

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

WJ 8

In the Matter of

CROOKED RIVER RANCH WATER
COMPANY

An Investigation Pursuant to ORS 756.515 to
Determine Jurisdiction

RULING

DISPOSITION: MOTION TO DISMISS REHEARING DENIED

I. INTRODUCTION

After this matter was remanded by the Court of Appeals, the Public Utility Commission of Oregon (Commission) issued Order No. 09-026, again finding that the Crooked River Ranch Water Company (Crooked River or the Company) is subject to this Commission's jurisdiction. After the Company petitioned for judicial review of that order, the Commission withdrew Order No. 09-026.

The Commission then issued Order No. 09-391, again asserting jurisdiction. Crooked River again petitioned for judicial review. The Commission then sought leave of the Court of Appeals (the Court) to withdraw its order, for the purpose of convening this rehearing to take additional evidence. On December 2, 2009, the Court issued an order acknowledging that the Commission had withdrawn its revised order (Order No. 09-391) as the Commission was entitled to do, without leave of court. In that same order, the Court denied Crooked River's motion for a stay of the Commission's revised order, because that order had been withdrawn by the Commission. On December 15, 2009, Crooked River filed a motion in the Court of Appeals asking for reconsideration of the Court's order acknowledging the Commission's withdrawal of Order No. 09-391.

By motion filed with this Commission on January 14, 2010, Crooked River requests that the rehearing of this matter be dismissed (and the hearing canceled). On January 21, 2010, Commission Staff (Staff) filed its response in opposition to the Company's motion. On January 22, 2010, Crooked River filed a reply to Staff's response.

II. CROOKED RIVER'S MOTION

As grounds for its motion, Crooked River argues that a rehearing is outside the scope of the Court of Appeals' remand "for reconsideration." According to Crooked River,

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.*” (emphasis added) (citing *Gritter v. Adult & Family Servs Div.*, 182 Or App 249 (2002) and ORS 183.482(6)). As noted by Crooked River, the *Gritter* court itself cited the Attorney General’s Administrative Law Manual (2001).

According to Crooked River, “the taking of additional evidence is not permissible on reconsideration and therefore would violate the scope of the Court of Appeals’ remand. The Company “gives notice” that any further action by the Commission to proceed with the rehearing “is without a reasonable basis in law or in fact,” and that the Company will seek to recover its attorney fees and costs if the Commission proceeds.

III. STAFF’S RESPONSE

Staff notes that Crooked River’s argument appears to be the same argument that the Company has made to the Court of Appeals in its motion asking the Court to reconsider its order. Staff attached the Company’s filings in the Court of Appeals as exhibits to its response.

Staff also notes that the *Gritter* decision “does not say anything about the scope of a Court of Appeals remand.” According to Staff, Crooked River has cited no precedent to support its argument that the Commission rehearing would exceed the scope of the Court’s remand.

Staff argues that Crooked River incorrectly relies on ORS 183.482(6) for determining what the Court of Appeals may prescribe as a remedy. According to Staff, the applicable statute is ORS 183.482(8)(B) which provides that the Court may “[r]emand the case to the agency for further action under a correct interpretation of the law.” Staff argues that “there is nothing in the language of [the statute] or in any cited cases that supports the Company’s argument that the Commission has exceeded the scope of the remand.

Staff further argues that the scheduled “supplemental hearing” will not violate the scope of the Court’s remand, given that “the Court of Appeals has issued an order acknowledging that the Commission withdrew its revised order for purposes of conducting this hearing.” According to Staff, the Commission has broad and continuing authority to determine its jurisdiction. The Commission “should carry out the remand of the Court of Appeals consistent with the existing, valid order of the Court of Appeals, and develop the record.”

IV. CROOKED RIVER’S REPLY

According to Crooked River, Staff misstates the Company’s argument. Crooked River states that it did not rely on ORS 183.482(6) for determining what the Court of Appeals may order as a remedy. “The only relevance of ORS 183.482(6) in this case is that the Commission has previously withdrawn its orders regarding [the Company] for reconsideration pursuant to that subsection of the statute, rather than for rehearing pursuant to subsection (5).”

Crooked River argues that the Court's decision prescribes "reconsideration." The Company again cites *Gritter* and the Attorney General's Administrative Law Manual to support its claim that the Commission's review "is limited to the record before it."

V. DISCUSSION

Crooked River's motion addresses the same subject matter as its motion for reconsideration now pending in the Court of Appeals. In that motion, the Company argues that the Commission failed to make a sufficient showing that "that the additional evidence it sought to introduce was material and that there was good reason it was not presented in the original hearing." Crooked River did not argue that rehearing itself was proscribed by the Court's remand of the matter for "reconsideration."

As evidenced by the Company's motion, the Court of Appeals issued an order allowing the Commission to proceed with the rehearing. Crooked River argues that the Court's order was improvidently issued and has filed a motion for reconsideration. In effect, Crooked River's motion filed in this proceeding asks the Commission to overturn the Court of Appeals' ruling. No authority has been cited for such an extraordinary remedy.

Crooked River Ranch Water Company's Motion to Dismiss Rehearing Proceeding and Cancel Hearing is DENIED.

Dated at Salem, Oregon, this 3rd day of February, 2010.



Patrick Power
Administrative Law Judge