2008, the Administrative Law Judge (ALJ) denied Crooked River’s motion.

¹ Although Staff styled its motion “Motion for Summary Disposition,” in the body of its motion Staff conceded that certain issues are not ripe for summary disposition.

On July 16, 2008, Crooked River filed its response to Staff's motion. Crooked River argues that summary disposition is not appropriate as there are issues of material fact that have not been resolved.

II. BACKGROUND

On May 1, 2008, Staff initiated this proceeding to determine whether civil monetary penalties should be assessed against the Defendants as provided in ORS 757.994(1).² The basis for Staff's action is the alleged failure of Defendants to comply with certain Ordering Paragraphs in Order No. 07-527.

In Order No. 07-527, entered November 29, 2007 in docket UW 120, the Commission decided a general rate case for Crooked River. The relevant Ordering Paragraphs were as follows:

4. Not later than 30 days from the date of this order, Crooked River Ranch Water Company shall submit any contracts between itself and its General Manager Mr. Rooks and members of Rooks' family, along with supporting testimony, to this Commission for approval.
5. Not later than 30 days from the date of this order Crooked River Ranch Water Company shall file an accounting of its collection of funds through its special assessment surcharge and the disposition of such funds, from the inception of the fund to the present.
6. Not later than 30 days from the date of this order, Crooked River Ranch Water Company shall file a report stating its need for funds for new capital improvements, including the intended projects, the estimated cost of each such project, and the time that each investment would be required.

Crooked River did not apply for rehearing or reconsideration of Order No. 07-527.

Crooked River made no filings within the 30 day period allowed by Order No. 07-527. On March 7, 2008, more than two months after the thirty day period had elapsed, Staff filed a motion requesting that the Commission find that Crooked River was in violation of Order No. 07-527. On March 13, 2008, Crooked River filed a response to Staff's motion. On March 21, 2008, Crooked River filed a supplemental response to Staff's motion.

² ORS 757.994(1) provides: "In addition to all other penalties provided by law, a person who violates any statute, rule or order of the Public Utility Commission related to water utilities is subject to a civil penalty of not more than \$500 for each violation. The commission may require that such penalties imposed under this section be used for the benefit of the customers of water utilities affected by the violation."

On March 24, 2008, the Commission issued Order No. 08-177. In that Order the Commission drew the following conclusions of law:

1. Crooked River failed to comply with Ordering Paragraphs 4, 5 and 6 of Order No. 07-527.
...
4. The Commission should initiate enforcement actions against the Board Members pursuant to ORS 757.994.

This proceeding is the “enforcement action” contemplated in Order No. 08-177.

On March 26, 2008, Crooked River filed an application for reconsideration of Order No. 08-177. In its application the Company asked the Commission to stay its order requiring that the Company distribute its special assessment fund balance to its members.

On March 30, 2008, the Commission issued Order No. 08-181, in docket UW 120, staying Order No. 08-177, in part. On May 2, 2008, the Commission issued Order No. 08-243 denying Crooked River’s application for reconsideration of Order No. 08-177 and lifting the stay that had been granted in Order No. 08-181.

On May 6, 2008, Crooked River filed a petition for judicial review in the Oregon Court of Appeals challenging Orders Nos. 08-177 and 08-243. Crooked River also sought a stay of the Commission’s order directing the distribution of the special assessment fund balance. On May 12, 2008, the Court of Appeals granted the stay. The petition has yet to be addressed by the Court on its merits.

III. THE COMPLAINT

Staff alleges three violations of Order No. 07-527, corresponding to the three Ordering Paragraphs cited above.

Staff first alleges that Crooked River violated Ordering Paragraph 4 relating to the Company’s contracts with Mr. Rooks and members of his family. According to Staff, beginning December 31, 2007, Defendants had been in continuous violation of Ordering Paragraph 4 for 121 days as of the date Staff filed the complaint to initiate this docket (May 1, 2008). Staff calculates the amount of penalties accrued to date, at the maximum rate of \$500 per day (\$60,500), and alleges that the individual defendants are jointly and severally liable for payment. Staff further proposes that any penalty proceeds be used for the benefit of the Company’s customers, pursuant to ORS 757.994.

Staff next alleges that Crooked River violated Ordering Paragraph 5 relating to the Company’s filing of an accounting of its special assessment surcharge funds. Again Staff alleges that, beginning December 31, 2007, Defendants had been in

continuous violation for 121 days as of the date Staff filed the complaint. Staff again calculates the accrued penalty at the rate of \$500 per day (\$60,500) and alleges that the individual defendants are jointly and severally liable. Staff again proposes that any proceeds be used for the benefit of the customers of Crooked River.

Finally, Staff alleges that Crooked River violated Ordering Paragraph 6 relating to the Company's need for funds for new capital improvements. In this instance Staff alleges that Defendants were in violation of the Commission's order for 28 days. Staff calculates the amount of the accrued penalty at the rate of \$500 per day (\$14,000) and alleges that the individual defendants are jointly and severally liable. Again Staff proposes that any proceeds be used for the benefit of the customers of Crooked River.

IV. CROOKED RIVER'S ANSWER

In its answer Crooked River denies the material allegations of the complaint. Crooked River denies that the Company is operated by individual members of the Board of Directors and further denies that the Board is a proper party "either individually or collectively."

As affirmative defenses Crooked River first states that the complaint fails to state a claim upon which relief can be granted. The Company next asserts that the Commission is without jurisdiction to entertain this action and lacks regulatory authority, citing its pending appeal of the Commission order asserting jurisdiction.

Crooked River states that it is a cooperative and not subject to the Commission's jurisdiction. The Company alleges that the subject Commission orders are void.

V. MOTION TO DISMISS

On May 22, 2008, Crooked River filed a motion to dismiss the complaint. As grounds for its motion, Crooked River argued that it is organized as a cooperative and not subject to the Commission's authority. Crooked River further argues that the Commission erroneously had decided that it had received the threshold number of petitions from Crooked River's members as required by ORS 757.063 as a condition precedent to the Commission's assertion of jurisdiction.

By ruling dated May 29, 2008, Crooked River's motion was denied.

VI. STAFF'S MOTION FOR SUMMARY DISPOSITION

According to Staff, summary disposition is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Regarding each alleged violation, Staff cites Orders Nos. 08-177 and 08-243, wherein the Commission found that the Crooked River had failed to comply with Order 07-527. Staff argues that the Commission's decisions may preclude re-litigation of an issue in another proceeding, so long as five requirements are met: (1) the issues in the two proceedings are identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on the issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type to which the court will give preclusive effect. Staff argues that these five requirements are met in this case for each of the three alleged violations.

Staff discusses Crooked River's answer and its denials of material facts. According to Staff, Crooked River's answer is a collateral attack on Orders Nos. 07-527, 08-177 and 08-243. Staff argues that the Company's noncompliance with the subject Ordering Paragraphs was previously determined and decided adversely to Crooked River.

That factual issue was litigated and essential to the final decision on the merits of the previous orders. Furthermore, Defendants had a full and fair opportunity to be heard on the merits in the previous orders. Furthermore, Defendants had a full and fair opportunity to be heard on the issue of compliance and are certainly in privity. Finally, the previous proceedings are the type that will be given preclusive effect.

For each of the three alleged violations Staff argues that there is no genuine issue of material fact regarding Crooked River's failure to comply with Order No. 07-527, except to determine the date when the Company became compliant.

Regarding the first alleged violation, Staff states "there remains a factual issue of whether the Defendants became compliant with Ordering Paragraph number 4 of Order No. 07-527 on day 140 (May 19, 2008) day 155 (June 3, 2008), or remain noncompliant." Staff offers to file testimony to address this issue if it is not decided in this order.

Regarding the second alleged violation, Staff states "there remains a factual issue of whether the Defendants became compliant with Ordering Paragraph number 5 of Order No. 07-527 on day 140 (May 19, 2008) day 155 (June 3, 2008), or remain noncompliant." Staff offers to file testimony to address this issue if it is ordered to do so by the Commission.

Regarding the third alleged violation, Staff notes that the Commission already has found that the Defendants were in violation of Ordering Paragraph 6 of Order No. 07-527 for 28 days. Staff argues that Crooked River's denial that it was in violation of the order amounts to a collateral attack on Order No. 08-177.

Regarding the liability of the Board Members themselves, Staff argues that the Commission already decided that issue in Order No. 08-177. Staff further argues that any arguments regarding the Commission's jurisdiction to hold board members responsible for penalties is purely a legal issue involving statutory interpretation.

Regarding the proposal to use any penalties for the benefit of the customers of Crooked River, Staff argues that ORS 757.994 unambiguously allows the Commission to provide for such treatment. Staff states that it will provide testimony if requested by the Commission, to support its view that it would be appropriate in this case to use the penalties in such a manner.

VII. CROOKED RIVER'S REPLY TO STAFF'S MOTION

Crooked River argues that summary disposition is not appropriate "as there are issues of material fact which have not been resolved." According to the Company, "on the face of it's (sic) motion Staff has made that concession for each of the issues that they have submitted." Crooked River argues that summary disposition is not appropriate on the issues of the amount of any penalty, or the liability for any penalty.

Crooked River argues that Staff's recitation of the appropriate standard of review is not complete. The party moving for summary disposition has the burden of proving the absence of a genuine issue as to any material fact. The judge [Commission] must view the record in the light most favorable to the opposing party. Summary disposition should be "cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues."

Crooked River notes that Staff admits that some material facts are still at issue, citing Staff's motion. The Company argues that its compliance with Ordering Paragraphs 4 and 5 "has not ultimately been ruled upon by the Commission."

Crooked River argues that the issue of its compliance with the ordering paragraphs that was raised in the earlier proceeding is not identical to the issue of its compliance in this case. According to the Company, no final ruling has been made regarding its compliance with Ordering Paragraphs 4 and 5 of Order No. 07-537 in docket UW 120. Crooked River states that it made several submissions with regard to each of the ordering paragraphs, and that each time it "either added additional information or changed the format of the presentation of that information so that it would be deemed compliant."

Crooked River posits that the Commission has deemed the company in compliance with Ordering Paragraph 4, because the Commission docketed its applications for approval of the affiliated contracts and then approved the contracts. The Company notes that the Commission previously decided that the Company has complied with Ordering Paragraph 6. Regarding Ordering Paragraph 5, Crooked River argues that its compliance is still being litigated.

Crooked River states that its multiple submissions in response to the Ordering Paragraphs reflect its effort “to both gather and produce responsive information.” The Company claims that “this was a learning process” by the Company “as a utility that is new to PUC regulation.”

Crooked River argues that its various submissions show that it “struggled with the vague language in Ordering Paragraphs 4, 5 and 6 and that any noncompliance with those paragraphs was not wilful [sic].” The Company argues that it has made a good faith effort to comply with the Commission orders. If the Commission were to impose sanctions on the Company, Crooked River argues that “it would destroy any hope of a productive relationship between [the Company] and [this Commission].”

Crooked River refers to “the motion and response discourse” over the ordering paragraphs as “an attempt to get clarification from the PUC on the content and form of information which had been requested.” According to Crooked River, “the incentive to avoid civil penalties was not present in that litigation as that issue had not been presented for determination in the form of a complaint.” The Company argues that there can be no final judgment of its liability “because the identity of issue and incentive to litigate was not the same in the Motion discourse as in this matter.”

Crooked River claims that the authorities cited by Staff require privity between the parties. Crooked River argues that Staff’s motion “contains nothing more than an assertion that privity exists.” The Company argues that Staff has not met its burden of proof.

Crooked River argues that the earlier Commission orders “did not result from the type of proceeding that should be given preclusive effect.” According to the Company, not all administrative proceedings are appropriate to establish issue preclusion, citing *Nelson v. Emerald People’s Utility Dist.*, 318 OR 99, 104. Crooked River argues that “the proceedings in this case were not sufficiently comprehensive on the issue of compliance to be given preclusive effect and were not of the same quality as required before imposing civil penalties.”

Regarding the disposition of any penalties, Crooked River notes that Staff offered to provide testimony to support its view that any penalties recovered be applied to the benefit of the customers of Crooked River. The Company construes such statements as proof that issues of fact and law still exist.

Regarding the amount of any penalty, Crooked River disputes Staff’s claim that the liability for the penalties accrues daily. Crooked River argues that the maximum amount of any penalty for each violation is \$500. The Company argues that rules of statutory interpretation support its position.

According to Crooked River, the legislative history is clear that the legislature did not intend for fines to accrue. The Company quotes legislative testimony

from Commission Chairman Lee Beyer to the effect that the fining authority would be “fairly small” under the bill. Crooked River argues that a fine that accrues at daily increments of \$500 would not be “small.”

Crooked River argues that, when the legislature intends to allow a fine to be imposed “per day,” it expressly states that rule. The Company cites ORS 757.993(3) as an example of such statutory language.

Regarding the personal liability of its Board Members, Crooked River did file a petition in the Court of Appeals for judicial review of Orders Nos. 08-177 and 08-243. Because there was never any litigation on individual board liability “or full and fair opportunity for hearing,” Crooked River argues that summary disposition of the issue of the vicarious liability of the Board Members is not appropriate.

VIII. DISCUSSION

As noted above, in Order No. 08-177 the Commission drew the following conclusions of law:

1. Crooked River failed to comply with Ordering Paragraphs 4, 5 and 6 of Order No. 07-527.

Whether to give preclusive effect to our own decision is an exercise in formality. Plainly, Crooked River failed to comply with Ordering Paragraphs 4, 5 and 6 of Order No. 07-527.

As stated by the Court in *Nelson, supra*, whether an administrative decision has preclusive effect depends on:

- (1) whether the administrative forum maintains procedures that are sufficiently formal and comprehensive; (2) whether the proceedings are ‘trustworthy’; (3) whether the application of issue preclusion would ‘facilitate prompt, orderly and fair problem resolution’; and (4) whether the same quality of proceedings and the opportunity to litigate is present in both proceedings.

Commission proceedings are of the character that qualifies Commission decisions for preclusive effect.

This Commission’s proceedings are formal and comprehensive. Parties may conduct discovery, offer direct testimony, cross-examine adverse witnesses, and file briefs. During the proceeding, parties may file motions and may seek review of adverse rulings and orders. After a decision, parties may apply for rehearing or reconsideration and have the right to petition the Court of Appeals for judicial review.

The State of Oregon has a deeply vested interest in the trustworthiness of the Commission's proceedings. Utility service is a matter of paramount public interest and the Commission's processes are a critical element in providing public confidence in the regulatory process.

In this case the preclusive effect of Order No. 08-177 facilitates prompt, orderly and fair problem resolution. Crooked River's failure to comply with Ordering Paragraphs 4, 5 and 6 is indisputable. No purpose would be served by entertaining "evidence" to the contrary. There is no such evidence.

We previously deemed Crooked River to have complied with Ordering Paragraph 6 on January 28, 2008. Crooked River's "filing" was 28 days late. The amount of any penalty will be determined in a second phase of this proceeding.

Crooked River complied with Ordering Paragraph 4 on May 20, 2008, when it filed its applications for approval of affiliated interest contracts. Crooked River's filing was 141 days late. The amount of any penalty will be determined in a second phase of the proceeding.

Regarding Ordering Paragraph 5, Staff states that there does remain a factual issue of whether Crooked River complied with the Ordering Paragraph on May 19, 2008, or June 3, 2008. Staff offered to file testimony on this issue.

In this order we find that Crooked River failed to comply with Ordering Paragraph 5 of Order No. 07-537. In the second phase of this proceeding Staff shall offer testimony regarding the date when the Company did comply. The amount of any penalty for Crooked River's failure to comply with Ordering Paragraph 5 will be determined in that second phase.

Crooked River states that it "has made a good faith effort to comply with the original order (07-527) as well as the subsequent orders in the rate case." (Docket No. UW 120). Crooked River's "good faith" is a factor to be taken into account in determining the amount of any penalties. It does not absolve the Company of liability for its failure to comply with the Commission's order.

Regarding the amount of any penalty, we conclude that Crooked River's interpretation of ORS 757.994, that the total amount of any penalty for a continuing violation is limited to \$500, is legally in error. Each day of noncompliance constitutes a discrete violation. If the Commission were to interpret that statute in the manner suggested by Crooked River, such a result would render the statute a nullity by making the penalty virtually *de minimis* and removing any incentive for compliance.

Nevertheless, Crooked River argues that such a result follows from the legislature's failure to include "each day that the violation continues shall constitute a separate violation." We note that the general statute that provides for penalties for violating "any lawful requirement or order made by the commission" likewise does

not contain the proffered phrase. (ORS 756.990(2)) It would eviscerate the Commission's authority to enforce its orders if the liability for failure to comply were so limited. This was obviously not the legislature's intention.

ORS 757.994(1) provides that "the Commission may require that penalties imposed under this section be used for the benefit of the customers of water utilities affected by this violation." Staff proposes that any penalties paid in this proceeding be applied to the benefit of Crooked River's customers. Staff may present evidence to that effect in the second phase.

Regarding the liability of its Board Members for the Company's failure to comply with the Commission's orders, Crooked River argues that there has been "no hearing on the issue of vicarious liability for individual board members." Crooked River misconstrues the issue. In Order No. 08-177, the Commission did not hold Crooked River's Board Members vicariously liable. Their liability is direct, not vicarious.

ORS 757.994 provides that "a person who violates any . . . order of the Public Utility Commission" is subject to a civil penalty. ORS 756.010 defines "person" to include "corporations and associations or their officers." Each of Crooked River's Board Members is a "person" and is jointly and severally liable for any penalties for the Company's failure to comply with Commission orders.

Staff's motion for partial summary disposition is granted. We find that Crooked River violated Order Paragraphs 4, 5 and 6 of Order No. 07-527 as set out above.

We will convene a second phase of this proceeding to determine: (1) the date when Crooked River complied with Ordering Paragraph 5; (2) the amount of any penalties for each violation; and (3) the disposition of any such penalties. Staff is directed to offer testimony on each of these issues. Crooked River also will be afforded the opportunity to offer its own testimony on each issue. A prehearing conference will be convened to set the schedule for the second phase.

FINDINGS OF FACT

1. Crooked River failed to comply with Ordering Paragraphs 4, 5 and 6 of Order No. 07-527 on a timely basis.
2. The Commission deemed a submission by Crooked River to Staff on January 28, 2008, to constitute compliance with Ordering Paragraph 6.
3. Crooked River complied with Ordering Paragraph 4 on May 20, 2008, when it filed its applications for approval of its affiliated interest contracts.
4. The date of Crooked River's compliance with Ordering Paragraph 5 is to be determined in the second phase of this proceeding.

5. Crooked River's Board Members are "persons" as defined in ORS 757.994.

CONCLUSIONS OF LAW

1. Crooked River's failure to comply with Ordering Paragraphs 4, 5 and 6 of Order No. 07-527 subjects the Company to penalties pursuant to ORS 757.994.

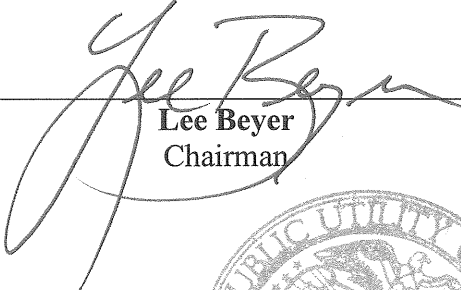
2. Crooked River's Board Members are jointly and severally liable for penalties for each of the Company's violations of Order No. 07-527 in the maximum amount of \$500 per day.

ORDER

IT IS ORDERED that

1. The Motion for Summary Disposition filed by the Staff of the Oregon Public Utility Commission is granted to the extent indicated in this Order.
2. A second phase of this proceeding shall be convened to determine: (1) the date when Crooked River Ranch Water Company complied with Ordering Paragraph 5; (2) the amount of any penalties for each violation of Order No. 07-527, by Crooked River Ranch Water Company; and (3) the disposition of any such penalties.

Made, entered, and effective AUG 07 2008



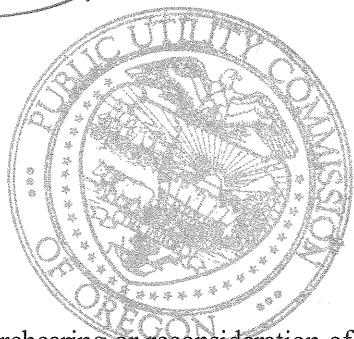
Lee Beyer
 Chairman



John Savage
 Commissioner



Ray Baum
 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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.