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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UM 1381

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 J. )  
MILLER, Secretary/Treasurer, in their )  
capacities as the CROOKED RIVER RANCH )  
WATER COMPANY BOARD OF )  
DIRECTORS. )

Defendants. )

CRRWC REPLY TO STAFF MOTION  
FOR SUMMARY DISPOSITION

COMES NOW, Defendant, Crooked River Ranch Water Company and responds to the Staff  
Motion for Summary Disposition.

**INTRODUCTION**

Summary Disposition is not appropriate as there are issues of material fact which have  
not been resolved. On the face of it's motion Staff has made that concession for each of the  
issues that they have submitted.. In the event that the Commission disagrees CRRWC will  
examine the criteria for issue preclusion under *Nelson v. Emerald People's Utility Dist.*, 318 Or  
99, 104, 862 P2d 1293 (1993)., to show that the criteria has not been met for Staff to prevail on a  
motion for summary determination. Staff makes a conclusory statement that the criteria have  
been met without analysis or explanation. A review and analysis of each separate criteria will

1 show that Summary Disposition is not appropriate.

2 Further arguments are made by Staff outside the issue of CRRWC's compliance with  
3 ordering paragraphs 4, 5 and 6 of Order No. 07-527. Staff makes arguments regarding the  
4 authority for the amount of monetary fine under ORS 757.994 and the liability for that monetary  
5 fine. For the reasons explained below summary disposition is not appropriate on the issue of the  
6 amount of penalty or liability for that penalty.

### 7 STANDARD OF REVIEW

8 Staff's citation of the appropriate standard of review is incomplete. The party moving for  
9 Summary Judgment (or in this case Summary Disposition) has the burden of showing the  
10 absence of a genuine issue as to any fact material to the application of the law. ORCP 47;  
11 *Beachcraft Marine Corp. v. Koster*, 116 Or App 133, 136, 840 P2d 1336 (1992). The judge must  
12 view the record in the light most favorable to the party opposing the motion. *Seeborg v. General*  
13 *Motors Corporation*, 284 Or 695, 699, 588 P2d 1100 (1978). Since its impact is rather drastic,  
14 summary judgment must be used with a due regard for its purposes and should be cautiously  
15 invoked so that no person will be improperly deprived of a trial of disputed factual issues. *Id* at  
16 699.

### 17 DISCUSSION

#### 18 ALLEGED VIOLATIONS:

19 Staff has conceded in it's own motion that Summary Disposition is not appropriate because  
20 there are material facts still at issue. "Stated another way, there remains a factual issue of whether  
21 the Defendant's became compliant ..." Staff Motion for Summary Disposition, (Page 5, Line 13-  
22 16). Staff makes a similar concession with regard to ordering paragraph number 5 (Page 9, Line 8-  
23 9). Staff's concession's regarding ordering paragraphs 4 and 5 reveal that Staff is seeking  
24 summary disposition on factual issues that as of yet have been undetermined. CRRWC

1 compliance with ordering paragraphs 4 and 5 has not ultimately been ruled upon by the  
2 Commission. With material facts still at issue Summary Judgment is not appropriate.

3         Despite the concession by Staff CRRWC offers an analysis of the criteria for determining  
4 whether summary disposition is appropriate under the holding in *Nelson v. Emerald People's*  
5 *Utility Dist.*, 318 Or 99, 104, 862 P2d 1293 (1993). Looking first to Criteria #1 under the holding  
6 in *Nelson*, supra, the issue of compliance with the ordering paragraphs raised in the previous  
7 pleadings is not identical to the issue in the complaint for civil penalties because in the case of  
8 paragraphs 4 and 5 no final ruling has been made. The commission made rulings during the course  
9 of litigation over paragraphs 4, 5 and 6 but each ruling was based upon the addition of factual  
10 information by CRRWC. CRRWC made several submissions with regards to paragraphs 4, 5 and  
11 6 each time CRRWC either added additional information or changed the format of the presentation  
12 of that information so that it would be deemed compliant with the relevant ordering paragraph.

13         Presumably, the Commission has now deemed CRRWC in compliance with paragraph 4  
14 because orders have issued in UI 281 and UI 282. The Commission has also deemed CRRWC as  
15 in compliance with ordering paragraph 6 in Order No. 08-177.. As for ordering paragraph number  
16 5 CRRWC compliance and obligation thereof is still being litigated. Nonetheless, the identity of  
17 the issue has constantly changed based on the submission of additional information and litigation  
18 thereby precluding summary disposition.

19         Criteria #2 and #3 under *Nelson* require that the issue was actually litigated and the party  
20 sought to be precluded had a full and fair opportunity to be heard on the issue. The multiple  
21 submissions by CRRWC in response to ordering paragraphs 4, 5 and 6 demonstrate that the  
22 litigation spawned by those paragraphs was less about CRRWC's legal rights and more of an effort  
23 by CRRWC to both gather and produce responsive information. This was a learning process by  
24 CRRWC to understand their legal obligations as a utility that is new to PUC regulation. This  
25 argument does not represent a collateral attack on Order No.'s 08-177 and 08-243 because the

1 litigation and exchange of information between the original order 07-527 and the present time is  
2 directly relevant to the identity of the issue and a full and fair opportunity for hearing on a final  
3 judgment.

4 CRRWC's responses to Staff Motions and Commission Orders regarding paragraph's 4, 5  
5 and 6 contained legal arguments as was appropriate to preserve CRRWC's legal rights as the issue  
6 of jurisdiction is under appeal and the Court of Appeal has acknowledged colorable arguments  
7 against jurisdiction. However, the motion and response discourse was well short of the actual  
8 litigation on the issue necessary to meet the requirements of a full and fair opportunity for hearing.  
9 CRRWC's motion discourse on the record clearly demonstrates that CRRWC struggled with the  
10 vague language in ordering paragraphs 4, 5 and 6 and that any non-compliance with those  
11 paragraphs was not wilful. What follows is a chronology of events as they relate to CRRWC's  
12 compliance with ordering paragraphs 4, 5 and 6:

- 13 1. 11/29/07: Order No. 07-527 issued by the PUC.
- 14 2. 12/13/07: Show Cause Hearing in State of Oregon by and through the Public  
15 Utility Commission of Oregon, v. James R. Rooks individually and Crooked River  
16 Ranch Water Company, Jefferson County Circuit Court Case No. CV07-0150. The  
17 result of which was that CRRWC provided Bank Records concerning the special  
18 assessment fund (Responsive to Paragraph 5) and documentation concerning the  
19 new construction projects costs (Responsive to Paragraph 6). This information was  
20 produced by CRRWC and the case was subsequently dismissed.
- 21 3. Exact Date Unknown: Counsel for CRRWC is contacted by Jason Jones requesting  
22 a response specific to ordering paragraph 4, as it was beyond the information  
23 provided in Jefferson County Case No. CV07-0150.
- 24 4. 1/28/08: CRRWC responds to Jason Jones request with the Declaration of  
25 James Rooks. James Rooks declaration specifically addresses the information  
26 requested in paragraph 4 and expands on information already provided in CV07-  
0150 related to paragraphs 5 and 6.
5. 3/7/08: Staff files a motion alleging non-compliance with ordering paragraphs 4, 5  
and 6.
6. 3/13/08: CRRWC files a response to the Staff motion re: non-compliance. In this  
response CRRWC challenges the allegation of non-compliance and in doing so  
seeks guidance from the PUC on the nature of the contracts require to be produced  
(paragraph 4), what type of "accounting" is required for special assessment funds  
(paragraph 5) and offers additional information on new capital improvements,  
intended projects, estimated costs and time required (paragraph 6).
7. 3/21/08: CRRWC files a supplemental response to staff's motion for violations of  
order 07-527 to address the Staff report attached to the Staff Motion.

- 1 8. 3/24/08: PUC issues order no 08-177. PUC deems CRRWC non-compliant with  
2 paragraph 4 and for the first time cites ORS 757.495(3) as the statutory authority  
3 for CRRWC to provide information on contracts with family members. This is  
4 relevant as CRRWC is new to PUC jurisdiction. The PUC concludes that not all  
5 information relevant to paragraph 5 has been provided and orders further  
6 production from CRRWC. The PUC concludes that information responsive to  
7 paragraph 6 has been produced.
- 8 9. 3/26/08: 2 days after order no. 08-177 CRRWC provides additional info responsive  
9 to paragraph 5.
- 10 10. 3/26/08: CRRWC files an Application for Reconsideration of Order No. 08-177;  
11 Request for Hearing and Petition for Extension of Time to Comply.
- 12 11. 3/28/08: PUC issues Order No. 08-181 staying the portion of Order No. 08-177  
13 related to distribution of funds by CRRWC. (Derivative of paragraph 5).
- 14 12. 4/8/08: CRRWC files a document captioned as "Response to Order No. 08-177.)  
15 This document could also be characterized as a supplemental response to Order No.  
16 07-527. This document includes additional specifics about the relationship between  
17 CRRWC and James & Jacquie Rooks in response to paragraph 4. This document  
18 also includes a detailed "accounting" of CRRWC accounts for the special  
19 assessment fund in response to paragraph 5.
- 20 13. 5/2/08: PUC issues Order No. 08-243 denying CRRWC's Motion for  
21 Reconsideration and addresses CRRWC's most recent attempt at compliance with  
22 paragraph 4. For the first time the PUC cites CRRWC to the specific OAR which  
23 controls conditions for approval of contracts between utilities and affiliated  
24 interests. Order No. 08-243 lifts the previously granted stay at the administrative  
25 level and order distribution of special assessment funds. Order No. 08-243 requests  
26 additional info regarding special assessment fund accounting.
- 14 14. 5/5/08: CRRWC files Petition for Review in the Court of Appeals for Order No. 08-  
15 177 and 08-243. (Staff's allegations on Page 3, Line 25-26; Page 7, Line 24-25;  
16 Page 11, Line 13-14 are incorrect).
- 17 15. 5/13/08: CRRWC files Motion for additional time to comply with Order No. 08-  
18 243 citing CRRWC's recently discovered obligation under OAR-860-036-073  
19 regarding affiliated interest contracts and the continued lack of information and  
20 guidance regarding the PUC's request for a "accounting."
- 21 16. 5/14/08: Letter from Counsel for CRRWC to Jason W. Jones and Paul A. Graham  
22 requesting clarification and guidance on what additional information the PUC  
23 required beyond that information already submitted.
- 24 17. 5/16/08: Court of Appeals issues a stay of PUC Order No. 08-243 requiring  
25 distribution of special assessment funds.
- 26 18. 5/16/08: PUC issues a ruling denying CRRWC's Motion for additional time to  
27 comply with Order No. 08-243. At this point in time CRRWC's obligation to  
28 provide information was sufficiently clear and CRRWC subsequently tendered the  
29 required information in UI 281 and UI 282. The ruling continued to be vague about  
30 the form and content of the information requested under paragraph 5.
- 31 19. 5/19/08: CRRWC files Motion for Reconsideration/Clarification. CRRWC sought  
32 reconsideration of the PUC ruling on 5/16/08 denying CRRWC's motion for  
33 extension of time. CRRWC also sought clarification of what the PUC was seeking  
34 under paragraph 5.
- 35 20. 6/3/08: CRRWC files it's supplemental response to Order No. 08-243.
- 36 21. 7/7/08: CRRWC files Petition for Writ of Mandamus in Jefferson County Circuit

1 Court Case No. 08CV-0055 which addresses the complaint for civil penalties.

2 CRRWC has made a good faith effort to comply with the original order (07-527) as well as  
3 the subsequent orders in the rate case. CRRWC has suffered from the handicap of being new to  
4 regulation by the PUC and there has not been any willful disobedience of PUC orders. If the PUC  
5 were to impose sanctions for non-compliance when CRRWC has made a continuing effort to be in  
6 compliance it would destroy any hope of a productive relationship between CRRWC and the PUC.  
7 If CRRWC is sanctioned despite it's efforts to be compliant then there would be little or no  
8 incentive to make any effort to attain compliance.

9 In addition to a full and fair opportunity for a hearing the claim must be litigated to a final  
10 judgment. If a claim is litigated to a final judgment on a particular issue or determinative fact is  
11 conclusive in a later or different action between the same parties...*State Farm Fire and Casualty v.*  
12 *Reuter*, 299 Or App 155, 700 P2d 236 (1985). (Emphasis Supplied). There is a legitimate  
13 question about whether a final judgment has been issued. In examining, the question whether or  
14 not a litigant has been afforded a full and fair opportunity for hearing on a final judgment the  
15 Oregon Supreme Court has held, "If the incentive to litigate the question is substantially the same,  
16 the procedural requisites for application of the issue preclusion rule would appear to exist." *In re*  
17 *White*, 305 Or 48, 750 P2d 485. (1988) (emphasis supplied). As explained above the motion and  
18 response discourse over ordering paragraphs 4, 5 and 6 was largely an attempt to get clarification  
19 from the PUC on the content and form of information which had been requested. The incentive to  
20 avoid civil penalties was not present in that litigation as that issue had not been presented for  
21 determination in the form of a complaint against CRRWC. Under the holding in *White*, supra,  
22 because the identity of issue and incentive to litigate was not the same in the Motion discourse as  
23 in this matter the Commission cannot conclude that CRRWC has been afforded a full and fair  
24 opportunity for hearing on a final judgment.

25 Criteria #4 and #5 under the holding in *Nelson*, supra require privity between the parties

1 sought to be precluded and that the prior proceeding was of the type to which the court will give  
2 preclusive effect. Staff's motion contains nothing more than an assertion that privity exists.  
3 Without additional explanation and argument Staff has not met their burden of proof on this  
4 criteria as required. In addressing Criteria #5 Staff cites four reasons for giving preclusive effect  
5 to a proceeding from the footnotes of the holding in *Nelson*, supra. There is no indication that the  
6 Court in the *Nelson* case considered these reasons for giving preclusive effect in rendering their  
7 opinion. Staff's citation to this case is improper because the reasons for giving preclusive effect  
8 come from the Court's holding in *North Clackamas School Dist. v. White*, 305 Or. 48, 50, 750 P.2d  
9 485, modified on other grounds 305 Or. 468, 752 P.2d. 1210 (1988). Assuming that the Court of  
10 Appeals reasons for giving preclusive effect remain valid after the court of appeals decision was  
11 overturned there is no explanation or analysis by Staff that those same reasons exist in the present  
12 case. Without explanation of how those reasons should be made applicable to this case Staff has  
13 not met their burden of proof on Criteria #5.

14 In fact, the orders PUC staff relies on for issue preclusion did not result from the type of  
15 proceeding that should be given preclusive effect. Not all administrative proceedings are  
16 appropriate to establish issue preclusion. *Nelson*, 318 Or at 104. The proceedings in this case  
17 were not sufficiently comprehensive on the issue of compliance to be given preclusive effect and  
18 were not of the same quality as required before imposing civil penalties.

19 ORS 757.994:

20 In addition to the concession by Staff on the need for additional testimony regarding  
21 compliance Staff states several times throughout it's motion that they will offer additional  
22 testimony on the propriety of using any penalties assessed for the benefit of CRRWC customers  
23 (Page 6, Line 22-23; Page 10, Line 11-12; Page 13, Line 5-6).

24 By offering to provide additional testimony on why it is appropriate to use any penalties  
25 assessed for the benefit of customers Staff has admitted that issues of fact and law still exist. At

1 the very least there is significant potential for issues of fact to arise based on the unknown nature  
2 of the additional testimony which Staff has offered to provide.

3 Staff has alleged in the Complaint that ORS 757.994 allows for penalties of up to \$500 per  
4 day. This is inconsistent with the plain language of the statute itself which provides for a civil  
5 penalty of not more than \$500 for each violation. It is a well established axiom of statutory  
6 interpretation “not to insert what has been omitted, or omit what has been inserted.” *Portland*  
7 *General Electric Co. v. Bureau of Labor & Industries*, 317 Or. 606, 611 859 P.2d 1143 (1993). By  
8 extrapolating from the statute that authority exists for fines of \$500 per day PUC staff is  
9 attempting to insert what has been omitted from the language of the statute.

10 When the interpretation of a statute is not clear from analysis of the text and context the  
11 next step is to consider the legislative history of the statute. In this case the legislative history is  
12 clear that the legislature did not intend to allow for accrual of fines at \$500 per day when there is  
13 an allegation of a continuing violation. In the March 25, 2003 House Water Work Session on HB  
14 2227, PUC Commissioner Lee Beyer explained the intent of amendments made to the bill. He  
15 testified that the intent of the amendment’s to the bill’s fine provision in 757.994 was to:

16 “clarify that the fining authority – which is fairly small, \$500 under the bill – If  
17 there is a fine, the money goes back to the benefit of the ratepayers in the utility  
18 from which is paid in the intent to make the system work, and improve it, and make  
19 sure they get their services.” Tape Recording, House Committee on Water,  
20 HB2227, March 25, 2003, Tape 42, Side A (statement of PUC Commissioner Lee  
21 Beyer).

22 The characterization by Lee Beyer of the fine a “small” is important to an appropriate  
23 interpretation of the authority granted by ORS 757.994. Obviously, if such a fine were to accrue at  
24 daily increments of \$500, that would hardly be “small” authority.

25 The PUC is not authorized as a matter of law to impose penalties of \$500 per day under  
26 ORS 757.994 and therefore PUC Staff is not entitled to prevail as a matter of law. When the  
legislature intends to allow a fine to be imposed “per day” it expressly states that fact. See e.g.



1 ORS 757.993(3) (“Each violation of any rule of the Oregon Utility Notification Center shall be a  
2 separate offense. In the case of a continuing violation, *each day that the violation continues shall*  
3 *constitute a separate violation.*”)

4 **LIABILITY OF BOARD OF DIRECTORS:**

5 In Order No. 08-177 the Commission makes a finding that CRRWC board members are  
6 individually liable for alleged non-compliance with PUC orders. Order No. 08-177 makes various  
7 other findings of fact related paragraphs 4, 5 and 6 additional orders therefrom. CRRWC  
8 subsequently filed a motion for reconsideration of that order and request for hearing. To date no  
9 hearing has been granted due largely in part to the Court of Appeals controlling disposition of the  
10 special assessment funds and CRRWC’s production of information in response to paragraph 4.  
11 Needless to say there was never any litigation on individual board liability or full and fair  
12 opportunity for hearing as required by *Nelson*, supra. No testimony has been submitted regarding  
13 the structure of the operations at CRRWC and no hearing on the issue of vicarious liability for  
14 individual board members. Consequently, summary disposition on board liability is not  
15 appropriate.

16 **CONCLUSION**

17 For the forgoing reasons, CRRWC requests that Staff’s Motion for Summary Disposition  
18 be denied in it’s entirety.

19  
20 RESPECTFULLY submitted this 16th day of July, 2008.

21 GLENN, SITES, REEDER & GASSNER, LLP

22 /s/ Timothy R. Gassner  
23 TIMOTHY R. GASSNER, OSB 02309  
24 Of Attorneys for CRRWC  
25

1 CERTIFICATE OF SERVICE

2 I certify that on July 16th 2008, I served the foregoing upon the following, by mailing a  
3 copy by postage prepaid first class to:

4 Charles G. Nichols  
5 PO Box 1594  
6 Redmond, OR 97756

Crooked River Ranch Water Co.  
Brian Elliott, President Board of Directors  
PMB 313-1604 S. Hwy 97  
#2  
Redmond, OR 97756

7 Public Utility Commission of Oregon  
8 Michael Dougherty  
9 550 Capitol St. NE  
10 Ste. 215  
11 Salem, OR 97301

James R. Rooks, General Manager  
Crooked River Ranch Water Company  
PO Box 2319  
Terrebonne, OR 97760

12 Steven Cook  
13 PO Box 1111  
14 Terrebonne, OR 97760

C. Robert Steringer  
1001 SW Fifth Ave  
16<sup>th</sup> Floor  
Portland, OR 97204

15 Craig Soule  
16 11953 SW Horny Hollow  
17 Terrebonne, OR 97760

Jona Maukonen  
1001 SW Fifth Ave  
16<sup>th</sup> Floor  
Portland, OR 97204

18 /s/ Timothy R. Gassner

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19 TIMOTHY R. GASSNER OSB 02309  
20 GLENN, SITES, REEDER & GASSNER, LLP  
21 205 SE 5<sup>th</sup> St.  
22 Madras, OR 97741  
23 (541) 475-2272  
24 Fax: 541-475-3394  
25