BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1248

ROATS WATER SYSTEM, INC.,

Complainant,

v.

GOLFSIDE INVESTMENTS, LLC,

Defendant.

DEFENDANT'S OPENING BRIEF

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I. INTRODUCTION

Complainant Roats attempts to recover approximately $130,000 in "hook-up charges" from Defendant Golfside. These charges have no legal basis, however, either in the Water Service Agreement executed by Roats and Golfside's predecessor or in Roats' tariff filed with the PUC. Additionally, the proposed charges are precluded by (1) ORS 92.845 which protects manufactured home park owners, like Golfside, who chose to subdivide; (2) ORS 757.020 which prohibits all unjust or unreasonable charges; and (3) the statute of limitations. All of these arguments are fully briefed below. Additionally, this brief discusses (a) the amount and timing of charges, should any be allowed, and (b) as raised by an earlier motion, the lack of jurisdiction.

II. LEGAL ARGUMENT

A. There is no legal basis for Roats' proposed charges.

Complainant asserts two justifications for its proposed charges: (1) a Water Service Agreement signed by Defendant's predecessor, and (2) Rule 9a from Complainant's tariff filed with the PUC. Both justifications fail for the reasons set out below.

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1. The Water Service Agreement does not provide any authority for Roats' proposed charges.

Complainant relies on §5.6 of the Water Service Agreement, Ex. "3"[1], which provides in part:

> 5.6 Connection charge for new service under OPUC approved tariff service charges:
>
> * * * * *
>
> | | |
> |---|---|
> | Residential/Multi-Residential Development Charge | As per OPUC tariff rules & regulations Schedule No. 5 and Rule 6a. |

However, this provision does not bind Defendant because Defendant is not a party to the contract. As shown on its first page, the Water Service Agreement ("WSA") is a contract between Complainant and 523, LLC. The contract was executed on January 31, 2000, *before* Defendant Golfside Investments, LLC existed as a legal entity. (Stipulation, p. 2). Accordingly, there is no legal basis to apply §5.6, or any other provision of the WSA, to Defendant.

Complainant argues that Defendant is bound by the WSA because (a) Defendant is the successor in interest to 523, LLC, and (b) Walt Musa, who signed the WSA on behalf of 523, LLC, is also the principal member of Defendant Golfside. First, the WSA contains no language purporting to bind "successors in interest." Second, WSA §5.6 cannot be appurtenant to and "bind" Defendant's property because "true connection charge[s] do[] not 'run with the land.'" *In the Matter of the Revised Rate Schedules filed by First Hill Water, Inc.*, PUC Order No. 97-432 (November 7, 1997).[2] Third, there is no legal authority to bind Golfside in disregard of corporate form merely because Mr. Musa was also involved with 523, LLC.

Assuming momentarily, and only for the sake of argument, that the WSA does somehow bind Defendant, the WSA still does not justify Roats' proposed charges. The WSA

[1] All exhibit citations refer to the exhibits attached to the Stipulated Statement of Facts and Legal Issues filed June 16, 2006.

[2] Copies of all PUC orders cited herein are appended to the end of this brief.

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labels the charges as "[c]onnection charge[s] for new service." However, no "new service" is at issue. The utility infrastructure is already "in place" and water has already been brought to all of the lots. (*See* Ex. "10", p. 33). Thus, Roats will not physically "connect" anything. Roats' water pipes are actually "connected" to the homes by the builders, not by Roats. This is the very same reason certain "hook-up" fees were rejected by the PUC in *First Hill, supra*: the utility company did not actually "hook-up" anything, so the fee amounted to an unlawful charge for a right to the water. The only "work" Roats must perform when a new house is completed is to install the individual meters Defendant already paid for, (Stipulation, p. 2:17), and begin billing its new customers.

Next, the WSA does not contemplate additional connection charges upon subsequent changes to the land use designation. The WSA provides that the "total amount of this contract is due and payable with the written acceptance of Company for the water facilities." (Ex. "3", §5.7) (emphasis added). Thus, the "total" contract amount became due when the "water facilities" were constructed and accepted over six years ago. The WSA lacks *any* provision allowing Roats to seek additional payment at a later date. As a matter of fact, because water lines have already been brought to all of Golfside's lots, there is no new consideration to support additional charges under the WSA. The law is absolutely clear that "[a] utility may not charge for the simple right to receive service." *First Hill, supra.* That appears to be exactly what Roats is trying to do.

Finally, it is likely Roats will advance an alternative interpretation to the WSA provisions just discussed. However, because Roats drafted the WSA, (*See* Ex. "2"), any ambiguity must be interpreted against Roats. *Heinzel v. Backstrom*, 310 Or. 89, 96, 794 P.2d 775 (1990).

2. Roats' tariff does not support the proposed charges.

In addition to the WSA, Roats relies on "the Company's Rule 9a." (Complaint, ¶6). However, Rule 9a did not become effective until June 24, 2005, *after* the December 18, 2003

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subdivision plat upon which Roats bases its claim. (Complaint, ¶s 4 and 6). The law provides:

> All tariff changes shall be made applicable with service rendered on and after the effective date of the changes, unless the Commission by order provides otherwise.

OAR 860-036-0640. Because the facts giving rise to Roats' claim occurred *before* Rule 9a became effective, Rule 9a cannot apply unless and until the Commission issues an order allowing Roats to apply the rule retroactively.

The correct rule is Rule 6a which is cited in the WSA, (Ex. "3", §5.6), and which is the predecessor to Rule 9a. But, because Roats' Complaint does not assert entitlement under Rule 6a, there is no basis for the proposed charges. Therefore, Roats' Complaint should be dismissed.

Even if Roats' pleading error can be overlooked, there is still no basis for the proposed charges. Rule 6a provides:

> **Subsequent to setting the master meter and payment of its fee, if lots within the master metered development** become separately identified tax lots, the developer(s) of these separately identified tax lots will then be assessed an additional charge...

(emphasis added). Pursuant to the plain language of this tariff, the setting of a master meter is a condition precedent to recovery of "additional" charges. However, no master meter was ever installed in the subdivision. (Stipulation, p. 2:17-18). Accordingly, the condition precedent has not been fulfilled, and no additional charges may be imposed.

Roats will probably argue that, despite its plain language, Rule 6a should not be interpreted to require a prior installation of a master meter. The law, however, requires strict construction of utility tariffs. *In the Matter of the Revised Rate Schedules Filed by US West Communications, Inc.*, PUC Order No. 96-128 (May 16, 1996). Tariffs are "interpreted narrowly" because, among other reasons, (a) utilities are "regulated monopol[ies] imposing [their] policies on [their] captured customers," and (b) utilities "draft[] the tariff, which is a

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contract," and "[c]ontracts, generally, are interpreted against the drafter." *Id.* With respect to contract interpretation, Oregon law specifically directs:

> In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, **not to insert what has been omitted, or to omit what has been inserted**...

ORS 42.230 (emphasis added). Thus, there is no basis to ignore or reinterpret the language "[s]ubsequent to setting the master meter..." as contained in Rule 6a. For that reason, Rule 6a does not apply to the Defendant's subdivision, and no additional charges can be imposed.

B. Golfside's affirmative defenses

In the event sufficient legal basis is found to support Roats' proposed charges, those charges still must fail for the reasons set forth below.

1. ORS 92.845 precludes any recovery by Roats.

The factual basis for Roats' claim is the December 18, 2003 subdivision plat that created 97 tax lots where only one tax lot had previously existed. However, because that subdivision was approved pursuant to HB 3686 (ORS 92.830 – 92.845), the law prohibits Roats' proposed charges. The law provides:

> (1) A planned community subdivision of manufactured dwellings created in a manufactured dwelling park or mobile home park under ORS 92.830 to 92.845:
>
> (a) Is subject to ORS 94.550 to 94.783;
>
> (b) **Is not subject to system development charges or other similar charges that are based on approval of the subdivision**; and
>
> (c) Remains subject to system development charges that are based on the prior approval of the manufactured dwelling park or mobile home park.
>
> (2) The declarant of a planned community subdivision of manufactured dwellings under ORS 92.830 to 92.845 shall:
>
> (a) Comply with the provisions of ORS 92.305 to 92.495, except ORS 92.337 and 92.395; and
>
> (b) Include in the declaration described in ORS 94.580 a statement that the subdivision will comply with the conditions required by ORS 92.835 and subsections (1)(b) and (c) of this section.

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ORS 92.845 (emphasis added). It is beyond dispute that Golfside Park was created pursuant to ORS 92.830 – 92.845. The City of Bend's September 16, 2003 decision authorized the December 18, 2003 plat. (Ex. "6"). The first page of the decision specifically notes that the Golfside Subdivision is "a Subdivision Approved Under the Authority of ORS 92.830 – 92.845." Because Roats bases its claim on "approval of the subdivision" rather than on "the prior approval of the manufactured dwelling park," Roats' claim is prohibited by ORS 92.845(1)(b).

Roats seeks to avoid ORS 92.845 by relying on two facts: (1) Defendant has not limited new development to manufactured homes but is constructing site-built homes on some lots, and (2) on March 17, 2005, the City approved Defendant's application to re-plat the subdivision as a Planned Unit Development. (Ex. "10"). With respect to the first argument, even though it now includes some site-built homes, Golfside Park still qualifies as a "manufactured dwelling park" pursuant to ORS 90.512(4)[3]. Moreover, when Defendant first obtained subdivision approval, the subject statutes (ORS 92.830 – 92.845) did not prohibit construction of site-built homes in new subdivisions created pursuant to those statutes.[4]

With respect to the second argument, the question presented is whether subsequent transformation of a manufactured home park into a planned unit development nullifies the protections of ORS 92.845. Nothing in the statute suggests such a result. The "trigger" for Roats' claim is the December 18, 2003 subdivision plat. (Complaint, ¶4; *see* Exs. "11" and "12": tariff Rules 6a and 9a). At that time, Golfside Park was, indisputably, a subdivision created pursuant to ORS 92.830 – 92.845. Accordingly, ORS 92.845(1)(b) prohibited any "system development charges or other similar charges" based on creation of the subdivision.

[3] "'Manufactured Dwelling Park' means any place where four or more manufactured dwellings are located within 500 feet of one another on a lot, tract or parcel of land under the same ownership, the primary purpose of which is to rent or lease space or keep space for rent or lease to any person for a charge or fee paid..."

[4] Legislative amendments that prohibit construction of site-built homes in such subdivisions became effective January 1, 2004, *after* the new plat was recorded. (Stipulation, p. 3:15-21).

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The subsequent conversion from an existing subdivision into a PUD does not "trigger" any new charges under the WSA or Roats' tariff. The only "trigger" is the subdivision of one tax lot into many, and this occurred on December 18, 2003, *while* Golfside benefited from the protection of ORS 92.485.

2. Under the circumstances, Roats' proposed charges are unjust, unreasonable and would impose an undue burden on Golfside.

Roats' proposed charges should be rejected because, under the circumstances, they are unreasonable and unjust. The law provides:

> Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and **every unjust or unreasonable charge for such service is prohibited**.

ORS 757.020 (emphasis added). In *First Hill, supra,* the PUC rejected a utility's assessment of "hook-up fees" similar to the "hook-up charges" Roats seeks here, (Complaint, p. 5), because, among other reasons, the utility did not actually perform any extra work in connection with the fee. Accordingly, the Commission deemed the charges unreasonable, and therefore, void pursuant to ORS 757.020. *First Hill, supra.* Similarly, Roats will not perform any additional work in connection with its proposed "hook-up" or "connection" charges. Thus, the charges, if allowed, will represent a windfall and unjust enrichment for Roats.

Golfside subdivided its property in reliance on the protections offered by HB 3686. The "policy" section of that bill provides:

> The Legislative Assembly finds:
>
> (1) There is a need to create a mechanism for owners of manufactured dwellings in existing manufactured dwelling parks and mobile home parks to acquire individual ownership interest in the lot on which the dwelling is located;
>
> (2) **The creation of an individual ownership interest should not impose an undue financial burden on the owner of a park...**

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ORS 92.832 (emphasis added). Consistent with this legislative policy, the City of Bend found that Defendant's development of the Golfside Park "will provide a public benefit." (Ex. "10", p. 13). That benefit will be lessened if Roats is successful in increasing development costs by an average of $1,375.00 per lot. The PUC clearly has the power "to intervene and adjust prices that [a]re contrary to the public interest" *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*, 168 Or.App. 466, 479, 7 P.3d 594 (2000). The City of Bend is experiencing a severe shortage of affordable housing. Because, contrary to the public interest, Roats' charges only exacerbate this problem, the proposed charges should be denied.

Roats argues that the conversion to a PUD and construction of site-built homes defeats any "public interest" involved in the development of Golfside Park. However, the "public benefit" finding, (Ex. "10," p. 13), was made in the City's decision approving conversion to a PUD. Likewise, the PUD still allows "[t]he creation of an individual ownership interest," ORS 92.832(2), and, accordingly, still furthers the public interest. Moreover, the only reason Defendant converted the already subdivided property into a PUD is because the City, unclear on how to apply the amendments to ORS 92.830 – 92.845, rejected a building permit application for a site-built home. "Rather than engage in lengthy and costly litigation over this issue," Defendant and the City "agreed that a re-plat of the subdivision [was] an effective way to solve th[e] problem." (Ex. "10", p. 16). It is unreasonable to punish Defendant for compromising with the City and pursuing a mutually agreeable course that resulted in a "public benefit." *Id.*, p.13. Roats, after all, did not participate in the PUD process, appeal the decision or give anyone any indication it would seek extra compensation for the conversion to a PUD.

3. Roats' claim is untimely.

Because Roats filed this Complaint on February 9, 2006, more than six years following execution of the WSA on January 31, 2000 and more than two years after the December 18, 2003 subdivision plat on which Roats' claim is based, Roats' claim should be

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rejected as untimely. It is not clear what statute of limitations governs Roats' claim. If the six year limitation for breach of contract actions controls, ORS 12.080, then Roats' claim is untimely because the "total amount" owed under the contract was "due and payable" when the water facilities were constructed and accepted more than six years before the Complaint was filed. On the other hand, if the two-year limit contained in ORS 12.110 for "any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter" controls, then Roats' claim became untimely no later than December 18, 2005, being two years after the disputed subdivision plat was recorded.

Alternatively, Roats' claim is precluded by the equitable doctrine of laches. Golfside made development decisions based, in part, on the lack of any claim by Roats following the recording of the December 18, 2003 plat. Roats' inaction for more than two years prejudiced Defendant because Oregon statutory law and Roats' tariff were amended in Roats' favor during the delay. The PUC should reject Roats' $130,000 claim that was sprung on Defendant without warning more than 6 years after the WSA and more than 2 years after the disputed subdivision plat.

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4. The amount due to Roats, if any, (a) must not include charges for houses already served by Roats water, and (b) is not due on each lot until building permits are issued.

About one-half of Golfside's lots were already occupied by houses (primarily manufactured dwellings) at the time Roats filed this Complaint.[5] There is no basis for Roats' "connection charge" for lots already fully connected and serviced by Roats water. No new service is required for these lots, so no new charges can apply. *First Hill, supra.*

Likewise, there is no basis to levy a "connection charge" for bare lots not presently receiving or about to receive (*i.e.*, in the process of construction) any water from Roats. Case law provides that "ORS 757.225 must be read as prohibiting charges for service which has not been performed." *Holman Transfer Co. v. Pacific Northwest Bell Telephone Co.*, 287 Or. 387,

[5] Defendant will prove the precise number by testimony or affidavit.

401, 599 P.2d 1115 (1979), *also see US West, supra* (the Commission ordered US West to "cease and desist from its practice of requiring some customers to pay construction charges in advance of installation service."). Similarly, the City of Bend's March 17, 2005 decision allowing conversion to a PUD provides: "SDCs shall be payable under city ordinance, Resolution and policy **upon issuance of building permit** and signing Sewer and or Water Agreements for projects." (Ex. "10", p. 7) (emphasis added). Roats did not appeal this decision. Accordingly, Roats' connection charge, if allowed, only becomes due as building permits are issued for each respective lot.

To summarize, if, despite Defendant's arguments to the contrary, the PUC allows Roats' proposed charges, those charges should be limited as follows:

- No charge can be imposed for lots with dwellings already receiving Roats water.
- The charge must be assessed on a lot-by-lot basis as building permits issue.
- If a manufactured home is connected to Roats water, no charge should be assessed pursuant to the law and policy set forth in ORS 92.830 – 92.845.

Anything else would be unlawful, unjust and/or unreasonable.

5. The Public Utility Commission lacks jurisdiction over Defendant.

Defendant previously moved to dismiss Roats' Complaint for lack of jurisdiction.[6] That motion was denied, however, upon a determination that ORS 756.500(5) grants jurisdiction. That statute provides:

> Notwithstanding subsection (1) of this section, any public utility or telecommunications utility may make complaint as to any matter affecting its own rates or service with like effect as though made by any other person, by filing an application, petition or complaint with the commission.

This provision, while allowing utilities to file Complaints in certain cases, does not purport to create a new class of <u>defendants</u> subject to PUC jurisdiction. Moreover, Roats' Complaint

[6] Defendant hereby re-asserts and incorporates herein all prior arguments made with respect to the jurisdiction question.

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does not concern "any matter affecting its own rates or service." Roats' rates are not at issue; only an additional "hook-up charge." Roats' per gallon rates are not in dispute. Nor is Roats' service at issue because Roats does not propose to perform any new service in connection with his proposed charges.

Neither Complainant nor Defendant has found a single case in which the PUC exercised jurisdiction over a utility's complaint against a customer. According to the Oregon Supreme Court, "the Commissioner is granted jurisdiction to hear complaints based **only** on allegations that rates are unreasonable or unjustly discriminatory." *McPherson v. Pacific Power & Light Co.*, 207 Or. 433, 296 P.2d 932 (1956) (emphasis added). Roats' claim does not fit this criterion.

By exercising jurisdiction over this Complaint against a customer, the PUC is acting contrary to its statutory mandate to "represent the customers of any public utility ... in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction." ORS 756.040. The law continues:

> **[T]he commission shall make use of the jurisdiction and powers of the office to protect such customers**, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.

ORS 756.040(1). Likewise, according to the Court of Appeals, the Commission has a "duty to oversee the interests of customers." *Cascade Natural Gas Corporation v. Davis*, 28 Or.App. 621, 560 P.2d 301 (1977) (emphasis added). This duty is violated when the PUC assists a utility by allowing a Complaint for additional charges that are patently unreasonable as discussed above. The proper venue for Roats' claim is Deschutes County Circuit Court.

C. Attorney Fees

Should Defendant prevail in this matter either by defeating, reducing or delaying Roats' proposed charges, then a violation of ORS 757.225, which prohibits utility companies from demanding "any rate not specified in [the] schedule", will have occurred. This violation

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would entitle Defendant to an award of attorney fees pursuant to ORS 756.185, which provides:

> (1) Any public utility which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or willful misconduct, the public utility is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. Except as provided in subsection (2) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.
>
> (2) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (1) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

III. CONCLUSION

For all the above reasons, Roats' proposed charges should be rejected, his Complaint should be dismissed, and Defendant should be awarded its reasonable attorney fees incurred herein.

DATED this 16th day of October, 2006.

Brian C. Hickman; OSB #03109
Of Attorneys for Defendant

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FOCUS - 37 of 51 DOCUMENTS

In the Matter of the Revised Rate Schedules Filed by First Hill Water, Inc., for a General Rate Increase/In the Matter of an Investigation into Connection Charges, Repair Assessment Fees, and Line Extension and Service Connection Practices of First Hill Water, Inc.

ORDER NO. 97-432; UW 54; UM 857 (PHASE II)

Oregon Public Utility Commission

1997 Ore. PUC LEXIS 268

November 7, 1997, Entered

DISPOSITION: [*1] REFUND PROCEDURES ADOPTED; INTERIM OPERATORS APPOINTED

PANEL: Ron Eachus, Chairman; Roger Hamilton, Commissioner; Joan H. Smith, Commissioner

OPINION: ORDER

On August 19, 1996, First Hill Water, Inc., filed rate schedules to be effective September 19, 1996. At its September 10, 1996, public meeting, the Public Utility Commission of Oregon found that good and sufficient cause exists to investigate the propriety and reasonableness of the rates pursuant to *ORS 757.210* and *757.215*. The Commission ordered suspension of the rate schedules pending that investigation.

On October 17, 1996, a prehearing conference was held in this matter in Bend, Oregon, before Ruth Crowley, Administrative Law Judge (ALJ). Paul Graham, Assistant Attorney General, appeared for Commission Staff (Staff); and Vicki Lee, Secretary and Treasurer, appeared for the company. Eleven members of the public also attended. The purpose of the prehearing conference was to inform the public about the Commission's role in ratemaking proceedings, to take public comment on the proposed rate increase, and to set a schedule for further proceedings in this docket. Staff proposed a schedule, which was adopted. The schedule was eventually modified [*2] because Staff was unable to obtain documents from First Hill. Finally, Staff proceeded to build its case based on the documents it had and on characteristics of similar water systems.

At the November 5, 1996, public meeting, Staff presented the Commission a report on First Hill's billing and assessment practices. Based on Staff's report and recommendation, the Commission opened an investigation into those matters. By Order No. 97-077, entered March 3, 1997, the Commission consolidated the investigation and the rate case. The docket number for the investigation is UM 857.

By Order No. 97-106, entered on March 18, 1997, the suspension period for the rate schedules filed by the company was extended an additional three months, to June 19, 1997.

A public comment hearing was held on these matters on May 21, 1997, in Bend, Oregon. An evidentiary hearing was held on May 22, 1997, also in Bend. Notice of the hearings was published in the Bend *Bulletin* on May 11, 1997. Both hearings were before Ruth Crowley, Administrative Law Judge (ALJ). At the evidentiary hearing, Staff was represented by Paul Graham, Assistant Attorney General. No one appeared for First Hill.

The rate portion [*3] of the case was dealt with in Phase I of these consolidated dockets. The investigation portion is

the subject matter of this order.

FINDINGS OF FACT

Staff witness Marion Anderson was charged with evaluating the appropriateness of company charges, fees, and practices in establishing and maintaining water provision, pursuant to the Commission's November 5, 1996, decision to investigate First Hill. To gain information, Mr. Anderson conducted a mail survey of current customers. The survey asked the customers to provide information and documentation regarding:

. payments made for hookup to the system;
. a 1994 repair assessment;
. main line extension; and
. any other company requested payment that customers considered questionable.

Over 40 percent of the approximately 40 current customers responded to the survey.

The survey revealed that 12 households paid hookup fees ranging from $ 3,000 to $ 11,900. Each household was assessed $ 300 for repairs in 1994. Two households reported that they had made main line extension payments.

The survey also showed that the company made other repair assessments in 1988, 1992, 1993, and 1994. One household reported a selective overcharge [*4] for monthly service. Another household listed a "tap charge." The total reported payments exceed $ 70,000.

Several households surveyed indicated that the actual service connection costs and responsibilities were left to the customers, even after payment of the hook-up fees. They submitted bills or receipts showing that they had been forced to hire their own contractors to do the work. At the public comment hearings in this docket, at least one customer also stated that the company did not bring water to the customer property line. At the evidentiary hearing, a customer testified that a number of customers had paid for hook-up but were receiving no water.

On October 14, 1996, Commission Staff contacted First Hill and requested an analysis supporting the connection charges represented by the hookup and extension charges in Appendix A. The company refused Staff's request.

Section 1 of the company's standard contract for water service states:

> [First Hill] will install at its expense a water well, pump, reservoir, pressure storage tanks, and a four inch water main to Consumer's property, all at its own expense.

Section 4 of the company's standard contract for water service [*5] states:

> [First Hill] shall be responsible for making proper allocation of the funds received as hookup fees and service fees so as to be financially able to expand service and reliability as necessary, keep the system in operation, provide water properly and in adequate amounts, and repair and replace any parts of the water system as necessary.

Section 7 of the company's standard contract states:

> The cost of the hookup shall be a one time expense which runs with the land and is transferable from owner to owner of said land. The cost of said hookup shall be to provide water for one residence for domestic household use only.

APPLICABLE LAW

Commission Jurisdiction

The Public Utility Commission has jurisdiction over the rates of public utilities. *ORS 757.005(1)* defines "public utility" in part as any "corporation . . . that owns, operates, manages or controls all or a part of any plant . . . in this state for the production, transmission, delivery or furnishing of . . . water . . . directly or indirectly to or for the public . . . ." Under *ORS 757.005(1)(b)(E)*, water companies serving fewer than 300 customers at an average annual residential rate of $ 18 per [*6] month or less, which provide adequate and nondiscriminatory service, are not included in the definition of public utility. First Hill's rates exceeded the average residential rate threshold of $ 18 per month and hence came under the definition of "public utility."

However, even water companies that meet the definition of "public utility" are not necessarily subject to full regulation. *ORS 757.061* provides:

> (1) *ORS 757.105* to *757.110, 757.135, 757.140, 757.205* to *757.220* [requiring rate schedule filing and approval], 757.400 to 757.460 and 757.480 to 757.495 do not apply to a water utility serving fewer than 500 customers unless:
>
> > (a) Twenty percent or more of the customers of the water utility file a petition with the commission requesting that the water utility not be exempt from regulation under the statutes set forth in this subsection; and
> >
> > (b) a rate charged by the water utility for water service exceeds maximum rates established by the commission under subsection (2) of this section.
>
> (2) The commission shall adopt rules establishing maximum rates for water utilities serving fewer than 500 customers for the purpose of determining whether such utilities are subject [*7] to regulation under the statutes set forth in subsection (1) of this section.

The Commission adopted OAR 860-022-0028, which established the average residential rate threshold at $ 18 per month. First Hill came under full rate regulation because the company was charging an average residential rate of over $ 18 per month, and 20 percent of the customers petitioned the Commission for rate regulation pursuant to *ORS 757.061*.

Furnishing Service

ORS 757.020 states:

> Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited.

OAR 860-021-0050(5) provides:

> Each water utility shall furnish a water service connection from the distribution main to the customer's property. The customer, however, may be required to pay a reasonable service connection charge. Such a charge shall not include the cost of the meter nor exceed an amount equal approximately to the average cost of making service connections for the past three years.

[*8]

Commission Powers

ORS 756.040(1) and (2) provide:

> (1) In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.
>
> (2) The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

OPINION

Commission Jurisdiction

Because First Hill was a public utility even before it became subject to full rate regulation by virtue of its customers' petition, we have jurisdiction to oversee its service. *ORS 757.020.*

Hook-Up Fees and Other [*9] Charges

As a public utility, First Hill is required to furnish service to its customers. *ORS 757.020.* This requirement applies to public utilities whether or not they are fully rate regulated under *ORS 757.061.* As discussed below, First Hill has assessed charges in this case for which no service was delivered, or levied additional charges for services that it is obligated to provide in any case. A utility may not charge for the simple right to receive service.

The record shows that the charges designated as hook-up fees are not actually fees charged to hook to the system. Customers paid a variety of sums designated as hook-up fees (see Appendix A, column a), but First Hill did not hook them up. Instead, customers had to hire someone else to hook them up, at additional charge, or remain without water service. When we look to Section 7 of First Hill's standard contract, it becomes clear that what First Hill designated as a hook-up fee was something else altogether: a licensing fee that First Hill charges to give users the privilege of receiving water service. A true connection charge does not "run with the land."

Appendix A, column b, lists a service repairs surcharge. Column [*10] d lists additional repair assessments. The charge for repair assessments violates the company's standard contract. The contract provides that First Hill will allocate hook-up and service fees so as to pay for repairs to the system. See Section 4, set out above. In charging repair assessments, First Hill billed its customers for something they were entitled to receive as part of their rates and the hook-up fees. The "tap charge" in column d appears also to fall into the category of services for which customers paid in their rates and were billed again. The extension charges listed in column c also violated First Hill's contract. Section 1 of the company's standard contract precludes extension charges to customers' property.

This case is highly unusual. First Hill has been imposing charges on its utility customers that are separate and distinct from utility service. In fact, the record shows that First Hill repeatedly imposed charges on its customers for the right to receive service, not for the actual provision of service. The record contains no evidence showing that First Hill delivered any of the hook-up, line extension, or repair services that it promised to provide. As a public [*11] utility, First Hill is obliged to provide adequate service at just and reasonable rates. *ORS 757.020.* It may not impose charges on its customers for the right to receive a service.

Moreover, First Hill's charges appear to be fraudulent and at a minimum are unreasonable. *ORS 756.040* gives us the responsibility of protecting customers from "unjust and unreasonable exactions and practices." That same statute gives us the power and jurisdiction to supervise and regulate all public utilities in the state and do "all things necessary and convenient in the exercise of such power and jurisdiction." The fact that some water utilities are exempt from full rate regulation under *ORS 757.061* does not exempt them from this more general supervision by the Commission. We conclude that we are authorized to order refunds of the First Hill charges at issue in the present case. Our conclusion in this case is limited to the facts before us. We reach no conclusion about other situations in which we may have authority to order refunds.

We direct Commission Staff to create a formal refund claim form and to distribute that form to past and present (as of the date of this order) customers of First Hill. [*12] Customers will fill out the form and submit it, notarized and accompanied by photocopies of supporting canceled checks (unless these were already submitted in response to the survey). The Commission will then order the utility to make customer refunds as appropriate.

System Administration

As we noted in the Phase I order in this case (Order No. 97-240), the owners of the system have essentially abandoned it. At its August 5, 1997, public meeting, Staff recommended that the Commission appoint agents to act on behalf of First Hill to operate and maintain the water system and perform the billing, collection, and record keeping functions associated with the water system for a period of one year or until a long-term solution for the provision of water service can be secured, whichever is sooner.

Staff recommended that Butch Rogers of Bend, Oregon, be appointed as the certified system operator. Mr. Rogers owns Pine Ridge Pump in Bend and currently provides similar service for six other water systems in the Bend vicinity. He is familiar with the system and has performed repairs on the system in the past. Mr. Rogers will oversee all operations and maintenance of the system. He has [*13] requested that Tom Oblizalo, a customer of First Hill, assist him and be responsible for water quality testing at a rate of $ 18 per month.

Mr. Rogers will not charge the system to be its certified operator; however, he will charge for any repairs that become necessary at a rate of $ 40 per hour for labor plus materials. If he has to use a pump truck, he will charge $ 60 per hour for labor plus materials. Mr. Rogers does not anticipate any major repairs in the near future. He sees a need for minor repair work on the pumping panel, which will cost approximately $ 250.

Mr. Rogers also asserts that First Hill owes him approximately $ 500 for past work on the system. He will provide an estimate for repairs to the pumping panel and a billing for his previous repairs to the system. He has agreed to take payments for these expenses over the next 12 months.

Staff also recommended that Karen Gilbride, a customer, be appointed to collect customer payments, pay the bills, and keep an accounting of all moneys associated with First Hill. Ms. Gilbride estimates that it will take eight to ten hours per month to perform these tasks; her rate is $ 10 per hour. Pacificorp should provide copies [*14] of bills and notices concerning First Hill to Ms. Gilbride, 19451 Kemple Drive, Bend, Oregon, 97702.

In Order No. 97-240, the Commission ordered a flat rate of $ 18 per month for 40 customers. At this rate, Staff noted that monthly revenues will be $ 720. Staff budgeted $ 351 per month for salaries and wages. Mr. Oblizalo's wage plus Ms. Gilbride's wage total approximately $ 118 per month. Mr. Rogers' payment for past repairs and the power panel repair will be approximately $ 62.50 per month. From time to time there will be additional expenses, such as power, postage, paper, and water tests. At this point, Staff recommends retaining the $ 18 per month flat rate. However, Staff will monitor the system's expenses closely and recommend rate adjustments if they become necessary.

The Commission adopted Staff's recommendations with respect to First Hill in their entirety. We also request that a

member of Commission Staff be a signator on the trust account we ordered established for First Hill revenues in Order No. 97-240 at 9 ("The duties of the administrator will include an accounting of expenditures, billing, collection, and deposit of revenue from the water system in a trust account [*15] for operation, expenses, and maintenance of the system."). The Commission will then be able to monitor the account.

At the August 5 public meeting, the Commission raised the issue of whether the appointees who will administer and operate the system should be bonded. Staff explored the reasonableness of bonding the appointees and on September 23, 1997, submitted a memorandum to the Commission, with a copy to First Hill's owners, containing its recommendations. Staff discovered that each appointee can be bonded up to $ 10,000 at a cost of $ 111 per person, through Capitol Insurance Center, Inc., in Salem.

Staff's testimony did not include any expenditure for bonding. We conclude that bonding is prudent and reasonable, however, and approve the expenditure by this order. The company has not accumulated enough revenue to cover the expenditure. As soon as enough revenue has been set aside for this transaction, Staff has committed itself to seeing that the appointees make application to be bonded and authorizing the necessary payment. Staff estimates that, barring unforeseen consequences, there will be sufficient revenue within sixty days to fund the bonding.

First Hill customers should [*16] note that the Commission's involvement in administration of the company will be of short duration. It is highly unusual for the Commission to involve itself in the everyday affairs of the companies it regulates, and in this instance the Commission has taken on an oversight role because the situation is extraordinary. First Hill customers must eventually take action to ensure their water supply, however. We encourage customers to pursue the options for receiving water service that have been raised at meetings between Commission Staff and customers and to select one in the near future.

ORDER

IT IS ORDERED that:

1. Refund procedures:

a. Commission Staff shall create a formal refund claim form and distribute that form to past and present customers of First Hill.

b. Customers will fill out the form and submit it, notarized and accompanied by photocopies of supporting canceled checks (unless these were already submitted in response to the survey).

c. The Commission will then order the utility to make customer refunds as appropriate.

2. For the period of one year from the Commission decision at its August 5, 1997 public meeting, or until a permanent solution is found [*17] to the provision of water service to First Hill customers, whichever comes first:

a. Butch Rogers is appointed as the certified operator of First Hill Water, Inc., with Tom Oblizalo as his assistant, under the conditions recommended by Staff and approved at the Commission's public meeting of August 5, 1997.

b. Karen Gilbride is appointed to perform administrative functions for First Hill under the conditions recommended by Staff and approved at the Commission's public meeting of August 5, 1997.

A member of Commission Staff shall be added to the First Hill trust account to allow the Commission to monitor the account.

As soon as enough revenue has accumulated to cover the expenditure for bonding, Staff shall see that the appointees mentioned in subparagraphs a. and b. above make application to be bonded, and shall authorize the payment necessary for bonding.

3. The interim flat rate of $ 18, made effective in Order No. 97-240, shall remain in effect subject to monitoring by Commission Staff. If Staff determines that the $ 18 rate is not sufficient to meet system expenses, Staff shall recommend a rate adjustment.

Made, entered, and effective ___.

Ron Eachus

Chairman [*18]

Roger Hamilton

Commissioner

Joan H. Smith

Commissioner

A party may request rehearing or reconsideration of this order pursuant to *ORS 756.561*. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in *OAR 860-014-0095*. A copy of any such request must also be served on each party to the proceeding as provided by *OAR 860-013-0070(2)*. A party may appeal this order to a court pursuant to *ORS 756.580*.

ORDER NO. 96-128

ENTERED MAY 16 1996

THIS IS AN ELECTRONIC COPY

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 128

In the Matter of the Revised Rate Schedules Filed by U S WEST COMMUNICATIONS, INC. for Telecommunications Service. Advice No. 1636 and Transmittal No. 96-013-PL	)))))	ORDER

At its April 30, 1996, public meeting, the Commission Staff asked the Commission to issue an order directing US WEST Communications, Inc. (USWC) to cease and desist from its practice of requiring some customers to pay construction charges in advance of installation of service. The Staff request was made in conjunction with its recommendation to suspend USWC's Advice No. 1636 and Transmittal No. 96-013-PL pending investigation of the propriety and reasonableness of the rates pursuant to ORS 759.180 and 759.185. Staff's recommendation, presented at the April 30, 1996, public meeting, is an Appendix to this Order. In Order

No. 96-111, the Commission adopted the Staff recommendation and suspended the advice. The Commission also ordered USWC to cease and desist.

OPINION

At the public meeting, Staff reported that the Commission has received a number of complaints from Internet service providers about USWC's practice requiring them to pay construction costs in advance of

installation of service. The Commission's files contain five complaints from customers beginning in January 1996. A review of the complaints indicates that USWC has asked some customers to pay the construction costs of installation because the customers requested a number of lines that USWC did not deem appropriate for the size and use of the building. According to the reports in the Commission's files, USWC did not provide any other reasons for requiring the customer to pay construction charges.

USWC points to its construction charge tariff for authority to require customers to pay for construction prior to obtaining service. The tariff provides:

> 2. Speculative Projects
>
> The provisions relative to speculative projects are intended to afford protection to the Company against loss in revenue from service furnished to subscribers engaged in projects of an unusually financially hazardous nature. Such projects include those involving oil wells, mining operations, stock or other promotion schemes, club membership or other drives, sales or election campaigns, resorts, and others of a similar nature. These provisions are also intended to afford protection to the company against loss from either residence or business services, which circumstances indicate to have more than usual liability of loss. The location where the service is to be furnished, the company's knowledge of a particular customer's activities, the information furnished by the customer, may all be considered in determining whether an account should be classified as speculative.
>
> Each applicant for service may be required to pay to the Company in advance or otherwise, as the Company may elect, the net cost of installing and removing any facilities necessary in connection with furnishing of the service by the Company.
>
> Each applicant for service may be required to deposit with the Company, before service will be furnished, a sum of money which the Company considers necessary to obtain adequate protection from loss of revenue, or to otherwise secure, in a manner satisfactory to the Company the payment of any bills which may accrue by reason of such service so furnished or supplied. P.U.C. Oregon No. 25, 4.6.A.2.

U S WEST advised Staff that it interprets the tariff to allow the company to require construction costs for commercial sites based on the type of building (i.e. office building, warehouse) and usable square feet in the building. The company states that this practice has been long standing. Staff believes the practice is based on a recent reinterpretation of the tariff.

For a number of reasons, this tariff should be interpreted narrowly. First, USWC is a regulated monopoly imposing its policies on its captured customers. Second, USWC drafted the tariff, which is a contract. Contracts, generally, are interpreted against the drafter. Strictly interpreting the tariff is important because USWC's practice seriously disadvantages customers. As Staff pointed out, basic rates are set to recover overall construction costs. Under this tariff, the customer's rates are not reduced after the customer pays its own costs up front. Nor is there any provision for return of the customer's capital during or after the provision of service. In effect, the customer pays the construction costs twice--once when it pays for construction, then again when it pays for service.

The language of the tariff indicates that USWC is attempting to protect itself from customer requests that impose "unusually financially hazardous" risks or customer requests that indicate "more than usual liability of loss." The tariff specifically allows the company to consider the particular circumstances of the customer. The tariff does not specify what conditions constitute financial risk. USWC has limited its inquiry under the statute to the type and square footage of building. We have no evidence to indicate that USWC considers other factors such as the customer's financial resources, credit history, or other information that would mitigate concerns about loss.

We conclude USWC's practice is inconsistent with the terms of its tariff. USWC requires all customers, whether they impose a risk of loss on the company or not, to pay construction costs. Ratepayers with exceptional credit history and extensive resources are thrown into the same pot as promoters of oil wells, mining operations, and stock schemes. USWC's decision to arbitrarily impose construction costs on all customers who do not meet its internal standard of appropriate use harms the ratepayers and goes beyond any reasonable claim it might have for protecting itself from financial loss. USWC's practice is not rationally related to purposes outlined in the tariff.

Furthermore, even if we assume that type and square footage of the customer's building is an appropriate indicator of risk, the company has chosen a type of security that is most harmful to the customer. In those instances when the company does face a legitimate risk of loss, we see no reason why USWC must exact construction charges from the customer without any mechanism to return the amounts to the customer after risk of loss has passed. Our concern over USWC's practice is particularly keen since the tariff, itself, authorizes the company to accept a deposit or other security. The company should require advance payment as a last resort. Performance bonds, term contracts, and other alternatives can provide adequate protection for the company, while imposing less burden on the customer.

For these reasons, USWC should cease and desist from requiring customers to pay construction costs based exclusively on the type and square footage of the customer's building space. The company should evaluate each customer individually to determine if guarantees regarding payment are necessary. In addition, USWC should consider other means of reducing its risk of loss, including requiring deposits or other manner of security. Such efforts by the company would insure that customers would not have to pay construction costs twice.

This determination shall remain in effect pending the outcome of our investigation of Advice No. 1636 and transmittal No. 96-013-PL, which were suspended in Order No. 96-111.

ORDER

IT IS ORDERED that:

Until completion of the Commission's investigation in UT 128, US WEST Communications, Inc. shall cease and desist from requiring customers to pay special construction charges exclusively based on the square footage and type of the customer's premises.

Unless USWC can document that the customer's requested service actually presents more than the usual liability of loss, USWC shall install service to customers at nonrecurring charges as specified in its existing tariff pending completion of the formal proceeding and final order in this docket.

USWC may be required to refund any construction charges paid by customers upon completion of this investigation.

Made, entered, and effective .

Roger Hamilton

Chairman

Ron Eachus

Commissioner

Joan H. Smith

Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of this order. The request must comply with the requirements of OAR 860-14-095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-13-070(2). A party may appeal this order to a court pursuant to ORS 756.580.

CERTIFICATE OF SERVICE

I hereby certify that I served on the date set forth below the foregoing **DEFENDANT'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.

[ ] by causing full, true and correct copies to be **hand delivered to** the above persons.

[X] by **FAXING and E-MAILING** a full, true and correct copy to the above.

DATED: October 16, 2006.

PETERKIN & ASSOCIATES

Brian C. Hickman, OSB #03109
Of Attorneys for Defendant

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1248

ROATS WATER SYSTEM, INC., Complainant, v. GOLFSIDE INVESTMENTS, LLC, Defendant.	**DEFENDANT'S BRIEF REGARDING EVIDENCE ISSUES**

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1. Introduction

This brief discusses evidence that is not included in the June 16, 2006 Stipulated Statement of Facts and Legal Issues but that Defendant wishes to introduce into these proceedings. At a September 11, 2006 telephonic hearing, the parties discussed the matter of whether additional evidence would be admitted and whether a formal hearing would be required. The attorney for Complainant argued that any evidence outside the Stipulation is irrelevant to these proceedings. Accordingly, Judge Petrillo asked Defendant's attorney to prepare a brief identifying the additional evidence at issue and arguing why the additional evidence is relevant. Defendant's attorney was instructed not to actually submit the proposed additional evidence but only to, at this point, describe its content.

2. Nature of the additional evidence

Defendant proposes to present testimony and/or affidavits[1] from Liz Fancher and Walt Musa regarding the following:

[1] Without waiver of any rights and only with the intent of making these proceedings more efficient and less costly for all involved, Defendant consents to resolution of this matter without a formal hearing. This consent is conditioned upon agreement that (1) affidavits are fully admissible from either party, (2) new affidavits may be submitted if necessary to rebut an opponent's assertions and (3) Defendant's consent to resolution without a formal hearing is not construed as a waiver of any rights, including appeal rights, Defendant may have.

1) Liz Fancher will testify about the reasons Defendant applied to convert the subdivision into a PUD. The reasons include the City's denial of a building permit for a site-built home, the pressure placed by the State of Oregon Real Estate Commissioner's Office on the City of Bend and threats of legal action.

2) Liz Fancher will testify that, as part of the PUD process, Defendant agreed to convert three buildable lots into parks in order to comply with the play area requirements for manufactured home parks.

3) Walt Musa will testify about the execution of the Water Service Agreement, his understanding of that document and when the required "water facilities" were constructed and accepted.

4) Walt Musa will testify about all payments he has made to Roats for, among other things, offsite improvements.

5) Walt Musa will testify, with supporting written evidence, that Roats conceded it will not have to perform any additional work as a result of the conversion to a PUD.

6) Walt Musa will testify about the status of each lot, including the dates and types of lot improvements.

7) Walt Musa will testify about the extent to which he relied on specific language in the Water Service Agreement and Roats' tariff, the extent to which he relied on the statutory protection of ORS 92.485, and the extent to which he relied on Roats' failure to assert a claim for several years.

8) Walt Musa will testify about the process of how new homes are "connected" to Roats' water.

3. Why the additional evidence is relevant to these proceedings.

All of the above is relevant to the question of whether Roats' proposed charges are unreasonable, unjust and/or impose an undue burden on the subdivision owner. The law, ORS 757.020, prohibits "*every* unjust or unreasonable charge." (emphasis added). Likewise, in the context of discussing the subdivision of manufactured home parks, ORS 92.832(2) provides that "[t]he creation of an individual ownership interest should not impose an undue financial burden on the owner of a park." Accordingly, if Roats' proposed charges are unjust, unreasonable and/or "impose an undue financial burden" then they should be disallowed.

The additional evidence that is proposed will develop the circumstances around the parties' relationship, the development of Golfside Park, and Roats' proposed charges. Roats

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argues that the circumstances do not matter; only the end result matters. However, ORS 757.020 and ORS 92.832(2) introduce a "reasonableness" standard into the calculation. To know whether or not Roats' proposed charges are "reasonable," the fact-finder will have to know all the material circumstances surrounding the alleged entitlement to those charges. For example, Roats' proposed charges may be unreasonable if (a) Roats misled Defendant about the charges, (b) Roats is not actually going to "connect" any homes to water as consideration for its "connection charge", and/or (c) the conversion to a PUD was for the sole purpose of settling a dispute and did not alter the subdivision's original characteristics that entitled it to statutory protection against additional utility charges.

Furthermore, it is possible Roats is entitled to impose residential development charges on some, but not all, of the lots. Information about the status of these lots is essential to make any such calculation. For example, as discussed in Defendant's Opening Brief, Roats may not be able to collect connection charges on lots that are already serviced by Roats water, on lots that contain manufactured homes, on lots that were improved before the conversion to a PUD, and/or on vacant lots. Relevant to the determination will be (a) whether there is *any* structure on a particular lot, (b) what *type* of structure (*e.g.*, manufactured home or site-built home) was placed on the lot and (c) what date the lot was improved.

Finally, the timing of key events such as the construction and acceptance of "water facilities" pursuant to the Water Service Agreement, is relevant to Defendant's statute of limitations and laches defenses.

4. Conclusion

The additional evidence proposed by Defendant is relevant and material to these proceedings because, among other reasons, it will aid the fact-finder's determination of whether or not Roats' proposed charges are "reasonable." If the Court will allow, Defendant can present its additional evidence by affidavits without requiring a formal hearing. However, because additional assertions by Complainant in its Opening Brief, Reply Brief and/or own

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affidavits may require rebuttal, Defendant asks that the Court allow the parties' to submit one final set of affidavits, if necessary, after the conclusion of argument and briefing. If this is unworkable, Defendant requests a formal hearing at which testimony can be presented.

DATED this 16th day of October, 2006.

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Of Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I served on the date set forth below the foregoing **DEFENDANT'S BRIEF REGARDING EVIDENCE ISSUES** 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.

[ ] by causing full, true and correct copies to be **hand delivered to** the above persons.

[X] by **FAXING and E-MAILING** a full, true and correct copy to the above.

DATED: October 16, 2006.

PETERKIN & ASSOCIATES

Brian C. Hickman, OSB #03109
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