

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 43

In the Matter of

ELDERBERRY NEHALEM WATER
SERVICE,

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction.

ORDER

**DISPOSITION: STAFF’S RECOMMENDATION ADOPTED; JURISDICTION
ASSERTED**

This order memorializes our decision, made and effective at our August 10, 2021, Regular Public Meeting, to adopt Staff’s recommendation in this matter. The Staff Report with the recommendation is attached as Appendix A.

Made, entered, and effective August 12, 2021.

Megan W. Decker
Chair

Letha Tawney
Commissioner



Mark R. Thompson
Commissioner

A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: August 10, 2021**

REGULAR CONSENT EFFECTIVE DATE August 10, 2021

DATE: July 8, 2021

TO: Public Utility Commission

FROM: Scott Shearer

THROUGH: Bryan Conway, Michael Dougherty, and Bruce Hellebuyck **SIGNED**

SUBJECT: ELDERBERRY NEHALEM WATER SERVICE:
(Docket No. WJ 43)
Assert Service Jurisdiction.

STAFF RECOMMENDATION:

Staff recommends the Commission assert service regulation over Elderberry Nehalem Water Service (Elderberry), as detailed in Attachment B, the draft order.

DISCUSSION:

Issue

Whether Elderberry meets the requirements for service regulation by the Commission.

Applicable Laws and Rules:

ORS 757.005 sets for the definition of “public utility,” which includes any corporation or company that owns, operates, manages, or controls all or a part of any plant or equipment in Oregon for the production, transmission, delivery or furnishing of water, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

ORS 757.061(4)(a) provides the Commission with authority to assert service regulation on water utilities if: (1) the utility meets the definition of “public utility,” (2) the water utility serves less than 500 customers, and (3) the water utility is shown to have provided inadequate or discriminatory service at any time.

Elderberry Nehalem Water Service Docket No. WJ 43
July 8, 2021
Page 2

OAR 860-036-1010(13) defines a water utility as a water system that is subject to Commission regulation as provided under ORS 757.005 and ORS 757.061.

OAR 860-036-1900(2) mirrors ORS 757.061 stating: A water utility serving less than 500 customers is subject to service regulation if: (a) The Commission determines that the water utility has provided inadequate or discriminatory service.

Analysis

Elderberry is a privately owned, community water system that provides water service to approximately 60 customers near Seaside, Oregon. It is solely owned and operated by Phillip Goode.

Staff was notified by the Commission's Consumer Services Section about service issues reported by customers of Elderberry and lack of response from Elderberry. Staff reviewed the Consumer Services records, as well as the Oregon Health Authority's Drinking Water Section (DWS) records for Elderberry. Staff also contacted the DWS and Clatsop County Public Health Department (Clatsop County) regarding their interaction with Elderberry. Based on these discussions and the records available, Staff determined the following:

- A boil notice that has been open and outstanding since October of 2020;
- Multiple violations related to non-reporting of required testing;
- Multiple customer complaints to the Oregon Health Authority Drinking Water Section and the Commission's Consumer Services Section; and
- Failure to respond in a timely manner to requests for information from the aforementioned authorities.

Staff listed the above service quality deficiencies in its April 28, 2021, Notice of Intent to Assert Service Regulation (Attachment A), along with a request that the company reply and inform Staff if they disputed any of the listed deficiencies. Elderberry did not reply to Staff's notice. Staff also made calls and sent emails on June 14, 2021, to Phillip Goode (owner) and Amanda Graham (bookkeeper) after the response period to reply lapsed, and did not receive a response to that communication.

Since issuing that notice, Staff has learned the DWS and Clatsop County will be starting an enforcement action regarding the failure to address drinking water standards. Finally, since issuing the notice, Staff has learned that Clatsop County has also received customer complaints regarding Elderberry's service and that Elderberry has not responded to the county's questions in a timely manner.

Elderberry Nehalem Water Service Docket No. WJ 43
July 8, 2021
Page 3

Staff believes the service deficiencies cited above meets the standards of ORS 757.061(4)(a) regarding inadequate service to customers.

Conclusion

The Commission should assert service regulation over Elderberry, as it provides water utility service to the public, has less than 500 customers, and is providing inadequate service to its customers, as specified in Attachments A and B.

PROPOSED COMMISSION MOTION:

Issue an order asserting service regulation over Elderberry Nehalem Water Service.

WJ 43 - Elderberry Nehalem Water Service – Assert Service Jurisdiction



Oregon

Kate Brown, Governor

ORDER NO. 21-257

Public Utility Commission

201 High St SE Suite 100

Salem, OR 97301-3398

Mailing Address: PO Box 1088

Salem, OR 97308-1088

503-373-7394

April 28, 2021

ELDERBERRY NEHALEM WATER SYSTEM
C/O PHILLIP GOODE
81061 GRONNEL RD
SEASIDE OR 97138-6070



WJ 43 - NOTICE OF INTENT TO ASSERT SERVICE REGULATION – Elderberry Nehalem Water System

The Oregon Public Utility Commission (“Commission”) regulates certain privately-owned water companies providing service directly or indirectly to or for the public - ORS 757.005. The Commission exercises two types of regulation over water companies - service regulation only, and full regulation – ORS 757.061.

Service Regulation

Pursuant to ORS 757.061(4), a water utility providing service to the public and serving less than 500 customers is subject to service regulation if: (a) A water utility that serves fewer than 500 customers and that is found by the commission, pursuant to an investigation under ORS 756.515 (Investigations and hearings on commission’s own motion), to have provided inadequate or discriminatory service at any time.; or (b) A water utility that serves fewer than 500 customers and that at any time charges an average annual residential rate of \$24 per month or more.

Commission Staff have received contact from both customers of the utility and from Clatsop County Public Health regarding issues with system and water quality issues. The Commission’s Consumer Services Section has attempted to contact you regarding the issues with the system, without success. Based on the documentation we have reviewed, it appears that your system is not providing appropriate service as listed in ORS 757.061(4). Based on that documentation, it appears to Staff that your system is experiencing service issues including, but not limited to, the following:

- a boil water notice that has been open and outstanding since October 2020;
- multiple violations related to non-reporting of required testing;
- multiple customer complaints to both the Oregon Health Authority, Drinking Water Section, and the Commission’s Consumer Services Section; and
- failure to respond in a timely manner to requests for information from both the Oregon Health Authority, Drinking Water Section, and the Commission’s Consumer Services Section.

As such, Staff intends to recommend that the Commission open an investigation pursuant to ORS 756.515 in order to determine whether service regulation is appropriate. If you dispute any of this information, please respond to this letter by May 31, 2021.

Please direct any questions regarding this letter to:

Bruce Hellebuyck
971-375-5088
bruce.hellebuyck@state.or.us

Scott Shearer
971-239-3801
scott.shearer@state.or.us

Sincerely,

Bruce Hellebuyck
Retail Telecom & Water Regulation Program Manager

Enclosures

CC: Jill Goatcher, DOJ

ORS 757.005 - Definition of public utility

<https://www.oregonlaws.org/ors/757.005>

(1)(a) As used in this chapter, except as provided in paragraph (b) of this subsection, “public utility” means:

(A) 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, whether or not such plant or equipment or part thereof is wholly within any town or city.

(B) Any corporation, company, individual or association of individuals, which is party to an oral or written agreement for the payment by a public utility, for service, managerial construction, engineering or financing fees, and having an affiliated interest with the public utility.

(b) As used in this chapter, “public utility” does not include:

(A) Any plant owned or operated by a municipality.

(B) Any railroad, as defined in ORS 824.020 (Definitions for ORS 824.020 to 824.042), or any industrial concern by reason of the fact that it furnishes, without profit to itself, heat, light, water or power to the inhabitants of any locality where there is no municipal or public utility plant to furnish the same.

(C) Any corporation, company, individual or association of individuals providing heat, light or power:

(i) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to July 14, 1985;

(ii) From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers;

(iii) From solar or wind resources to any number of customers; or

(iv) From biogas, waste heat or geothermal resources for nonelectric generation purposes to any number of customers.

(D) A qualifying facility on account of sales made under the provisions of ORS 758.505 (Definitions for ORS 758.505 to 758.555) to 758.555 (Effect of energy sales on qualifying facility).

(E) Any person furnishing heat, but not delivering electricity or natural gas to its customers, except:

(i) As provided in ORS 757.007 (Contract and rate schedule filing for certain furnishers of heat exempt from regulation) and 757.009 (Procedure for reregulation of furnishers of heat); or

(ii) With respect to heat furnished in municipalities which on January 1, 1989, had a municipally owned system that was furnishing steam or other thermal forms of heat to its customers.

(F) Notwithstanding subparagraph (E) of this paragraph, any corporation, company, partnership, individual or association of individuals furnishing heat to a single thermal end user from an electric generating facility, plant or equipment that is physically interconnected with the single thermal end user.

(G) Any corporation, company, partnership, individual or association of individuals that furnishes natural gas, electricity, ethanol, methanol, methane, biodiesel or other alternative fuel to any number of customers for use in motor vehicles and does not furnish any utility service described in paragraph (a) of this subsection.

(H) An electricity service supplier, as defined in ORS 757.600 (Definitions for ORS 757.600 to 757.689).

(2) Nothing in subsection (1)(b)(C) of this section shall prohibit third party financing of acquisition or development by a utility customer of energy resources to meet the heat, light or power requirements of that customer.

[Amended by 1953 c.583 §2; 1967 c.241 §1; 1967 c.314 §1; 1971 c.655 §64a; 1973 c.726 §1; 1979 c.62 §1; 1981 c.360 §1; 1981 c.749 §21; 1983 c.118 §1; 1983 c.799 §7; 1985 c.550 §1; 1985 c.633 §7; 1985 c.779 §1; 1987 c.447 §96; 1987 c.900 §3; 1989 c.5 §2; 1989 c.999 §§1,2; 1991 c.294 §1; 1995 c.267 §1; 1999 c.330 §2; 1999 c.491 §1; 1999 c.865 §21; 2001 c.104 §292; 2003 c.82 §4]

860-036-1900 - Regulation of Water Utilities

http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_860/860_tofc.html

- (1) Except as provided in section (2) and (3) of this rule, a water utility serving less than 500 customers is not subject to Commission regulation and need not pay an annual revenue fee.
- (2) A water utility serving less than 500 customers is subject to service regulation if:
- (a) The Commission determines that the water utility has provided discriminatory service; or
 - (b) The water utility charges an average annual residential rate that exceeds \$24 per month.
- (3) A water utility serving less than 500 customers is subject to rate and service regulation if:
- (a) The water utility also provides wastewater services within the boundaries of a city;
 - (b) The water utility requests that it be subject to rate and service regulation as provided in OAR 860-036-1940; or
 - (c) The water utility proposes to charge a monthly rate that exceeds the threshold level set forth in OAR 860-036-1910 and at least 20 percent of the customers petition the Commission requesting the water utility be subject to rate and service regulation.
- (4) A water utility serving 500 or more customers is subject to rate and service regulation. When a water utility's customer count exceeds 500 customers, the Commission will issue an order establishing the water utility's regulatory status as a rate-regulated water utility.

Statutory/Other Authority: ORS 183, 756 & 757

Statutes/Other Implemented: ORS 757.061 & 757.063

History: PUC 1-2017, f. & cert. ef. 1-24-17

Order

ORDER NO.

ENTERED

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 43

In the Matter of

ELDERBERRY NEHALEM WATER SYSTEM

An Investigation Under ORS 756.515
to Determine Jurisdiction.

ORDER

DISPOSITION: JURISDICTION ASSERTED

The Public Utility Commission of Oregon (Commission) regulates private and investor-owned water utilities that meet the definition of a public utility in ORS 757.005. Public water utilities may be regulated for both rates and service in accordance with ORS Chapters 756, 757, 758, and 772.

Under Division 36 of the Oregon Administrative Rules, the Commission regulates adequacy of service including, but not limited to: water quality, water pressure, customer service, and plant maintenance for certain water utilities designated a public utility.

FINDINGS OF FACT

Elderberry Nehalem Water System (Elderberry or Utility) is a privately owned water utility that provides water service to 60 customers, near Seaside, Oregon.

Elderberry is providing inadequate service to its customers. Commission Staff received contact from customers of the utility, the Clatsop County Public Health department, and the Oregon Health Authority. Based on the documentation that Staff reviewed, Elderberry is experiencing service issues that include the following:

- A boil notice that has been open and outstanding since October of 2020;
- Multiple violations related to non-reporting of required testing;
- Multiple customer complaints to the Oregon Health Authority, Drinking Water Section and the Commission’s Consumer Services Section; and
- Failure to respond in a timely manner to requests for information from the aforementioned authorities.

On April 28, 2021, Commission Staff sent the Notice of Intent to Assert Service Regulation to Elderberry. The Utility did not respond to the notice. Commission Staff made numerous attempts to contact the Utility after the notice period lapsed and received no response.

CONCLUSIONS OF LAW

Under ORS 757.005, public utilities may be regulated by the Commission if they provide service to the public. ¹ Elderberry has not provided any information that they are a cooperative, municipality, or private homeowner association that is not serving the public generally. Therefore, Elderberry is a public utility under ORS 757.005 unless further contested.

Elderberry meets the requirements set forth in ORS 757.005 and ORS 757.061(4)(a), which provides that a water utility is subject to service regulation if it provides service to the public, serves fewer than 500 customers, and provides inadequate service.

As a service-regulated water utility, Elderberry will be subject to applicable Oregon Administrative Rules (OAR). Specifically, Elderberry is subject to all rules of Division 36 applicable to service regulated utilities. Elderberry is exempt from provisions in statutes and administrative rules related specifically to rate regulation. ²

ORDER

IT IS ORDERED that ELDERBERRY NEHALEM WATER SYSTEM is subject to service regulation and must pay the fee provided for in ORS 756.310.

Made, entered, and effective _____.

Megan W. Decker
Chair

Letha Tawney
Commissioner

¹ See OAR 860-036-1010(13).

² The rules applicable to rate regulated utilities include OAR 860-036-2000, OAR 860-036-2010, OAR 860-036-2020, OAR 860-036-2030, OAR 860-036-2130, OAR 860-036-2140, OAR 860-036-2150, OAR 860-036-2160, OAR 860-036-2170, OAR 860-036-2200, OAR 860-036-2210, OAR 860-036-2220, OAR 860-036-2230, OAR 860-036-2300, OAR 860-036-2310, OAR 860-036-2350, OAR 860-036-2360, OAR 860-036-2370, OAR 860-036-2380, OAR 860-036-2390, and OAR 860-036-2410.

Mark R. Thompson
Commissioner

A party to this docket may request reconsideration under ORS 756.561. The request must be filed within 60 days of the date of service of this order and include information that demonstrates that Elderberry Nehalem Water System is not subject to Commission jurisdiction. 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.