

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ8

In the Matters of

CROOKED RIVER RANCH WATER COMPANY

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

**REQUEST TO POSTPONE
TELEPHONE PREHEARING
CONFERENCE BY CROOKED
RIVER RANCH WATER
COOPERATIVE**

Crooked River Ranch Water Company, nka Crooked River Ranch Water Cooperative ("CRRWC"), respectfully requests postponement of the pre-hearing conference currently scheduled for January 8, 2010, at 9:30 a.m. on the ground that a motion is pending before the Oregon Court of Appeals seeking reconsideration of that court's statement that the Commission had effectively withdrawn its order.

As explained in more detail in the attached copy of CRRWC's Motion for Reconsideration, the Appellate Commissioner apparently misidentified the Commission's motion to withdraw its order as having been brought under ORS 183.482(6), which the Commission may exercise at any time for the purpose of reconsideration of an order and which requires no order of the Court of Appeals to affirm. Based on that misunderstanding, the Appellate Commissioner stated in his order that the Commission's order is deemed withdrawn because the Commission did not need the court's permission to withdraw the order.

In fact, the Commission's motion to withdraw the order at issue in this case was brought under ORS 183.482(5) for the purpose of rehearing, which does require the agency

to make certain showings and which requires an order of the Court of Appeals to permit the withdrawal.

The Court of Appeals might ultimately conclude that the Commission made the requisite showing under ORS 183.482(5), but that is disputed by CRRWC. Unless and until the Court of Appeals issues an order based on the correct subsection of ORS 183.482, it is premature to begin whatever rehearing process the Commission seeks to hold. Accordingly, CRRWC requests that the currently scheduled pre-hearing conference be postponed pending resolution of CRRWC's Motion for Reconsideration currently pending before the Oregon Court of Appeals.

Dated: January 5, 2010

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

HARRANG LONG GARY RUDNICK P.C.

s/ C. Robert Steringer
C. Robert Steringer OSB #98351

Of Attorneys for Crooked River Ranch Water
Cooperative

CERTIFICATE OF FILING AND SERVICE

I certify that on January 5, 2010, I filed the foregoing **REQUEST TO POSTPONE TELEPHONE PREHEARING CONFERENCE**, on the Public Utility Commission by email and first class mail, postage prepaid, addressed as follows:

Public Utility Commission of Oregon
Attn: Filing Center
P.O. Box 2148
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PUC.FilingCenter@state.or.us

I further certify that on January 5, 2010 I served copies of the foregoing **REQUEST TO POSTPONE TELEPHONE PREHEARING CONFERENCE** addressed to the following email addresses:

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I further certify that on January 5, 2010, I served copies of the foregoing **REQUEST TO POSTPONE TELEPHONE PREHEARING CONFERENCE** addressed to the following, via first class mail, postpaid, as follows:

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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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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.

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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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.

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 efilng system.

Participants in the case who are registered efilng users will be served by the appellate efilng system.

I further certify that some of the participants in the case are not registered efilng 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-efiling participants:

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