BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1248

ROATS WATER SYSTEM, INC., Complainant, v. GOLFSIDE INVESTMENTS, LLC, Defendant.	**DEFENDANT'S REPLY TO COMPLAINANT'S OPENING BRIEF**

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In response to Complainant Roats Water System, Inc.'s Opening Brief, Defendant Golfside re-asserts all arguments contained in Defendant's Opening Brief. In addition, Defendant supplements its arguments as follows:

1. The Water Service Agreement

Roats' Opening Brief refers to a "contractual agreement with Golfside," and asserts that "Golfside agreed to pay the charges." (Roats' Opening Brief, p. 6:2, p. 7:4). However, Roats' contract was with 523, LLC, not Golfside. Roats does not have any contract or agreement with Golfside. Realizing this, Roats also asserts:

> Pursuant to the Water Service Agreement between the Roats and 523, **the owner of the property is responsible for paying** residential development charges in conformance with the Oregon Public Utility Commission Tariff Rules and Regulations.

(Roats' Opening Brief, p. 2:5-7) (emphasis added). However, there is no provision in the Water Service Agreement ("WSA") which purports to hold the "owner of the property" liable for additional charges. As a general rule, Water Service Agreements are "personal to the signators." *Aspgren v. Columbia City*, 34 Or.App. 991, 1001, 581 P.2d 536 (1978) ("We also agree with the trial court that the 1941 Domestic Water Service Agreement between the City and the east side property owners was personal to the signators.") Roats' WSA does not

contain any language that would take it outside that general rule.

Even if the WSA somehow applies to Golfside, that document *still* does not authorize Roats' proposed charges. Complainant relies on §5.6 of the WSA, which discusses a "[c]onnection charge for new service." However, no "new service" is at issue. There has not been *any* increase in the number of potential dwellings since Roats entered the WSA with Golfside's predecessor almost seven years ago. The utility infrastructure is already "in place" and water has already been brought to all of the lots. (Ex. "6", "Factual Background"[1]; Ex. "10", p. 33)[2]. Roats does not propose to do any additional work or provide any additional service in connection with its proposed charges. Thus, there is no "new service" to trigger Roats' proposed charges.

By limiting connection charges to "new service," the WSA is consistent with established law holding that "[a] utility may not charge for the simple right to receive service." *In the Matter of the Revised Rate Schedules filed by First Hill Water, Inc.*, PUC Order No. 97-432 (November 7, 1997). Without any "new service," there cannot be any new charges.

Finally, Roats characterizes its proposed charges as "connection charges," but "connection charges" are specifically discussed in WSA paragraph 5.3:

> COMPANY will perform the following work as required: **Connection**, Inspection, Testing, Chlorination and Flushing. USER shall reimburse COMPANY for the **actual cost** of the above described work including labor, material and equipment. Overhead will be charged on all labor and material.

Roats has not produced any evidence of its "actual cost" to connect new dwellings to its water system. This is probably because Roats has no "actual cost" due to the fact that water has already been brought to each lot's property line and Roats has no significant work left to

[1] "The applicant has completed all public and private improvements required for Phases 1 and 2 of the Golfside Subdivision." Only Phases 1 and 2 are at issue because, as set forth in the parties' stipulation, Defendant sold phases 3 and 4 in April, 2005.

[2] All exhibit citations refer to exhibits attached to the parties' Stipulated Statement of Facts and Legal Issues.

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perform. Either way, Roats' "actual costs" certainly do not approach the $130,050 windfall Roats seeks here.

2. The tariff

Regardless of the WSA, no tariff supports Roats' proposed charges. Roats asserts:

> In the [Water Service] Agreement, Roats agreed to provide water services to 523 and 523 agreed to pay hook-up charges pursuant to a schedule of fees which identified different rates for different types of developments in accordance with the tariff structure required of Roats by the Public Utilities Commission.

(Roats' Opening Brief, p. 1:18-21). The "tariff structure" when the WSA was signed, and when the subdivision occurred, included Rule 6a, not Rule 9a which Roats now asserts. In fact, the WSA specifically references Rule 6a but makes no mention of Rule 9a.

Pursuant to Rule 6a, additional development charges can only be assessed, "subsequent to setting the master meter and payment of its fee." (Ex. "11"). Because no master meter was ever installed, no additional charges can be imposed.

Roats offers no explanation or support for its argument that Rule 6a was "not intended to require the setting of a master meter." (Roats' Opening Brief, p. 6:7). The plain language of that rule makes the setting of a master meter a condition precedent to imposing the additional charges Roats now seeks. Moreover, tariffs are strictly construed, and all ambiguities must be interpreted in the consumer's favor. *In the Matter of the Revised Rate Schedules Filed by US West Communications, Inc.*, PUC Order No. 96-128 (May 16, 1996). Accordingly, Rule 6a must be interpreted according to its plain language, and no additional charges may be imposed.

In an attempt to avoid this result, Roats claims that "[t]he tariffs are not set by Roats." (Roats' Opening Brief, p. 7:2). This is not accurate. While the PUC must approve Roats' tariffs, they are drafted and proposed by Roats. *U.S. West Communications, supra; also see* Exhibit "C" to Roats' Complaint.

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3. ORS 92.845

The "trigger" for Roats' claim is the December 18, 2003 subdivision plat. (Complaint, ¶4; *see* Ex. "11"). At that time, Golfside Park was, indisputably, a subdivision created pursuant to ORS 92.830 – 92.845. (*See, e.g.*, Ex. "6", "Application" description). Accordingly, Roats' proposed charges are prohibited by ORS 92.845(1)(b).

Roats' response is that ORS 92.845 "is intended to create a mechanism for owners of manufactured dwellings in existing manufactured dwelling parks and mobile home parks to acquire individual ownership interests in the lot on which the dwelling is located." Why, then, is Roats assessing new charges against all of Golfside's lots, *including* those lots already occupied by manufactured homes and already receiving Roats' water? Applying the proposed charges against such lots conflicts with the legislative purpose acknowledged by Roats and would *decrease* the possibility of individual lot ownership by *increasing* the costs associated with the lots.

Moreover, at the time the subdivision plat was approved and recorded in 2003, none of the relevant statutes "restrict[ed] the use of lots in the subdivision to the installation of manufactured dwellings." (Roats' Opening Brief, p. 5:11; *Cf.* Ex. "8" with Ex. "9"). Roats' Brief quotes only the amended statute, Ex. "9", even though Golfside subdivided under the original, *un-amended* statute, Ex. "8".

It should be clear that ORS 92.845(1)(b) prohibits Roats' additional charges with respect to lots already occupied by manufactured homes. With respect to the remaining lots, statutory protections should still be applied because (1) the plain language of the subject statutes insulated Golfside from additional charges at the critical time when the subdivision plat was recorded and Roats' proposed charges allegedly accrued, (2) at the time the subdivision was created, there was no prohibition on improving the subdivision with site-built homes and (3) regardless of what type of dwelling is placed on the lots, the subdivision of the manufactured home park did, consistent with the legislative purpose of ORS 92.830 – 92.845,

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"create a mechanism for owners ... to acquire individual ownership interests in the lot on which the dwelling is located." As a result of Golfside's actions taken in reliance on the protections offered by ORS 92.845, all of Golfside's lots are now subject to potential individual ownership. Accordingly, all of Golfside's lots should be protected from Roats' proposed charges.

4. **The Statute of Limitations and Laches**

Roats claims it notified Golfside of the additional charges "immediately after it learned that Golfside had converted the development from a single tax lot manufactured home park to a planned unit development with 94 separate tax lots." (Roats' Opening Brief, p. 6:10-12). However, the "trigger" for Roats' additional charges was the December 18, 2003 plat which first divided the single tax lot into many tax lots. (*See*, Complaint, ¶4 and Roats' Opening Brief, p. 1:25-26). That plat was subject of a public hearing on July 18, 2002, (Ex. "5"), and was publicly recorded in Deschutes County Records in December, 2003. (Ex. "7"). Roats is charged with knowledge of these public events and, therefore, must account for the greater than two-year delay from the time Roats' charges allegedly accrued until the Complaint was filed.

5. When all the facts are considered, Roats' proposed charges are unreasonable and unjust, and therefore, are prohibited by ORS 757.020.

Without any citation, Roats asserts: "Under its theory, Golfside or any other developer in Oregon can avoid statutorily required charges simply by initially promising one type of development and then changing to another." This assertion is wrong for a number of reasons: (1) there are probably only a few developers who, like Golfside, subdivided their property pursuant to *un-amended* HB 3686 and then sought to place site-built homes on the subdivided lots, (2) no statute "requires" Roats to impose additional charges for no new

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service[3], and (3) Golfside never promised to limit development to manufactured homes.

Golfside has resisted Roats' proposed charges because, among other reasons, the purpose of the proposed charges has never been explained. How would Golfside's $130,050 be spent? Roats' Opening Brief suggests three possibilities: (1) to "increase[] Roat's cash flow", (2) to "allow[] Roats an increased opportunity to invest in future plant improvements," and (3) to "offset infrastructure costs." (Roats' Opening Brief, p. 3:22-24; p. 7:2). However, there is no linkage between Roats' proposed charges and a need for "future plant improvements" or to "offset infrastructure costs." As a matter of fact, Golfside's predecessor *already* "contributed to the construction of off-site improvements necessary to extend Roats' 12" mainline to the subdivision." (Stipulation, p. 2).

The potential number of residences in Golfside Park, and the related burden on Roats' water systems, has never increased subsequent to Roats' signing of the Water Service Agreement. In fact, the conversion to a PUD resulted in the replacement of three residential lots with parks. (Ex. "10", Finding of Fact #4). Thus, the conversion to a PUD actually decreased the potential burden on Roats' water system and decreased the need for "future plant improvements."

Upon final analysis, it appears that Roats' proposed residential development charges were never intended to apply to a situation, like the present one, where Roats always knew how many dwellings it would have to serve. Rather, the supplemental charges were only meant to apply when the use of land changes in a way that imposes a *greater burden* on the utility infrastructure and utility supplier. For example, if Golfside had subdivided or

[3] Despite Roats' argument, ORS 757.225 does not require Roats to seek additional connection charges. In fact, ORS 757.225 prohibits Roats' collection efforts. First of all, ORS 757.225 discusses charges for "service," but, as previously established, no new service is at issue. Secondly, ORS 757.225 prohibits attempts to collect any fees greater "than is specified in printed rate schedules **as may at the time be in force,**" (emphasis added), yet Roats is trying to apply Rule 9a *retroactively* to a subdivision and re-plat which occurred *before* that Rule was adopted. Thirdly, ORS 757.225 prohibits attempts to collect any fees "not specified in such schedule," and Rule 6a plainly requires the setting of a master meter before additional charges can be imposed.

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partitioned a single lot with one home to allow five lots and five homes, it is easy to see how there would be an increased burden on Roats' water system and, accordingly, a basis for new charges. But, here, where Roats always knew how many dwellings it would have to serve, Roats had all the information it needed to charge the correct amount upfront. Accordingly, there is no need or basis for $130,050 in additional charges several years later.

Whether or not Roats' proposed charges are reasonable depends, at least in part, on the parties' expectations. Here, Mr. Musa and Mr. Roats knew from the very beginning how many dwellings would be located on the subject property. The parties contracted for water service under that understanding, and the number of potential dwellings covered by that contract has never increased but has, in fact, slightly decreased. It is unreasonable and, therefore, unlawful to impose additional charges for a decreased burden. Accordingly, Roats' proposed charges should be rejected.

DATED this 30th day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I served on the date set forth below the foregoing **DEFENDANT'S REPLY TO COMPLAINANT'S OPENING BRIEF** on the following counsel by the following indicated method(s):

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[X] by **MAILING** a full, true and correct copy in a sealed, postage paid envelope, addressed to the above and deposited with the U S Postal Service in Bend, OR 97701.

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DATED: October 30th, 2006.

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