

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 8

In the Matter of

CROOKED RIVER RANCH WATER
COMPANY

STAFF'S RESPONSE TO MOTION TO
DISMISS REHEARING PROCEEDING AND
CANCEL HEARING

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction.

INTRODUCTION

On January 8, 2010, a telephonic prehearing conference was held in this matter. At the prehearing conference two issues were identified to be decided in this phase of the proceedings. The first issue is whether there is reason to provide Commission oversight. The second issue is whether Crooked River Ranch Water Company ("Company") is a cooperative exempt from jurisdiction under ORS 757.063(2).

In addition to identifying the issues, the prehearing conference established a schedule which includes dates for prefiled testimony and an evidentiary hearing. Based upon a procedural issue raised by Company's counsel, it was directed to file a written motion to be filed on January 14, 2010. The Company timely filed a motion and the Public Utility Commission of Oregon Staff ("Staff") takes this opportunity to file a timely response.

DISCUSSION

1. The Commission is entitled to hold a supplemental hearing on whether there is reason to provide Commission oversight and whether the Company is a cooperative for purposes of ORS 757.063(2).

In its Motion to Dismiss Rehearing Proceeding and Cancel Hearing ("Company's Motion to Dismiss), the Company argues that the Commission is limited to consideration of evidence on the existing record from 2006.¹ Contrary to the Company's assertion, holding a supplemental

¹ At the prehearing conference, it was Staff's understanding that the Company intended to file a motion at the Commission raising an argument that was different than the argument before the Court of Appeals. Unless Staff is

1 evidentiary hearing is not a violation of the scope of the Court of Appeals' remand in *Crooked*
2 *River Ranch Water Company v. Public Utility Comm'n*, 224 Or App 485.

3 As in its filings with the Court of Appeals, the Company relies on *Gritter v. Adult &*
4 *Family Servs Div.*, 182 Or App 249, *vacated as moot*, 183 Or App 578 (2002), and the Oregon
5 Attorney General's Administrative Law Manual for authority that the these Commission
6 proceedings are outside the scope of the Court of Appeals remand. (Company's Motion to
7 Dismiss at 1-2). *Gritter*, however, does not say anything about the scope of a Court of Appeals
8 remand and was vacated because it was moot when it was issued.

9 The Company has cited no precedent to support its argument that the Commission is
10 exceeding the scope of the Court of Appeals remand. Rather, the Company incorrectly relies on
11 ORS 183.482(6) for determining what the Court of Appeals may order as a remedy.² The
12 appropriate judicial review statute is ORS 183.482(8), which provides the following remedies:

13 (8)(a) The court may affirm, reverse or remand the order. If the court finds that
14 the agency has erroneously interpreted a provision of law and that a correct
interpretation compels a particular action, the court shall:

15 (A) Set aside or modify the order; or

16 (B) Remand the case to the agency for further action under a correct
interpretation of the law.

17 The meaning to ORS 183.482(8)(B) is not the same as the meaning of ORS 183.482(6) –
18 they are different sections of the statute with different meanings. ORS 183.482(8) provides what

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20 missing something, it appears that the Company is merely repeating the argument that is currently before the Court
of Appeals. The Company's Motion to Dismiss cites to a recent filing of the Commission at the Court of Appeals.
21 As the Company's argument seemingly is the same argument that is briefed before the Court of Appeal, Staff has
attached courtesy copies of the motions filed in the Court of Appeals and respectfully requests that the Commission
take official notice of these filings pursuant to OAR 860-014-0050.

22 ² ORS 183.482(6) provides: (6) At any time subsequent to the filing of the petition for review and prior to the date
23 set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order
for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse
24 its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the
petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended
25 petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order
with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses
26 the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from
funds available to the agency.

1 the Court of Appeals may do in its disposition of the case and a “remand . . . for further action
2 under a correct interpretation of the law” does not have the same meaning as “reconsideration”
3 under ORS 183.482(6). In fact, the Company is silent regarding how the Commission’s
4 proceeding is inconsistent with ORS 183.462(8), because there is nothing in the language of
5 ORS 183.482(8) or in any cited cases that supports the Company’s argument that the
6 Commission has exceeded the scope of the remand under ORS 183.462(8).

7 In *Crooked River Ranch*, the Court of Appeals ordered a remedy under ORS
8 183.482(8)(B) and remanded the case to the agency “for further action under a correct
9 interpretation of the law.” Specifically, the Court of Appeals remanded this matter to the
10 Commission to “complete the process” required by the statute. 224 Or App at 492. The
11 Commission cannot complete the process and take further action under a correct interpretation of
12 the law without further developing a record on the two issues to be determined in this
13 proceeding.

14 As the Commission is aware, in 2006 it ruled that, because it had received petitions from
15 more than 20 percent of the membership before the Company attempted to reorganize as a
16 cooperative, the Company’s efforts were without legal effect for purposes of Commission
17 regulation. *Crooked River Ranch*, 224 Or App at 489. Because the Court disagreed that
18 jurisdiction attached upon receipt of a sufficient number of petitions, it remanded to the
19 Commission to “complete the process contemplated by its notice” and “issue an order
20 determining that the requisite petitions had been filed and that Crooked River was an association
21 ‘subject to regulation[.]’” *Id.* at 492. In order to determine whether or not the Company is an
22 association ‘subject to regulation’ under a correct interpretation of the law, the Commission must
23 develop a factual record that was not developed in the previous proceeding because of an
24 erroneous interpretation of the law.

25 Finally, Staff notes that the original record is from 2006 and we are now in 2010.
26 There may be additional evidence since the original hearing in 2006 that is relevant to the two

1 issues to be decided in this proceeding. The Commission has broad and continuing jurisdiction
2 to determine its jurisdiction. The Commission has been directed by the Court of Appeals to issue
3 a decision under the correct interpretation of whether the Company is an association 'subject to
4 regulation.' It is questionable whether the Commission can complete the process required by the
5 Court of Appeal's remand, if it is limited to the 2006 record.

6 **The Commission scheduled hearing should not be cancelled.**

7 The Company requests that the Commission proceedings be dismissed and hearing be
8 cancelled. For the reasons described herein and provided in the Commission's Response to
9 Motion for Reconsideration filed in the Court of Appeals, these proceedings should not be
10 dismissed and the hearing should not be cancelled.

11 The Court of Appeals has issued an order acknowledging that the Commission withdrew
12 its revised order for purposes of conducting this hearing. Although the Commission is
13 endeavoring to persuade the Court of Appeals to reverse that order, the court's order is currently
14 in effect, and Staff believes it will remain in effect. Because the Company's Motion to Dismiss
15 seems to raise the same arguments and rely on the same authority as its Motion for
16 Reconsideration in the Court of Appeals, which has been fully briefed as of January 15, 2010,
17 the Commission should not dismiss these proceedings or cancel the hearing before the Court of
18 Appeals rules on these issues. For the reasons briefed above, the Company's Motion filed in the
19 Court of Appeals has little chance of resulting in an order limiting the Commission's action in
20 developing the record. Furthermore, the adopted schedule provides that Staff will file testimony
21 by February 16, 2010 and the Company does not respond until March 8, 2010. Thus, it is likely
22 that any decision by the Court of Appeals will be known in advance of the Company's
23 testimony, if not Staff's. In the meantime, the Commission should carry out the remand of the
24 Court of Appeals consistent with the existing, valid order of the Court of Appeals, and develop
25 the record. To do otherwise and unnecessarily prolong these proceedings would be a disservice
26 to the hundreds of customers who have petitioned the Commission asking for its help.

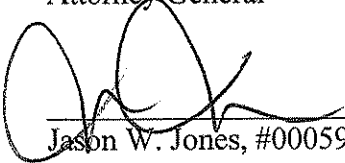
1 **CONCLUSION**

2 For the foregoing reasons, Staff respectfully requests that Crooked River Ranch's Motion
3 to Dismiss and Cancel hearing be denied until and unless the Court of Appeals alters its lawfully
4 entered order allowing these proceedings to go forward.

5 DATED this 21st day of January 2010.

6 Respectfully submitted,

7 JOHN R. KROGER
8 Attorney General

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11 Jason W. Jones, #00059
12 Assistant Attorney General
13 Of Attorneys for the Public Utility Commission
14 of Oregon
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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON,**

Respondent.

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON,**

Respondent.

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON, G. T. & T. T.,**

Respondents.

Public Utility Commission
Case Nos: WJ8, UW 120, UCR 100,
UI281, UI282

CA A 141283

**PETITIONER'S MOTION
RECONSIDER ORDER –
ACKNOWLEDGING
WITHDRAWAL OF ORDER
FOR RECONSIDERATION**

Petitioner Crooked River Ranch Water Company ("CRRWC") moves for reconsideration of this court's Order Acknowledging Withdrawal of Order for Reconsideration and Denying Motion for Stay (Attached).

I. BRIEF BACKGROUND.

The Public Utility Commission ("PUC") issued an order finding that CRRWC was "subject to regulation" under ORS 757.063(1). That statute provides that an association – other than a cooperative – that furnishes water to its members is subject to PUC regulation in the same manner as a public utility if 20 percent or more of the members file a petition with PUC requesting regulation.

CRRWC petitioned for judicial review of PUC's order. Among other things, CRRWC argued that it became a cooperative, exempt from PUC's regulation, prior to PUC asserting regulatory authority. PUC staff argued that CRRWC was subject to regulation before it became a cooperative because PUC's regulatory authority attached as soon as PUC received petitions from 20 percent of CRRWC's members. *Crooked River Ranch Water Company v. Public Utility Commission*, 224 Or App 485, 488-89, 198 P3d 967 (2008).

This court held that PUC staff's interpretation of the applicable statutes, which PUC had adopted, was incorrect and that under ORS 757.063(1) CRRWC was subject to PUC's regulatory authority "only after the PUC issues an order * * * determining

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**PAGE 2 – PETITIONER'S MOTION RECONSIDER ORDER –
ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment A
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whether the 20 percent threshold had been satisfied.” This court remanded the case to PUC for reconsideration, to “complete the process contemplated by its notice [of intent to assert regulatory authority] in light of a correct interpretation of ORS 757.063.” *Id.* at 491-92.

On remand, PUC issued Order No. 09-026 in which it again found that CRRWC was subject to regulation. CRRWC petitioned for review of that order. PUC withdrew that order for reconsideration pursuant to ORS 183.482(6), and then issued Order No. 09-391. CRRWC petitioned for review of that order. PUC again moved to withdraw its order. This time, rather than withdrawing its order pursuant to ORS 183.482(6) as it had done previously, PUC sought leave of this court pursuant to ORS 183.482(5) to withdraw its order for purpose of rehearing to take additional evidence. This court issued an order stating that PUC did not need the court’s permission to withdraw its order and acknowledging that PUC had withdrawn its order.

II. ARGUMENT.

PUC moved the court for leave under ORS 183.482(5) to withdraw its final order on reconsideration for the purpose of rehearing. PUC observed in its motion that CRRWC had objected to PUC’s consideration of additional evidence on reconsideration without providing a hearing. Resp.’s Mot. – Leave to Withdraw Order for Rehearing at 1-3. PUC argued that its “revised order on reconsideration should be withdrawn, a new notice of hearing should be issued, and a supplemental hearing should be held to take new evidence.” *Id.* at 2-3.

**PAGE 3 – PETITIONER’S MOTION RECONSIDER ORDER –
ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment A
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Before CRRWC had an opportunity to respond to PUC's motion, this court issued an order stating that, under ORS 183.482(5), PUC could withdraw its order without leave of the court and acknowledged that withdrawal. CRRWC moves for reconsideration of this court's order on three grounds:

(1) The court apparently confused subsection (5) of ORS 183.482 with subsection (6) of that statute. Under subsection (6), the agency has the right to withdraw its order for reconsideration at any time before oral argument. In this instance, however, PUC made its order pursuant to subsection (5) of ORS 183.482. Subsection (5) requires that a party seeking to present additional evidence to the agency must make a showing to this court that the evidence is material and that there was a good reason it was not presented in the original hearing.

(2) PUC failed to make the showing required under ORS 183.482(5) that the additional evidence it sought to introduce was material and that there was good reason it was not presented in the original hearing.

(3) PUC's intent to hold a rehearing is outside the scope of this court's remand in *Crooked River*, 224 Or App 485.

A. To invoke ORS 183.482(5), a party must apply to this court to be allowed to present additional evidence to the agency.

If a party wishes to present additional evidence on review of a contested case, the party may apply to this court pursuant to ORS 183.482(5) for leave to do so.

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ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment A
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Specifically, the statute provides:

If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders, or its certificate that the agency elects to stand on its original findings and order, as the case may be.

ORS 183.482(5).

CRRWC respectfully suggests that this court erred when it decided that PUC could withdraw its order pursuant to ORS 183.482(5) without leave of this court. In fact, the applicable statute required PUC to make a particular showing and for this court to enter an order either granting or denying the application for leave to withdraw the order.

B. PUC failed to show that the additional evidence is material and that was a good reason for failing to present it in the proceeding below.

ORS 183.482(5) requires that a party requesting leave of this court to present additional evidence show that the "additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding." PUC did not meet that standard. PUC did not identify what additional evidence it planned to introduce at the supplemental hearing. PUC did not assert that such additional evidence is material.

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ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment A
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PUC did not explain why such additional evidence was not presented in the evidentiary hearing.

In fact, PUC's motion appears to suggest that it wants to hold a hearing to introduce evidence that it already considered after taking official notice of it. That would not be an appropriate use of ORS 183.482(5), which is only available when a party wants to present "additional evidence." PUC's motion was so lacking in information necessary to evaluate a motion under ORS 183.482(5), however, that it is impossible to tell what PUC intends to do.

Because PUC did not make the required showing under ORS 183.482(5), this court should have denied PUC's motion.

C. PUC's request for rehearing exceeds the scope of this court's remand.

Another basis for denying PUC's motion to withdraw its order for rehearing and the presentation of additional evidence is that a rehearing is outside the scope of this court's remand in *Crooked River*, 224 Or App 485. When this matter was last before this court, this court remanded the case for reconsideration after holding that PUC erred in its interpretation of applicable law. *Crooked River*, 224 Or App at 492. This court did not remand the case for PUC to hold an additional hearing for the purpose of taking new evidence.

III. CONCLUSION.

CRRWC requests that this motion for reconsideration be granted and this court issue an order denying PUC's motion to withdraw its order for the purposes of holding a new hearing and presenting additional evidence pursuant to ORS 183.482(5).

Dated this 15th day of December, 2009.

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 15, 2009, I filed the foregoing **PETITIONER'S MOTION RECONSIDER ORDER – ACKNOWLEDGING WITHDRAWAL OF ORDER FOR RECONSIDERATION** via electronic filing with the Appellate Court Administrator for the Oregon Court of Appeals by using the appellate e-filing system.

Participants in the case who are registered e-filing users will be served by the appellate e-filing system.

I further certify that some of the participants in the case are not registered e-filing users. I have caused to be mailed the foregoing document by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-e-filing participants:

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Of Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CROOKED RIVER RANCH WATER
COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF
OREGON,

Respondent.

CROOKED RIVER RANCH WATER
COMPANY,

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PUBLIC UTILITY COMMISSION OF
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CROOKED RIVER RANCH WATER
COMPANY,

Petitioner,

v.

PUBLIC UTILITY COMMISSION OF
OREGON and G. T. & T. T.,

Respondents.

A Introduction

This is a judicial review of the PUC's revised order on reconsideration asserting regulatory authority over petitioner Crooked River Ranch Water Company (CRRWC) under ORS 757.063(1). The PUC previously moved for leave to withdraw

Public Utility Commission
Nos. WJ8, UW120, UCR100, UI281, UI282

Appellate Court No. A141283

RESPONDENT PUBLIC UTILITY
COMMISSION'S RESPONSE TO
PETITIONER'S MOTION —
RECONSIDERATION

its revised order on reconsideration for re-hearing, citing ORS 183.482(5). This court took no action on that motion. Instead, on December 2, 2009, the court issued an order acknowledging that the PUC had withdrawn its revised order for reconsideration, under ORS 183.482(6), as the PUC was entitled to do without leave of the court. In the same order, the court denied CRRWC's motion for a stay of the PUC's revised order, because that order been withdrawn for reconsideration.

On the basis of the court's order, the PUC has given the parties notice of the rehearing and has begun the rehearing process. Following a prehearing conference on January 8, 2010, the rehearing is scheduled to take place on March 30-31, 2010.

CRRWC has now moved the court for reconsideration of the court's order acknowledging withdrawal of order for reconsideration and denying motion for stay. For the following reasons, the court should deny CRRWC's motion.

B. The PUC withdrew the revised order on reconsideration for the purpose of holding a supplemental evidentiary hearing on the issue of CRRWC's purported reorganization as a cooperative.

The commission's purpose in withdrawing the revised order on reconsideration is to hold a supplemental evidentiary hearing on the question of whether CRRWC was a water association subject to regulation or a cooperative exempt from regulation, under ORS 757.063(2), when the PUC asserted regulatory authority. In light of the contentions CRRWC made to the PUC in its objections to the revised order on reconsideration, the PUC determined that it was necessary to hold a supplemental

hearing because the record has not been sufficiently developed on the question of CRRWC's purported reorganization.

A brief review of the procedural history will explain why the judicial review record developed as it did. The PUC initially notified CRRWC of its intent to assert regulatory authority based on the petitions received from association members, and "expressly gave Crooked River the right to dispute the validity of those petitions" at a hearing. *See Crooked River Ranch Water Company v. PUC*, 224 Or App 485, 492 n 5, 198 P3d 967 (2008). CRRWC requested a hearing, asserting that it had recently reorganized as a cooperative and was therefore exempt from regulation. 224 Or App at 488. The PUC ruled that, because its receipt of petitions from more than 20 percent of the members established its jurisdiction over CRRWC, and the PUC received those petitions before CRRWC's attempt to reorganization as a cooperative, CRRWC's efforts to reorganize were without legal effect. *See id.* at 489. In short, the parties did not fully litigate the issue of whether CRRWC's efforts to reorganize as a cooperative were otherwise legally effective.

On judicial review, this court reversed the PUC's ruling and remanded the case to the PUC to "complete the process contemplated by its notice"—that is, to issue "an order determining that the requisite petitions had been filed and that Crooked River was an association 'subject to regulation[.]'" *Id.* at 492. Compliance with the court's order ultimately resulted in the revised order on reconsideration that is the subject of this judicial review proceeding.

The PUC's revised order on reconsideration provided that CRRWC could request a hearing to determine whether the order should stay in effect. (Order No. 09-391 at 10). See ORS 756.515(6) (providing for hearing request). Instead of requesting a hearing, CRRWC filed an amended petition for judicial review and an emergency motion for stay in this court. CRRWC also filed objections with the PUC, as discussed below. In light of CRRWC's contentions, the commission determined to reopen the evidentiary record by holding a supplemental hearing.

C. The PUC withdrew its revised order on reconsideration in light of CRRWC's objections to the order.

The PUC withdrew the revised order on reconsideration in light of the objections to the order CRRWC filed with the commission—primarily, that the PUC had taken official notice of its files in other dockets without giving CRRWC an opportunity to respond or to rebut that evidence. (Att- 3,6). Specifically, CRRWC objected to the part of the revised order on reconsideration taking official notice of the files in other, related dockets, as follows:

Based on those petitions [received from association members], 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.

⁸ 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).

(Order No. 09-391 at 5).

CRRWC made three arguments in support of their objections to the revised order. First, the PUC had “exceeded the scope of the Court of Appeals’ remand by considering new evidence,” because the court had remanded for “reconsideration,” not for “rehearing.” (Att-2). Second, ORS 756.558(1) prohibited the PUC from taking evidence after the record closed without giving the parties a reasonable opportunity to respond and rebut the additional evidence. (Att-3). And third, CRRWC “dispute[d] any averments of improper conduct by CRRWC personnel that the Commission intends to suggest by citing those documents [the files in other, related dockets].” (Att-3,4).

CRRWC made similar arguments to this court in its emergency motion to stay the PUC’s revised order on reconsideration. Among other things, CRRWC argued to the court that the PUC had exceeded the scope of the court’s remand by “accept[ing] and rel[y]ing on new evidence (without providing notice or a hearing to CRRWC)[.]” (Pet Motion – Stay Previous Judgment/Order 8). CRRWC also contended that the PUC made an “erroneous determination that CRRWC was not a validly formed cooperative at the time the PUC issued its order.” (Pet Motion Stay 8). In part, CRRWC argued that the PUC erred by receiving evidence after the record closed, “without providing CRRWC with notice or a hearing.” (Pet Motion Stay 11). CRRWC also argued that the PUC erred in placing the burden of proof on CRRWC, “without notice or an opportunity for a hearing[.]” (Pet Motion Stay 11-12).

In view of CRRWC's numerous objections, the commission determined that the appropriate action was to withdraw the revised order on reconsideration for the purpose of holding a supplemental evidentiary hearing, thereby affording CRRWC the notice and opportunity to respond that it claimed to have been denied. As discussed below, the PUC was well within its authority in doing so.

D. The PUC was entitled to withdraw its order for the purpose of holding a supplemental evidentiary hearing, whether under ORS 183.482(5) or under ORS 183.482(6).

The PUC requested leave of the court to withdraw the revised order on reconsideration for rehearing, pursuant to ORS 183.482(5).¹ The PUC provided ample reason for doing so: CRRWC had objected to the commission's taking official notice of certain evidence on the ground that CRRWC was not given notice and an opportunity to respond to that evidence. What is more, CRRWC was entitled to request a hearing under ORS 756.515(5) to determine whether the order should continue in effect. Additional evidence regarding CRRWC's status is material to the

¹ ORS 183.482(5) provides:

If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders, or its certificate that the agency elects to stand on its original findings and order, as the case may be.

question of whether CRRWC is exempt from regulation, and there are good reasons and substantial reasons why additional evidence was not offered at the prior hearing. Assuming that ORS 183.482(5) applies when an agency chooses to withdraw its order to hold a supplemental evidentiary hearing, the PUC satisfied the requirements of that provision.

This court ruled, however, that the PUC was entitled to withdraw the order for reconsideration under ORS 183.482(6), without leave of the court, and that the PUC had, in fact, already done so. (Order Acknowledging Withdrawal of Order for Reconsideration and Denying Motion for Stay). Assuming, without conceding, that the court has authority to reconsider its order at this time, there is no reason for the court to do so. Even if ORS 183.482(5) applies here, the result should be the same. The PUC should be permitted to proceed with the rehearing process currently underway.

Contrary to CRRWC's contention, holding a supplemental evidentiary hearing is not "outside the scope of this court's remand in *Crooked River*, 224 Or App 485." (Pet Motion 6). The court remanded to the PUC to "complete the process" by issuing "an order determining that the requisite petitions had been filed and that Crooked River was an association 'subject to regulation[.]'" 224 Or App at 492 n 5. Thus, the court's remand *requires* the commission to determine whether CRRWC is an association subject to regulation.


The commission has made that determination, but CRRWC claims, essentially, that it was denied a fair proceeding. The supplemental evidentiary hearing currently scheduled will resolve CRRWC's objections and allow the PUC to decide the issue of CRRWC's exemption from regulation on a fully developed record. If CRRWC's contentions have any merit, nothing is to be gained by preventing the supplemental evidentiary hearing from taking place until after judicial review is completed.

E. Conclusion

For all the above reasons, the court should deny CRRWC's motion to reconsider the order acknowledging the PUC's withdrawal of its order for reconsideration.

Respectfully submitted,

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ATT-1

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

WJ 8, UW 120, UI 281, UI 282, UM 1381, and UCR 100

In the Matters of

CROOKED RIVER RANCH WATER COMPANY

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction (WJ 8)

Request for rate increase in the total annual revenues
from \$806,833 to \$868,453, or 8.13 percent.
(UW 120)

Affiliated Interest Applications with James and
Jacquie Rooks. (UI 281 and 282)

**CROOKED RIVER RANCH
WATER COMPANY'S
OBJECTIONS TO
COMMISSION'S NOTICE OF
CERTAIN ALLEGED FACTS**

THE PUBLIC UTILITY COMMISSION OF
OREGON,

Complainant,

v.

CROOKED RIVER RANCH WATER COMPANY,
et al.,

Defendants. (UM 1381)

G.T. & T.T.,

Complainants,

v.

CROOKED RIVER RANCH WATER COMPANY,

Defendant. (UCR 100)

RECEIVED
OCT 22 2009

APPELLATE DIVISION
SALEM, OR 97301

**PAGE 1 – CRRWC'S OBJECTIONS TO COMMISSION'S NOTICE OF
CERTAIN ALLEGED FACTS**

P0192743

Attachment B
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ATT-2

Pursuant to OAR 860-014-0050(2), Crooked River Ranch Water Company ("CRRWC") objects to the Commission's "taking of official notice" of all of its files in UW 120 and UCR 100, as set out in PUC Order No. 09-391. The Commission's action is objectionable for the following reasons:

1. **Taking notice of new evidence exceeds the scope of the Court of Appeals' remand in Court of Appeals case no. A134177.**

In the Court of Appeals' decision in case number A134177, dated December 24, 2008, the court concluded that the Commission erroneously interpreted applicable law when it asserted jurisdiction over CRRWC. *Crooked River Ranch Water Company v. Public Utility Commission of Oregon*, 224 Or App 485, 198 P3d 967 (2008). In disposing of the appeal, the Court of Appeals "remanded for reconsideration." *Id.* at 492. The Commission exceeded the scope of the Court of Appeals' remand by considering new evidence. See Attorney General's Administrative Law Manual at 168-69 ("Reconsideration occurs when, *based on the existing record* in the case, an agency examines the factual or legal basis for its order or reexamines the adequacy of its findings. * * * Rehearing occurs when an agency either holds an entirely new hearing and re-decides the case based solely on the new hearing record, or the agency holds a supplementary hearing and re-decides the case based on the original record and the record developed at the supplementary hearing.") (emphasis added).

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PAGE 2 – CRRWC'S OBJECTIONS TO COMMISSION'S NOTICE OF CERTAIN ALLEGED FACTS

P0192743

Attachment B
Page 10 of 15

ATT-3

- 2. The Commission is not permitted to take evidence after the conclusion of taking evidence without providing notice to the affected parties and opportunity to respond.**

The taking of evidence in the jurisdiction case concluded at some point prior to the entry of the original jurisdiction order. State law prohibits the Commission from reopening the record after the taking of evidence is concluded unless the Commission gives the parties a reasonable opportunity in which to respond. ORS 756.558(1) ("At the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence concluded. Thereafter no additional evidence shall be received except upon the order of the commission and a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence."). The Commission erred by issuing an order without complying with ORS 756.558(1) with respect to the newly accepted evidence.

- 3. CRRWC disputes the Commission's averments of improper conduct by CRRWC personnel.**

The Commission's decision to take notice of voluminous documents, without providing copies to CRRWC or making specific findings of fact with respect to specific

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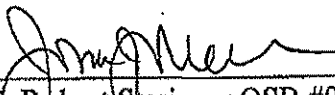
ATT-4

allegations, prevents any meaningful rebuttal. Nevertheless, CRRWC notes for the record that it disputes any averments of improper conduct by CRRWC personnel that the Commission intends to suggest by citing those documents.

Dated: October 20, 2009

GLENN SITES REEDER & GASSNER LLP
Timothy R. Gassner, OSB #023090

HARRANG LONG GARY RUDNICK P.C.



C. Robert Steringer OSB #98351
Jona Maukonen, OSB #043540
Of Attorneys for Crooked River Ranch Water
Company

ATT-5

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

WJ 8, UW 120, UI 281, UI 282, UM 1381, and UCR 100

In the Matters of

CROOKED RIVER RANCH WATER COMPANY

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction (WJ 8)

Request for rate increase in the total annual revenues
from \$806,833 to \$868,453, or 8.13 percent.
(UW 120)

Affiliated Interest Applications with James and
Jacquie Rooks. (UI 281 and 282)

**DECLARATION OF JAMES
ROOKS IN SUPPORT OF
OBJECTION TO
COMMISSION'S NOTICE OF
CERTAIN ALLEGED FACTS**

**THE PUBLIC UTILITY COMMISSION OF
OREGON,**

Complainant,

v.

**CROOKED RIVER RANCH WATER COMPANY,
et al.,**

Defendants. (UM 1381)

G.T. & T.T.,

Complainants,

v.

CROOKED RIVER RANCH WATER COMPANY,

Defendant. (UCR 100)

RECEIVED
OCT 22 2009

**APPELLATE DIVISION
SALEM, OR 97301**

ATT-6

I, JAMES ROOKS, declare and state as follows:

1. I am the General Manager for the Crooked River Ranch Water Company ("CRRWC") and I make this declaration based upon my personal knowledge and in support of CRRWC's Objection to Commission's Notice of Certain Alleged Facts.

2. In PUC Order No. 09-391, the Commission purports to take official notice all of its files in UW 120 and UCR 100. Although the Commission fails to identify or make a finding on any alleged fact within those documents, making it impossible to respond to the Commission's "official notice" of those voluminous documents, I dispute for the record any insinuation by the Commission that any employee, manager or director of CRRWC engaged in any form of wrongdoing against CRRWC or its members.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty of perjury.

Dated this 20th day of October, 2009


James Rooks

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 11, 2010, I directed the original Respondent Public Utility Commission's Response to Petitioner's Motion — Reconsideration to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that I directed the Respondent Public Utility Commission's Response to Petitioner's Motion — Reconsideration to be served upon Timothy Richard Gassner, attorney for respondents G. T. and T. T., and Jona Jolyne Maukonen, attorney for petitioner, on January 11, 2010, by mailing a copy, with postage prepaid, in an envelope addressed to:

Timothy Richard Gassner #02309
Glen Sites & Reeder LLP
205 SE 5th Street
Madras, OR 97741
Telephone: (541) 475-2272

Jona Jolyne Maukonen #043540
Harrang Long Gary Rudnick PC
1001 SW 5th Ave., Suite 1650
Portland, OR 97204-1116
Telephone: (503) 242-0000

/s/ Judy C. Lucas 

JUDY C. LUCAS #903285
Senior Assistant Attorney General

Attorney for Respondent
Public Utility Commission of Oregon

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON,**

Respondent.

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON,**

Respondent.

**CROOKED RIVER RANCH WATER
COMPANY,**

Petitioner,

v.

**PUBLIC UTILITY COMMISSION OF
OREGON, G. T. & T. T.,**

Respondents.

Public Utility Commission
Case Nos: WJ8, UW 120, UCR 100,
UI281, UI282

CA A 141283

**PETITIONER'S REPLY IN
SUPPORT OF MOTION
RECONSIDER ORDER –
ACKNOWLEDGING
WITHDRAWAL OF ORDER
FOR RECONSIDERATION**

**PAGE 1 – PETITIONER'S REPLY IN SUPPORT OF MOTION RECONSIDER
ORDER – ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment C
Page 1 of 9

Petitioner Crooked River Ranch Water Company nka Crooked River Ranch Water Cooperative ("CRRWC") submits this reply in support of its motion for reconsideration of this court's Order Acknowledging Withdrawal of Order for Reconsideration and Denying Motion for Stay as follows.

I. INTRODUCTION.

This court should grant reconsideration and order that the Public Utility Commission not be allowed to withdraw its order to hold a supplemental evidentiary hearing. The Commission has not met its burden under ORS 183.482(5) to identify evidence that is material to this case and for which there were good and substantial reasons why they were not submitted in the original administrative proceeding. More fundamentally, holding a supplemental evidentiary hearing is outside the scope of this court's remand for reconsideration in *Crooked River Ranch Water Co. v. PUC*, 224 Or App 485, 492, 198 P3d 967 (2008).

II. ARGUMENT.

A. The Commission must meet the requirements in ORS 183.482(5) to withdraw its order for the purpose of holding a supplemental hearing.

The Commission moved this court pursuant to ORS 183.482(5) for an order allowing it to withdraw its current order and to hold a re-hearing. This court instead issued an order acknowledging that the Commission had withdrawn its order, apparently

applying the standard found in a different subsection of the statute - ORS 183.482(6).

ORS 183.482(5) should have been applied, and is materially different from ORS

183.482(6). Subsection (5) provides, in part:

“If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. * * *”

ORS 183.482(6), on the other hand, provides as follows:

“At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. * * *”

In *Gritter v. Adult & Family Servs Div.*, 182 Or App 249, 255, 48 P3d 195, vacated on other grounds, 183 Or App 578, 53 P3d 469 (2002) (vacated as moot), this court addressed whether ORS 183.482(5) or (6) governed in a situation similar to this case. In *Gritter*, after petitioner filed her opening brief in this court, the respondent, Adult and Family Services Division (“AFSD”), issued a notice stating that it was withdrawing its order pursuant to ORS 183.482(6) “to allow the parties to present additional evidence.” *Id.* at 251. The petitioner objected, arguing that the agency needed to seek leave of court to do so under ORS 183.482(5). *Id.* This court agreed with the

Petitioner, holding that AFSD could not withdraw its order pursuant to ORS 183.482(6) for the purpose of taking additional evidence. *Id.* at 255-56.¹

In this case, because the Commission is seeking to withdraw its current order for the purpose of taking additional evidence, it must do so pursuant to ORS 183.482(5).

B. The Commission has not met the requirements for ORS 183.482(5).

ORS 183.482(5) requires that, in seeking to withdraw an order, the Commission must show “to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency.” The Commission contends that it provided “ample reason” for withdrawing the order because the additional evidence is material to whether or not CRRWC is a cooperative exempt from regulation. Respondent Public Utility Commission’s Response to Petitioner’s Motion – Reconsideration (PUC’s Resp.) at 6. The Commission also contends that there are good and substantial reasons why the additional evidence was not offered at the prior hearing. PUC’s Resp. at 7.

The Commission’s argument should fail for the simple reason that it has not provided sufficient information about the new evidence it intends to submit in a rehearing. In the absence of such information, this court cannot make a determination that the additional evidence is material.

¹ In *Gritter*, AFSD had held a hearing and issued a new order on reconsideration before the Court of Appeals issued its opinion. The Court of Appeals held that “AFSD’s order on reconsideration is a nullity.” 183 Or App at 256.

Furthermore, the Commission has failed to provide “good and substantial reasons” for its failure to present additional evidence in the Commission proceedings. The Commission asserts that the parties did not “fully litigate the issue of whether CRRWC’s efforts to reorganize as a cooperative” in the agency proceedings because the Commission ruled that it had established jurisdiction before the reorganization occurred. PUC’s Resp. at 3. That argument is unpersuasive, as well. The Commission’s ruling regarding the timing of the establishment of jurisdiction came at the end of the proceeding. CRRWC contended from the beginning that it was a cooperative exempt from regulation and put in evidence to support that contention. If Commission staff made a strategic decision not to submit evidence regarding CRRWC’s reorganization at the hearing in 2006, they have no right to a second bite at the apple now. This court should reject the proposition that decisions of litigation strategy constitute “good and substantial reasons” for not submitting evidence in a hearing.

Finally, the Commission’s motion cannot be supported by the fact that CRRWC has pointed out that the Commission relied on new information to support its most recent order without providing CRRWC with notice or a hearing to address that purported evidence. CRRWC’s primary position has been that it was impermissible for the Commission to consider any new evidence on remand from this court. Although the Commission’s decision to base its most recent order on new information without any notice or opportunity for CRRWC to be heard is an additional ground for reversal on judicial review, CRRWC has never demanded a rehearing in this case.

**PAGE 5 – PETITIONER’S REPLY IN SUPPORT OF MOTION RECONSIDER
ORDER – ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment C
Page 5 of 9

C. A supplemental evidentiary hearing is outside the scope of the Court of Appeals remand in this case.

A supplemental evidentiary hearing is outside the scope of the Court of Appeals remand in this case. In its response to CRRWC's motion for reconsideration, the Commission argued:

“Contrary to the CRRWC’s contention, holding a supplemental evidentiary hearing is not ‘outside the scope of the court’s remand in Crooked River, 224 Or App 485.’ (Pet Motion 6). The court remanded to the PUC to ‘complete the process’ by issuing ‘an order determining that the requisite petitions had been filed and that Crooked River was an association “subject to regulation.”’ 224 Or App at 492 n 5. Thus, the court’s remand requires the commission to determine whether CRRWC is an association subject to regulation.”

PUC’s Resp. at 7 (emphasis in the original). That argument misunderstands the Court of Appeals’ decision. First, the text quoted from footnote 5 of the Crooked River decision merely states what a certain letter from the Commission to CRRWC was not; it is not part of the court’s remand instructions.² Instead, the court’s instructions were as follows:

² Footnote 5 reads as follows in its entirety:

“The PUC’s April 2006 ‘Notice of Intent to Assert Financial and Service Regulatory Authority’ indicated only that PUC intended to make that determination *in the future*. That letter, although stating that the commission had received petitions from more than 20 percent of Crooked River’s members, expressly gave Crooked River the right to dispute the validity of those petitions and indicated that the PUC would issue an order asserting jurisdiction in the event that Crooked River did not respond to the letter within 30 days. By its own terms, the letter was not an order determining that the requisite petitions had been filed and that Crooked River was an association ‘subject to regulation,’ but rather a notice of the PUC’s intent to make such a determination. See OAR

“The PUC erred in [its interpretation of ORS 757.063], and on remand, it must complete the process contemplated by its notice in light of a correct interpretation of ORS 757.063.

“Remanded for reconsideration.”

Crooked River, 224 Or App at 492.

“Reconsideration” is distinct from a “rehearing.” *Gritter*, 182 Or App at 255.

When an agency reconsiders an order, it may supplement its reasoning, modify its analysis or retreat from a previous position; but it must make any of those changes on the existing record. *Id.* In *Gritter*, the court explained that the term “reconsideration” indicates that the agency is “limited to rethinking its decision based on the existing record.” *Id.* The court explained the distinction between “reconsideration” and a “rehearing” in part by reference to the Attorney General’s Administrative Law Manual (2001). The court quoted from the manual: “Reconsideration occurs when, based on the existing record in the case, an agency examines the factual or legal basis for its order or reexamines the adequacy of its findings.” *Id.* (quoting the Oregon Attorney General’s Administrative Law Manual (2001) at 156) (emphasis in original). “Rehearing,” on the other hand, “occurs when an agency either holds an entirely new hearing or re-decides the case based solely on the new hearing record, or the agency holds a supplementary

860-036-0412(5) (providing that, in the event that 20 percent of the association’s members petition the PUC for regulation, the PUC ‘must issue an order notifying the association of its change in regulatory status to a regulated water utility’).”

Crooked River, 224 Or App at 492 n 5.

**PAGE 7 – PETITIONER’S REPLY IN SUPPORT OF MOTION RECONSIDER
ORDER – ACKNOWLEDGING WITHDRAWAL OF ORDER FOR
RECONSIDERATION**

Attachment C
Page 7 of 9

hearing and re-decides the case based on the original record and the record developed at the supplementary hearing.” *Gritter*, 182 Or App at 255 (quoting the Oregon Attorney General’s Administrative Law Manual (2001) at 156).³

This court specifically remanded “for reconsideration.” To act consistently with the Court of Appeals’ opinion, the Commission must limit itself to the original record in this case; it cannot hold a supplemental evidentiary hearing.

III. CONCLUSION.

CRRWC requests that this motion for reconsideration be granted and this court issue an order denying the Commission’s motion to withdraw its order for the purposes of holding a new hearing and presenting additional evidence pursuant to ORS 183.482(5).

Dated this 15th day of January, 2010.

GLENN SITES REEDER & GASSNER LLP
Timothy R. Gassner, OSB #023090

HARRANG LONG GARY RUDNICK, P.C.

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Attorneys for Petitioner

³ The 2008 edition of the Attorney General’s Administrative Law Manual contains the same quoted language at pages 168-69.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 15, 2010, I filed the foregoing **PETITIONER'S REPLY IN SUPPORT OF MOTION RECONSIDER ORDER – ACKNOWLEDGING WITHDRAWAL OF ORDER FOR RECONSIDERATION** via electronic filing with the Appellate Court Administrator for the Oregon Court of Appeals by using the appellate e-filing system.

Participants in the case who are registered e-filing users will be served by the appellate e-filing system.

I further certify that some of the participants in the case are not registered e-filing users. I have caused to be mailed the foregoing document by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-e-filing participants:

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Terrebonne, OR 97760

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205 SE 5th St.
Madras, OR 97741

Attorneys for Petitioner, Crooked River
Ranch Water Company

HARRANG LONG GARY RUDNICK P.C.

s/ Jona J. Maukonen
Jona J. Maukonen, OSB #043540
jona.maukonen@harrang.com

Of Attorneys for Petitioner

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 21, 2010, I served the foregoing Staff Response upon all WJ 8
3 and UW 120 parties of record in this proceeding by delivering a copy by electronic mail to those
4 parties with email addresses, and upon all WJ 8 parties only, by mailing a copy postage prepaid
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

6 WJ 8:

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info@crookedriverranch.com

10 **CROOKED RIVER RANCH WATER CO**
11 BRIAN ELLIOTT
12 PRESIDENT, BOARD OF DIRECTORS
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Legal Secretary
Department of Justice
Regulated Utility & Business Section