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BEFORE THE OREGON PUBLIC UTILITY COMMISSION

PUBLIC UTILITY COMMISSION OF OREGON,

Complainant,

v.

VCI COMPANY f/k/a STAN EFFERDING and STANLEY JOHNSON d/b/a VILAIRE, and VCI COMPANY, a Washington corporation,

Defendants.

Docket No. UM1288

DEFENDANTS' MOTION TO VACATE DEFAULT ORDER AND TO DISMISS CLAIM

**1. Motion**

Pursuant to OAR 860-013-0050(4), defendants move the Commission for an order vacating the September 26, 2007, Default Order and dismissing the claim for lack of subject-matter jurisdiction.

**2. Points and Authorities**

**A. The Commission Has No Jurisdiction to Award Monetary Damages.**

OAR 860-013-0050(4) provides "objections to the Commission's jurisdiction or that a pleading does not state facts sufficient to constitute grounds for relief are never waived." "The commission[]'s jurisdiction is limited. [Its] authority must affirmatively appear from the law creating his office and defining [its] powers." *Oregon - Wash. R. & N. Co. v. McColloch*, 153 Or. 32, 46, 55 P.2d 1133 (1936).

In the present case, the complainant alleges a single claim for monetary damages based on the assertion that complainant overpaid defendant VCI Company OTAP reimbursements. *Complaint*, ¶¶ 1, 10. While the Complaint does not state a theory of recovery, it is either a claim

1 for breach of contract or money had and received, both legal causes of action. *See American*  
2 *Timber & Trading Co. v. First National Bank of Oregon*, 263 Or. 1, 11, 500 P.2d 1204 (1972)  
3 (“The actions here are for the recovery of money for breach of contract or for money had and  
4 received, and the relief requested is not equitable, but is for a judgment in excess of \$6,000,000  
5 and attorneys fees.”).

6       Regardless of the theory, however, the complainant’s prayer is for monetary damages.  
7 The Oregon Supreme Court and Oregon Public Utility Commission have ruled over and over  
8 again that the proper jurisdiction for such a claim is the Circuit Court and that the Commission  
9 does not have jurisdiction to award monetary damages. *McPherson v. Pacific Power & Light*  
10 *Company*, 207 Or. 433, 296 P.2d 932 (1956) (the proper jurisdiction for an overcharge claim  
11 against a regulated utility is the trial court); *Oregon-Wash. R. & N. Co.*, 153 Or. at 46 (1936)  
12 (Public Utility Commissioner did not have jurisdiction to hear complaints requesting payment of  
13 amounts allegedly overcollected); *Schaefer v. CenturyTel of Oregon, Inc.*, UC 569, Order  
14 No. 01-157 (Feb. 8, 2001) (“The Commission has only those powers granted to it by statute.  
15 There is no statute granting the Commission authority to order a utility company to pay damages  
16 . . . . That kind of dispute normally is handled through mediation, arbitration, or the judicial  
17 system.”); *Shepherd v. U.S. West Communications, Inc.*, UC 477, Order No. 99-749 (Dec. 12,  
18 1999) (“The Commission notes that in general it has no jurisdiction to award monetary damages.  
19 . . . . However, Complainant is free to pursue whatever other remedies he may have in an  
20 appropriate forum.”); *Sage v. U.S. West Communications, Inc.*, UC 368, Order No. 98-473 (Nov.  
21 18, 1998); *Pacific Parts Locator Service v. Pacific Northwest Bell*, UC 15, Order No. 84-042  
22 (Jan. 24, 1984)(“The complaint does not ask for specific relief, but can be interpreted to request  
23 an award of damages. If so, it is in the wrong forum, because the Commissioner does not have  
24 jurisdiction to award monetary damages to [complainant].”).

25       The Oregon Supreme Court has specifically ruled that the proper forum for a claim for  
26 money had and received for the overcollection of fees by a utility is the Circuit Court, not the

1 Commission. In *McPherson*, the Court ruled that “where the only allegation of the patron is that  
2 the charges were in excess of the lawfully filed schedule of rates . . . , the patron must seek  
3 redress by proceeding directly in the courts for the relief provided in [ORS 756.185] or in an  
4 action for money had and received.” *Id.* at 453. While the complainant in *McPherson* was a  
5 private party and not the Commission itself, the facts of the case are very similar to the present  
6 case. In *McPherson*, utility customers brought an action against a public utility for  
7 overcollection of fees. A complaint was brought both before the Commission and in the Circuit  
8 Court. *Id.* at 444-46. The Oregon Supreme Court, citing to *Oregon-Wash. R. & N. Co. v.*  
9 *McColloch*, 153 Or. 32, 55 P.2d 1133 (1936), specifically held that the Commission did not have  
10 jurisdiction to hear a complaint for the refund of fees collected:

11 [W]e find that the Commissioner has no authority to award any reparations, either  
12 for unreasonable or unjustly discriminatory rates, or for overcharges, and that the  
13 Commissioner is granted jurisdiction to hear complaints based only on allegations  
14 that rates are unreasonable or unjustly discriminatory.

15 *McPherson*, 207 Or. at 449.

16 In this case, the sole remedy sought by the complainant in this action is monetary  
17 damages for breach of contract or money had and received. There is no claim of  
18 unreasonableness or discrimination. The Commission and the Oregon Supreme Court have long  
19 held that the legislature has not granted the Commission jurisdiction to award monetary damages  
20 against a private utility company, such as defendant VCI Company. Therefore, this action  
21 should be dismissed in this forum.

22 **B. The Commission Should Not Use This Case to Expand Its Jurisdiction.**

23 Even if an argument can be made that the Commission could exercise jurisdiction to  
24 entertain this claim, this is not the case to seek to extend the Commission’s jurisdiction. As  
25 discussed in detail in defendants’ *Motion to Disclose Ex Parte Communications*, the Commission  
26 is operating in a dual role as both prosecutor of the claim and as the adjudicator. This has  
already caused confusion over the proper timing to file the answer and apparently improper *ex*

1 *parte* communications between those within the agency in charge of prosecuting the claim and  
2 those adjudicating the claim. As Justice Van Hoomissen raised in his concurring opinion in  
3 *Regero v. Teacher Standards and Practices Commission*, 312 Or. 402, 822 P.2d 1171 (1991),  
4 this dual role raises serious due process concerns:

5 [The] issue is whether the agency hearing violated due process because the  
6 agency's counsel, and assistant attorney general, may have combined  
7 prosecutorial and adjudicative functions....

8 In the context of an APA contested case hearing, ORS 183.413 et seq., the dual  
9 role of the attorney general as prosecutor and as legal advisor to the agency on  
10 evidentiary and procedural matters is troublesome to me. Assuming that such a  
11 dual assignment is permissible in the abstract, the issue remains whether, in this  
12 and other cases, the requisite degree of separation of functions is being  
13 maintained within the Department of Justice.

14 *Id.* There is no need in the present case for the Commission to hear its own claim. An action for  
15 breach of contract or money had and received, essentially a collection action, is better left to the  
16 Circuit Court.

17 This is not a claim that implicates that Commission's ratemaking jurisdiction. Oregon  
18 courts have long distinguished the legislative or administrative function of the Commission in  
19 "determining what rate is just or reasonable" and the judicial function of "finding and awarding  
20 reparation or damages." The Oregon Supreme Court held in *Oregon-Wash. R. & N. Co.*, that:

21 If the only complaint which the [complainant] has was that he had been  
22 overcharged, there would be no issue before the commissioner as to the  
23 reasonableness of rates, and no necessity of determining just and reasonable rates  
24 to be charged in the future.

25 \* \* \* \* \*

26 There is no necessity of resorting first to the commission in those instances in  
which the only question involved is an overcharge . . .

*Id.*, 153 Or. at 47-49. The same is true here. If the only question here is the application of the  
correct rate to the facts and whether there had been an overpayment, the question is for the  
courts, not the Commission.

1 Circuit Courts have original jurisdiction over suits, including suits for the collection of  
2 money allegedly overpaid to regulated utilities. Although this suit involves the construction of  
3 the OPUC rules regarding OTAP reimbursements, it never implicates the Commission's "rate  
4 setting" function of determining what rate level is just and reasonable. The setting of monetary  
5 damages in this case, if any is owing, would not involve the setting of any rates, and thus does  
6 not necessitate Commission adjudication.

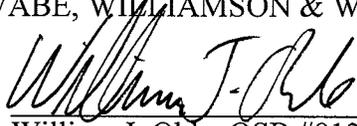
7 Therefore, given the difficulties and the problems already experienced attempting to  
8 separate the dual functions of simultaneously acting as the prosecutor and the adjudicator of the  
9 same claim, the Commission should defer to the Circuit Court any claim for monetary damages  
10 in this particular case.

11 **3. Conclusion**

12 The statutory and judicial scheme for the adjudication alleged overcharges by regulated  
13 utilities in Oregon dates back more than seventy years. There is no need to vary that proceeding  
14 in this case, and in fact, with the Commission as the "plaintiff" attempting to collect the alleged  
15 overcharge, the reasons for deferring to Circuit Court jurisdiction are overwhelming. The  
16 complainant's Complaint should be dismissed and the Default Order entered on September 26,  
17 2007, should be vacated for lack of subject-matter jurisdiction.

18 Dated this 26<sup>th</sup> day of October, 2007.

19 SCHWABE, WILLIAMSON & WYATT, P.C.

20 By: 

21 William J. Ohle, OSB #913866

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24 Of Attorneys for VCI COMPANY f/k/a  
25 STAN EFFERDING and STANLEY  
26 JOHNSON d/b/a VILAIRE, and VCI  
COMPANY, a Washington corporation

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 27<sup>th</sup> day of October 2007, I served the foregoing  
3 DEFENDANTS' MOTION TO VACATE DEFAULT ORDER AND DISMISS CLAIM on the  
4 following party at the following address:

5 David B. Hatton  
6 Assistant Attorney General  
7 1162 Court Street NE  
8 Salem, OR 97301-4096  
9 David.Hatton@state.or.us

10 by electronic filing, emailing and mailing to him a true and correct copy thereof, certified by me  
11 as such, placed in a sealed envelope addressed to him at the address set forth above, and  
12 deposited in the U.S. Post Office at Portland, Oregon, on said day with postage prepaid.

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14 \_\_\_\_\_  
15 William J. Ohle