



1 allegations are legally incorrect and factually unsupported. As Ms. Miller's testimony details,  
2 she carefully, thoroughly, and exhaustively reviewed the received petitions. As the Company's  
3 testimony demonstrates, they did not. *See* Tr.<sup>1</sup> at 48; 83. Instead, the Company boldly asserts  
4 that Staff violated its own rules because it included petitions that did not have telephone  
5 numbers.

6 The reason that OAR 860-036-0412(3) requests the petitions include telephone numbers  
7 is in order for Staff to more easily confirm the petitions. *See* Tr. at 7-9; 15. As Ms. Miller  
8 testified, she was able to find the telephone numbers of most of the petitioners. *See* Tr. at 13.  
9 Finally, and regardless of the bluster about the lack of telephone numbers, the Commission has  
10 the authority to waive a technical requirement of its own rules. *See* OAR 860-036-0001.

11 Here, we have a case where the elected representatives of the State of Oregon have  
12 determined that the Commission should regulate water associations if 20 percent or more of the  
13 customers petition for such regulation. Staff has demonstrated that substantially more than 20  
14 percent of the customers have petitioned for regulation. In this situation, there should be little  
15 doubt that the intent of the Oregon Legislature should guide the Commission in its consideration  
16 of the technical application of its own rule. While the telephone number requirement is intended  
17 to assist Staff if it was necessary to contact signatories to the petition to verify their customer  
18 status, Staff was able to confirm the signatures as valid customers. If necessary, Staff  
19 recommends the Commission waive the telephone number requirement for these petitions.

20 Third, the Company alleges that ORS 757.063 is unconstitutional. While the scoping  
21 ruling allowed the Company to present evidence to support its assertion that ORS 757.063 is  
22 unconstitutional as applied to how it conducts its business, the Company has not done so. In  
23 fact, the Company conveniently ignores that it was an elected, democratic legislature that passed  
24 ORS 757.063. Furthermore, it is well established that governments can regulate businesses  
25 affected with the public interest. Indeed, the Oregon Legislature has determined that if more

26 <sup>1</sup> As used herein, "Tr." means the official transcript of the evidentiary proceeding held on August 8, 2006.

1 than 20 percent of the customers petition, a water utility affected with the public interest and  
2 should be regulated. Finally, the Company utterly ignores what Commission regulation means.  
3 While Mr. Rooks testified that he believed that Commission was taking over the water company,  
4 such statements are obviously absurd. *See* Tr. at 46; 55-57. As in all Commission-regulated  
5 water companies, the Commission will regulate rates and service but does not micromanage the  
6 regulated company nor make day-to-day decisions on the Company's behalf.

## 7 **DISCUSSION**

8 1. The Company is not exempt from ORS 757.063.

9 In Staff's previous filings and at the evidentiary hearing, it was dispositively established  
10 that the Company was an association at the time the petitions were received. *See* Tr. at 61; 32.  
11 In response, the Company now asserts that the Commission does not have jurisdiction until a  
12 final order is issued and that ORS 757.480 does not apply because the dissolution of the  
13 association was not a disposal of utility property.

14 As detailed in Staff's trial brief and not rebutted by the Company, the plain meaning of  
15 ORS 757.063 is that the Company is regulated once more than 20 percent of the petitions are  
16 received. Instead of discussing the applicable statute, the Company claims that a Commission  
17 Staff letter dated April 28, 2005, demonstrates that the Commission does not have jurisdiction.  
18 First, the letter does not state that the Company is not regulated. In fact, the letter states that,  
19 while the Company has a due process right to challenge the petitions, more than 20 percent of the  
20 association members have requested regulation. Under ORS 757.063, the Company was  
21 regulated from the date the petition threshold had been meet. The fact that the Company has  
22 been given additional due process to challenge the petitions does not change the effective date of  
23 regulation.

24 Furthermore, assuming *in arguendo*, that the April 28, 2005, letter could be read as not  
25 asserting jurisdiction, the Commission cannot be estopped from following the legal requirements  
26 of ORS 757.063. While the Oregon Supreme Court "has accepted the general proposition that,

1 under appropriate circumstances, an agency of the government may be estopped to assert a claim  
2 inconsistent with a previous position taken by it.” *See* Dept. of Transportation v. Hewitt  
3 Professional Group, 321 Or 118, 895 P2d 755 (1995). However, the party claiming estoppel  
4 must have relied on the agency’s misstatements and the party’s reliance must have been  
5 reasonable. *Id.* Whether a party’s reliance was reasonable depends on whether it was within the  
6 lawful powers of the agency to make the statements relied on. *Id.* In this case, the statements  
7 were made by a Commission Staff member. Even if the statements in the letter suggested that  
8 the Company was not under the Commission’s jurisdiction, which they do not, a Commission  
9 Staff statement cannot bind the Commission from performing its legal duty in enforcing ORS  
10 757.063.

11 The Company also claims that Commission Staff alleges a violation of ORS 757.480.  
12 While the Company claims that Staff has not offered any explanation of how the Company has  
13 disposed of water utility property, it is incorrect and completely ignores Staff’s explanation.  
14 First, there would be a violation of ORS 757.480 because the Company was under the  
15 jurisdiction of the Commission once more than 20 percent of the petitions were received. Once  
16 under the jurisdiction of the Commission, it must get approval to “sell, lease, assign or otherwise  
17 dispose of” the utility property. *See* ORS 757.480(5).

18 Ironically, the Company itself introduced “Articles of Dissolution” for the association.  
19 *See* CRRWC Ex. 3. It is curious that the Company seems to think that dissolution does not mean  
20 to otherwise dispose of the utility property. While the Company spends quite some time arguing  
21 that it did not assign or otherwise dispose of any property, it is legally incorrect. As a matter of  
22 law, dissolving one entity and transferring the property to another entity is subject to ORS  
23 757.480.<sup>2</sup>

24 ///

25

26 <sup>2</sup>In its trial brief, Staff also highlights several other infirmities with the Company’s attempt to change to a cooperative. Staff will not reiterate each of those infirmities but does incorporate them by reference.

1 The point regarding ORS 757.480 is that it is additional support that the Company has not  
2 become a cooperative for purposes of Commission regulation. However, as explained above, the  
3 dispositive issue is that the Company was an association at the time a sufficient number of the  
4 petitions were received. Ultimately, the discussion regarding ORS 757.480 further demonstrates  
5 that the Company is not a cooperative for regulatory purposes. Regardless of the discussion  
6 about ORS 757.063, however, the Company came under Commission jurisdiction once a  
7 sufficient number of petitions were received and when they were self-admittedly an association.

8 2. The evidence establishes that more than 20 percent of the customers petitioned the  
9 Commission.

10 The Company asserts that the petitions are flawed. However, they have failed to  
11 demonstrate that any petition is flawed. First, they argue that some of the petitions do not  
12 contain telephone numbers. The telephone numbers are requested in order to assist in  
13 confirming the adequacy of the petition. As Ms. Miller testified, in cases where Ms. Miller  
14 needed to confirm a signatory as a valid customer of the company, she was able to find the  
15 telephone numbers for many of those missing telephone numbers. Therefore, the telephone  
16 number requirement was not needed to verify the validity of the petitions. Finally, the  
17 Commission has the authority, if necessary, to waive a technical requirement of its own rules.  
18 *See* OAR 860-036-0001. In a case like this, the Legislative mandate should be implemented  
19 even if it requires the waiver of a rule in order to do so.

20 The Company also asserts that the petitions are flawed according to the unrelated  
21 chapters of Oregon law. While the Company was unable to produce any supporting evidence for  
22 its claims that the Secretary of State would not accept the petitions in this proceeding, is  
23 ultimately irrelevant as they are not statutes and rules applicable to this proceeding.

24 Finally, at the hearing the Company attempted to cast doubt on a handful of the petitions  
25 because of “questionable” signatures. However, the Company also admitted that they had no  
26 experience in forgery or handwriting. *See* Tr. at 79. Furthermore, even if the petitions were

1 thrown out as doubtful (which they should not be), there would still be more than enough  
2 petitions to meet the 20 percent criteria. *See* Staff/100, Miller/8.

3 3. ORS 757.063 is not unconstitutional.

4 It is difficult to respond to the Company's superficial claim that the ORS 757.063 is  
5 unconstitutional because our country is founded on the principle of democracy. In that federal  
6 system of "democracy" established by the United States Constitution, the Oregon Legislature has  
7 exercised its constitutional powers to regulate certain businesses affected with the public  
8 business.

9 Here, the Legislature has determined that if 20 percent or more of the customers of an  
10 association request regulation, they should be subject to regulation. In other cases, the  
11 Legislature has said that investment owned electric utilities are subject to regulation. In neither  
12 case does the Oregon Legislature lack the constitutional authority to determine that certain  
13 businesses should be regulated. In fact, our "democratic" governments are permeated with  
14 government regulation that impacts the rights of individuals and businesses. The Company's  
15 constitutional claims are unmeritorious red herrings and should be dismissed by the Commission.  
16 In fact, the Company's opening post-hearing brief suggests that they are facially challenging the  
17 constitutionality of ORS 757.063 and intimate that it is doing so only to reserve its constitutional  
18 claims on appeal. As stated in Staff's prehearing brief, the Commission should presume acts of  
19 the Oregon Legislature constitutional and the Commission should only declare statutes  
20 unconstitutional infrequently and with care.

## 21 **CONCLUSION**

22 Since the last time the Commission investigated the Company, the Oregon Legislature  
23 has passed ORS 757.063 and made this proceeding straightforward. The relevant question is  
24 whether the Commission received more than 20 percent of the customers' petitions. The  
25 evidence in the record establishes that the Commission has received more than the required  
26 number of petitions.

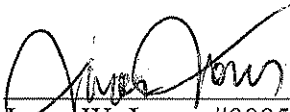
1 In response, the Company continues to offer a panoply of reasons why the Commission  
2 does not have jurisdiction. In fact, the Company's actions imply that they will attempt almost  
3 any artifice to escape Commission regulation. Nonetheless, the Company's claims do not have  
4 any merit and are, instead, desperate attempts to avoid statutorily mandated regulation.

5 For the foregoing reasons, Staff respectfully urges that the Commission confirm that the  
6 petitions have been validated and order the Company to file tariffs.

7 DATED this 19th day of September 2006.

8 Respectfully submitted,

9  
10 HARDY MYERS  
Attorney General

11  
12 

13 Jason W. Jones, #00059  
14 Assistant Attorney General  
Of Attorneys for Public Utility Commission of  
Oregon Staff

1 **CERTIFICATE OF SERVICE**

2  
3 I certify that on September 19, 2006, I served the foregoing upon all parties of record in  
4 this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid  
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.  
6

7 **GLENN SITES & REEDER LLP**

8 DAVID C GLENN  
9 ATTORNEY  
205 SE 5TH ST  
MADRAS OR 97741-1632  
gsr-dcg@crestviewcable.com

10 **PUBLIC UTILITY COMMISSION OF OREGON**

11 MICHAEL DOUGHERTY  
550 CAPITOL ST NE - STE 215  
SALEM OR 97301  
michael.dougherty@state.or.us

12 MARC HELLMAN  
13 ADMINISTRATOR  
PO BOX 2148  
SALEM OR 97308-2148  
14 marc.hellman@state.or.us

15 

16 \_\_\_\_\_  
17 Neoma Lane  
18 Legal Secretary  
19 Department of Justice  
20 Regulated Utility & Business Section  
21  
22  
23  
24  
25  
26