

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**  
3 **UM 1288**

4 PUBLIC UTILITY COMMISSION OF  
5 OREGON,

6 Complainant,

7 v.

8 VCI COMPANY f/k/a STAN EFFERDING  
9 and STANLEY JOHNSON, dba VILAIRE,  
and VCI COMPANY, a Washington  
corporation

10 Defendants.

PUBLIC UTILITY COMMISSION OF  
OREGON'S RESPONSE TO MOTION TO  
VACATE DEFAULT ORDER AND TO  
DISMISS CLAIM

11  
12 **INTRODUCTION**

13 The Public Utility Commission of Oregon's (Commission) complaint here is for the  
14 recovery of the overpayment made to a defendant utility from the Residential Service Protection  
15 Fund (RSPF). Defendants argue that the Default Order must be vacated and the "claim"  
16 dismissed based on a line of cases holding that the Commission does not have jurisdiction over  
17 damage claims brought by utility customers against utilities. The cases cited by Defendants are  
18 inapposite; this case does not involve a utility customer's claim against a utility. The  
19 Commission has authority and jurisdiction through its complaint statute to seek recovery from a  
20 regulated utility overpayments made from the RSPF. Defendants' motion should be denied.

21 **ARGUMENT**

22 **A. The Commission has jurisdiction to recovery from a Defendant Utility**  
23 **overpayments from the RSPF**

24 ORS 756.040 provides, in relevant part, that:  
25  
26

1 (1) \* \* \* the commission shall represent the customers of any public  
2 utility or telecommunications utility and the public generally in all controversies  
3 respecting rates, valuations, service and all matters of which the commission has  
4 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.

5 \* \* \* \* \*

6 (2) The commission is vested with power and jurisdiction to supervise and  
7 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.

8 The legislature in Oregon Laws 1987, chapter 290 declared that it is the policy of this  
9 state to “assure that adequate, affordable residential telecommunication services is available to  
10 all citizens of the state.” *See* § 2. To carry out the policy, the RSPF was established with all  
11 moneys in the fund appropriated to the Commission to carry out the provisions of Oregon Laws  
12 1987, chapter 290. *See* § 8. The Act also authorized the Commission to do the following:  
13 establish different rates for local exchange residential telecommunications for low income  
14 customers, *see* § 4; develop and implement a surcharge against each paying subscriber to fund  
15 affordable residential telecommunications services; and annually review the surcharge and  
16 balance in the RSPF and make adjustments to the surcharges to ensure the fund has adequate  
17 resources. *See* § 7.

18 ORS 756.060(1) empowers the Commission to adopt “any reasonable and proper” rule  
19 “relative to all statutes administered” by it.

20 ORS 756.062 provides:

21 (1) Substantial compliance with laws adequate for commission activities;  
22 construction of laws generally. (1) A substantial compliance with the  
23 requirements of the laws administered by the Public Utility Commission is  
24 sufficient to give effect to all the rules, orders, acts and regulations of the  
commission and they shall not be declared inoperative, illegal or void for any  
omission of a technical nature in respect thereto.

25 (2) The provisions of such laws shall be liberally construed in a manner  
26 consistent with the directives of ORS 756.040 (1) to promote the public welfare,  
efficient facilities and substantial justice between customers and public and  
telecommunications utilities.

1           ORS 756.070 provides that,

2                   The Public Utility Commission may inquire into the management of the  
3           business of all public utilities and telecommunications utilities and shall keep  
4           informed as to the manner and method in which they are conducted and has the  
5           right to obtain from any public utility or telecommunications utility all necessary  
6           information to enable the commission to perform duties.

7           ORS 756.075 provides, in relevant part,

8                   (2) The commission or authorized representatives shall, upon demand,  
9           have the right to inspect the books, accounts, papers, records and memoranda of  
10           any public utility or telecommunications utility and to examine under oath any  
11           officer, agent or employee of such public utility or telecommunications utility in  
12           relation to its business and affairs.

13           OAR 860-033-0045 provides, in relevant part,

14                   (1) Each eligible telecommunications provider shall be compensated from  
15           the Residential Service Protection Fund for specific costs incurred as a  
16           consequence of participating in OTAP. \* \* \*:

17                   (a) Each eligible telecommunications provider will be compensated for  
18           benefit costs. Compensation will equal the revenue the provider foregoes by  
19           providing local service to qualified low-income customers at a reduced rate. The  
20           telecommunications provider's invoices shall indicate the number of qualified  
21           customers who received the OTAP benefit during a specified period and the  
22           amount of revenue foregone during the same period;

23           The Commission's complaint involves the recovery of an overpayment from the RSPF  
24           from Defendants, who the Commission alleges were "acting as an eligible telecommunication  
25           carrier participating in the OTAP under OAR 860-033-0010 to OAR 860-033-0047." The  
26           Commission has a duty to both account for public monies entrusted to it and a duty to recover  
27           money from any person liable to the state. *See generally* ORS 293.240. The Commission is  
28           charged with the "powers and duties" to "represent the customers of any public utility or  
29           telecommunications utility and the public generally in all controversies respecting rates, valuations,  
30           service and all matters of which the commission has jurisdiction." ORS 756.040(1). To aid it in  
31           carrying out these duties, the legislature empowered the Commission to "supervise and regulate  
32           every public utility and telecommunications utility in this state, and to do all things necessary  
33           and convenient in the exercise of such power and jurisdiction." ORS 756.040(2). Commission

1 regulation of telecommunications utilities participating in OTAP and receiving monies from the  
2 RSPF are “matters of which the commission has jurisdiction.” ORS 756.040(1). That jurisdiction  
3 and the Commission’s “power and jurisdiction to supervise and regulate every public utility and  
4 telecommunications utility in this state, and to do all things necessary and convenient in the  
5 exercise of such power and jurisdiction” ineluctably gives the Commission jurisdiction to seek  
6 the recovery of RSPF funds from a telecommunications utility that the Commission regulates.  
7 ORS 756.040(2).

8 Additional support for the Commission filing a complaint here seeking the recovery of an  
9 overpayment of RSPF funds is found in the Commission’s Telecommunications Devices Access  
10 Program (TDAP). *See* OAR 860-0330505 to OAR 860-033-5620. Under that program, the  
11 Commission loans assistive telecommunication devices or adaptive equipment owned by the  
12 State of Oregon to eligible recipients. Recipients of equipment under that program are “held  
13 financially responsible for any damage to the equipment that is not caused by normal wear and  
14 tear or acts of nature or disasters.” *See* OAR 860-033-0536. The statutory authority for the rule  
15 and the statute implemented are ORS 756.040 and Oregon Laws 1987, chapter 290. The  
16 Commission routinely brings complaints against TDAP recipients that damage the loaned  
17 equipment. The Commission pursues these damage claims through its complaint statute, not  
18 through the court system. *See e.g. Public Utility Commission of Oregon, Complainant v.*  
19 *Michelle Pate, Defendant*, TT 45, Order No. 01-127 (January 25, 2001) (holding defendant liable  
20 damages for loaned equipment; *Public Utility Commission of Oregon, Complainant v. Lonteshia*  
21 *Stanton, Defendant*, TT 50, Order No. 01-146 (February 1, 2001) (holding defendant liable for  
22 the replacement value of lost equipment); *Public Utility Commission of Oregon, Complainant v.*  
23 *Thomas Starrat, Defendant*, TT 51, Order No. 01-148 (February 1, 2001) (holding defendant  
24 liable for the replacement value of lost equipment).

25 The legislature in enacting the complaint and investigation procedure, ORS 756.500 to  
26 756.610, expressly authorized the Commission to: investigate any utility, and after making

1 investigation, make such findings and orders as the commission deems justified and required by  
2 the result of the investigation, ORS 756.515; file and serve a complaint against them, ORS  
3 756.512; conduct a hearing, *id.*, establish hearings procedures, *see* ORS 756.518 to ORS  
4 756.610, including a procedure for judicial review of Commission final orders. *See* ORS  
5 756.610. The Commission has jurisdiction to seek recovery of the overpayment through the  
6 complaint statute.

7 **B. The cases cited by Defendants are inapposite.**

8 Defendants argue that the Oregon Supreme Court and the Commission have ruled “over  
9 and over again” that the proper jurisdiction for the Commission’s complaint is court and the  
10 Commission does not have jurisdiction to award monetary damages, citing *McPherson v. Pacific*  
11 *Power & Light Company*, 207 Or 433, 296 P2d 232 (1956) and *Oregon-Wash. R. & N. Co., v.*  
12 *McColloch*, 153 Or 32, 55 P2d 1133 (1936). Defendants’ Motion at 2. Defendants’ reliance on  
13 *McPherson* and *Oregon-Wash. R & N* is misplaced.

14 In *McPherson* the customers brought their complaint under section 112-431, OCLA  
15 Chapter 1-4, OCLA (now ORS 757.225), which limited the Commission’s review to the  
16 reasonableness of the rate the utility charged. The Commission did not have authority under that  
17 statute to review whether the utility customers had been overcharged. *Id.* at 449-50. The  
18 *Oregon-Wash. R & N* case, the earlier of the two cases, presented a similar issue. In that case  
19 customer of a railroad sought to recovery overcharges from a railroad under Or. Code § 62-126.  
20 The Commission found that the statute distinguished between an unreasonable rate and an  
21 overcharge and the Commission did not have jurisdiction under the statute to grant relief for  
22 overcharges. *See Oregon-Wash. R & N*, 153 Or at 52. Both cases dealt with specific statutes  
23 that prohibited charges in excess of filed rates, an issue not implicated by the Commission’s  
24 complaint here. The Commission’s complaint here does not rely on ORS 757.225. Defendants  
25 are relying on cases that simply do not apply here.

1 Defendants also cite several Commission cases holding that the Commission does not  
2 have authority to award monetary damages to a complaining customer against their utility. *See*  
3 Defendants Motion at 2. All of these cases are distinguishable because the Commission’s  
4 complaint here involves the Commission recovering an overpayment made to a defendant utility  
5 from the RSPF. A far more relevant line of cases, completely ignored by the Defendants, are the  
6 cases brought under the Commission’s complaint statute against TDAP recipients that damage  
7 the state-owned equipment that is loaned to them. *See e.g. PUC v. Michelle Pate, Defendant,*  
8 *supra; PUC v. Lonteshia Stanton, supra; and PUC v. Thomas Starrat, supra.* .

9 Before closing the discussion on *McPherson* it is worth noting that the court, in  
10 discussing Commission authority to hear various types of claims, noted that the Uniform Practice  
11 Act of the Public Utility Commissioner, former ORS 756.520 (now ORS 756.500), is a uniform  
12 practice act which defines the rules for all proceedings over which jurisdiction has been  
13 conferred upon the commissioner in respect to the various businesses within his jurisdiction. To  
14 determine jurisdiction for the commission over a particular business one must refer to the  
15 substantive statutes governing that business. *McPherson*, 207 Or at 941-42.

16 Nowhere in their motion have the Defendants addressed the Commission’s substantive  
17 statutes governing telecommunications utilities. The Commission clearly has jurisdiction over a  
18 telecommunications utility participating in OTAP and receiving RSPF funds. ORS 756.040(1)  
19 and (2); Oregon Laws 1987, chapter 290. And given that jurisdiction, the legislature expressly  
20 authorized the Commission to investigate any utility, file complaints, and make such findings  
21 and orders as the commission deems justified and required as the result of the investigation. The  
22 Commission has a duty to administer the RSPF and recover public funds paid out in error. *See*  
23 ORS 293.240. The “relief” that is being requested here is not “damages,” but simply the recovery  
24 of public funds that Defendants received that the Commission alleges they are not entitled to.

1                   **C. The Commission’s complaint is an appropriate exercise of Commission**  
2 **jurisdiction**

3                   Defendants argue that the Commission should not use this case to extend the  
4 Commission’s jurisdiction. Defendants assert that the Commission is operating in a dual role as  
5 prosecutor and adjudicator and that has already caused confusion over the proper timing to file  
6 an answer and assert that there have been improper ex parte communications. Defendants argue  
7 that this matter does not involve the Commission’s ratemaking jurisdiction and that it is a matter  
8 better left to the courts.

9                   The Commission disputes the Defendants’ implication that this case is not squarely and  
10 firmly within the Commission’s jurisdiction. Defendants rely on *McPherson* and a line of cases  
11 that are clearly distinguishable, while ignoring cases the Commission brings under its complaint  
12 statute to recover damages from TDAP recipients that damage state-owned equipment loaned to  
13 them. The complaint here alleges that the Defendants, a telecommunications utility participating  
14 in OTAP, received over \$200,000 in RSPF funds to which they are not entitled. The  
15 Commission clearly has jurisdiction here and it has a duty to attempt to recover the public funds  
16 that were paid to Defendants.

17                   As to the Defendants’ alleged “confusion” regarding the proper time to file an answer,  
18 Defendants do not quarrel with the fact they were served with a copy of the complaint  
19 electronically and by mail, which clearly and specifically directed the Defendants to answer the  
20 complaint within 10 days from the date it was mailed to them. Defendants received notice of the  
21 ten-day filing deadline, but chose to ignore it. The Defendants’ decision to ignore explicit  
22 directions by the Commission does not militate against the Commission exercising its  
23 jurisdiction here.

24                   Finally, Defendants’ assertion that there have been ex parte contacts here has no basis in  
25 law does not support Defendants’ argument that the Commission should not exercise its  
26

1 jurisdiction here. *See* Commission’s Response to Defendant’s Motion for Disclosure of Ex Parte  
2 Communications.

3 DATED this 2<sup>nd</sup> day of November 2007.

4 Respectfully submitted,

5 HARDY MYERS  
6 Attorney General

7  
8 s/David B. Hatton  
9 David B. Hatton, #75151  
10 Assistant Attorney General  
11 Of Attorneys for the Public Utility Commission  
12 of Oregon  
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4 PUBLIC UTILITY COMMISSION OF  
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8 VCI COMPANY f/k/a STAN EFFERDING  
9 and STANLEY JOHNSON, dba VILAIRE,  
and VCI COMPANY, a Washington  
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10 Defendants.

PUBLIC UTILITY COMMISSION  
OF OREGON'S RESPONSE TO  
DEFENDANTS' MOTION FOR  
DISCLOSURE OF *EX PARTE*  
COMMUNICATIONS

11  
12 **INTRODUCTION**

13 Defendants, citing OAR 860-012-0015(1), have requested a broad order requiring  
14 complainant to disclose all ex parte communications complainant has had with the  
15 adjudicating authority in this case and for an identification of those agency employees  
16 involved in the "prosecution" of the case and those involved in the "adjudication" of the  
17 claim. To justify this broad order Defendants baldly characterize communications as ex parte  
18 communications even though they are clearly not. No ex parte communications have been  
19 declared because there have been no ex parte communications. The Defendants' motion  
20 should be denied.

21 **ARGUMENT**

22 OAR 860-012-0015, the Commission's rule regarding ex parte communications,  
23 provides:

24 (1) Ex parte communications are discouraged and, if made, must be disclosed to  
25 ensure an open and impartial decision-making process.

1 (2) Except as provided in this rule, an ex parte communication is any oral or  
written communication that:

2 (a) Is made by any person directly to a Commissioner or presiding  
3 Administrative Law Judge (ALJ) outside the presence of any or all parties  
4 of record in a contested case proceeding, as defined in ORS 183.310(2),  
without notice to, or opportunity for rebuttal by, all such parties; and

5 (b) Relates to the merits of an issue in the pending contested case  
6 proceeding.

7 (3) For purposes of this rule, a contested case proceeding is pending:

8 (a) When any filing is made that initiates a proceeding between identified  
9 parties or a “major proceeding” as defined in OAR 860-014-0023; or

10 (b) After the Commission initiates a process similar to that described in  
11 OAR chapter 860, division 014, including but not limited to, an order  
12 suspending a tariff for investigation or the holding of a prehearing  
13 conference.

14 (4) A person who has an ex parte communication with a Commissioner must  
15 promptly notify the presiding ALJ that such communication has occurred.

16 (5) Upon notice of or receipt of an ex parte communication, the presiding ALJ shall  
17 promptly notify the parties of record of the communication and place in the record:

18 (a) The name of each person who made the communication and that  
19 person's relationship, if any, to a party in the case;

20 (b) The date and time of the communication;

21 (c) The circumstances under which the communication was made;

22 (d) A summary of the matters discussed;

23 (e) A copy of any written communication; and

24 (f) Any other relevant information concerning the communication.

25 (6) The presiding ALJ may require the person responsible for the ex parte  
26 communication to provide the disclosure and notice of the communication required  
by this rule.

(7) Within 10 days of receiving notice, a party may file a written rebuttal of any  
facts or contentions contained in the ex parte communication, with service on the  
parties of record in the proceeding.

(8) The provisions of this rule do not apply to communications that:

(a) Address procedural issues, such as scheduling or status inquiries, or  
requests for information having no bearing on the merits of the case;

- 1 (b) Are made to a Commissioner or presiding ALJ by a member of the  
Commission staff who is not a witness in the proceeding;
- 2 (c) Are made to a Commissioner or presiding ALJ by an Assistant Attorney  
3 General who is not representing the Commission staff in the proceeding;
- 4 (d) Are made in a rulemaking proceeding conducted pursuant to ORS  
183.325 through 183.410; or
- 5 (e) The presiding ALJ determines should not be subject to this rule,  
6 including but not limited to communications from members of the public  
7 that are made part of the administrative file or communications that are the  
subject of *in camera* proceedings.

8 Defendants contend that the Commission’s decision to direct the Defendants to file an  
9 answer within 10 days of service of the Complaint under ORS 756.512(1) must have been  
10 communicated to the Commission’s attorney who is prosecuting the claim, constituting *ex*  
11 *parte* communications that must be disclosed. Defendants’ Motion to 4.

12 Counsel for the Commission certainly did receive directions from the Commission  
13 that Defendants were to be given 10 days to answer the Complaint. However, that  
14 communication is not an *ex parte* communication. For a communication to be *ex parte* it  
15 must “[r]elate[] to the merits of an issue in the pending contested case proceeding.” *See* OAR  
16 860-012-0015(2)(b). In addition, the Commission’s *ex parte* rules do not apply to  
17 “communications that \* \* \* [a]ddress procedural issues.” *See* OAR 860-012-0015(8)(a).  
18 Any communications between the Commission and its counsel regarding the Commission’s  
19 decision to require the Defendants to file an answer within 10 days of service of the  
20 Complaint are procedural and not related to the merits. Accordingly, they are not an *ex parte*  
21 communication.

22 Defendants’ second argument focuses on who drafted and presented the Default  
23 Order to the Commission on September 26, 2007. Defendants contend that if the drafting  
24 and presentation of the Default order “was not performed by a ‘judicial’ employee, but was  
25 performed by someone engaged in the prosecution of the claim, the presentation of the Order  
26 to the Commission again was an *ex parte* communication.” Defendants’ Motion at 3. The

1 Commission does not agree that Defendants' argument is a correct statement of the law  
2 where a party is in default. Under the Commission's default rule, OAR 860-013-0055(1),  
3 once a party is in default, the Commission may dispose of the proceeding without further  
4 notice to the defaulting party. The Defendants had been in default for six days when the  
5 Default Order was presented to the Commission on September 26, 2007. No ex parte  
6 communications have been declared because there have no ex parte communications.  
7 Defendants' motion should be denied.

8 DATED this 2nd day of November 2007.

9 Respectfully submitted,

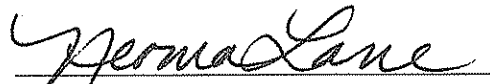
10 HARDY MYERS  
11 Attorney General

12 s/David B. Hatton  
13 David B. Hatton, #75151  
14 Assistant Attorney General  
15 Of Attorneys for the Public Utility  
16 Commission of Oregon  
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1 **CERTIFICATE OF SERVICE**

2  
3 I certify that on November 2, 2007, 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 to:

6 **SCHWABE WILLIAMSON & WYATT**  
7 WILLIAM J. OHLE  
8 SCHWABE WILLIAMSON WYATT PC  
9 1211 SW 5TH AVE  
10 SUITE 1500 - 1900  
11 PORTLAND OR 97204  
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13   
14 Neoma Lane  
15 Legal Secretary  
16 Department of Justice  
17 Regulated Utility & Business Section