

ORDER NO. 09-026

ENTERED 01/28/09

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 8, UW 120, UM 1381, & UCR 100

In the Matters of)
)
CROOKED RIVER RANCH WATER COMPANY)
)
An Investigation Pursuant to ORS 756.515 to)
Determine Jurisdiction (WJ 8))
)
and)
)
Request for rate increase in total annual revenues from)
\$806,833 to \$868,453, or 8.13 percent. (UW 120))
)
_____)

THE PUBLIC UTILITY COMMISSION OF)
OREGON,)
)
Complainant,)
v.)
)
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. (UM 1381))
_____)

G. T. & T. T.,)
)
Complainants,)
)
v.)
)
CROOKED RIVER RANCH WATER COMPANY,)
)
Defendant. (UCR 100).)
_____)

ORDER

SUMMARY

In this decision, we respond to the Court of Appeals' decision in *Crooked River Ranch Water Company v. Public Utility Commission of Oregon*, ** Or App *** (2008) (slip opinion, issued Dec 24, 2008). In that decision, the court remanded for reconsideration Order No. 06-642, issued in docket WJ 8, in which the Public Utility Commission of Oregon (Commission) had asserted jurisdiction over Crooked River Ranch Water Company (Crooked River or the Company). We issued the order pursuant to ORS 757.063, which provides the Commission with jurisdiction over a water association "if 20 percent or more of the members of the association file a petition with the Public Utility Commission requesting that the association be subject to such regulation."¹

In *Crooked River*, the Court of Appeals upheld our finding that a sufficient number of valid signatures had been received to meet the 20 percent threshold under ORS 757.063(1).² The court concluded, however, that we erred in finding that our jurisdiction became effective when we had confirmed and verified receipt of the threshold number of signatures. The Court held that "in light of the text, context, and legislative history of ORS 757.063, the legislature intended an association to be 'subject to regulation' only after the PUC issues an order pursuant to ORS 756.515 determining whether the 20 percent threshold has been satisfied."³ The court remanded this matter to the Commission to "complete the process contemplated by its notice in light of a correct interpretation of ORS 757.063."

We now complete that process in docket WJ 8 (WJ 8) consistent with the Court of Appeals' decision. We also address the status of all dockets pending before us related to Crooked River in light of the court's remand. These dockets include Crooked River's general rate proceeding (UW 120), an enforcement action filed by the Commission against Crooked River and its individual Board members in their capacities as the Board of Directors (UM 1381), and a consumer complaint proceeding (UCR 100).

We begin with a review of WJ 8, and summarize the prior proceedings that resulted in the assertion of Commission jurisdiction in Order No. 06-642. Based on the evidentiary record in that proceeding, as well as other evidence of which we take

¹ ORS 757.063 provides:

(1) Any association of individuals that furnishes water to members of the association is subject to regulation in the same manner as provided by this chapter for public utilities, and must pay the fee provided by this chapter for public utilities, and must pay the fee provided for in ORS 756.310, if 20 percent or more of the members of the association file a petition with the Public Utility Commission requesting that the association be subject to such regulation.

(2) The provisions of this section apply to an association of individuals even if the association does not furnish water directly to or for the public. The provisions of this section do not apply to any cooperative formed under ORS chapter 62 or to any public body as defined by ORS 174.109.

² Slip op. at 5.

³ Slip op. at 4.

official notice, we reassert jurisdiction, but give Crooked River the opportunity to challenge this decision. We then reaffirm orders in UW 120 and UCR 100, but dismiss the UM 1381 proceeding.

I. WJ 8 AND COMMISSION JURISDICTION

A. *Background*

As noted by the Court of Appeals, the facts underlying this dispute are essentially undisputed. The court summarized the facts as follows:

In February 2006, the PUC began receiving petitions from Crooked River's members, requesting that the PUC regulate the association. The PUC tracked those petitions to determine whether the 20 percent statutory threshold had been met, and verified the petitions by confirming that the address on each of the petitions matched that of a current Crooked River member. Some petitions were rejected because they were duplicates or could not be associated with the address of a current Crooked River member. Nonetheless, by April 2006, the PUC believed that the 20 percent threshold had been met.

That month, the PUC sent a letter to Crooked River that was captioned 'NOTICE OF INTENT TO ASSERT FINANCIAL AND SERVICE REGULATORY AUTHORITY[.]' (boldface and uppercase in original.) The letter stated, in part, 'The Commission has received petitions from more than 20 percent of the association members that request regulation of [Crooked River]. This letter is notification of the Commission's intent to assert its authority and regulate [Crooked River] for rates and service.' The letter also notified Crooked River of its 'right to dispute whether the 20 percent threshold has been met, including challenging the validity of the filed petitions, and formally request a hearing within 30 days from the date of this letter.'

In May 2006, Crooked River requested a hearing to dispute whether the 20 percent threshold had, in fact, been met. As part of its request for a hearing, Crooked River argued that it had been operating as a cooperative under ORS chapter 62. At that time, however, Crooked River was actually registered with the Secretary of State as a nonprofit corporation rather than a cooperative. In July 2006, the Crooked River Board of Directors dissolved the nonprofit corporation and formed a cooperative under ORS chapter 62.

The following month, the PUC held an evidentiary hearing pursuant to its notice. Crooked River asserted, among other arguments, that it was formed as a cooperative and was therefore exempt before the PUC assumed regulation of it under ORS 757.063(2). PUC staff, on the other hand, took the position that Crooked River's attempts to reorganize as a cooperative were ineffective. According to PUC staff, Crooked River became 'subject to regulation' as soon as the petitions were received from 20 percent of the members; at that point, Crooked River became 'subject to' ORS 757.480, which requires a public utility to obtain PUC permission before disposing of certain property.⁴

In Order No. 06-642, we adopted the position of Commission Staff (Staff) regarding the effect of ORS 757.063 and ORS 757.480. We explained that, although Crooked River was provided a right to a hearing to challenge the petitions, jurisdiction presumptively attached when we verified a sufficient number of signatures had been received by April 2006. Based on that finding, we concluded that Crooked River's attempt to reorganize the Company as a cooperative was without legal effect.

On appeal, the Court of Appeals upheld our finding that the threshold number of member signatures had been received, but concluded that the Commission had misinterpreted ORS 757.063. Based on its statutory analysis, which included a review of legislative history, the court concluded that a water association does not become a "regulated entity" under ORS 757.063 until the Commission issues its final order asserting jurisdiction. According to the court, this required that the Commission "make a determination that 'there is a reason to provide oversight'" before the initiating regulation.⁵ The court did not address Crooked River's claim that it had reorganized as a cooperative, and remanded our order for reconsideration.

B. *Proceedings on Remand*

The Court of Appeals' remand of Order No. 06-642 presents two issues for our resolution. First, having found that 20 percent of Crooked River's members have filed petitions for regulation, we must determine if "there is reason to provide oversight."⁶ Second, we must determine whether Crooked River is a cooperative exempt from jurisdiction under ORS 757.063(2). We address each separately.

1. *Reasons to Provide Oversight*

⁴ Slip op. at 2-3.

⁵ Slip op. at 4

⁶ As of March, 2006, Crooked River had 1552 accounts or members, requiring 311 signatories to the petitions (20 percent). On April 6, 2006, Staff had verified 312 signatures. That date was the date the Commission asserted jurisdiction attached. By the time Staff filed testimony (August 1, 2009), Staff had verified 397 signatures, or about 26 percent of the membership. Staff/100/Miller/7-8.

In deciding whether to provide oversight, the Commission exercises discretion. If the subject association were shown to be a well-managed enterprise, providing high quality water service at fair rates, petitioners would have the burden of proving that the Commission's exercise of that discretion to assert jurisdiction would likely result in a public benefit.

On the face of their petitions, association members state compelling grounds for the Commission to assert jurisdiction:

The Company's Bylaws effectively prevent members from having any meaningful participation in the Company's affairs;

The Company's Bylaws permit directors and employees to perform contract work for the Company without the necessity of competitive bids;

The Company's directors have been unresponsive and uncooperative in responding to member complaints or requests for information concerning Company operations, finances and policy; and

It would be burdensome and ineffective for individual members to instigate litigation concerning their individual grievances concerning misuse of Company resources, differences in terms of utility services, and other matters that are the fundamental purpose of laws and regulations of this state covering the provision of utility service.

Additionally, the Commission received numerous complaints from association members.

Based on those petitions, and on the evidentiary record in this proceeding, as augmented by the records in Crooked River's general rate proceeding (UW 120) and the consumer complaint (UCR 100), we find overwhelming factual circumstances and policy considerations for assuming oversight of the operations of Crooked River.⁷

In addition to the widespread member dissatisfaction, the Commission has received evidence of financial mismanagement, inappropriate ratemaking practices, and mistreatment of customers that compels our assertion of jurisdiction. Many of these considerations are documented in Order No. 07-527⁸ and Order No. 08-379.⁹

These include the imposition of a special assessment surcharge for purposes not allowed for water companies by Commission practice, the apparent misuse

⁷ The Commission takes official notice of its files in UW 120 and UCR 100. Any party may object to any fact noticed within 15 days of entry of this order. See OAR 860-014-0050(2).

⁸ The general rate case decision in UW 120, wherein the Commission adopted rates for the Company, after having asserted jurisdiction.

⁹ The decision in UCR 100 ordering Crooked River to connect a customer and setting the amount of the charge the Company may assess a new customer.

of special assessment fund revenues, excessive management compensation, self-dealing, and conflicts of interest, and inappropriate financing measures for system improvements.

Also, we are aware of a criminal investigation into the practices of Crooked River undertaken by the State of Oregon Department of Justice (DOJ). The Commission takes official notice of the DOJ report and instructs Staff to provide the report for the record in this proceeding.

2. *Crooked River's Corporate Status*

Throughout these proceedings, Crooked River has claimed that, although it was organized as a mutual benefit corporation at the time the customer petitions were filed, it subsequently reorganized as a cooperative and is now exempt from jurisdiction under to ORS 757.063(2). In our prior order (06-642), we did not reach that claim, finding instead that Commission jurisdiction had attached prior to the attempted reorganization. The Court having vacated our prior finding, Crooked River's claim that it is a cooperative is now ripe for a decision.

a. *Position of the Parties*

In support of its claim of exemption, Crooked River submitted copies of filings it had made with the Secretary of State in April, 2006, purporting to effectuate the Company's reorganization as a cooperative. These filings included a Certificate of Incorporation, Articles of Incorporation – Cooperative, Articles of Dissolution – Business/Professional/Nonprofit, and restated Articles of Incorporation. Although the Company offered no direct testimony to explain its reorganization, Crooked River's General Manager James Rooks testified on redirect as follows:

Q. And it's correct that the board of directors for the water company voted in favor of changing the entity status with the Secretary of State from mutual benefit to cooperative; correct?

A. That's true.

Q. And to the best of your knowledge was the Secretary of State consulted as to the most appropriate procedure for doing so?

A. Yes, they were.

Q. And is there two options available for how to accomplish that end?

A. Yes, there is. You can either dissolve the company or you can just put in for an amendment of some sort. And they said don't do that because the paperwork is horrendous. They just said dissolve it with the intent at

the same time changing it to a corporation. And that's what we did. I'm sorry. To a co-op.¹⁰

In other words, Crooked River claims simply that its Board members voted to dissolve the corporate entity and filed documents with the Secretary of State as a cooperative.

Staff argues that Crooked River's attempted reorganization was not valid for a number of reasons. First, Staff contends the dissolution of the mutual benefit association was outside the authority of its Board of Directors. Second, Staff alleges that the putative assignment of the assets to the cooperative was inconsistent with Crooked River's dissolution clause in the Company's Articles of Incorporation. Finally, Staff claims that the directors' actions breached their fiduciary duty to the corporation as specified in ORS 65.357.

b. *Resolution*

ORS 757.063(1) provides a right for a minority of the members of an association that furnishes water to petition the Commission for rate and service regulation as a public utility. ORS 757.063(2) exempts that right if the association is a cooperative formed under ORS chapter 62.

In applying those provisions, we must interpret them to give the statute the effect intended by the legislature. As a general rule, statutes are construed to avoid unreasonable results. The legislature does not intend to enact useless or meaningless legislation. *1000 Friends of Oregon v. Wasco County Court*, 299 OR 344 (1985).

For that reason, we will not accept, without inquiry, Crooked River's bare assertion that it has reorganized as a cooperative. To give effect to the statute, and to observe the rights of the minority members, we construe ORS 767.063(2) to require that any attempted reorganization of the corporate entity be carried out fully in compliance with the entity's corporate Bylaws, Articles of Incorporation, and applicable statutes.

Crooked River offered only copies of its filings with the Secretary of State purporting to reorganize itself as a cooperative. It offered no evidence to the effect that its attempted reorganization was conducted pursuant to duly convened meetings of the Board of Directors or the membership. It offered no evidence that its Bylaws or Articles of Incorporation had been amended to facilitate the reorganization.

As noted above, for this Commission to acknowledge that Crooked River had effectively reorganized as a cooperative, the Company needs to show that duly elected members of the Board of Directors had complied with all applicable legal requirements to effectuate the change. The Company has proven none of these elements of its case. In fact, even a cursory review of Crooked River's Articles of Incorporation and Bylaws as mutual benefit corporation support's Staff's claim that the attempted

¹⁰ Transcript, pages 72-73.

reorganization was invalid. Under those Articles, the water system reverts back to Crooked River Ranch upon dissolution of the corporation. Moreover, under the Bylaws, one of the Board members, Mr. Rooks, is barred from serving on the Board because he is also the Company's general manager.

Neither the corporate Bylaws, nor the Articles of Incorporation, invest in the Board the authority to dissolve the association, without a vote by the membership. The Company failed to prove that it amended either the Bylaws or the Articles of Incorporation to provide for the dissolution of the association or for the distribution of the corporate assets to the putative cooperative.

Because the attempted reorganization was undertaken after we first served notice of our intent to assert jurisdiction, Crooked River's claim that it is a cooperative is treated as an affirmative defense to our assertion of jurisdiction. As an affirmative defense, Crooked River has the burden of proving that it fully complied with all legal requirements when it tried to reorganize as a cooperative.

Accordingly, pursuant to ORS 756.515(4), we find that, to date, Crooked River has failed to establish that it is a cooperative exempt from jurisdiction under ORS 757.063(2). Based on that finding, at this time, we conclude Crooked River remains an Oregon mutual benefit corporation, subject to the provisions of ORS 757.063(1), and reassert jurisdiction.

II. RELATED CROOKED RIVER DOCKETS

Having reasserted jurisdiction, we must address the status of other dockets related to Crooked River.

In Order No. 07-527, UW 120, we established rates for service provided by Crooked River to its members. Pursuant to ORS 756.515(4), we find that the reinstatement of the rates adopted in that order is necessary for the public health and safety, and to prevent the dissipation of assets of the business.¹¹

In Order No. 08-243, UW 120, we ordered Crooked River to distribute \$130,656.26 to its members. Pursuant to ORS 756.515(4), we find that the distribution of those funds is necessary to prevent the dissipation of assets of the business, and reinstate the order. We will stay the distribution upon the posting by Crooked River of a sufficient bond to ensure the ability to perform this obligation to distribute \$130,656.26 to its members in the event of a final order directing distribution of the funds.

In Order No. 08-379, the consumer complaint, we ordered Crooked River to provide service to a customer at a connection rate we determined to be reasonable. Pursuant to ORS 756.515(4), we find that the reinstatement of that order is necessary for the public health and safety.

¹¹ The Commission also reinstates its errata Order No. 07-528.

In UM 1381, we initiated an enforcement proceeding against Crooked River and its Board members for failing to comply with our orders. Pursuant to ORS 756.515(4), we dismiss and close that proceeding.

III. FUTURE PROCEEDINGS

Pursuant to ORS 756.515(5), Crooked River may request a hearing to determine whether this order should continue in effect. Crooked River may request a hearing not later than 15 days after the date of service of this order, and the hearing shall be held not later than 60 days after Crooked River's request for hearing.

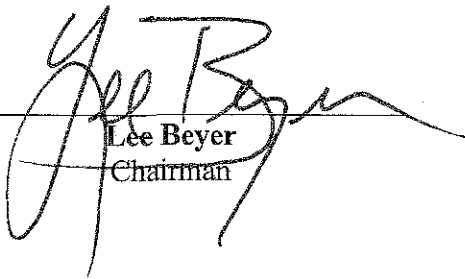
ORDER

IT IS ORDERED that:

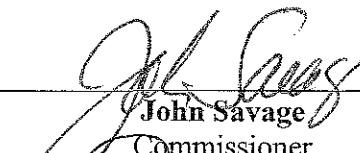
1. Crooked River Ranch Water Company is a regulated utility pursuant to ORS 757.063.
2. The tariffs filed by Crooked River Ranch Water Company in compliance with Order Nos. 07-527 and 07-528 are effective immediately.
3. Crooked River Ranch Water Company shall make a timely connection to the property specified in Order No. 08-379 upon receipt of Complainants' payment.
4. Within three business days of the date of service of this Order, Crooked River Ranch Water Company shall provide verified notice regarding whether the terms of this order are accepted and the time within which the order will be obeyed pursuant to OAR 860-014-0094.
5. Crooked River Ranch Water Company shall distribute \$130,656.26 to its members, or alternatively, post a sufficient bond to ensure the ability to perform the obligation.
6. Docket UM 1381 is closed.

7. Crooked River Ranch Water Company may request, within 15 days of service of this order, a hearing to determine whether this order should remain in effect.


Made, entered, and effective JAN 28 2009



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.