

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

WJ8

In the Matters of

CROOKED RIVER RANCH WATER
COMPANY

**MOTION TO DISMISS
REHEARING PROCEEDING AND
CANCEL HEARING**

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

**By Crooked River Ranch Water
Company, nka Crooked River Ranch
Water Cooperative**

Crooked River Ranch Water Company, nka Crooked River Ranch Water Cooperative (“CRRWC”), respectfully moves to dismiss the rehearing proceeding and cancel the hearing currently scheduled before ALJ Patrick Power on March 30-31, 2010, because a rehearing is outside the scope of the Court of Appeals’ remand in this case.

The matter of the Commission’s regulatory jurisdiction over CRRWC has been before the Oregon Court of Appeals, which held that the Commission erroneously interpreted ORS 757.063 and “remanded for reconsideration.” *Crooked River Ranch Water Co. v. Public Utility Comm’n*, 224 Or App 485, 492, 198 P3d 967 (2008). “Reconsideration” is distinct from a “rehearing.” *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). 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 of Appeals considered whether, when an agency withdraws an order for “reconsideration” pursuant to ORS 183.482(6), the agency may reopen the record and take new evidence. The court held that an agency could not, on reconsideration, reopen the record and take additional evidence. 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 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).¹

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¹ The 2008 edition of the Attorney General’s Administrative Law Manual contains the same quoted language at pages 168-69. A copy is attached as Exhibit A for the Administrative Law Judge’s convenience.

In a recent filing in the Court of Appeals, 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.”

Respondent Public Utility Commission’s Response to Petitioner’s Motion –

Reconsideration at 7 (emphasis in the original). Anticipating that this motion will be opposed on the same grounds, we will note here that the above quoted 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

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 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.

Instead, the court's instructions were as follows:

“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. Thus, regardless of what the Commission is required to determine on remand, it must do so within the confines of “reconsideration.” As explained above, the taking of additional evidence is not permissible on reconsideration and therefore would violate the scope of the Court of Appeals’ remand.

CRRWC hereby gives notice that any further action by the Commission to proceed with a rehearing is without a reasonable basis in law or in fact, as recognized in *Gritter* and the Attorney General’s own Administrative Law Manual, and that CRRWC will seek to recover its attorney fees and costs pursuant to ORS 183.497 if the Commission proceeds with a rehearing.

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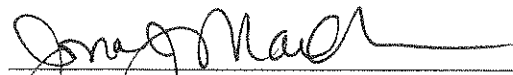
The Court of Appeals specifically remanded “for reconsideration.” To act consistently with the Court of Appeals’ opinion, the Commission must limit itself to the original record in this case in issuing a new order on reconsideration.

Accordingly, this rehearing proceeding should be dismissed and the currently scheduled hearing date should be cancelled.

Dated: January 14, 2010.

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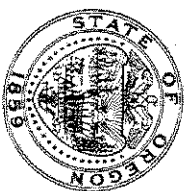
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OREGON
ATTORNEY GENERAL'S
ADMINISTRATIVE LAW MANUAL
AND
UNIFORM AND MODEL RULES OF
PROCEDURE
UNDER THE
ADMINISTRATIVE PROCEDURES ACT



HARDY MYERS
Attorney General

Christine A. Chute, Assistant Attorney General
Editor-in-Chief

January 1, 2008

any, of the officer or agency.²⁴⁶ Unless agency statutes provide for a seal, none is needed.

A final order is defined as a "final agency action expressed in writing." ORS 183.310(6)(b). Whether an order is "final" within the meaning of the APA depends upon the statutory scheme in which the agency's order is made.²⁴⁷

The difference between the due and payable date described in ORS 183.745 and the definition of "final order" suggests a different time for a civil penalty action to become effective than the final order date. The legislative history of ORS 183.745, suggests that the legislature intended to set the due and payable date of a civil penalty to fall 10 days after the opportunity for further appeal has passed.

7. Reconsideration and Rehearing

Under the APA, when an agency issues a final order adverse to a party, the party may appeal the order to the Court of Appeals without first asking the agency to reconsider its order or to rehear the case. However, statutes other than the APA or the agency's own rules may require a party to petition for reconsideration or rehearing before an appeal may be taken and may establish the timeliness for filing such petitions. ORS 183.480.

Reconsideration occurs when, based on the existing record in the case, an agency reexamines the factual or legal basis for its order or reexamines the adequacy of its findings of fact, conclusions of law or its order. A petition for reconsideration is appropriate when, for example, the order seems inconsistent with prior agency practice, but does not explain why; the order seems to misinterpret the law; or the order misstates the facts. In such cases, the agency may be well advised to grant a petition for reconsideration, reanalyze the record and the order, correct any errors, fill in omissions, clarify the findings and conclusions or clarify the rationale in the order. An agency may, on its own initiative,

²⁴⁶ ORS 205.125(1)(f).

²⁴⁷ *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663, 665-77, 919 P2d 1172 (1996); *Grobovsky v. Bd. Of Med Ex.*, 213 Or App 136, 159 P3d 1245 (2007); *Oregon Restaurant Services v. Oregon State Lottery*, 199 Or App 545, 556-58, 112 P3d 398, rev den 339 Or 406 (2005).

reconsider a final order.²⁴⁸ OAH Rule 137-003-0675, Model Rule 137-003-0080. Following reconsideration, the agency must issue a new order. If, upon reconsideration, the agency is satisfied with its original order, the agency may reaffirm that order.

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. A petition for rehearing is appropriate when, for example, new evidence is discovered that was not reasonably available at the time of the original hearing or when a court decision establishes a new interpretation of the substantive law or the law regarding the significance of the evidence that was or could have been offered at the original hearing.

If an agency grants a petition for rehearing, it should clearly identify the scope of the record to be considered (e.g., either the new hearing record that replaces the original hearing record or the original hearing record plus the supplementary hearing record). Following rehearing, the agency must issue a new order based only on the rehearing record. Depending on the facts in the rehearing record, the new order may be the same as originally issued, or it may be entirely different.

Under OAH Rule 137-003-0675, although the agency decides the scope of the rehearing, an ALJ must conduct the rehearing. The agency should set out the scope of a rehearing in a written request to the ALJ, with copies provided to all parties. The ALJ must prepare a new proposed order, and the agency must issue a new final order in accordance with OAH Rule 137-003-0665.

The filing of a petition for reconsideration or for rehearing, and the agency's decision to grant reconsideration or rehearing, does not stay the effect of the original agency order. The original order remains in effect until replaced by the agency's order on reconsideration or rehearing. The agency may, in its discretion, stay its order pending reconsideration or rehearing, either upon petition or on its own initiative. See discussion below of Stays.

²⁴⁸ *Boydston v. Liberty Northwest Ins. Corp.*, 166 Or App 336, 341, 999 P2d 503, rev den 331 Or 191 (2000).

CERTIFICATE OF FILING AND SERVICE

I certify that on January 14, 2010, I filed the foregoing **MOTION TO DISMISS REHEARING PROCEEDING AND CANCEL HEARING**, on the Public Utility Commission by email and first class mail, postage prepaid, addressed as follows:

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PUC.FilingCenter@state.or.us

I further certify that on January 14, 2010 I served copies of the foregoing **MOTION TO DISMISS REHEARING PROCEEDING AND CANCEL HEARING** addressed to the following email addresses:

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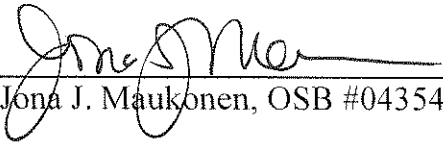
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I further certify that on January 14, 2010, I served copies of the foregoing **MOTION TO DISMISS REHEARING PROCEEDING AND CANCEL HEARING** addressed to the following, via first class mail, postpaid, as follows:

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